



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/23541/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 4 October 2018

Decision

Promulgated

On 18 October 2018

&

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SUNDAS MEHMOOD

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Bellara, counsel instructed by AH Solicitors

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

DECISION AND REASONS

1. The Appellant is a national of Pakistan born on 25 November 1993. She arrived in the UK on 6 February 2012 as a student and sought to extend her leave. This was curtailed to expire on 15 September 2013. On 16 October 2013 she was granted leave to remain as a spouse valid until 16 April 2016. On 29 March 2016 the Appellant sought further leave to remain as a spouse. This application was refused in a decision dated 30 September 2016 on the basis that she failed to meet the suitability requirements at S-LTR.1.6 due to the assertion by the Respondent that she submitted a TOEIC certificate taken at Biettec on 3 July 2013 and that certificate had been fraudulently obtained.

2. The Appellant appealed against this decision and her appeal came before Judge of the First-tier Tribunal Fowell for hearing on 12 February 2018. In a decision and reasons promulgated on 28 February 2018, the judge dismissed the appeal both in respect of the Appellant's ability to meet the suitability requirements of the Rules and in respect of the proportionality of the decision, in light of the fact that the Appellant had at that time two children both of whom are British by virtue of the fact that her husband Abid Hussain has been born and brought up in the UK.
3. Permission to appeal was sought, in time, on the basis that the judge had materially erred in law both in relation to the assessment of the Appellant's ability to meet the suitability requirements of Appendix FM of the Rules in light of the jurisprudence *cf. SM and Qadir* [2016] UKUT 229, *Shehzad and Chowdhury* [2016] EWCA Civ 615, and in that there were no adverse credibility findings. Both the Appellant and her husband gave strong oral evidence at interview with the Respondent, such interview having taken place on an unknown date. On 22 June 2016 the Appellant had been found by the interviewing officer to be credible and the recommendation summary was "*very credible and genuine when answering all the questions*" the Appellant having answered in a fluent manner and answered the questions in basic English. It was further asserted that the judge had erred in his approach to the Article 8 limb of the appeal, in that there is no reference to the evidence given by the Appellant's husband nor to a credibility finding or assessment of the significant disruption it would cause to him and the children if the Appellant were to be removed and that there was no proper assessment of the best interests of the children.
4. Permission to appeal was granted by First-tier Tribunal Judge Shimmin in a decision dated 7 June 2018 on the basis that "*it is arguable that the judge has made a material error of law by making irrational findings on matters material to the outcome and having failed to give adequate reasons for findings on material matters*".

Hearing

5. At the hearing before me, Mr Bellara sought to rely on the grounds of appeal. He submitted that the Appellant had discharged the evidential burden. She had been found to be very credible and genuine however the judge has played this down at [30] of his decision and he fell into error in this respect, bearing in mind the interview took place some three years after the test. Mr Bellara submitted that the Appellant had no real reason to cheat, that her evidence was set out and summarised at [27], she had passed her IELTS test before arriving in the UK. At [29] the judge acknowledged that the Appellant gave quite a detailed account of her activities on the day in question, her evidence is recorded at [9] to [11] of the decision and acknowledged by the judge at [27] to [29].
6. Mr Bellara submitted that the judge's findings do not sit comfortably with the evidence before him. He submitted the judge may have confused himself by relying unduly heavily on the decision in MA (ETS - TOEIC

testing) [2016] UKUT 00450 (IAC) which was entirely distinguishable on its facts, as in that case there were significant gaps in the witness statement of that Appellant, who had failed to provide a satisfactory explanation, which was not the case here. Mr Bellara submitted that there were only two issues in respect of which the judge had decided to dismiss the appeal on the basis that the Appellant could not meet the suitability requirements. The first of these was at [31] of the decision and that was the number of people taking the test according to the look-up tool was seven. Mr Bellara submitted that in light of the Appellant's roughly consistent evidence at interview and in her witness statement and in her oral evidence that there were between 17 and 25 people, this was likely to be a typo and should have read 17 and that it would be unusual to only have seven people taking a test, as these are normally quite busy. Secondly, he submitted that the judge's undue reliance on the case of MA (op cit) led him into error.

7. In relation to Article 8, Mr Bellara pointed out that the Appellant's partner gave evidence orally at the hearing and that that was the case is recorded by the judge at [13] however there is no detailed record of his evidence and at [47] the judge's findings essentially ignore the evidence given by Mr Hussain both in his witness statement and orally. He submitted there were multiple errors of law and that the decision was unsafe and unsustainable.
8. In his submissions, Mr Tufan submitted that in respect of the interview questions at the interview with the Respondent the judge had been correct to say that these are very simple. In relation to the discrepancy as to the number of people attending the hearing, Mr Tufan pointed out the look-up tool gives six invalid test results and one questionable. In relation to the decision in MA (op. cit.) this was a presidential decision which postdates SM and Qadir and the judge was entitled to rely on it. At [51] it is clear that overall the judge was satisfied that he should treat the invalid assessment as reliable. The fact that the Appellant did not need to cheat as she had taken an IELTS test earlier was irrelevant (see [57] of MA). Mr Tufan submitted that the judge had considered the case law in some detail and there were no errors of law in his decision. In relation to Article 8, Mr Tufan pointed out at [36] that the matter was argued by both sides on the basis that the judge's conclusions on the TOEIC issue are decisive and there was no submission by Mr Bellara that he might nevertheless find in the Appellant's favour under Article 8 despite raising this expressly with him.
9. In reply, Mr Bellara submitted that there was no real assessment of the best interests of the British children and that in relation to the TOEIC issue in MA he could not emphasise enough that this Appellant's case comes nowhere near the MA situation and there was a marked difference in the quality of the evidence.
10. I reserved my decision which I now give with my reasons.

Findings

11. I find material errors of law in the decision of First-tier Tribunal Judge Fowell in the following material respects:

11.1. It is striking that when interviewed by the Respondent, it is recorded at the end of the interview that in the opinion of the interviewing officer, the Appellant was: *“very credible and genuine when answering all the questions”*. Whilst the opinion of the interviewing officer is not, of course, binding on the Judge, I consider that he fell into error at [30] in that, whilst acknowledging that this was true at the hearing too, but went on to find: *“those facts have limited value as evidence, since the interview was mainly to establish fluency. The other questions, which after introductions amounted to about 20 in total, were all simple, open ones, asking her to describe the test. It cannot therefore shed any more light on the truthfulness of her account than her cross-examination at the hearing.”*

11.2. I further find that the Judge erred in finding that the interview was mainly to establish the Appellant’s fluency, when it is entitled *“Permanent migration credibility interview template”* and it is clear from the content that the questions concerned the TOEIC test

11.3. I find that, given that the Appellant clearly impressed both in interview and at the hearing and whilst acknowledging that the weight to be attached to evidence is a matter for the Judge hearing the appeal, in this case I find that the Judge failed to give adequate reasons for dismissing the Appellant’s evidence so readily, particularly in circumstances where her credibility was very much in issue yet her ability to answer questions was credible. I make this finding in particular in light of the fact that there is no adverse credibility finding made against the Appellant.

12. As to the assertion that the Judge placed undue reliance on the decision in MA (ETS- TOEIC testing) [2016] UKUT 450 (IAC) I find that this is made out in light of the principle set out therein that each case is fact sensitive and the facts in that particular case are distinguishable in that the Upper Tribunal found that Appellant to be “surprisingly hesitant” in his oral evidence [54] and there were *“significant gaps in the Appellant’s witness statement and notably discrepancies between these statements and his evidence to the Tribunal”* [48](i), in contrast to the credibility of this Appellant’s responses in interview and in her oral evidence.

13. Whilst as Mr Tufan correctly identified, it appears that Mr Bellara, who appeared for the Appellant at the First-tier Tribunal hearing, did not seek to argue that the appeal could succeed in respect of Article 8 [36 and [46] refer] the Judge nevertheless went on to deal with that aspect of the appeal. Mr Bellara submitted and I accept that there is no assessment of the credibility of Mr Hussain, the Appellants husband, despite the fact that he gave oral evidence. Contrary to the grounds of appeal, the Judge does consider the best interests of the Appellant and Mr Hussain’s biological children at [42]-[45] but found himself unable to assess the best interests of Mr Hussain’s eldest daughter due to an absence of information. It is unclear at best whether Mr Hussain gave oral evidence about the level of contact he has with his eldest daughter, in order to assist the Judge in assessing the impact upon

her if he were to leave the United Kingdom, however, I have decided to apply the benefit of the doubt and to find that the failure by the Judge to make a finding as to the oral evidence of Mr Jussain is a material error of law.

Notice of Decision

14. The appeal is allowed to the extent that it is remitted back to the First-tier Tribunal for a hearing *de novo*.

No anonymity direction is made.

Signed Rebecca Chapman

Date 15 October 2018

Deputy Upper Tribunal Judge Chapman