



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/23757/2015

THE IMMIGRATION ACTS

Heard at Field House
On 25 January 2018

Decision & Reasons Promulgated
On 23 February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MR AJIT SINGH SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Bellara of Counsel, SMK Solicitors

For the Respondent: Mr L Tarlow, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of India who was born on 7 February 1984. On 8 January 2010 the appellant entered the United Kingdom on a Tier 4 (General) Student visa valid until 16 April 2012. On 5 April 2012 he applied for further leave to remain as a Tier 4 (General) Student. This application was refused on 30 April 2012. The appellant applied again on 19 May 2012 for leave to remain as a Tier 4 (General) Student. That application was granted on 31 July 2012 and the appellant was granted leave to remain until 10 September 2014. On 2 September 2014 the appellant applied for leave to remain based upon his family and private life in the UK. The appellant

in that application said that he had a partner, Nirmala Beeharee a Mauritian national whose date of birth is 2 January 1985. He said that they had married on 24 October 2012.

2. The respondent refused the appellant's application. The refusal of that application was based on the respondent's assertion that the appellant had obtained his leave to remain as a Tier 4 (General) Student on 31 July 2012 by deception. As a result the appellant was not found to meet the suitability requirements for consideration of limited leave to remain in the UK either as a partner or as a parent. The respondent also indicated that the appellant did not qualify as a partner because his partner was not a British citizen in the United Kingdom or present and settled in the United Kingdom. The appellant was not considered to meet the requirements of paragraph 276ADE in any event because there were no very significant obstacles to the appellant's reintegration into India.

The appeal to the First-tier Tribunal

3. The appellant appealed against the Secretary of State's decision to the First-tier Tribunal.
4. In a decision promulgated on 17 May 2017 First-tier Tribunal P B Conrath dismissed the appellant's appeal. The appeal was considered on the papers of the request of the appellant.
5. The appellant applied for permission to appeal against the First-tier Tribunal's decision. On 1 December 2017 First-tier Tribunal Judge Pickup granted the appellant permission to appeal.

The hearing before the Upper Tribunal

6. At the commencement of the hearing I considered an application for permission to add further grounds of appeal that had been sent to the Upper Tribunal on 15 January 2018. Essentially the appellant sought permission to file supplementary grounds of appeal which were not considered by the First-tier Tribunal Judge. It is submitted that there is a material error of law arising from a procedural unfairness. In essence the appellant argued that the judge failed to consider properly the material with regard to the evidence concerning the use of deception to obtain his TOIEC certificate. Reliance is placed on the case of **Chen paper appeals proving dishonesty [2014] UKUT 00236**. During consideration of this preliminary matter Mr Bellara considered a document referred to by the judge in the decision which set out the appellant's test score results. This is a document that the appellant had not seen. After considering that document Mr Bellara indicated that the application to amend the grounds of appeal was not pursued vigorously.
7. In the grounds of appeal to the First-tier Tribunal which were settled by the appellant's legal representative there was no appeal against the 'deception' decision. At paragraph 3 of those grounds it simply mentions that deception was a reason for refusal. In the witness statements for the appeal hearing the appellant did not

dispute that he has used deception to obtain his TOEIC certificate. In the grounds of appeal to this Tribunal there was no appeal against the judge's consideration of that issue either.

8. The judge considered from paragraphs 21 to 23 the respondent's assertion that the appellant has used deception to obtain his TOEIC certificate and therefore to obtain his leave to remain in the UK. The judge has given careful consideration to the respondent's evidence and whether or not it was sufficient to satisfy the evidential burden. As the judge set out:

"This Appellant has not sought to do this [establish an innocent explanation] at all, either in his Notice and Grounds of Appeal, or in his written Witness Statement dated the 23rd August 2016. Consequently, I find that it has been established, on the balance of probabilities, that the Appellant's test scores were obtained on the 18th April 2012 by deception, and are therefore invalid. Not only does this mean, therefore, that he does not meet the 'suitability' requirements for consideration of Leave to Remain under the Rules, but it means that he has effectively been in the United Kingdom 'unlawfully' since his previous Application for Leave to Remain was refused on the 30th April 2012."

There was no error of law in the First-tier Tribunal Judge's consideration of this issue.

9. For the reasons set out above I do not grant permission for the appellant to amend his grounds of appeal.
10. The grounds of appeal are focused on the best interests of the appellant's child. As set out in the First-tier Tribunal's decision the appellant had a child born on 7 December 2014. It is asserted that the judge has not adequately considered the effects of removal on the child and has not considered and made findings as to what the child's best interests are.
11. It is also asserted that the judge erred by failing to consider appropriately the situation of the appellant's wife, a Mauritian national, with no links to India who cannot possibly go and settle in India to be with her husband. This should be considered an insurmountable obstacle to returning to India to live there. In oral submissions Mr Bellara relied on the grounds of appeal and submitted that the appellant's child was a British citizen. He indicated that the child's passport had been produced before the First-tier Tribunal Judge. To justly dispose of the appeal the First-tier Tribunal Judge was required to assess what the best interests of the child were. In this case there is no consideration at all for what that child's best interests are. With regard to insurmountable obstacles he submitted that the best interests issue overlaps on the basis of family life in the UK and failure to consider the effect on the family life if the appellant is removed. Mr Bellara referred to paragraph 12 of the grounds of appeal where it is asserted that the judge should not have considered that the appellant's relationship was entered into while he was in the UK unlawfully. He submitted that it is unreasonable and unfair for the judge to raise this issue of his own accord. Mr Bellara accepted that in fact the appellant was

in the UK unlawfully after his previous application for leave to remain was refused on 30 April 2012 and did not pursue this further.

12. Mr Tarlow relied on the Rule 24 response which asserts that the judge did properly consider the best interests of the child and relocation to India. In any event the child is not expected to leave the UK with the appellant as the child can remain in the UK with the mother who has ILR. This is a case in which separation is justified given the adverse findings against the appellant in respect of deception employed in a previous application and these findings have not been challenged. Mr Tarlow submitted the fact that the appellant cannot meet the suitability requirements has a bearing on the situation with regard to the child. The appropriate course of action is for the appellant to make a fresh application from abroad.
13. Mr Bellara submitted that whilst suitability is important the fact that the judge makes no reference at all to the best interests of the child cannot be overcome. The judge was required to consider carefully the duty under Section 55 of the Borders, Citizenship and Immigration Act to consider the best interests of the child. He submitted that the sins of the parents has to be considered very carefully in the proportionality exercise.

Discussion

14. In an otherwise carefully reasoned decision the First-tier Tribunal Judge in this case has simply failed to consider the best interests of the appellant's child. The judge at paragraph 27 went on to consider the appellant's claim outside of the Immigration Rules and correctly set out the approach in Razgar. The judge accepted that the appellant has a son born on 7 December 2014 who at the time of the hearing was 2¼ years old. The judge accepted that refusal of the appellant's application will cause a serious interference in his family and private life. When considering Section 117B of the Immigration Act 2014, which inserted this provision into the Nationality, Immigration and Asylum Act 2002, the judge considered the weight to be given to the appellant's private life. In paragraph 34 the judge considered that:

"I accept that any requirement for the Appellant to leave, whilst he returns to India and makes what would be a fresh Application for Entry Clearance as a 'Partner' and/or 'Parent' will cause both him and his wife, and his son some degree of hardship."

15. That is the only substantive consideration of the effect of removal of the appellant on his son. This is woefully inadequate in terms of the consideration of a child's best interests. It is not clear that the judge considered at all what those interests are before reaching a decision.
16. I find that the failure to consider the best interests of the appellant's child is a material error of law and I set the decision aside.
17. I find that there is a material error of law in the First-tier Tribunal decision. I set that decision aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA').

18. I considered whether or not I could re-make the decision myself. I considered the Practice Statement concerning transfer of proceedings. As there have been no findings of fact or proper consideration of the child's best interests after considering whether I could make the decision myself I accepted that there would need to be a fuller consideration and findings. I am satisfied that the nature and extent of judicial fact finding that is necessary in order for the decision in the appeal to be re-made is such, having regard to the overriding objective, that it is appropriate to remit the matter to the First-tier Tribunal.
19. There are two findings in the First-tier Tribunal's decision that are preserved. Firstly, at paragraph 23 the judge found "I find that it has been established, on a balance of probabilities, that the Appellant's test scores were obtained on the 18th April 2012 by deception, and are therefore invalid."
20. Secondly the finding that the appellant has been in the United Kingdom unlawfully since his previous application for leave to remain was refused on 30 April 2012 is also preserved.
21. It was not clear to me the basis on which the child is a British Citizen. I indicated that this needs to be established at the hearing and that I would give a direction to that effect.
22. I remit the case to the First-tier Tribunal for the case to be heard at the First-tier Tribunal at Taylor House before any judge other than Judge Conrath pursuant to section 12(2)(b) and 12(3)(a) of the TCEA. A new hearing will be fixed at the next available date.
23. No anonymity direction is made.

Decision

The decision of the First-tier Tribunal contains a material error of law. The decision is set aside. The case is remitted to the First-tier Tribunal to be re-heard with two findings preserved as set out above.

Direction

The child's passport or other evidence to prove that he is a British citizen should be filed with the First-tier Tribunal and served on the respondent.

Signed P M Ramshaw

Date 18/2/18

Deputy Upper Tribunal Judge Ramshaw