



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10403/2016

THE IMMIGRATION ACTS

Heard at Field House
On 2 August 2018

Decision & Reasons Promulgated
On 11 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMAD [R]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr A McVeety, Senior Presenting Officer
For the Respondent: Mr S Karim, counsel instructed by Hamlet Solicitors LLP

DECISION AND REASONS

1. In this decision the Appellant is referred to as the Secretary of State and the Respondent is referred to as the Claimant.

2. The Claimant made an application for leave to remain, it seems on 28 September 2015, which was refused by the Secretary of State on 20 April 2016. An appeal against that decision was made and on 29 August 2017 First-tier Tribunal Judge Rowlands (the Judge) allowed the appeal on human rights Article 8 ECHR grounds. Upper Tribunal Judge Kekic gave permission to appeal on 6 June 2018.
3. At the hearing before me the issue was raised about the Claimant's Rule 24 response and the issue of whether or not the Judge had properly considered the allegation that the Claimant had used a proxy test taker to obtain his TOEIC certificate. The additional element to the appeal, which had really centred on, was the fact that the Claimant has a British national child date of birth 30 July 2016. In the light of the well-understood case law the issue was raised as to whether or not with reference to Section 117B(6) of the NIAA 2002 as amended there was a subsisting parental relationship between the Claimant and child and whether it would be unreasonable to expect the British national child to leave the UK. That issue played into the consideration of proportionality.
4. The Judge made no reference to the case law of MA [2016] EWCA Civ 705 which existed at the time of his decision and of course the consideration requires in the light of EV (Philippines) [2014] EWCA Civ 874 and other cases that it is appropriate in assessing reasonableness to take into account a Claimant's immigration history.
5. It is also clear as later decisions have made plain that the guidance issued by the Secretary of State much of which is recited in the case of SF (Guidance, post 2004 Act) Albania [2017] UKUT 00120 (IAC) that there is considerable assistance given as to how the Secretary of State regards the issue of whether it is unreasonable to expect a British citizen child to leave the UK. Somewhat selectively perhaps the Judge identified some of the considerations that were raised but perhaps did not go on to consider, as would have been helpful, the further comments made by the Secretary of State which are at best only guidance that they are a strong indicator as to the Secretary of State's view as to whether it is proportionate or not to seek a child to leave with his or her parents.

6. Ultimately, as the case law makes plain now, there need to be powerful reasons and that is affirmed in both in the decision in AM Pakistan [2017] EWCA Civ 180 and ET and MT [2018] UKUT 00088. Unfortunately there are two critical aspects to the Judge's decision that have been of concern. First, he formed the view that it would not be reasonable with reference to Section 117B(6) for the child to leave and accepted the parental relationship did not take into account the balance in assessing the immigration history of the Claimant; particularly the finding that the Judge had made in effect that the Claimant had used a proxy test taker.
7. It could be that the result if it had been properly expressed could have been the same but quite simply the reasoning given is not adequate to address that matter. I do not seek to second guess what the outcome might be had it been properly dealt with. What I am satisfied is that it cannot be said that the error of law and failure to give adequate reasons is not material or that any other Tribunal faced with the same evidence would have reached the same decision come what may that is a step too far.
8. Mr Karim has rightly pointed me to the evidence that was put before the Judge of the innocent explanation being proffered by the Claimant as the nature of the test, how he had taken it, the circumstances in which he had taken it. Those points must be understood in the context that the Claimant had not, it seems, sought to obtain from ETS information relating to the test or a copy of the test or other matters which could be pursued.
9. The Claimant had provided was a statement which contained a fairly extensive description of events of the taking of the test, also had provided evidence of a previous IELTS score in 2009 and evidence of qualifications in July 2012 which showed or from which could reasonably be inferred that he must have had reasonable English language skills. Such evidence does not gainsay the fact that someone with the English language skills may nevertheless use a proxy test taker but quite simply the Judge gives no indication that that evidence was taken into account.

10. In the circumstances it seemed to me the absence of findings on that issue was also a significant failure in the case which has impact upon what further steps should be taken. The appropriate course is that it should be returned to the First-tier Tribunal. The Original Tribunal's decision cannot stand.

DECISION

The appeal is allowed to the extent that the matter is to be remade in its entirety in the First-tier Tribunal. No findings of fact stand.

DIRECTIONS

- 1) Re-list First-tier Tribunal not before First-tier Tribunal Judge Rowlands nor before Resident Judge Appleyard in the First-tier Tribunal or First-tier Tribunal Judge Davey.
- 2) List hearing two hours.
- 3) Interpreter not required.
- 4) Any further documents relied upon in support of the Article 8 ECHR claim to be provided by the parties not less than ten working days for the further hearing and served also upon the IAC list for hearing at Taylor House.

ANONYMITY

No anonymity order was sought nor is one required.

Signed

Date

Deputy Upper Tribunal Judge Davey