



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/30640/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 7th November 2018**

**Decision & Reasons
Promulgated
On 30th November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

**WAQAS ALI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Iqbal, Legal Representative

For the Respondent: Ms A Everett, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Garbett promulgated on 22nd June 2018 dismissing his appeal on human rights grounds and under the Immigration Rules. The Appellant appealed

against that decision and was granted permission to appeal by First-tier Tribunal Judge Blundell in the following terms:

- “2. This is an ETS case involving a Pakistani appellant who is married to a British citizen who continues to have regular contact with her teenage children from a previous relationship. The judge found that the respondent had discharged the burden of proving that the appellant used a proxy in his TOEIC test. The judge went on to find that there were no insurmountable obstacles to the sponsor relocating to Pakistan with the appellant and that the respondent’s decision was proportionate.
3. In substance, there are four grounds of appeal:
 - (i) The judge misunderstood the ETS evidence and the distinction between an ‘invalid’ and a ‘questionable’ designation;
 - (ii) The conduct of the hearing was procedurally unfair, in that the appellant was not offered an interpreter when his answers became confused and the judge had difficulty understanding him;
 - (iii) The judge erred in law and failed to take material matters into account in assessing paragraph EX1(b);
 - (iv) The judge erred in law and failed to take material matters into account in assessing the best interests of the sponsor’s children.
4. I consider the third of these points to be arguable. It is arguable, in particular, that the judge’s finding at [37] (regarding the absence of insurmountable obstacles to the sponsor relocating to Pakistan) were reached by adopting an impermissibly literal approach to paragraph EX1(b). It is arguable that the judge failed to consider the question posed by paragraph EX2, of whether the sponsor, who suffers from epilepsy and other conditions, would be caused very serious hardship by relocating to Pakistan and not seeing her teenage children every month as she presently does. I also consider there to be merit in the fourth of the grounds, as summarised above.
5. For my part, I consider there to be considerably less merit in the first of the two points summarised above. It is far from clear that the judge erred in his understanding of the ETS evidence. Nevertheless, I note the guidance given in Ferrer [2012] UKUT 304 (IAC) and I do not limit the grounds which may be argued.
6. Permission to appeal is granted on all grounds”.

2. I was not provided with a Rule 24 response from the Respondent but was given the indication that the appeal was resisted.

Error of Law

3. At the outset of the hearing I canvassed with the parties my preliminary view which was that there was in fact a material error of law in the decision, however not quite on the basis framed in the grounds, but on the basis that the judge had reached findings in respect of the Article 8 assessment which were inconsistent with the structure and content of the Immigration Rules under Appendix FM. To put the point succinctly, in respect of Ground 3 of the Grounds of Appeal, the assessment of Appendix FM under EX.1(b) at paragraph 37 of the decision would not avail the Appellant in an assessment of his appeal under the rules because the primary issue on this appeal was that the Appellant had been refused leave to remain as the spouse of a British person under paragraph S-LTR.1.6. in respect of his having used a proxy in an ETS English language test as a consequence of which the Appellant's presence in the United Kingdom was considered to be undesirable. The reason why paragraph EX.1(b) or EX.2 is of no avail to the Appellant is because he must first meet paragraph R-LTRP.1.1(d)(i) which is the key paragraph governing the requirements to be met for limited leave to remain as a partner. These requirements include that an applicant must *not* fall for refusal under Section S-LTR: suitability leave to remain, which of course includes S-LTR.1.6. Thus, in that light given the findings against the Appellant in respect of his ETS test the third ground concerning EX.1(b) could only have any merit if there were also merit in the first Ground of Appeal challenging the assessment of the ETS evidence (which I shall turn to in a moment). Thus, in that light Ground 3 would stand and fall with Ground 1 and there would need to be an error of law in respect of both in order for there to be any merit in Ground 3.
4. Turning to Ground 1, upon which Ground 3 is entirely dependent in demonstrating any materiality of error, the complaint made in essence by Mr Iqbal is that the judge failed to appreciate the distinction between when an ETS test is categorised as invalid or questionable. Mr Iqbal turned my attention to paragraph 25 of the decision, however that paragraph merely reflects the generic evidence as it was put in previous authority, that there are two categories of where tests can be cancelled which are either invalid or questionable. I drew to Mr Iqbal's attention that the supplementary Respondent's bundle before the First-tier Tribunal contained a table showing the SELT source data and the designation that the Appellant's test at South Quay College in Stratford High Street was deemed to be invalid. Given that the test was deemed to be invalid (as opposed to questionable) in my view there can be no materiality or even any relevance in the dichotomy or distinction between the two categories of test result as the test was expressly stated to be "invalid" due to the use of a proxy test taker, and not that it was a "questionable" result which was rendered invalid as a consequence of other test results at that test

centre also being rendered invalid. Thus, there is no merit in Ground 1 and as a consequence, Ground 3 would also fail as it cannot stand alone.

5. Turning to Ground 2 and whether the judge should have asked the Appellant if he wanted an interpreter or not when he was having difficulty with his evidence, I find that there is no merit whatsoever in this ground and no appearance of bias or unfairness in the judge's approach in this appeal. I remind myself that if this were an appeal involving a litigant in person, they may not necessarily know that they could request an interpreter if they were having difficulty during an appeal, nor would they be in a position to have a professional representative assist them in knowing that one should be requested having observed them having difficulty with their oral evidence. However, in this appeal Mr Iqbal was of course present as the legal representative before the First-tier Tribunal and any criticism that could be levelled against the judge in not thinking to ask for an interpreter could equally be laid at his door. Mr Iqbal could give no reason why he equally did not think of asking for an interpreter when the Appellant was struggling to give his evidence, nor was one requested before the hearing taking a cautious approach to the evidence. Mr Iqbal conversely specified that the Appellant was intent on giving evidence in English according to his instructions, and in that light, there is also a tension in a judge altering the manner in which an appellant may wish to give their evidence if an interpreter is insisted upon. Those instructions also make this ground of appeal all the more bizarre. In any event, it is for an appellant to present their evidence as best they can and in the manner which they see fit, which would also involve a certain degree of intuition as to whether an interpreter is required or not. Regardless of the appellant's instructions to Mr Iqbal in this appeal, it seems to me that if an appellant is unrepresented, then the Tribunal should certainly volunteer that an interpreter be provided if the appellant is ostensibly struggling to testify or be understood, but where a legal representative is instructed and they are not blind to such events, the best interests of the appellant should also be safeguarded by that professional, given the capacity in which they are present in the first place, particularly as they will be more familiar with their client's ability to speak English, over and above a Tribunal judge whom will have not met the appellant before the hearing. Thus, given that the Appellant was represented and could have also asked for an interpreter through his representative at any time, I do not see any unfairness in the judge not offering one to the Appellant of his own volition where no one has stated that the appellant was struggling to give his evidence.
6. Turning finally to Ground 4 and whether the judge has considered the best interests of the children, I do not consider this ground substantively as there is a further error of law in the decision which I raised with the parties and which was agreed before the hearing began, to which I shall now turn. Given the judge's findings on S-LTR.1.6., the later findings made by the judge in respect of Article 8 outside the Rules at paragraphs 38 through to 45, and paragraph 44 in particular, plainly suffer from material error. This is because once the judge found against the Appellant in terms of his

suitability, in light of the above analysis of R-LTRP.1.1(d)(i) and Section S-LTR, when then considering the proportionality of the outcome of that rule-based assessment under Article 8 ECHR, there would be no question of the separation between the Appellant and his British spouse being “temporary” and the judge was wrong to assess the matter on that basis. Indeed the separation of the couple may well be permanent or for a specific period of time as the Appellant would not be able to qualify for entry clearance after a ‘short separation’ because the Secretary of State would no doubt refuse such an entry clearance application under paragraph S-EC.1.5. on the basis that the exclusion of the applicant from the UK is conducive to the public good as a consequence of the judge’s findings against the Appellant under S-LTR.1.6. Although not raised as a Ground of Appeal, Ms Everett pragmatically and sensibly accepted that this was an error that infected the entire Article 8 proportionality assessment outside the rules. As a consequence I set aside specific paragraphs of the First-tier Tribunal’s decision, namely, paragraphs 38 to 45 in their entirety.

7. As agreed between the parties, this matter therefore calls for further evidence and a *de novo* assessment of the Article 8 ECHR aspect of the appeal *outside* the Rules in respect of the proportionality of two possible scenarios:
 - (a) *either* the permanent separation (or at least long term separation) of the couple with the Appellant remaining in Pakistan and Mrs Ali in the United Kingdom as a British citizen choosing to remain here, *and/or*
 - (b) on the basis that Mrs Ali would need to relocate permanently (or for the long term) to Pakistan with the Appellant as he does not qualify under the Immigration Rules under Appendix FM solely due to his falling foul of S-LTR.1.6, and the impact this matter may have upon Mrs Ali owing to her particular circumstances including having not travelled to or lived in Pakistan and not being able to speak Urdu etc. etc..
8. These are questions that will likely call for further up-to-date evidence from Mrs Ali, particularly in respect of her up-to-date healthcare difficulties, given that she has suffered from cancer in the past and also suffers from epilepsy and bouts of dizziness and fainting, I am told. It also raises the question of the best interests of Mrs Ali’s three minor British children from her previous relationship and the extent to which they will be affected by either the removal of the Appellant or Mrs Ali with him as she would need to relocate to Pakistan in the second scenario for the long term or be permanently separated from her spouse in the first scenario.
9. In light of the above findings, the decision under the rules is hereby affirmed in respect of S-LTR.1.6. (which is the sole basis for the Appellant’s failure to meet Appendix FM); however, regarding the Article 8 assessment outside the rules, I set aside paragraphs 38 to 45 of the First-tier Tribunal’s

decision in their entirety as well as the notice of decision that the appeal is dismissed on human rights grounds.

Notice of Decision

10. The appeal to the Upper Tribunal is allowed only in part and in respect of the Appellant's Article 8 family life, given that the appeal against the outcome under the Immigration Rules remains dismissed.
11. The appeal is to be remitted to the First-tier Tribunal to be heard by a differently constituted bench.

Directions

12. I make the further following directions for the remitted hearing and continuation of this appeal in the First-tier Tribunal:
 - (1) The appeal is to be remitted to IAC Birmingham, that Tribunal apparently being closer to the Appellant's address in Cambridge.
 - (2) An Urdu interpreter is to be provided.
 - (3) The Appellant and Mrs Ali are to be called as witnesses at present (notwithstanding that Mrs Ali may also wish to call her children to testify).
 - (4) The time estimate given is three hours, although this may increase if further witnesses are called for.
 - (5) No special directions are given.
 - (6) I do not make any anonymity direction.
 - (7) This matter is to be brought to the attention of the Resident Judge at IAC Birmingham to facilitate the listing of this matter given that the matter is being remitted solely on the basis that fresh findings are needed in respect of Article 8 ECHR in light of the decision under the Immigration Rules being affirmed.

Signed

Date 25 November 2018

Deputy Upper Tribunal Judge Saini