



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/13510/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 23<sup>rd</sup> February 2018

Decision & Reasons Promulgated  
On 22<sup>nd</sup> March 2018

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

KANIS [K]  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr M Hossain, instructed by Hossain Law Chambers

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

**The Appellant**

1. The appellant is a national of Bangladesh born on [ ] 1978. The appellant's leave to remain under her Tier 4 visa had been curtailed and expired on 12<sup>th</sup> May 2015. On that same date she made an application on the basis of her family life with her partner (a British citizen) and subsequently raised the issue of her new born child with whom she and her partner "share parental responsibility". The Secretary of State refused the application and based her decision on paragraph S-LTR.1.6 of

Appendix FM. She also considered the matter under Article 8. The Secretary of State considered whether there were any significant obstacles to the appellant's integration into Bangladesh where she had lived for 29 years prior to her residency in the UK and where she was educated and worked before coming to the UK as a student. It was concluded she had not lost all social and cultural ties to her home nation. From her passport endorsements she had travelled to Bangladesh in 2010 which underlined that she had remaining ties with her country.

2. The requirements of paragraph R-LTRP.1.1(d) of Appendix FM of the Immigration Rules (based on being a partner) are that:
  - (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
  - (ii) the applicant meets the requirements of paragraphs E-LTRP.1.2-1.12. and E-LTRP.2.1-2.2; and
  - (iii) paragraph EX.1 applies.
3. The Secretary of State confirmed that the appellant's TOIEC test, submitted as part of her previous Tier 4 (General) Student application on 22<sup>nd</sup> May 2012 was withdrawn by ETS and declared questionable. The appellant was required to attend a further interview and at that interview on 10<sup>th</sup> February 2016 the Secretary of State concluded she had obtained her original ETS certificate by deception. The appellant admitted at question 1 to having taken the ETS TOEIC English language test but was unable to confirm where and when she had taken the test or how long it had lasted. Her scores from the test taken on 18<sup>th</sup> April 2012 at Sevenoaks College had been cancelled by ETS on the basis of the information provided by ETS.
4. The Secretary of State concluded that the appellant's presence in the UK was not conducive to the public good because her conduct, that is the deception, made it undesirable to allow her to remain in the UK and therefore her application was refused under suitability S-LTR.1.6.
5. The appellant appealed against the Secretary of State's decision dated 18<sup>th</sup> May 2016 to refuse her application for leave to remain in the United Kingdom on human rights grounds and following a hearing on 13<sup>th</sup> October 2017 First-tier Tribunal Judge Moore considered the basis for the decision and the appellant's appeal against the respondent's finding that the ETS test certificate was fraudulently obtained. The appellant appealed that decision.

### **Application for Permission to Appeal**

#### 6. Ground (i)

It was advanced that the judge referred to the decision of **Majumder and Qadir [2016] EWCA Civ 1167** but did not explain how he applied the principles of that case. The appellant could not precisely remember the name of the place where the English language test was taken but she went through a series of academic courses and it was

not possible for her to remember the details of each test centre. The judge did not place proper weight on the evidence that the appellant passed the English language courses under City & Guilds with first class scores and in IELTS she scored band 6. She had completed several courses including the postgraduate diploma. These demonstrated her pre-existing competence in English language. Moreover, the Home Office concerns were mainly about the spoken part of the TOEIC test. The appellant demonstrated her competence in English and her oral evidence given during the hearing was fluent. The First-tier Tribunal Judge failed to consider and make a decision on the balance of probabilities.

#### Ground (ii)

The decision of the First-tier Tribunal Judge on the best interests of the child was not adequate bearing in mind the child is a British citizen by birth.

#### Ground (iii)

The judge failed to carry out a freestanding assessment in relation to Article 8.

### **Submissions**

7. At the hearing Mr Hossain submitted that the partner had been her partner for two years as at the date of hearing and the appellant had taken the IELTS test and passed. The judge had not had the benefit of the medical evidence such that she had lost things from her memory. There was sufficient evidence for the judge to allow the appeal. The judge had not followed the correct principles of **Majumder** and the burden of proof. Mr Hossain accepted that medical evidence had come by way of surprise to him in the hearing that the appellant had been subject to mental health issues. She was lawfully in the United Kingdom and did not have a criminal record. I was referred to **SF (Albania) (Guidance, post-2014 Act) Albania [2017] UKUT 00120**, which states specifically at paragraph 7:

*“Mr Wilding, however, has with the fairness which Presenting Officers always attempt to apply, drawn our attention to an important guidance document. It is the Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10 year Routes". It is the edition of August 2015 and therefore not in force at the date of the decision under appeal, but it was in force at the date of the First-tier Tribunal hearing and decision, and is still in force. It contains important guidance about the following topic at 11.2.3: Would it be unreasonable to expect a British Citizen Child to leave the UK? We will set out the relevant parts, they are as follows:*

*‘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.*

...

*Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the*

*basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.*

*In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.*

*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.'*

*We were not specifically referred to any other part of this document and we do not need to set any more out''.*

It was unreasonable to expect the child to leave the UK. The child's father was a British citizen, the child's mother had no freedom and this would restrict the child's welfare.

8. Mr Tufan submitted that the judge had made no error in the application of the principles in relation to **Majumder** and I was referred to **MA (ETS)** at paragraph 57 which confirmed that there were a plethora of reasons why someone may employ a proxy. The case of **Majumder** confirmed that generic evidence was sufficient and I was referred to paragraph 12.
9. In relation to the British national child the father was of Bangladesh origins and the mother was of Bangladesh nationality. At paragraph 8 it was clearly the case that there was a possibility of an alternative primary carer and in that case it was not one where the conduct of the mother was such as to give rise to considerations of weight as to justify separation. The deception at this level was a relevant factor.

## **Conclusions**

### **Ground (i)**

10. The judge was clear as to the principles enunciated in **Majumder** and set out at paragraph 21 that the Court of Appeal had held that the generic evidence relied on by the Secretary of State was sufficient to discharge the initial burden of proof; the judge noted that the legal burden of proof rested with the respondent to show

dishonesty. The judge also set out that each case would be fact-sensitive but the judge stated *“Thus, clearly the initial evidential burden with regard to the generic evidence lay with the Secretary of State”*.

11. The judge had before him confirmation of an ETS invalid test analysis and also the interview record sheet for the interview on 10<sup>th</sup> February 2016 which found the appellant not credible. The judge analysed the evidence before him in relation to the appellant's explanation and as follows at paragraphs 20 and 23 :

*“20. The appellant has claimed in evidence that she is competent in the English Language and speaks it in a reasonable manner and competently. She makes this claim bearing in mind her 1994 academic certificate and achievement in education in Bangladesh, and also the fact that she has undertaken and completed serious academic courses in the UK which would have been conducted in the English language. However, notwithstanding that I accept that appellant might have been nervous at this hearing, her apparent understanding was poor in relation to numerous questions that were put to her, not only by her own legal representative, but also when questioned by the Home Office Presenting Officer and by myself. My record of proceedings clearly shows that in respect of many questions the appellant failed to understand and initially replied ‘sorry’. On many occasions questions had to be put to her on two or three occasions sometimes eliciting no response at all. As a matter of fact the appellant towards the end of her evidence then accepted that she knew the name of the test centre because it was to be found in the Respondent's refusal letter”*.

*“23. The appellant was interviewed on 10<sup>th</sup> February 2016 and at that time could not remember where the test was taken, other than it was outside London, and ‘maybe the test was taken in 2012’, but she could not remember the exact date. To be fair to the appellant she was able to state that the test had 4 parts, including listening, reading, writing and speaking and maintained that the elements of the test were spread over two days. She claimed to have chosen the English Language test because ‘it was popular’ and because ‘everybody participated’ in that test. However, at this hearing the appellant denied stating that, and after a question was put to her and repeated due to a lack of understanding, the appellant stated that she could not remember saying that it was popular, but the reason she chose the college was because it was closest to her home. I do not accept that the interviewer would have incorrectly recorded the appellant's response as to why she chose the college. I would also have expected the appellant to have had some recall as to where she took the test bearing in mind, that according to her, the choice of college was based on the fact that it was nearest to her home.*

*The appellant now claimed at this hearing that she did not know whether she was fit and well to be interviewed and that she was suffering from depression at that time. However, the appellant accepted at her interview that she was fit and well enough to be interviewed and there is no reliable evidence demonstrating that due to depression or any other medical condition she was not well enough to be interviewed. In all the circumstances I do not accept that this appellant attended the test centre on 18<sup>th</sup> April 2012 in order to undertake an English language test. In those circumstances it is inevitable that the certificate relied upon by this appellant was obtained fraudulently, and that the appellant must have exercised deception in order to obtain such a certificate. Even at this hearing the appellant's understanding of the English language was poor despite having apparently taken the English Language test more than 5 years ago and having lived in the UK since*

*that time, and in most recent years apparently living together in a household with her British Citizen partner. The appellant has therefore demonstrated a disregard for the public interest and relevant immigration requirements whereby applicants are required to demonstrate a certain level of English language ability”.*

12. **Shezhad v SSHD [2016] EWCA Civ 615** confirmed that it was possible for the Secretary of State to discharge the initial evidential burden with her generic evidence and the lookup tool which was indeed included in this appeal. **Ahsan v SSHD [2017] EWCA Civ 2009** does not deviate from this approach and indeed accepts that such appeals are fact sensitive. As Lord Justice Underhill reasoned at paragraph [33] of **Ahsan**

*‘However, I am not prepared to accept – and I do not in fact understand Ms Giovannetti to have been contending – that even in such specially strong cases the observations in the earlier case-law to the effect that a decision whether the applicant or appellant has cheated is fact-specific are no longer applicable or that there is no prospect of their oral evidence affecting the outcome’.*

13. Simply the judge found, having considered and carefully analysed the evidence as can be seen at paragraph 20, including the courses the appellant had undertaken and those conducted in English language to which appropriate weight was given, that the appellant did not appear to understand English and further that on two or three occasions questions elicited no response from the appellant. The judge found the appellant knew the name of the test centre because it was to be found in the respondent's refusal letter. As can be seen from the judge's analysis at paragraph 23 the appellant appeared to have changed her evidence. The conclusions were open to the judge.
14. There was no material error of law in the judge's treatment of the said examination certificates and courses undertaken. **MA (ETS - TOEIC testing) [2016] UKUT 00450(IAC)** confirmed at paragraph 57 that there was indeed a variety of reasons why people proficient in English (and this appellant was clearly found not to be so proficient even after a number of years in the UK) might engage in fraud not least a lack of confidence fear of failure, lack of time and contempt for the system. Indeed the examinations may have carried more weight had the appellant been less underwhelming in her English at the hearing before the First-tier Tribunal.
15. The judge identified that although the appellant raised the factor of being unwell at the hearing before him there was no evidence to support that assertion and the appellant had confirmed that she was fit and well at the date of the Home Office interview. Although the appellant claimed that she was suffering from depression, and although the decision letter was dated 18<sup>th</sup> May 2016 and a witness statement was submitted dated 4<sup>th</sup> October 2017, at no point in that statement did the appellant make any mention of any mental health difficulties. Even before me, no medical evidence was submitted despite the appellant stating that she had received medical attention in 2016. Mr Hossain stated that the submissions were not made before him until the last moment.

16. As the judge stated, and this was open to the judge, he did not accept that the appellant attended the English language centre to conduct the test on 18<sup>th</sup> April 2012 and it was thus inevitable that the certificate relied on by the appellant was obtained fraudulently.
17. There is no indication in the analysis by the judge that he has deduced the wrong principles from the relevant case law or has applied them incorrectly. The judge made a careful and detailed analysis. Simply the Secretary of State having discharged the initial evidential burden the appellant failed to discharge that same burden when it passed to her.

#### Ground (ii)

18. Nor is there force in the contention that the judge failed to have the Section 55 of the Borders, Citizenship and Immigration Act 2009 “best interest” considerations. It is quite clear that he found that the child’s best interests were to remain with the mother but the judge was also clear that the birth father was a British national.

#### Ground (iii)

I am not persuaded that the judge failed to consider Article 8 outside the Rules. The judge applied the correct test in line with Agyarko & Ors v SSHD [2017] UKSC 11 and took into account the relevant factors. On the evidence the judge was unarguably entitled to conclude the removal would not result unjustifiably harsh consequences. The judge applied as he was obliged to do, Section 117B of the Nationality Immigration and Asylum Act 2002

19. The judge had referred to the appellant's deceitful conduct and noted at paragraph 28 that the appellant in exercising deception with regard to her English language certificate clearly intended to frustrate the Immigration Rules. FZ (China) v Secretary of State [2015] EWCA Civ 550 confirms that the critical question is whether there is an entire dependency of the relevant child on the person who is refused a residence permit or who is being deported. As set out in the Secretary of State’s reasons for refusal there was *shared* parenting between the appellant and the appellant's partner of the child and there is no doubt that the child could remain in the UK with the father if required. The judge was aware that the child was a qualifying child. The fact is that the appellant, as the judge found, had engaged in deceitful conduct and as such the Secretary of State was entitled to refuse her application under S-LTR.1.6. That is the starting point in the assessment under Article 8. The judge considered the best interests of the child. Clearly it is a choice as to the parents as to whether they wish to remain together and remove together or whether the child is left in the UK with the father. As Mr Tufan pointed out both parents are of Bangladesh origin. Essentially, they found that it was reasonable for the child to leave but the child was not obliged to leave the United Kingdom. The Secretary of State in VM (Jamaica) [2017] EWCA Civ 255 confirmed that a British child’s location in the UK was not to be treated as a fixed point and that the Article 8 analysis had to be moulded in that light. The presence of children in the UK does not

as a result of the operation of EU law have to be treated as a fixed point for the purposes of the proportionality analysis under Article 8 and the possibility that the appellant and children would remove with the partner would not necessarily violate the fundamental precepts of EU law. Indeed, paragraph 64 stated:

*“It follows that the presence of the children in the UK does not, as a result of the operation of EU law, have to be treated as a fixed point for the purposes of the proportionality analysis under Article 8. It was legitimate for the FTT in the 2015 FTT decision to consider for the purposes of its Article 8 proportionality analysis whether the family unit could be expected to take the option, which EU law allows the Secretary of State to present to KB and the children, of relocating to Jamaica with VM”.*

20. This was exactly what the judge undertook in this case. Albeit that **VM (Jamaica)** was a deportation case, it has been identified that the appellant had engaged in conduct which was not conducive to the public good. As the judge said at paragraph 26:

*“It is the father’s choice not to accompany his partner and therefore the child would live in Bangladesh with the mother in that family unit. I also have not accepted that there are no family members upon which the appellant could rely for support and assistance. The appellant gave evidence that there is still a home in Bangladesh which he owned upon the death of her husband in 2010”. ... “In all the above circumstances I am satisfied that it would be reasonable to expect the child to live in the UK with the appellant who is her mother”.*

21. Underlying this decision is the maintenance of the effective immigration. The judge found the life of the family could reasonably be expected to be enjoyed elsewhere, taking full account of all considerations and that the decision did not prejudice the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8, **Huang v SSHD** [2007] UKHL 11
22. As such, the decision of First-tier Tribunal Judge Moore shall stand.
23. No anonymity direction is made.

### Notice

The Decision of First-tier Tribunal Judge does not contain a material error of law and shall stand. The appellant’s appeal is dismissed.

Signed

*Helen Rimington*

Date 19<sup>th</sup> March 2018

Upper Tribunal Judge Rimington