



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16133/2016

THE IMMIGRATION ACTS

Heard at Field House
On 2nd July 2018

Decision & Reasons Promulgated
On 10th July 2018

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MIZANUR RAHAMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Sharma of Counsel, instructed by Immigration Aid
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Doyle promulgated on 9 October 2017 in which the Appellant's appeal against the decision to refuse his application for indefinite leave to remain on the basis of long residence dated 15 June 2016 was dismissed.
2. The Appellant is a national of Bangladesh, born on 18 November 1986, who first entered the United Kingdom on 10 July 2006 with entry clearance as a student. He was granted further periods of leave in the same capacity to 30 August 2012 and subsequently as a Tier 1 (Entrepreneur) to 12 May 2018. On 15 June 2016 the Appellant applied for indefinite leave to remain in the United Kingdom on the basis of long residency.

3. The Respondent refused the application on 15 June 2016 on suitability grounds under paragraph 322(5) of the Immigration Rules. This was because the Appellant had fraudulently obtained a TOIEC English language test certificate by using a proxy test taker and the certificate had been cancelled by ETS for that reason. The Respondent expressly accepted that the Appellant did not rely on this certification in any application for leave to remain in the United Kingdom, but considered that his complicity in the fraud nonetheless contributed to an extremely serious attack on the maintenance of effective immigration control and the public interest more generally, such that his continued presence in the United Kingdom was not conducive to the public good.
4. In any event, the Respondent also decided that the Appellant did not meet the substantive requirements for leave to remain in the United Kingdom in Appendix FM of the Immigration Rules (as he had no family in the United Kingdom, his wife being resident in Bangladesh) or in paragraph 276ADE of the Immigration Rules; and fell for refusal on suitability grounds. There were no exceptional circumstances to warrant a grant of leave to remain outside of the Immigration Rules.
5. Judge Doyle dismissed the appeal in a decision promulgated on 9 October 2017 on the basis first, that the Appellant relied on an invalid English-language certificate and therefore could not meet the suitability requirements of Appendix FM. Secondly, that Article 8 was not engaged because the Appellant has no family life in the United Kingdom and there was no evidence of any established private life in the United Kingdom either.

The appeal

6. The Appellant appeals on the ground that the First-tier Tribunal proceeded in error on the basis that the Appellant had relied upon a false English language certification to obtain leave to remain in the United Kingdom when the Respondent had expressly accepted that the certificate had not been relied upon in any application. The grounds go on to assert that this error led to the assumption that the Appellant had knowledge of the ETS fraud and the First-tier Tribunal therefore gave a widely expanded interpretation to S-LTR.1.6 of Appendix FM to the Immigration Rules.
7. Permission to appeal was granted by Judge Bennett on 29 March 2018 on all grounds.
8. At the oral hearing, Mr Sharma sought permission to appeal on a further ground to challenge the factual findings made by the First-tier Tribunal in relation to the English language certificate on the basis that evidence has been given by Professor Summers that the ETS look up tool is a Home Office document and not reliable evidence from ETS. Mr Sharma however accepted that no report from Professor Summers was before the First-tier Tribunal in this appeal and no reason could be offered as to why permission to appeal was not sought on this point at any earlier time. Mr Sharma was only instructed in this appeal a few days before the Upper Tribunal hearing and therefore no criticism is made of him personally in not seeking to raise this application sooner, nor for any lack of knowledge as to why it was not done.

9. I refused to admit the application for permission to appeal on this additional ground at the hearing on the basis that it was significantly out of time (by more than 8 months) with no reason at all offered for the delay, let alone any good reason to extend time. In any event, the First-tier Tribunal could not arguably have materially erred in law in its assessment of the reliability of one part of the evidence submitted by the Respondent by reason that it did not take into account another report which had not been submitted by the Appellant and was not before it. There was also nothing to suggest the Appellant's case had been put to the First-tier Tribunal in this way or that there was any challenge to the reliability of the look up tool or otherwise.
10. As to the grounds of appeal that were pleaded and upon which permission was granted, Mr Sharma submitted that there was a clear misdirection of fact in paragraph 9 of the decision that the Appellant had obtained leave to remain using a fraudulently obtained English language certificate whereas he had never relied upon the same in any application. The error is material as the First-tier Tribunal then failed to engage with the issue of whether paragraph 322(5) of the Immigration Rules (or, similarly S-LTR.1.6 of Appendix FM of the same) encompassed conduct where a person had not obtained leave to remain by deception. Reference was made to the Respondent's guidance on paragraph 322(5) of the Immigration Rules and the high threshold contained therein in relation to conduct, the examples of such conduct to be considered for refusal including war crimes, sham marriages and serious criminality. It was at least arguable that the Appellant's conduct was not sufficient for a refusal on this basis.
11. On behalf of the Respondent, Mr Jarvis accepted that there was a mistake of fact in the First-tier Tribunal's decision but submitted that it was not material in that the Judge could not have reached any different conclusion on the application of paragraph 322(5) of the Immigration Rules in light of the findings of fraud, even if not relied upon in an application for leave to remain. The Appellant was a party to a widescale fraud which constituted a significant attack on immigration control and he financially contributed to those organising the fraud. It was further submitted that the Respondent is the primary assessor of the public interest, which was clearly set out in the decision letter. In any event, the Appellant's case before the First-tier Tribunal was not put on the basis that it was unlawful to refuse under paragraph 322(5) of the Immigration Rules.
12. Mr Jarvis also submitted that the error could not in any event be material because this is a human rights appeal which would inevitably be dismissed due to the unchallenged finding that Article 8 of the European Convention on Human Rights is not engaged.
13. In response, Mr Sharma submitted that Article 8 must be engaged in this case as it is an appeal from an application for indefinite leave to remain on long residence grounds which was also considered on private and family life grounds under the Immigration Rules. As these provisions were considered, private life must be engaged. Mr Sharma further relied on the Court of Appeal's decision in TZ (Pakistan) and PG (India) v Secretary of State for the Home Department [2018] EWCA Civ 1109 to the effect that the Immigration Rules are the starting point for consideration by a Tribunal and if satisfied, private life must be engaged.

Findings and reasons

14. The difficulty for the Appellant in seeking to establish a material error of law in the First-tier Tribunal's decision in relation to the application of paragraph 322(5) of the Immigration Rules is that he has not challenged the finding that Article 8 of the European Convention on Human Rights is not engaged in his case. On the basis of that finding, his appeal on human rights grounds must inevitably fail because whether or not his application was properly refused on suitability grounds could only ever be relevant to the balancing exercise under Article 8(2). That stage is not reached where Article 8(1) is not engaged.
15. Mr Sharma's reliance on TZ (Pakistan) was misplaced for two reasons. First, in that case, Sir Ernest Ryder holds that the Tribunal should consider whether a person satisfies the requirements of the Immigration Rules first, but expressly confirms in paragraph 34, "*That has the benefit that where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed*". It remains fundamental that Article 8(1) is engaged and satisfaction of an Immigration Rule, even if informed by an Article 8 requirement does not automatically mean that it is.
16. Secondly, the cases of TZ and PG considered by the Court of Appeal were appeals from decisions which predated the changes to section 82 of the Nationality, Immigration and Asylum Act 2002 (which came into effect from 20 October 2014) and were therefore old-style appeals which could be pursued under the Immigration Rules. In such cases, as confirmed in TZ (Pakistan), the requirements of the Immigration Rules had to be the starting point for the Tribunal if that distinct ground of appeal was raised, followed by an assessment of human rights outside of the Rules where needed.
17. The present appeal can only be on human rights grounds pursuant to section 84(2) of the Nationality, Immigration and Asylum Act 2002, that the removal of the Appellant from the United Kingdom is unlawful under section 6 of the Human Rights Act 1998. As the First-tier Tribunal could only allow the appeal on human rights grounds, this appeal would inevitably be dismissed as none were engaged. For these reasons, I do not find that there is any material error of law in the decision the First-tier Tribunal and as such it is not necessary to set aside the decision.
18. However, I do accept, as emphasised by Mr Sharma, the significance to the Appellant of a finding that he has obtained leave to remain by relying on a fraudulently obtained English language certificate and the potential long-term implications of the same. I therefore deal briefly with the grounds of appeal as pleaded even though they could not, for the reasons outlined above, amount to a material error of law.
19. There is no dispute in this appeal that the First-tier Tribunal proceeded on the erroneous basis that the Appellant had obtained leave to remain by deception. He did not and the Respondent has never suggested that he did. There is an unchallenged finding that the Appellant fraudulently obtained an English language certificate but

he never submitted this to the Respondent nor relied upon it in any application for leave to remain. That is potentially an important distinction for the application of paragraph 322(5) or S-LTR.1.6 of Appendix FM to the Immigration Rules and arguably takes the Appellant's conduct further away from the types of cases referred to by the Respondent in her guidance on this issue. The mistake of fact in the First-tier Tribunal's decision leads to an error of law in failing to consider whether the Appellant's actual conduct was sufficient for his application to be refused on suitability grounds (either under paragraph 322(5) or S-LTR.1.6 of Appendix FM). However, only if Article 8(1) was engaged could that failure be material to the outcome of this appeal.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.



Signed

Date

6th July 2018

Upper Tribunal Judge Jackson