



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/26388/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 2nd February 2018**

**Decision & Reasons
Promulgated
On 13th March 2018**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR SAKTHIVEL PICHAI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Ms S Anzani, Counsel instructed by Nag Law Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, I shall refer to the parties as in the First-tier Tribunal. The Appellant is an Indian national, born on 8 June 1986. His appeal against the refusal of discretionary leave to remain was allowed, on human rights grounds, by First-tier Tribunal Judge Wright on 10 July 2017.
2. The Secretary of State applied for permission to appeal on the following grounds: Although the judge cited the reported case of SM and Qadir v Secretary of State for the Home Department (ETS - evidence - burden of proof) [2016] UKUT 00229 (IAC), she failed to apply the legal principles in that case. The Secretary of State had discharged the evidential burden by

submitting the invalid test result accompanied by the generic witness statements. That evidence was clearly before the judge including an expert report from Professor French and a college specific report quantifying the number of invalid scores for the day the Appellant took the test to show that on balance he cheated. The judge found that despite the presence of this evidence the Secretary of State had failed to discharge the burden of proof. It was difficult to decipher where the findings of the judge commenced. The judge's findings were brief and mainly unreasoned and infected by a misdirection in law in respect of SM and Qadir. The judge failed to follow the law in respect of the ETS deception issue and failed to direct herself properly in respect of family life and the provisions of Section 117B and she failed to give adequate reasons for allowing the appeal on human rights grounds.

3. Permission was granted by First-tier Tribunal Judge Shimmin on 18 December 2017 on the basis that the judge arguably erred in law in failing to follow the decided case in respect of the deception issue, failing to direct herself properly in respect of family life, including not considering any of the provisions of Section 117B, and failing to give adequate reasons.

Submissions

4. Mr Tarlow relied on the grounds of appeal and submitted that in the case of SM and Qadir the Tribunal held that the Respondent's generic evidence satisfied the evidential burden which then shifted to the Appellant in order to offer an innocent explanation. The evidence specific to this Appellant was before the judge in the Respondent's bundle, but she failed to take it into account. This is apparent from her conclusion at paragraph 40 in which she states:

"In view of the limited evidence from the respondent in respect of the actual test taken by this appellant the burden of proof has not been discharged. The Tribunal accepts the appellant's submission that the failure to provide specific evidence and to question the appellant upon that evidence does not discharge the burden which the respondent has to meet."

5. Mr Tarlow submitted that the judge should have concluded that the Respondent met the evidential burden and then gone on to consider the Appellant's oral evidence as to his explanation. The judge failed to consider that there had been a shift in the burden of proof in her conclusion at paragraph 40.
6. Further, the judge stated at paragraph 43, "In considering proportionality the Tribunal takes into account Section 117B of the Nationality, Immigration and Asylum Act 2002". She has failed to show that she has considered all its elements and therefore erred in law in her assessment of

Article 8. Her conclusions on family life and proportionality were inadequately reasoned.

7. Ms Anzani submitted that it was necessary to look at the decision as a whole not just at paragraph 40 when considering the question of deception. In particular, at paragraphs 24 and 25 the judge stated:

“24. In the respondent’s supplementary bundle there are the ETS results and the generic witness statements. The respondent has come to the conclusion that the appellant used a proxy to take the spoken English test. It was submitted the respondent has discharged the legal burden demonstrating the appellant used a proxy test taker. On 14 December 2011 out of 184 tests taken, 64% were invalid. With regards to the respondent’s position, she does not say everyone who took the test used a proxy, but that significant weight can be given to those findings.

25. The respondent referred to the report of Professor French and his evidence on false positives at paragraph 3.2 (identification of different speakers as the same person).

8. Ms Anzani submitted that it was clear from the judge’s conclusion at paragraph 40 that she was referring to the legal burden. The Appellant was entitled to challenge the adequacy of the evidence submitted by the Respondent and the generic evidence was not sufficient to satisfy the legal burden. The judge was fully aware of the distinction between the evidential burden and legal burden.
9. The judge had applied SM and Qadir and appreciated the shift in burden. This was apparent from paragraph 32 of the decision which stated:

“32. In respect of the respondent’s position on the ETS, the only evidence provided by the respondent is (as with all similar cases) generic. The appellant submitted there was no evidence as to how the appellant’s test had been assessed or how the questions over the appellant’s test had been assessed. His result had been declared invalid; however the respondent has not given evidence as to what procedure was used to reach that conclusion. The test centre results suggest 36% of tests were questionable and 64% were invalidated. It was submitted there were shortcomings; there was no evidence to confirm the appellant’s individual results. The evidence upon which the respondent relies only just passed the evidential burden in SM and Qadir and that was a case where there was evidence specific to those two appellants. The appellant referred to the distinction between the evidential burden of proof and the burden of proof to the civil standard.”

10. Ms Anzani submitted that the judge had outlined the evidence correctly, outlined the Appellant’s innocent explanation and overall the conclusion at paragraph 40 that the legal burden was not met was open to the judge on the evidence before her.

11. In relation to Article 8, it was accepted that the Appellant did not meet the Immigration Rules, therefore any finding in relation to the ETS deception was not relevant if the judge's findings on Article 8 were sustainable. There was no error in her assessment of Article 8 outside the Rules because there were exceptional circumstances in this case sufficient to outweigh the public interest. The judge had focused on the economic situation in assessing the public interest. She accepted there was family life and her conclusions were open to her on the evidence before her. Her reasons were sufficient because it was in the best interests of the children for the status quo to be maintained.

11. At paragraph 42 the judge stated:

"It is accepted by the Tribunal, taking into account the evidence of the sister's needs, the children's needs and how the appellant meets those needs, he has established in the particular circumstances of this case his family life with his sisters and nieces. His removal would consequently interfere with that family life. Indirect contact with his sister and nieces would not replace the emotional care which the appellant provides, besides the undoubted very practical domestic support which he supplies. It is accepted that even if the appellant's sister was able to afford and engage someone to assist her (it is not accepted it would be practical to do so), any form of assistance received would not replicate that which the appellant currently supplies. In view of the requirements which would fall elsewhere, it must make economic sense for the appellant to continue to shoulder that burden and for it to be provided by him. The appellant's removal cannot satisfy any legitimate public interest, as the burden would then fall elsewhere."

12. Ms Anzani submitted that the reasons given at paragraph 42 were sufficient to sustain the judge's Article 8 findings. She submitted that the Respondent's submissions amount to disagreements with the judge's findings but disclose no error of law.

13. In response Mr Tarlow submitted that there was nothing exceptional in what the judge had described at paragraph 42. They merely were a reiteration of family reasons for the Appellant to support his sister and his children. It was unclear what the findings under Section 117B were and the reasons for them.

Judge's findings

14. The judge concluded that the Respondent had failed to establish deception and the Appellant's removal would be disproportionately harsh in the circumstances. Her findings start at paragraph 40 and end at paragraph 44:

"40. In consideration and in reaching conclusions, in respect of the English language test, the Tribunal is cautioned against applying its own test of English language skills based upon the level

demonstrated at the hearing (SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC)). In view of the limited evidence from the respondent in respect of the actual test taken by this appellant the burden of proof has not been discharged. The Tribunal accepts the appellant's submission that the failure to provide specific evidence and to question the appellant upon that evidence does not discharge the burden which the respondent has to meet.

41. In respect of Article 8 the respondent submitted the appellant has given oral evidence, saying he cares for his sister and he has a large input into the children's upbringing, schooling, cooking, housework and attending hospital appointments with his sister. That said, the respondent submitted the appellant has not raised exceptional circumstances with regards to Article 8. The appellant submits to the contrary that it is these exact circumstances which are exceptional and leave to remain should be granted.
42. It is accepted by the Tribunal, taking into account the evidence of the sister's needs, the children's needs and how the appellant meets those needs, he has established in the particular circumstances of this case his family life with his sisters and nieces. His removal would consequently interfere with that family life. Indirect contact with his sister and nieces would not replace the emotional care which the appellant provides, besides the undoubted very practical domestic support which he supplies. It is accepted that even if the appellant's sister was able to afford and engage someone to assist her (it is not accepted it would be practical to do so), any form of assistance received would not replicate that which the appellant currently supplies. In view of the requirements which would fall elsewhere, it must make economic sense for the appellant to continue to shoulder that burden and for it to be provided by him. The appellant's removal cannot satisfy any legitimate public interest, as the burden would then fall elsewhere.
43. In considering proportionality the Tribunal takes into account s.117B of the Nationality, Immigration and Asylum Act 2002.
44. It would be disproportionately harsh in these circumstances and for the reasons set out above, not to exercise that discretion in the appellant's favour."

Discussion and Conclusions

15. The judge records, at paragraph 32, that the Appellant submitted: "The evidence upon which the respondent relies only just passed the evidential

burden in SM and Qadir and that was a case where there was evidence specific to those two appellants.”

16. At paragraph 40, the judge does not refer to either the evidential burden or the legal burden. She stated: “In view of the limited evidence from the respondent in respect of the actual test taken by this appellant the burden of proof has not been discharged.” This finding suggests that there was no evidence before her of the actual test taken by the Appellant. It is clear from the Respondent’s supplementary bundle, referred to by the judge at paragraph 24, that there was evidence of the Appellant’s actual ETS result, the number of tests taken and the proportion which were rendered invalid. Accordingly, there was evidence before the judge specific to this Appellant such that the judge ought to have concluded that the evidential burden was satisfied. The judge failed to apply SM and Qadir and acknowledge the shift in burden.
17. The judge set out the Appellant’s oral evidence in her decision at paragraphs 10 to 18. However, she made no finding on whether she accepted the veracity of that evidence or whether she found that it amounted to an innocent explanation. There were no reasons given for why the Appellant had discharged the evidential burden. It is therefore not clear, in concluding that the Respondent had not discharged the burden, whether the judge was referring to the evidential burden or the legal burden.
18. Ms Anzani submitted that it was the legal burden and that finding was open to the judge, but unfortunately the judge failed to specifically state the test in SM and Qadir failed or to show that she has applied it. She failed to show that she appreciated the shift in burden and failed to give any reasons for why she accepted the evidence of the Appellant that he did not cheat. Those conclusions have to be inferred from what she stated at paragraph 40. It may well be that, looking at the evidence as a whole the Respondent has failed to discharge the legal burden, but it is not apparent that the judge has taken into account all the relevant evidence or applied the relevant test. She has failed to make sufficient findings or give sufficient reasons for her conclusion at paragraph 40. Accordingly, I find that the judge erred in law in relation to ground 1.
19. Ground 1 obviously affects the assessment of proportionality under Article 8. Ms Anzani tried to persuade me that this was not relevant because it was accepted that the Appellant could not satisfy the Immigration Rules and therefore an error of law in relation to the ETS deception was not material to the overall outcome. I disagree because whether the Appellant had used deception was relevant to the public interest and therefore relevant to the assessment of proportionality. Having found there is an error of law in respect of the ETS deception, that error has infected the judge’s assessment of Article 8.
20. Further, the judge has failed to give adequate reasons for why there is family life between the Appellant, his sister and his nieces. The Appellant was not the father of the children and the judge has not explained why the

situation amounted to more than normal emotional ties in relation to his family life with his sister. The judge's finding that the Appellant's situation amounted to family life discloses an error of law because she has failed to properly apply the relevant case law.

21. Further, the judge's assessment of proportionality is lacking in reasons. The judge focuses on the assistance provided by the Appellant to his sister and the economic benefit he provides. She has failed to make findings on Section 117B, merely stating that she has taken it into account in assessing proportionality.
22. Although Ms Anzani submitted that the judge found that it was in the best interests of the children for the status quo to be maintained, there is no proper assessment of the children's best interests or why they would outweigh the public interest given that the Appellant cannot satisfy the Immigration Rules. It is incumbent on the judge to deal with the provisions of Section 117B and her brief comment that she has taken them into account was not sufficient to show that she had regard to each of those considerations.
23. I find that the judge erred in law in her assessment of Article 8 and in allowing the appeal on human rights grounds. It was agreed by the parties that if an error of law was found then the matter should be remitted to the First-tier Tribunal for a rehearing. I agree that is the appropriate course. It will be open for the First-tier Tribunal to assess the Appellant's explanation and make proper findings on whether he took the test, notwithstanding that the Respondent satisfied the evidential burden. It will be open to the Appellant to submit up-to-date evidence on his Article 8 claim which must be assessed at the date of the hearing.
24. Accordingly, I find there is an error of law in the decision of First-tier Tribunal Judge Wright dated 10 July 2017 and I allow the Respondent's appeal. I set aside the First-tier Tribunal decision and remit the matter to the First-tier Tribunal for rehearing. I do so on the basis that the case involves an assessment of the oral testimony of the Appellant in accordance with paragraph 7.2 of the Practice Statements of 25th September 2012. None of the judge's findings are preserved.

Notice of Decision

The Respondent's appeal is allowed and the Appellant's appeal is remitted to the First-tier Tribunal with directions (see below).

No anonymity direction is made.

J Frances

Signed

Date: 9 March 2018

Upper Tribunal Judge Frances

DIRECTIONS

- (i) The Tribunal is directed pursuant to section 12(3) of the Tribunals, Courts and Enforcement Act 2007 to reconsider the appeal at a hearing before a First-tier Tribunal Judge other than First-tier Tribunal Judge Wright.
- (ii) The Appellant and the Respondent to submit any further evidence/ and or skeleton arguments upon which they intend to rely 14 days before the date of hearing.