Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13377/2016

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 6th February 2018	**On 1 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

MUHAMMAD [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Khan of Counsel instructed by Legal Justice Solicitors
For the Respondent: Ms R Pettersen, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Moxon made following a hearing at Bradford on 18th May 2017.

Background

2. The appellant is a citizen of Pakistan born on 1st March 1988. He applied for leave to remain in the UK on 15th March 2016 on the basis of his marriage. His wife and child, born on [ ] 2015, are both British citizens born in the UK.

3. The appellant originally entered the UK on 15th May 2011 with entry clearance as a student which was subsequently extended to 30th December 2013. He then applied for leave to remain as a spouse and was granted leave until 11th April 2016.

4. The present application was made on 15th March 2016. Although it was accepted that the appellant had a genuine and subsisting relationship with a British wife and child, the appellant was refused on the grounds that he failed to satisfy the suitability requirements of Appendix FM in particular paragraph S-LTR1.6 which provides:

> "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 paragraphs S/LTR.1.3 to 1.5), character, associations or other reasons make it undesirable to allow them to remain in the UK."

5. It was argued by the respondent that the appellant had taken TOEIC speaking tests with ETS on 17th July 2012 and 1st August 2012 which had been cancelled because the certificates arising from those tests had been fraudulently obtained.

6. The appellant denied that he had used a proxy test taker and asserted that he honestly undertook the TOEIC test.

7. The judge found against the appellant. He concluded that the generic evidence used to analyse the TOEIC test recordings was reliable and there was sufficient scrutiny to the assessment of tests before they are determined invalid.

8. The judge considered the appellant's individual circumstances but set out, at paragraph 64, his reasons for preferring the evidence of the respondent and decided that she had satisfied him on the balance of probabilities that the TOEIC certificates were obtained by fraud.

9. The judge then looked at paragraph S-LTR1.6 and concluded that the appellant's behaviour was undesirable and not conducive to the public good. Accordingly the appellant failed to meet the suitability requirements of Appendix FM to the Immigration Rules. He considered Article 8 in some detail andconcluded that the interference with the appellant's private and family life was proportionate to the legitimate public end sought to be achieved. On that basis he dismissed the appeal.

The Grounds of Appeal

10. The appellant sought permission to appeal on a number of grounds.

11. Ground 1 challenges the judge's reliance upon Professor French's report that the methodology used to analyse the TOIEC test recording was reliable. Professor French's evidence was generic in nature and did not suggest that the conclusion of the ETS review in this specific case was correct.

12. Second, the judge had erred in his assessment of the appellant's innocent explanation. He gave the appellant credit for the fact that he had obeyed immigration laws otherwise than in the instance alleged in this case but said that the likelihood of two invalid test scores being taken would be extremely low. He had no evidence to suggest that this was the case. Neither did he accept the appellant's explanation that there had been a raid by the Home Office when he first took the test; but his assessment of the appellant's evidence was based on speculation. The judge further stated that he did not accept that the appellant had disclosed this information in previous interviews to the Home Office without having seen the transcripts. Finally, it was illogical for the appellant to have used a proxy when the appellant's scores were relatively low. One would have thought that he would have had good scores in the first attempt rather than having to take three attempts.

13. In any event, in the alternative, the judge had erred in concluding that a fraudulently obtained ETS test was sufficient to fall foul of S-LTR1.6. He had failed to take into account the guidance set out in the respondent's policy IDI Appendix FM family life as a partner or parent. In concluding that the appellant did not fall within the policy because he had a very poor immigration history the judge had erred in law since in this case there was no such history. The appellant had otherwise obeyed immigration laws and had not been charged with any criminal offence.

14. Permission to appeal was granted by Judge Pedro on 7th December 2017.

Submissions

15. Ms Khan relied on her grounds and submitted that the judge had acted irrationally in finding that the appellant's behaviour fell foul of the suitability requirements when a criminal conviction would not necessarily do so. Furthermore there was in this case a single instance of alleged bad behaviour and otherwise, the appellant had a good immigration history.

16. The witness statements from both appellants said that they could not live in Pakistan and the Home Office Policy document states in terms that it was unreasonable to expect a British child to leave. It was in the best interests of the child to have both parents with him. The appellant was in practise being put in a more disadvantaged position than deportees. The appellant's child was entitled to live in the UK and it was not reasonable for family life to be conducted at a distance. The decision was simply disproportionate.

17. Ms Pettersen defended the determination and submitted that the judge was entitled to conclude both that the appellant had used deception and that, in these circumstances, it was proportionate to expect either the family to go and live in Pakistan together, or for the appellant to leave and to apply for entry clearance.

Findings and Conclusions

The challenge to the Judge's Conclusions in Relation to the TOIEC Test

18. The respondent relied on generic evidence from Peter Millington, Rebecca Collings and a report from Professor Peter French. He recorded that the two tests taken at Roses College in Manchester on 17th July 2012 and 1st August 2012 were deemed invalid. The appellant had taken an earlier test at Manchester Learning Academy and obtained a lower score, which in itself was questionable.

19. The judge accepted that the generic evidence was sufficient to discharge the burden on the respondent in the first instance to establish that deception had taken place. He then considered the appellant's innocent explanation.

20. The appellant's explanation for having obtained a significantly lower mark in a speaking test only a month before the first invalid test was that the test had been interrupted by Home Office officials demanding to see identification. However there was no evidence that the appellant had asked for a retake and he did not make the allegation of the raid prior to the witness statement. The judge rejected the appellant's evidence that he had disclosed the incident in previous interviews. He had made no reference to the raid in his Grounds of Appeal.

21. It was open to the judge to conclude that the low mark was not the result of his exam being interrupted by the Home Office.

22. He said that there was no proper explanation for the significant improvement in his marks between the July assessment and the assessment taken two weeks later. The rapid improvement in his test results had not been adequately explained and undermined the appellant's credibility. There is nothing illogical in his decision making process.

23. The judge said that the likelihood of having two invalid results would be extremely low if the tests had been taken lawfully. In the grounds it was argued that this was mere speculation on the judge's part but it seems to me that this was an observation plainly open to him.

24. Moreover the judge was entitled to hold it against the appellant that he had failed to acknowledge that he had used the TOEIC certificate to obtain his CAS when in fact he had done so.

25. The judge adopted the proper approach to the law in assessing whether there had been fraud in this case. He was entitled to rely on the generic evidence. He considered the appellant's explanation in detail and gave proper reasons for rejecting it. The grounds amount to an attempt to reargue the appellant's case.

The article 8 challenge

26. Paragraph S-LTR1.6 provides:

> "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 paragraphs S/LTR1.3 to 1.5), character, associations or other reasons make it undesirable to allow them to remain in the UK."

27. In the respondent's IDI it states:

> "In doing so, decision makers should look at whether their conduct (including any convictions which do not fall within paragraphs S/LTR1.3 to S-LTR1.4) mean the applicant's presence in the UK is undesirable or non-conducive to the public good under conduct, character, associations or other reasons. It is possible for an applicant to meet the suitability requirements, even where there is some low level criminality."

28. Ms Khan argued that it was irrational for the judge to conclude that the appellant fell foul of the suitability requirements when committing a criminal offence would not necessarily mean that he would do so. She submitted that the appellant did not have a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.

29. However, at paragraph 68, Judge Moxon dealt with the criminality point and said that it was clearly not the intention of the Rules or the IDI that there must be criminal conduct for the suitability requirements not to be met. The appellant had relied upon fraudulent documents and then had sought to use them in order to obtain a CAS which was then used in order to obtain leave to remain. It was not irrational for the judge to conclude that the deception constituted behaviour covered by the suitability requirements of the Rules.

30. Finally, Ms Khan argued that the judge had erred in his assessment of the policy in relation to British children. This states:

> "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 will 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."

31. However the judge deals with that point at paragraph 94 of the determination when he concluded that even if it was not reasonable for the child to leave the UK the option remained with him to reside with his mother in the UK. He did consider the best interests of the child, and both possible scenarios, that of the appellant leaving the UK alone, and of the family going altogether. It was Judge Moxon's view that in fact the appellant's wife and child would join him voluntarily in Pakistan and it would be reasonable for them to do so. He is of a very young age. The family speak Urdu and have many family members in Pakistan. He was entitled to rely upon the respondent's policy which states that it might be appropriate to refuse to grant leave where the conduct of a parent or

primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent in the UK.

32. It is wrong to suggest, as Ms Khan did, that it would never be reasonable for a British child to be expected to leave. There are some circumstances in which the parent's behaviour is sufficiently serious so as to justify either separation of the child from his father or for the family to decide to live apart. Deception is a serious matter. The fact that the appellant had an otherwise good immigration history does not of itself make it irrational for the judge to consider that the conduct of the appellant in this instance was sufficiently serious to warrant removal. The judge was entitled to consider that the appellant's reliance upon fraudulent TOIEC certificates, his subsequent failure to accept the allegation against him and then his attempt to mislead during the Tribunal hearing amounted to being a very poor immigration history. It was open to him to conclude that the public interests outweighed those of the appellant. It is true that not every Immigration Judge would have reached the same decision but it cannot properly be said that this was not one which the judge was not entitled to make.

33. This is a very thorough and detailed determination. The grounds and submissions amount to a strenuous disagreement with the judge's conclusions but do not establish any error of law either in his approach or his consideration of the evidence or of the conclusions which he reached.

Notice of Decision

The judge did not err in law. His decision stands. The appellant's appeal is dismissed.

No anonymity direction is made.

Deborah Taylor

Signed Date 28 February 2018

Deputy Upper Tribunal Judge Taylor