



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

Appeal Number: HU/08722/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 18th February 2019**

**Decision & Reasons
Promulgated
On 11th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR JATINDER [K]
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Duffy, Senior Home Office Presenting Officer

For the Respondent: Miss A Jones, Counsel

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of a First-tier Tribunal (Judge Farmer) allowing the appeal of Jatinder [K] against the Secretary of State's decision of 28th March 2018 refusing him leave to remain on account of his family/private life (Article 8).
2. For the sake of clarity throughout this decision I shall refer to the Secretary of State as "the Respondent" and to Jatinder [K] as "the Appellant" reflecting their respective positions before the First-tier Tribunal.

Background

3. The Appellant is a citizen of India who entered the UK in July 2009 and has remained here since that date. He has made various applications since that time but suffice to say for the purposes of this decision in May 2016 he made application for leave to remain and it is this application, the refusal of which, is the subject of these proceedings.
4. There were two strands to the Respondent's decision to refuse the application:
 - (i) the Appellant had used deception by way of a proxy test taker in June 2012, when taking the English language test; and
 - (ii) based on (i) above, the Appellant could not satisfy the requirement for leave to remain as the partner of a person settled and present in the UK. His application in this regard, was based on a relationship with a woman by the name of [HN].

The FtT Hearing

5. By the time of the appeal hearing in November 2018, matters had moved on so far as the Appellant was concerned. In particular the relationship between the Appellant and Ms [N] had broken down and the Appellant had formed a new relationship with Ms [K]. She is a person settled in the UK with indefinite leave to remain. A child (SH) was born of that relationship in May 2018 and SH is a British citizen.
6. The FtTJ noted that the issues before him therefore were as follows:
 - did the Appellant use deception by way of a proxy test taker in June 2012; and
 - are the requirements of EX1(b) met now that there is a qualifying British child which brings into issue the "reasonableness test" under Section 117B(6)?
7. Having heard from the Appellant and his partner Ms Kaur, the judge found that the Appellant had offered an innocent explanation showing that he had not employed deception when taking the English language test and furthermore it would not be reasonable to expect SH to leave the UK and accompany his father to India. He therefore allowed the appeal "under the Immigration Rules."
8. The Respondent sought and was granted permission to appeal on two grounds:
 - (i) the FtTJ's approach to the Appellant's evidence concerning the innocent explanation, was flawed. It was asserted that the FtTJ gave too much weight to the Appellant's English language ability. It was contended that the test is not whether the Appellant speaks English well but whether on the balance of probabilities he employed deception; and

- (ii) there was a failure to assess the family circumstances in the light of the recent decision in **KO Nigeria [2018] UKSC 53**. A point was also raised that the FtTJ had failed to recognise that the Appellant's appeal could only be brought on the basis of human rights. The FtTJ's finding that the appeal was allowed under the "Immigration Rules" was in error and demonstrated and that the FtTJ had failed to carry out a proper proportionality exercise.
9. Permission having been granted the matter thus comes before me to decide if the decision contains such material error that it must be set aside and re-made.

Error of Law Hearing

10. Before me Mr Duffy appeared for the Respondent and Miss Jones for the Appellant. At the outset of the proceedings, Mr Duffy outlined that permission had been granted on two grounds as set out above. (No point was being taken on the FtTJ's error in allowing the appeal under the "Immigration Rules" rather than under the Human Rights Act.) Mr Duffy indicated in any event that he was not pursuing the second ground. His submissions, therefore, were confined to ground one. They followed the lines of the grounds seeking permission. He emphasised that the FtTJ had failed in his approach to the evidence by giving too much weight to the Appellant's current English language ability. The judge should have focused on the question of why the evidence put forward by the Appellant precluded the use of a proxy test taker.
11. Miss Jones in response said that the Secretary of State's submissions amounted to no more than a disagreement with the reasoned findings made by the judge. She pointed out that the judge had properly directed himself setting out the issues before him [6] and was clearly aware of where the burden of proof lay [7]. There was no misdirection. The Secretary of State's challenge was essentially a reasons one and amounted to no more than a disagreement with the clear findings made by the FtTJ. Those findings were ones which were fully open to him to make.

Consideration of Error of Law

12. I find force in Miss Jones's submissions. I find that the FtTJ has set out clearly the task before him and from a reading of the decision, has demonstrated that he has kept this in mind.
13. It is clear that the FtTJ found the Appellant to be a credible witness in that the Appellant was able to go into substantial detail concerning the test he took, why he selected the test centre he did and how he accessed the centre. It is correct that the judge took account of the fact that the Appellant, in giving his evidence, had a good command of the English language and gave his answers clearly. This may be considered unsurprising in that over 5 years have elapsed since the date of the test.

Deputy Upper Tribunal Judge Roberts