



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Numbers: HU/24828/2016

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre

Decision & Reasons Promulgated

On the 31<sup>st</sup> May 2018

On the 3<sup>rd</sup> July 2018

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR JUNAID SHAHID

(No anonymity direction made)

Claimant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant in the Upper Tribunal

Representation:

For the Claimant: Miss Mughal (Solicitor)

For the Respondent: Mrs Aboni (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Smith promulgated on the 29<sup>th</sup> August 2017, in which he allowed the Appellant's appeal pursuant to Article 8 of the ECHR. In the decision of First-tier Tribunal Judge Smith, the

Judge noted that the Appellant had first entered the United Kingdom on the 8<sup>th</sup> October 2010 as a Tier 4 (general) student and had made further various applications for leave to remain and on the 13<sup>th</sup> June 2013 submitted an application for leave to remain in the United Kingdom as the spouse of a British citizen. Although initially refused, that application was reconsidered and the Appellant granted leave to remain as a spouse on the 22<sup>nd</sup> May 2014 valid through to the 22<sup>th</sup> November 2016. When the Appellant made an application for further leave to remain as a spouse, in time, that application was refused on the basis that the Appellant had provided a fake or false TOEIC certificate, in respect of the English-language test that the Appellant sat on the 5<sup>th</sup> November 2011. It was that refusal the Appellant appealed against to the First-tier Tribunal.

2. Having heard the evidence, Judge Smith in his findings stated that the only issue in dispute in the case was whether or not the Respondent had established if the Appellant had engaged in fraud, in the case before him. He said that the issues raised in the refusal letter regarding whether or not the Appellant had produced appropriate documentation as set out within Appendix FM SE to demonstrate that he met the financial requirements, but found that it was clear from the financial documents available to Judge Smith on the day of the hearing that the Appellant was capable of meeting the financial requirements, which he went on to address in his judgement.
3. The Judge found that the Appellant had not engaged in fraud and had not formally arranged for a proxy to sit his English language test. The Judge went on to find, however, the fact that although the TOEIC certificate had previously been accepted as valid, the fact that it had now been invalidated meant that on the evidence before him it would be impossible for the Appellant to demonstrate that he could comply with paragraph E-LTRP 4,1, which required him to produce evidence to show he had passed the English language test in speaking and listening in English. The Judge went on to find that the refusal letter noted that there was additional documentation which had not been requested, as it would not change the overall decision regarding whether or not the Applicant's wife who was a British citizen, was self-employed as a company director.
4. The Judge at [26] of his judgement, having heard the evidence and considered the documents, found that the documents clearly set out that the Appellant's wife (RH) was a director of her own company and that in the year ending 2016 her business made a profit

of £15,258 taking an additional dividend of £15,000. He further found that the Appellant himself had been working in a bank earning £1495 per month, but he too had adopted the same business arrangement of his wife and he was now the sole director of the company working on a contract with Deloitte and that he in effect got paid £113 per day providing services for the limited company. He further found bank statements with savings in the Applicant's wife's name of £18,664.79. The Judge noted the requirements for those documents produced for the appropriate period of time prior to the application with the written application, but found that had the issue not been raised regarding the alleged fraud the Secretary of State would have invited the Claimant to send the missing documentation. He found that as a result of the fraud the Claimant had wrongly lost the opportunity for that discretion to be applied in his favour, but found that the Appellant could not meet the requirements of producing the documents required by Appendix FM in regards to both the English language requirement and the financial requirements to allow leave to be granted under the Immigration Rules.

5. However, when considering the Article 8 case, First-tier Tribunal Judge Smith at [42] considered the 5 stage Razgar test and found that the Claimant had established both a private life and family life in the UK and the decision of appeal had potential to interfere with that private and family life. He went on to state that "*on the basis that the Appellant can meet the published requirements of the Immigration Rules for leave to remain I am satisfied that would I require him to leave the United Kingdom and return to Pakistan was a disproportionate interference with that private and family life*". In those circumstances, I am of the opinion that the refusal in this case is an unlawful interference with the right of the Appellant to a private and family life.
6. The Secretary of State has sought to appeal against that decision for the reasons set out within the Grounds of Appeal. That is a matter of record and is therefore not repeated in its entirety here, but in summary, it is argued that it is unclear how the Judge reached the conclusion that at [42], the Appellant can meet the published requirements of the Immigration Rules given his previous findings and that the Judge's proportionality assessment is flawed. It is said in any event the Judge at [34] found that the sponsor was unwilling to live in Pakistan, but that is not the same as saying there was very significant difficulties in him going to Pakistan and the decision did not amount to interference with

family life, because it could continue in Pakistan. It is argued that the Judge failed to identify compelling circumstances such as to justify consideration of whether there would be a breach of Article 8 outside of the Immigration Rules and that the Court of Appeal in VW and MO (Uganda) v Secretary of State for the Home Department [2008] UKAIT 00021 had stated that "*An Applicant cannot normally succeed if all he can show is that he or she would prefer to conduct his family life in the host member state. More must be shown than that relocation abroad could cause difficulty or hardship*". It was further argued that there was nothing to prevent the Applicant from returning back to Pakistan in order to apply for correct entry clearance and that any separation would be temporary proportionate in the public interest in maintaining an effective immigration control.

7. Permission to appeal has been granted by First-tier Tribunal Judge Kelly on the 23<sup>rd</sup> January 2018.
8. In her oral submissions, Mrs Aboni argued that the Judge had erred in his assessment of Article 8 in proportionality that the Claimant had not met the provisions of the Rules regarding the provision of a valid English language certificate, it having been invalidated, such that it was impossible to demonstrate compliance with the Rules and that as at the date of the hearing the Claimant did not meet the requirements of the Rules and could not show that he met the Rules until he passed an appropriate English language test. She argued that the fact the sponsor did not want to go and live in Pakistan is different from her having very significant difficulties living in Pakistan. She argued that Judge had failed to identify why it was not proportionate for the Claimant to seek to return back to Pakistan to seek entry clearance from there and that there would be a short period of separation and his wife could support him from the UK.
9. Mrs Aboni conceded that the Judge had acknowledged that the Claimant had been denied the opportunity of submitting documents because of the focus on the English language test and whether or not fraud had been utilised and did concede that on the evidence before him the Judge had been satisfied regarding the financial requirements, although she stressed that those documents had not been submitted with the application.
10. In her submissions, Miss Mughal on behalf of the Claimant argued that there is no contradiction or error in the findings of the Judge at [42] in respect of his previous

findings and that the Judge found that the Claimant did take the English-language test and that at [26] the Judge was satisfied that the financial requirements of the Rules were comfortably met, even though formally, those documents had not been submitted as required by Appendix FM SE, with the application, such that formally he did not meet the requirements of the Rules. She argued the Judge accepted and found that the documents clearly show the RH was the director of her own company R Hussain Limited. She argued that the point being made by the Judge was that although the Claimant did not meet the requirements of the Immigration Rules, as formally his English language certificate which appeared to have been accepted as valid had been invalidated and the documentation regarding his wife's self-employment as a company director had not been sent through with the application, the Judge had accepted both her level of earnings and her directorship of that limited company, and that it was simply technicalities that the previous valid English language certificate having been invalidated could no longer be relied upon and the point being made by the Judge was the fact that the Claimant can meet the published requirements of the Immigration Rules for leave to remain if he were to apply now, the Judge accepting his English language ability and the position regarding his wife's position as a company director and self-employment in that capacity.

My Findings on Error of Law and Materiality

11. I do not accept the submission made by the Secretary of State that the First-tier Tribunal Judge's consideration of the Article 8 claim in assessment of proportionality was flawed. The point quite properly being made by the Judge is not that in fact the Claimant did meet the published requirements of the Rules, in terms of the requisite documentation having been submitted and the Claimant having a valid English language certificate, but the fact that the Appellant would be able to meet the published requirements of the Immigration Rules, the Judge having been satisfied that the Claimant had not utilised fraud which is the only basis upon which his English language certificate had been invalidated and after the judge considered the Claimant's English language ability and the fact that as the Judge found [20] the Claimant was fluent in English and had no grammatical errors or no obvious mispronunciation, and that he sat his A-levels in the English language. The Judge also accepted the Claimant could, if applying again, meet

the requirement of the Immigration Rules in respect of his wife's self-employment and income generated therefrom, and the Judge accepted that the Claimant's wife is a company director of R Hussain limited, and the level of her income and self-employment were as claimed.

12. The Judge's findings at [42] were therefore not inconsistent, on the basis that he was not saying that the Claimant did in fact as at that date meet the requirements of the Rules, but that he could meet the requirements of the Rules, if in effect was applying again at that date and that in such circumstances requiring him to leave the United Kingdom to return back to Pakistan to make a fresh application, would be a disproportionately interference with the family and private life the Claimant had established. That was a finding open to the Judge on the evidence before him. The fact that the Judge accepted that in fact if the application was made now the Claimant would meet the requirements of the Rules, although formally he did not meet the requirements as at the date of the hearing due to the technicality of his English-language certificate having been invalidated, but in circumstances where the Judge considered that if he were to further take the English language test the Claimant would easily pass given his fluency in English and the Judge's acceptance that although the documentation regarding the self-employment as a company director of the Claimant's wife had not been submitted with the application, the position of her self-employment was as claimed and that it was simply as a result of fraud wrongly been averred against him that the Claimant lost the opportunity for the discretion to apply in his favour for such documentation to be submitted, did give rise to a compelling circumstance in this case as to why the case should be allowed outside the rules. It was open to the judge to find that the decision was disproportionate to the legitimate public end sought to be achieved, even though the requirements of the Immigration Rules were technically not met, as at the date of the decision or the hearing before Judge Smith. There were therefore sufficient compelling circumstances as to justify the Judge reaching the conclusion reached on Article 8 outside of the rules given the circumstances that he found existed as at the date of the hearing.

13. In respect of the argument that the decision does not amount to interference with the family life as it can continue in Pakistan, the fact that as the Judge found the sponsor was unwilling to Pakistan but that was not the same as saying there were very significant

difficulties in her going to Pakistan, the Judge made it quite clear in his findings at [37] that there would not be very significant obstacles to the Claimant reintegrating back into Pakistan and did not in his decision state that there will be significant obstacles to his wife living in Pakistan, but did take account of the fact that she was a British citizen and therefore a qualifying partner for the purposes Section 117B at [41] and further the fact that the Appellant himself had established a private life in the UK during the 7 years he had been in the UK lawfully. The Judge found that the decision was an interference with both his private and family life. Therefore, it was open to the Judge to find the decision did amount to an interference with that private and family life, as it was currently enjoyed in the UK.

14. The decision of First-tier Tribunal Smith does not reveal any material errors of law and is maintained

Notice of Decision

The decision of First-tier Tribunal Judge Smith does not reveal any material errors of law and is maintained. The Secretary of State's appeal is dismissed.

No anonymity direction made.

Signed



Deputy Upper Tribunal Judge McGinty

Dated 31<sup>st</sup> May 2018