



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00307/2017

THE IMMIGRATION ACTS

Heard at Employment Tribunal Liverpool
On 8 February 2018

Decision & Reasons Promulgated
On 22 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

JAHAANGIR KHAN
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr McIndoe, Solicitor, of Lattitude Law
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

- 1 The Appellant appeals against the decision of Judge of the First Tier Tribunal Shergill dated 9.6.17 dismissing his appeal against the decision of the Respondent dated 12.12.16 refusing his human rights claim.
- 2 The Appellant is a national of Pakistan and made an application for leave to remain on 24.5.16. His previous immigration history was that he had entered as a student in 2011, and had applied for further leave to remain as a Tier 1 entrepreneur, but that application had been refused on 11.1.13 on the basis that the Appellant had used an ETS English language certificate that had been fraudulently obtained. The Appellant appealed against that decision and the appeal was dismissed. When the Appellant appeared further to the Upper Tribunal, the Respondent withdrew its case and re-issued a decision dated 17.9.15 maintaining the refusal of leave to remain on the basis of fraud. An appeal against that decision was filed, but was withdrawn by the Appellant on 5.7.16 after the Appellant had, on 24.5.16, made the present application.

- 3 In his application, the Appellant relied on the family life with his British partner ZK and their daughter, HK, born in March 2016. The Appellant and ZK had cohabited since April 2015. They are not legally married in the UK.
- 4 The Respondent refused the application for leave to remain for the following reasons, in summary:
- (i) the Appellant failed to meet suitability criteria S-LTR.1.6 in Appendix FM on the grounds of his past use of a fraudulently obtained document (the ETS English language certificate), making that undesirable that the Appellant remain in the UK;
 - (ii) the Appellant was not married to ZK and they had not cohabited for 2 years prior to the application, and ZK was therefore not the Appellant's 'partner' for the purposes of GEN.1.2;
 - (iii) the Appellant could not benefit from the EX1 criteria as the Appellant had not satisfied the mandatory suitability and eligibility requirements above;
 - (iv) in any event, there was no evidence that there were insurmountable obstacle to family life continuing outside the UK (EX.1(b));
 - (v) in relation to the Appellant's relationship to his British daughter, he was unable to have the benefit of EX1(a) as he failed to meet mandatory suitability and eligibility requirements;
 - (vi) under para 276ADE(1), the Appellant did not meet the suitability requirements, and there were no very significant obstacles to the Appellant integrating into Pakistan;
 - (vii) in relation to Article 8 outside the rules, there were was no compelling evidence that the welfare of the Appellant's daughter could not be maintained to a sufficient level in the Appellant's absence by her mother, and the Appellant's actions justified separation from his child.
- 5 In his grounds of appeal dated 21.12.16, the Appellant argued *inter alia* that by the time of the appeal, the Appellant's partner would meet the definition of partner under Appendix FM, and that section EX1 was met, on the grounds that the Appellant had genuine and subsisting relationship with a British citizen child and that it would not be reasonable to expect that child to leave the UK.
- 6 The Judge held that the ETS allegation was not a matter that was capable of engaging the Suitability criteria in S-LTR.1.6 and thus declined to make any findings on the deception issue (paras 17). However, the Judge considered the remaining issues in the Appellant's appeal, and dismissed it on human rights grounds.
- 7 In an application for permission to appeal, the Appellant argues that the Judge materially erred in law as follows:

- (i) failing to find that the Appellant's partner did not, at the time of the hearing, meet the definition of partner under GEN.1.2 (Grounds, para 3-4);
- (ii) by finding that the provisions relating to leave to remain as a parent under paragraphs R-LTRP.1.1(d) and E-LTRPT.2.3(b)(ii) applied to the appeal and in failing to consider EX.1(a) (Grounds, paras 5-6);
- (iii) in finding that in any future application, the Appellant would have to meet the financial eligibility requirements; whereas he could meet the rules by possibly satisfying Section EX.1(a) (Grounds, para 7);
- (iv) misdirecting himself in law, by considering whether there were insurmountable obstacles to family life continuing outside the UK (EX.1(b)), which was not relied upon in the appeal (Grounds, para 8);
- (v) in observing that the Appellant had potentially submitted an invalid application for leave to remain; although the Appellant accepted that he was unlawfully present in the UK, that did not preclude a successful application for leave to remain if the requirements of section EX1 were met (Grounds, paragraph 9);
- (vi) suggesting that the application was invalid (Grounds, paras 10 and 11);
- (vii) insofar as the Judge suggested that family life would continue with the Appellant's daughter outside the UK, such finding was inconsistent with the cases of C- 34/09 Ruiz Zambrano ZH (Tanzania) v SSHD [2011] UKSC 4, and the Respondent's and published guidance on the application of the Zambrano principles (Ground, para 13);
- (viii) failing to make proper assessment of the child's best interests (Grounds, para 14);
- (ix) finding that the financial eligibility criteria could be met in future by the Appellant's wife undertaking work in the UK (Grounds, para 15).

8 At the outset of the hearing, Mr McIndoe helpfully confirmed that which was set out in the grounds of appeal, which was that the Appellant did not seek to argue that the Appellant met the requirements of EX.1(b) of Appendix FM on the grounds that there were insurmountable obstacles to family life continuing outside the UK.

9 I heard substantive submissions from the parties.

Discussion

10 The Appellant's argument that at the date of hearing the Appellant's partner then satisfied the definition of partner under GEN.1.2 is misconceived. Even if the couple had cohabited for more than two years, from April 2015 until the hearing in May

2017, this would still not satisfy the requirements of GEN.1.2(iv), that a partner includes 'a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application'. That requirement was simply not met at the date of application on 24.5.16. Mr McIndoe accepted as much. It follows that the Appellant's appeal was to be considered on the basis that the Rules were not met either at the date of application or appeal. The Appellant's subsequent criticisms of the Judge's consideration of any remaining element of the Immigration Rules is to be considered in that context; the Appellant did not meet the rules.

- 11 Further, although the Judge briefly referred to the requirements of the rules for leave to remain as a parent, R-LTRP.1.1(d) and E-LTRPT.2.3(b)(ii) , at [19] (and found that those requirements were not met) the Judge in no way restricted his consideration of other matters, considering in the decision whether the requirements for leave to remain as a partner were met, and leave to remain outside the rules including the application of Part 5 A NIAA 2002.
- 12 In observing that the Appellant would have to meet the financial eligibility requirements in any further application for leave to remain, the Judge was similarly not misdirecting himself in law or failing to take into account any relevant rule; the Judge was well aware of the requirements of EX1(a) and (b), discussing them in the decision.
- 13 Having found that the Appellant's partner did not meet the definition of partner under Appendix FM, the Judge proceeded to consider the potential application of EX1(b) in any event, i.e. whether there were insurmountable obstacles to family life continuing outside the UK (para [23-31]). In doing so, the Judge gave cogent reason (see [31] in particular) for finding that there would not be such obstacles. Not only is there no challenge to that finding, the Appellant now specifically disavows any reliance on EX1(b) at all.
- 14 In understanding that consideration, the Judge did not err in failing to consider in the alternative EX1(a), and whether it would be reasonable to expect the child to leave the UK. Those same issues were considered at length in the Judge's deliberations under s.117(B) 6 NIAA 2002 at paras [47-60].
- 15 The Judge raises a salient point in querying whether the Appellant had in fact made a valid application for leave to remain on 24.5.16 when his leave to remain was statutorily extended by operation of s.3C Immigration Act 1971; an application at such a time does appear to be precluded by operation of s.3C(4). However, the Judge did not determine the appeal on that basis; rather, the Judge proceeded to determine all the issues raised in the appeal. The Appellant suffers no prejudice by the Judge having raised that issue. Mr Bates did not argue before me that the Judge lacked jurisdiction to entertain the appeal on the basis that no valid application for leave to remain had been made.
- 16 The Judge's decision that it would not be unreasonable for the Appellant's child to leave the UK discloses no error of law. The Judge did not find that the child would be 'forced to leave' the UK [53-54]; indeed, the Judge found that the Appellant's

partner and child would probably remain in the UK [51]. If the daughter left, it would probably be for a temporary period only [52, 55, 57]. The Judge held that there was no evidence before him that there would be a disruption to the child's best interests for that proposed course [52].

- 17 There is no error in the Judge's decision by reason of alleged failure to take into account the Respondent's August 2015 policy on Family Life as a Partner or Parent (see Grounds, page 4, footnote 1). As per SF and others (Guidance, post-2014 Act) [2017] UKUT 120 (IAC) (16 February 2017):

"Even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal."

However, the guidance did not 'clearly point' to a particular outcome in the present appeal; even on the (incomplete) quotation from that policy in the Grounds of Appeal, the effect of Appellant leaving the UK, would not, on the Judge's findings, be to force a British child to leave the EU; the child would probably remain in the UK with her mother. Further, the Judge did not believe the evidence of the parents about alleged lack of childcare in the UK; see middle of para [36]; the Judge proceeded on the basis that the Appellant had not established that there would be no child care available to enable the Appellant's partner to increase her work hours in the UK if necessary to support an application for leave to enter.

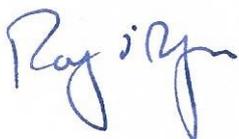
- 18 The position of the best interests of the Appellant's daughter was considered in detail in the decision; pars [47]-[60]. The Judge noted in particular the very young age of the daughter and her ability at that age to adapt to changes in her circumstances [49].

Decision

- 19 There is no material error of law in the Judge's decision.
- 20 I do not set aside the Judges decision.
- 21 The Appellant's appeal is dismissed.

Signed:

Date: 16.5.18



Deputy Upper Tribunal Judge O'Ryan