



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00954/2016

THE IMMIGRATION ACTS

Heard at Liverpool
On 10th July 2018

Decision & Reasons Promulgated
On 02nd August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR RIZWAN HANIF
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Timpson of Counsel

For the Respondent: Mr C Bates, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on 18th February 1989. The Appellant made application for entry clearance as a partner under Appendix FM of the Immigration Rules. His application was considered under paragraph EC-P.1.1 of Appendix FM and paragraph 320(11) of the Immigration Rules. His application was for entry clearance to join his wife Sana Tahir, who is a British national. The Appellant had married his Sponsor on 1st April 2014. It was noted that when the Appellant married in the UK his immigration status was uncertain and that he had made an application to extend his stay as a student, but this application had been

refused because it was supported by false documents. The Appellant was served with IS151A and subject to removal directions. The Appellant left the UK on 26th June 2014 in accordance with those directions. The Respondent's refusal of the application of entry clearance was dated 25th November 2015.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal J. Law at Stoke-on-Trent on 31st August 2017. In a decision promulgated on 4th September 2017 the Appellant's appeal was allowed on human rights grounds pursuant to Article 8 of the European Convention of Human Rights.
3. The Secretary of State lodged grounds of appeal to the Upper Tribunal on the same day as receiving the First-tier Tribunal Judge's decision. Those grounds acknowledged the judge had been satisfied that the Appellant had obtained his English certificate by deception and that the judge had found it was not reasonable to expect the Appellant's child to have to leave the UK. As the Appellant was currently outside the UK it was contended that the Respondent's decision did not interfere with the status quo and therefore did not interfere with family life as it is currently enjoyed. Further it was submitted that the judge had failed to identify compelling circumstances such as to justify consideration of whether there would be a breach of Article 8 and that the judge had failed to adequately consider that the Appellant's use of deception in obtaining his English language certificate justified the refusal and that the decision was proportionate in the public interest in maintaining an effective immigration control.
4. Permission to appeal was initially refused by First-tier Tribunal Judge Nightingale on 20th February 2018. Renewed Grounds of Appeal were lodged on 2nd March 2018. On 12th April 2018 Upper Tribunal Judge King considered that it was arguable that in considering whether it was reasonable to expect the British child to live with the parents in Pakistan an unduly narrow approach had been taken and that it was difficult when considering paragraph 44 of the determination to understand why the public interest considerations were in fact applied. No Rule 24 response has been served by the Appellant's solicitors.
5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. I note that this is an appeal by the Secretary of State. For the purpose of continuity throughout the appeal process Mr Hanif is referred to herein as the Appellant and the Secretary of State as the Respondent. The Appellant appears by his instructed Counsel, Mr Timpson. The Secretary of State appears by her Home Office Presenting Officer, Mr Bates.

Submissions/Discussion

6. Mr Bates relies on the Grounds of Appeal, pointing out to me that the judge had already found at paragraph 27 of his decision that as the parties were not legally married at the date of decision, albeit that they were married shortly afterwards, that did not alter the fact they were not legally married when the application was refused and that as there was no suggestion that they could have qualified by virtue of

having lived together for two years, the appeal under the Immigration Rules could not succeed.

7. Consequently, Mr Bates submits that the appeal was considered by the judge outside the Immigration Rules and he submits that deception is relevant to the public interest. He refers me to paragraphs 9, 11, 30 and 33 of the judge's decision and points out that family life had been formed outside the UK due to the Appellant leaving the country and that this is what he would describe as "an SS (*Congo*) situation" in that the Appellant had chosen to form family life whilst his immigration status was precarious. He submits that the judge has misapplied the Home Office guidance on family migration of August 2015, referred to at paragraph 42 of the decision, in that the policy goes beyond criminality and can relate to a poor immigration history. He submits that the judge failed to deal with this, thus creating an error of law.
8. Mr Bates continues by querying the manner in which the judge has approached public policy. He notes that at paragraph 44 the judge has given due consideration to *MA (Pakistan) and Others [2016] EWCA Civ 705* and that whilst the judge states that he has had regard to the issue of deception he queries whether he has actually done so. He submits that the judge has not done sufficient to explain why deception is outweighed and consequently there is an error which he contends is material.
9. In reply Mr Timpson submits that the bottom line here is that the Home Office did not like the fact that the appeal had been allowed. He indicates the Secretary of State's main criticism is that there had previously been a refusal under Section 320(11) but points out that this requires both deception and aggravating factors. He takes me to paragraph 4 of the decision, which he indicates shows that the judge has directed himself to this particular issue, emphasising that the Entry Clearance Officer's refusal does not make clear what the aggravating circumstances are considered to be. However, he submits that the Secretary of State does not remedy the situation by then failing within the Grounds of Appeal to the First-tier Tribunal to set out even then what the aggravating circumstances are considered to be and that the only fact held against the Appellant is an allegation that he cheated in an English language examination and consequently the Appellant failed to get an in-country right of appeal. As a result, the Appellant returned, quite properly, to Pakistan. He emphasises that the Rule requires aggravating circumstances and that none have been given, and indeed that this was a fact picked up by Immigration Judge Nightingale when he refused permission to appeal. He submits that the judge has weighed up all the factors.
10. Mr Timpson contends that the basis upon which Upper Tribunal Judge King has granted permission is unusual and points out that at paragraph 44 of the judge's decision he has referred to *MA (Pakistan)* and has gone on to consider Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 although he would submit that he is not really required to do so. However he does ask me to take note of the fact that at paragraph 44 (in the final sentence) the judge acknowledges that Section 117B(6) does not apply in this case as the Appellant is not in the UK but that the

judge has taken it into account in his findings in that the Appellant did use deception in respect of the language test in 2012. He submits that everything has been weighed up by the judge, that the judge has given cogent reasons and that there is no error of law.

11. In brief response, Mr Bates contends that the aggravating factor is that at the date of hearing the Appellant was not accepting of his deception, and therefore there is an aggravating factor in someone who continues to say he has not cheated. Mr Timpson responds to this by stating that the Home Office Presenting Officer at the hearing did not suggest any of this, and that it is a bizarre contention, pointing out that there were thousands of applicants refused on ETS courses and that this certainly is firstly not an aggravating factor and secondly a new issue that has been raised at this stage. He asked me to dismiss the Secretary of State's appeal.

The Law

12. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

14. The thrusts of the Secretary of State's appeal are set out in some detail above. They centre on two factors. Firstly whether the judge has failed to find compelling circumstances such as to justify consideration of whether there would be a breach of Article 8, and secondly and in more detail the judge has failed to take into account appropriate aggravating circumstances. Despite the submissions of Mr Bates I find that neither argument is sustainable and that the contentions made by the Secretary of State amount to little more than disagreement with the finding of the First-tier Tribunal Judge.

15. This is a decision by a very experienced judge which starts by taking into account the basis of refusal under paragraph 320(11) and acknowledging early on in the decision that the refusal did not make clear what those aggravating circumstances are considered to be. Thereinafter he has considered the decision pursuant to Article 8 outside the Immigration Rules as he was entitled to do and given full and due consideration to the relevant case law and to the Home Office's own guidance on the IDIs on family migration. He has given full and proper consideration to the authority of *MA (Pakistan)* bearing in mind that the court or Tribunal should not simply focus on the child but have regard to the wider public interest consideration including the conduct and immigration history of the parents. Whilst the judge has acknowledged it is not strictly necessary for him to give consideration to Section 117B(6) as the Appellant is not in the UK, he has even then taken into account the fact that the Appellant used deception in respect of the language test in 2012.
16. That fact is therefore accepted. I do not accept that it is appropriate for Mr Bates at the very last minute to try and raise a submission that failing to acknowledge deception at the date of hearing constitutes an aggravating factor - something that is vehemently attacked by Mr Timpson - nor indeed even if I accepted it at this late stage that it would constitute an aggravating factor.
17. This is an Appellant who has complied with removal directions and has gone back to Pakistan. I understand he remains there despite the successful appeal before Judge Law. Judge Law's decision is well-constructed. It addresses all the relevant issues and for all the reasons given above the submissions made by the Secretary of State amount to little more than disagreement. They certainly do not constitute any error of law which is material. For all those reasons, the decision of the First-tier Tribunal Judge is maintained and the appeal of the Secretary of State is dismissed.

Notice of Decision

The decision of the First-tier Tribunal Judge contained no material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal Judge is maintained.

No anonymity direction is made.

Signed

Date 30 July 2018

Deputy Upper Tribunal Judge D N Harris