



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/06515/2015

THE IMMIGRATION ACTS

Heard at Field House
On 5th February 2018

Decision & Reasons Promulgated
On 13th April 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MR TANVIR KHAN OMAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

AND

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S.Karim, Counsel, instructed by Zahra and Co, Solicitors.
For the respondent: Mr.T.Melvin, Home Office Presenting Officer.

DETERMINATION AND REASONS

Introduction

1. The appellant, a national Bangladesh, came to the United Kingdom in September 2009 as a student. His visa was valid until January 2013 and was extended until 24 June 2014. He then made an in time application for leave to remain as the spouse of a British national. That application was refused on 28 January 2015.
2. His application was considered under appendix FM of the rules and refused on suitability grounds. His English language test results from 12 December 2014 had been cancelled on the basis they had been obtained by deception, that is, by someone else taking the test. The respondent went on

to consider EX1 and concluded he had not demonstrated insurmountable obstacles to the relationship with his wife continuing in Bangladesh. She can understand Bengali. They had been to Bangladesh on several occasions; his wife was familiar with its traditions; her family originated there and they were married in an Islamic ceremony. Regarding private life, there was no significant obstacle to integration into Bangladesh. No other circumstances were identified justifying the grant of leave.

The First tier Tribunal

3. His appeal was heard at Hatton Cross on 8 June 2017 before Judge of the First-tier Tribunal EB Grant. In a decision promulgated on 20 June 2017 it was dismissed.
4. The judge did not find the appellant credible and concluded that the test had been taken by proxy. Within the respondent's bundle there was confirmation from ETS that it had invalidated the test result. The judge commented that the appellant had not contacted ETS about their invalidation to take issue with this. Further points taken against the appellant were that the test arrangements were made by a third party and the appellant's account of events changes. The appellant said he had taken the test at Gants Hill but the respondent's evidence was that the test was taken at South Quay College, a considerable distance away. In this case had been the subject of an in-depth audit resulting in 67% of the tests taken between 2012 and 2014 were declared invalid. The judge commented that ETS had no ulterior motive in cancelling the test result other than ensuring the test centres could be relied upon. Reference was made by the judge to the case law relating to the evidential and legal burdens of proof. The judge rejected the argument that the evidence produced could not be relied upon as generic. The judge referred to the evidence of invalidation and the disparity over the centre where the test was taken.
5. The appellant had argued that he had no reason to cheat because he was competent in English, evidenced by the fact he had obtained a degree here through the medium of English. At paragraph 20 the judge referred to the fact the appellant was able to give his evidence in English was no indicator of his skills in 2012. Consequently, the judge found the suitability requirements were not met.
6. The judge then went on to consider the family life the appellant had. The judge accepted the relationship with his wife was genuine and subsisting. The respondent's decision did interfere with that right but the judge pointed out it was lawful and in the interests of maintaining effective immigration control. Finally, the judge concluded the decision was proportionate. The appellant had been here since 2009; had met his wife in 2012 and they married the following year. The judge acknowledged that he has in-laws here with whom he lives and that he has a private life.

However, the judge concluded it would not be in the public interest to allow someone who had obtained leave by fraud to remain. Whilst his wife may have been unaware of his conduct the appellant did.

7. The judge referred to the appellant's leave being precarious and at paragraph 27 said that according to section 117 B little weight should be attached to the private and family life developed when the leave was precarious.
8. The judge concluded that family life could continue to be enjoyed in Bangladesh and found the account that they had not discussed this unconvincing. His wife has extended family there and both of her parents were born there. She would be entitled to live in Bangladesh through her husband. Alternatively, she could support an application for entry clearance. They had no children.

The Upper Tribunal

9. Permission to appeal was sought on multiple grounds.
10. The first ground is that the judge did not follow the Devaseelan principle in that there had been an earlier appeal which should have formed the starting point of deliberations.
11. The second ground is that the judge in finding the respondent had discharge the burden of proof failed to distinguish between the legal and evidential burden.
12. The third ground seeks to fault the judge for relying upon the ETS evidence that the test was taken at Gants Hill and not where the appellant said.
13. The fourth ground argues there was a low threshold of explanation upon the appellant, described as the 'minimum level of plausibility' which the judge did not apply.
14. The fifth ground contended the judge failed to engage with the appellant's statement that he was proficient in English and did not need to cheat.
15. The sixth ground was the judge erred in law in stating that under section 117 B little weight should be attached to the appellant's family life because of his precarious status. The provision refers to someone being in the United Kingdom unlawfully rather than precariously.
16. The seventh ground calls upon the Chikwamba argument in relation to the suggestion his sponsor could support an application for entry clearance.

17. The eighth ground is that the judge failed to assess the impact of the appellant's removal upon his wife and the wider family circle.
18. Ground nine was that the judge failed to consider the appellant's ties and investments in the United Kingdom.
19. Permission was granted in respect of grounds one, three, six, seven and eight.
20. The respondent has prepared a response dated 12 January 2018 opposing the appeal. It states the Devaseelan principle does not apply as the previous decision was unrelated to the issue arising. It contends the other grounds are a disagreement with the outcome in relation to the ETS evidence. At paragraph 19 of the decision the judge clearly had considered and rejected the appellant's explanation as to where he sat test. Regarding article 8 it was accepted that in relation to section 117 B the grounds were correct but that does not prevent little weight being given to family life in the overall proportionality assessment where fraud has been used.
21. At hearing the appellant's representative said the Devaseelan point was no longer being pursued. The appeal was otherwise argued along the grounds set out in the grounds for permission. It was contended the judge had not followed the stages set out in the case law with the evidential burden on the respondent; if applicable, consideration of the appellant's explanation and then consideration of the legal burden. It was argued that the judge did not properly consider the appellant's explanation that he took a Bachelors degree through the medium of English which had predated the test. It was submitted the judge was wrong to simply rely upon the record from ETS as to the location of the test.
22. I was then referred to the article 8 consideration and the error in relation to section 117 B and family life. The relationship the appellant established with his wife was when he was here lawfully. The respondent has acknowledged this in the response. It was also argue that if the appellant could meet the rules for entry clearance then his removal was disproportionate in line with the Chikwamba decision. I was referred to his wife's ties with the United Kingdom and the family she has here. The appellant had also invested £10,000 in a business which was not reflected in the decision.
23. In response, the presenting officer relied upon the rule 24 response. He submitted that the evidence from ETS was clear and adequate findings were made by the judge. The appellant had presented no evidence in relation to taking the test at an alternative centre. He provided no evidence he had paid for the test. The judge also commented on the fact he had not gone to ETS and taken issue with them over the allegation made. I was referred to the case law on the issue of proxy test taking.

24. It was accepted that the judges reference to section 117 B and family life was incorrect but it was submitted this made no material difference to the outcome.
25. In response, the appellant representative again referred to the staged approach required in relation to the evidential and legal burden. Again, reference was made to the appellant having taken his degree shortly before the test.

Consideration

26. I have considered the decision in its entirety. The appellant's difficulties came from the allegation of fraud in the taking of English test. It is now known that there was widespread fraud in relation to this issue. This went to the heart of the respondent's attempts at immigration control in relation to students. As appeals have progressed the case law has developed. It was argued before the judge that the evidence presented was generic. Originally this consisted of the standard statements used in such cases. The judge has referred to the fact that the respondent had provided a supplementary bundle. Typically there is now a screen-print showing a test result being invalidated. At paragraph 16 and 17 the judge refers to the relevant case law, particularly MA (ETS-TOEIC testing)[2016] UKUT 00450 where the Tribunal reviewed the evidence which was similar to that before the judge in the supplementary bundle. The judge quotes from the decision at paragraph 51 stating that the ETS statement of 'invalid' should be treated as reliable. The judge referred to the generic evidence of Mr Millington and Ms Collings and the introduction of further specific evidence. Clearly the judge was aware of the relevant case law, the evidential and legal burden, and the notion of shifting burdens. Paragraph 45 to 47 of the judicial review decision in Ranjit Kaur JR 8997-15 provides a summary of the standing of the lookup tool.
27. The judge makes valid points. The first is that ETS have no reason to give false evidence against the appellant. Their focus is in maintaining the integrity of the testing scheme. The appellant has been vague about the test arrangement, referring at one stage to a close family friend doing this and then saying the person was not a close family friend. There was then the discrepancy as to where the test was taken. The grounds criticise the judge for accepting what ETS said on this. However, the judge makes the very legitimate point that the appellant has not been in contact with ETS or otherwise provided an alternative explanation. At para 19 the judge concluded that the appellant could not name the correct test centre because he never sat the test.
28. At paragraph 20 the judge commented on the fact the appellant gave his evidence in reasonable English. However, this was no indicator as to what his English language ability was back in 2012. It also been argued that the appellant had obtained a degree through the medium of English. The case

law has given various reasons why people may use proxy testers. For instant, they may lack confidence in their own ability. Whatever the reason, if the test was taken by proxy they engaged in deception which was fundamentally at odds with the system of immigration control. I find no fault with the points made by the judge.

29. It is correct that the judge was mistaken in referring to section 117 B and the appellant's family life .The appellant established his family life when he was here with leave. It could be argued that the leave had been improperly obtained but nevertheless it was valid. His situation therefore was that of being someone who is here was a precarious status in that it was not confirmed but he was not here illegally. Consequently, the statutory provision directing that little weight be given related to his private life not his family life. I find this to be a slip on the part of the judge which was not fundamental. Section 117 B is only part of the article 8 assessment. The judge is required to go wider than that and they can look at the appellant's conduct in considering the proportionality of the decision. The appellant's wife may not have appreciated his cheating but the appellant certainly did.
30. Although his wife is British she has strong connections with Bangladesh. She has a choice of going with her husband. The alternative, that she assist him in an application for entry clearance, is not a Chikwamba situation. The factual matrix in that case was quite different. Here, there is no guarantee an application will succeed and the appellant would be returning to a country where he has not claimed he had any issues.
31. The respondent's decision correctly reflects the need for immigration control in the face of abuse. The judge did not need to comment in detail on the appellant's private life. In this context the statutory consideration would play a major part.
32. In summary therefore I find no material error of law established. Consequently, the decision dismissing the appeal shall stand.

Decision

No material error in the decision of First-tier Tribunal Judge EB Grant has been established. Consequently, that decision dismissing the appellant's appeal shall stand

Francis J Farrelly
Deputy Upper Tribunal Judge

2nd April 2018