



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07097/2017

THE IMMIGRATION ACTS

Heard at Manchester
On 8th May 2018

Decision & Reasons Promulgated
On 29th May 2018

Before

THE HON. MR JUSTICE LANE, PRESIDENT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUHAMMAD AZEEM JAVED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Bates, Home Office Presenting Officer
For the Respondent: Miss Wilkins, Counsel, instructed by Knightbridge Solicitors

DECISION AND REASONS

1. This is an appeal against the decision of the First-tier Tribunal, First-tier Tribunal Judge Caskie, sitting in North Shields, who by a determination which was promulgated on 13th September 2017 allowed the then appellant now respondent Mr Javed's appeal against the Secretary of State's decision to refuse his human rights claim.

2. The judge set out the essential history of the matter. The claimant, as I shall hereafter call the respondent, is a citizen of Pakistan who was born on 14th January 1984. He entered in June 2006 as a student and obtained extensions of leave to remain in that capacity until 2012 when an application was refused. The claimant became an overstayer in 2012.
3. The judge noted that the decision of the Secretary of State which is dated 7th June 2017 was made on the basis that the Secretary of State did not consider that the claimant was a suitable person to be granted leave to remain. The Secretary of State considered that the respondent was unsuitable because he had employed deception in connection with the taking of an English language test.
4. At the hearing the representative of the claimant indicated that she would not be calling the claimant to give evidence and she would be dealing with the matter solely by reference to submissions. This was because she relied upon the case of SF and others [2017] UKUT 120. The judge set out passages from that decision, including passages from a policy of the Secretary of State to which I shall make reference in due course.
5. The judge then turned to making his findings and said as follows at paragraph 7:

“It is clear from the above that the criminality that is referred to is criminality in relation to which there has been a conviction and I am not satisfied that the alleged breach by ETS of their obligations to ensure the validity of tests undertaken mean the appellant is unsuitable to be granted leave in the United Kingdom. I note that it is said that the appellant undertook this examination on 21st February 2012. Even if the information supplied by the Secretary of State is accurate the attempted fraud carried out occurred more than half a decade ago and the appellant has an otherwise unblemished record. I also note from the appellant’s immigration history that in 2012 he had just been refused leave to remain as a student, having completed an MBA. In such circumstances, having just completed an MBA the appellant would not have been required to submit an English language certificate as his MBA qualification would exempt him from this requirement.”

The judge then concluded in relation to the Rules that he was “satisfied that it is not appropriate to refuse the appellant on suitability grounds”. The judge concluded by referring back to the policy to which I shall make reference in a moment. He was satisfied that the decision that he had made represented what he described as a proportionate response to the appellant’s situation.

6. Permission to appeal was granted to the Secretary of State and for that reason the matter comes before the Upper Tribunal.
7. The policy in question is set out in a document which is dated August 2015 and is entitled Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes. Under 11.2.3 we find this:

“Would it be unreasonable to expect a British citizen child to leave the UK?

Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano.

The decision maker must consult the following guidance when assessing cases involving criminality”

and reference is then made to criminality guidance in ECHR cases.

8. On page 56 we find this:

“It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.

The circumstances envisaged could cover amongst others:

- criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
- a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.

In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation. If the decision maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the Office of the Children’s Champion on the implications for the welfare of the child, in order to inform the decision.”

9. The judge, as I have said, made reference to the suitability requirements of the Immigration Rules. We note that S-LTR.1.6 states that an applicant will be refused if the presence of the applicant in the UK is “not conducive to the public good because their conduct including convictions which do not fall within S-LTR.1.3. to 1.5., character, associations, or other reasons, make it undesirable to allow them to remain in the UK”. As regards that, the decision of 7th June 2017 made reference to the ETS issue to which I have already referred.

10. The decision then continued as follows:

“In fraudulently obtaining a TOEIC certificate in the manner outlined above you willingly participated in what was clearly an organised and serious attempt given the complicity of the test centre itself to defraud the SSHD and others. In doing so you displayed a flagrant disregard for the public interest according to which migrants are required to have a certain level of English language ability in order to facilitate social integration and cohesion as well as to reduce the likelihood of them being a burden on the taxpayer. Accordingly I am satisfied that your presence in the UK is not conducive to the public good because your

conduct makes it undesirable to allow you to remain in the UK. Your application is therefore refused under suitability S-LTR.1.6 of Appendix FM of the Immigration Rules.”

11. The final statutory provision to which I shall make reference is section 117B of the Nationality, Immigration and Asylum Act 2002. That states as follows:
 - “(6) In the case of a person who is not liable to deportation, the public interest does not require the person’s removal where –
 - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
 - (b) it would not be reasonable to expect the child to leave the United Kingdom.”
12. The second of the two grounds upon which the Secretary of State was granted permission relates to alleged procedural unfairness. I can deal with that issue shortly. The rule 24 response to the claim, drafted by Miss Wilkins, makes reference to previous proceedings. From that it is plain that an earlier decision of the respondent which was challenged was compromised on the basis that there would be a new decision made, taking account of the then pregnancy of the claimant’s partner. A son was born to the couple on 21st April 2017. One looks, however, in vain at the letter of 7th June 2017, which is the decision that was challenged on appeal, for reference to the child. It appears that at the hearing before the First-tier Judge no issue was taken as to the existence or nationality of the child. That remains the position because Mr Bates has confirmed it today. Accordingly, so far as the child is concerned there can be no procedural unfairness in the judge proceeding to deal with matters by reference to the submissions.
13. So far as the alleged ETS deception is concerned, I also consider that no material error has been disclosed. This is because it is plain from paragraph 7 of the decision, which I have set out, that the First-tier Judge took that matter at its highest, in that he accepted that some deceptive behaviour had occurred in relation to the ETS.
14. Furthermore, and in any event, it is plain from the witness statement of Mr Appleby dated 3rd May 2018 that Mr Appleby did not object to the course of action being taken by the judge. In particular, it does not appear that Mr Appleby indicated that he wished to have the claimant summoned so that he could be cross-examined as to the ETS matter or indeed otherwise.
15. The first ground therefore is the only one which remains extant. This contends that the judge failed properly to take into account the claimant’s immigration history when reaching his conclusion. Mr Bates has elaborated upon that ground today. He says that the terms of the policy to which I have referred make it manifest that criminality is not the sole touchstone for deciding whether it would be reasonable to refuse leave on the basis that the Zambrano principle would or would not be violated. That is undoubtedly true. As we have seen from the terms of the policy, leave may be refused where conduct not amounting to criminality has been

displayed. In particular, the policy makes reference to a very poor immigration history.

16. The Secretary of State, however, faces an uphill task in showing that the judge committed a material error of law in paragraph 7. That is in part because it is plain from the binding case law of MA (Pakistan) [2016] EWCA Civ 705 that where we are dealing, as here, with a qualifying child, there need to be powerful reasons to expect the family in effect to be fractured by the Secretary of State's refusal to grant leave.
17. It is, in my view, axiomatic that the position where the child is a British citizen is that if it is in all the circumstances as the judge found, unreasonable to expect that British citizen to leave then the inexorable consequence of the Secretary of State's decision would be fracturing the family life. That may well be appropriate in cases of criminality. It may well be appropriate in other cases. It may well in fact be the case that another judge looking at this matter would have come to the conclusion that the ETS deception was such as to render it inappropriate for the appellant to be able to remain in the United Kingdom by reference to the position of his child.
18. However, this judge decided otherwise. I do not consider that in doing so it can be said that he ignored relevant considerations or took into account irrelevant considerations. He certainly took a benign view of the claimant's immigration history overall but that does not amount to an error of law.
19. The judge accordingly was, in my view, entitled to take the view that he did in paragraph 8, that is to say that he considered the suitability requirements of the Immigration Rules were met. Even if that were not so, however, then the matter is, in my view, put beyond doubt by section 117B(6). That provision, as I have already indicated, states that in the case of somebody who is not liable to deportation, the removal of the person concerned would not be in the public interest where there is a qualifying child and it would be unreasonable to expect the child to live outside the United Kingdom.
20. Looking at the judge's findings as a whole, it seems to me that such a finding would inexorably have followed, had he referred expressly to section 117B(6). I reiterate that in so finding I am not to be taken as concluding that that was the only view that could be taken. Plainly, there is a judgment exercise to be undertaken in matters of this kind. For that reason it is, in my view, generally undesirable to compare and contrast between the various facts of other cases.
21. For these reasons this appeal by the Secretary of State is dismissed.

Signed

Date 25 May 2018

The Hon. Mr Justice Lane
President of the Upper Tribunal

Immigration and Asylum Chamber