



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/15076/2018**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 21st February 2019**

**Decision & Reasons Promulgated
On 13th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

AMARJEET SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss E Harris instructed by ATM Law Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge O'Malley made following a hearing at Taylor House on 20th November 2018.

Background

2. The appellant is a citizen of India born on 31st December 1989. He came to the UK on a Tier 4 (General) Student visa on 22nd September 2010 with leave to 28th January 2013. He made a further application for leave valid until 30th April 2014, but this was curtailed with the cancellation of the licence of the education provider. The appellant made a further application for leave to remain in the UK as a student on 2nd February 2014 and was refused on 9th June 2014 with no right of appeal. Thereafter the

appellant remained without leave until he applied on 14th October 2016 for leave on the basis of his relationship with his British citizen partner, Sharon Kaur, and their British citizen child born on 13th February 2016.

3. His application was refused on the basis that he did not meet the suitability requirements because of a fraudulent TOEIC certificate. The respondent was therefore not satisfied that the appellant met the suitability requirements of Appendix FM. The judge agreed with the respondent and concluded that the appellant had indeed been party to a fraud. She concluded, on the balance of probabilities, that the respondent had discharged the burden of proof of showing that the TOEIC certificate produced by the appellant to obtain an extension of stay was validly cancelled by ETS.
4. The judge accepted that the appellant's relationship with his partner was genuine and subsisting and that they enjoyed family life. She was also satisfied that he enjoyed a genuine parental relationship with his daughter. His wife is now pregnant again and their second child is due in May 2019.
5. The judge wrote as follows:-

“I find that it would not be reasonable to expect a British Citizen child of a British Citizen parent to leave the UK and it would not be in her best interests but that this child would not be expected to do so as she has another parent on whom she is dependent who will remain in the UK and can continue care in the UK. I am satisfied that this is in the best interests of the child, taking into account that communication can continue by technological means; she can visit India with her mother and that her needs will be met by her mother and the remainder of her family in the UK which the appellant identifies as including grandparents and uncles.”

6. The judge then cited Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 and concluded as follows:-

“The statute sets out in the plainest terms that the public interest does not require removal where there is a qualifying child and it would not be reasonable to expect the child to leave the UK. I rely on my earlier finding that neither the appellant's partner nor his child would leave the UK. I also rely on FZ (China) v SSHD [2015] EWCA Civ 550 where the Court of Appeal dismissed the appeal in circumstances where if the Claimant's wife was herself compelled to leave, the child would be compelled to go with her, but there was no compulsion on the wife and, in those circumstances, the child could not be said to be compelled either. I find this consistent with KO (Nigeria)”.

7. On that basis she dismissed the appeal.

The Grounds of Application

8. The appellant sought permission to appeal on two grounds.
9. In respect of Ground 1 the appellant argued that the judge had failed to properly apply the correct burden and standard of proof in relation to the TOEIC aspect of the case. She accurately found that the initial evidential burden had been met by the Secretary of State as per SM and Qadir, and then went on to assess the appellant's explanation. However, at this stage there was only an evidential burden on the appellant, i.e. a requirement that the appellant raise a prima facie case with a minimum level of plausibility that he did in fact take the test. The judge wrongly assessed the appellant's account on the balance of probabilities.
10. In relation to Ground 2 the judge found that the appellant's relationship with his British daughter was genuine and subsisting and that it would not be reasonable to expect her to leave the UK and it would not be in her best interests. However, in dismissing the appeal, she had not had regard to the fact that Section 117B(6) applies irrespective of whether the child would in practical terms be compelled to leave at any point. 117B(6) explains that the public interest does not require the appellant's removal where it would not be reasonable to expect the child to leave the UK.
11. Permission to appeal was granted by Judge Hodgkinson limited to Ground 2.
12. Prior to the hearing the appellant sought to argue that permission ought to have been granted in relation to Ground 1. At the hearing Mr Avery did not seek to argue that in fact Judge Hodgkinson's grant of permission included Grounds 1 and 2 since he had said at the head of his decision that permission to appeal was granted (as per the decision in Safi & ors (permission to appeal decisions [2018] UKUT 388)).

The Appellant's Submissions

13. Miss Harris relied on her Grounds.
14. Mr Avery submitted that there was no error in relation to the suitability decision. So far as the Section 117B(6) point was concerned he submitted that the factual reality was that the child would stay with her mother and since she would not leave the UK the judge was entitled to conclude that there would be no breach of Article 8.

Findings and Conclusions

The TOEIC Decision

15. The evidence before the judge was that the appellant had taken his test with Premier Language in Gants Hill. He had been recommended to do so by a person whom he believed to be a solicitor. He had paid him and he had then paid for the test. He said that the test took place a long time ago and he could not remember much detail. He did not contact ETS or the consultant about the test because he did not know there had been a problem.

16. The judge recorded that the data from Premier Language was that 75% of the tests were invalidated and the remainder were questionable. ETS had not released any of the results. The appellant had been aware of the curtailment of his leave because he had made a fresh application for leave as a Tier 4 Student and had been informed in June 2014 that his application had been refused without a right of appeal. The judge was therefore, reasonably, not satisfied that the appellant was unaware of the allegations of fraud. She was entitled to conclude that by March 2015 he was aware that the TOEIC had been found to be deficient and that was the reason for the refusal of his claim to remain. His oral evidence that his tests had been organised through an agent was not the evidence given in his appeal or witness statement. Whilst she accepted that some time had passed since the date of the test it was open to her to find that there was no explanation for the significant lack of recall and not to be satisfied that the appellant had provided a coherent account of actual events.
17. The judge set out the law and said that the initial evidential burden had been met by the Secretary of State on the documents. She then had to go on to consider whether the appellant was able to provide an innocent explanation. She was not so satisfied.
18. At paragraph 84 she said:-

“I am not satisfied that there is an innocent explanation which meets the burden on the appellant. I am mindful of the serious consequences of such a finding but I am not persuaded, on the balance of probabilities, that the appellant was present and took the TOEIC exams in October 2012”.
19. I do not accept that the judge erred in applying the wrong standard of proof. Paragraph 84 is silent. In a detailed judgment the judge set out the evidence and the appellant’s explanation at some length, and gave proper reasons for concluding that there was not an innocent explanation.
20. She concluded at paragraph 85 by saying:-

“I accept the information in the respondent’s skeleton argument and I am satisfied on the balance of probabilities that the respondent has discharged the burden of proof of showing that the TOEIC certificate produced by the appellant to obtain an extension of stay was validly cancelled by ETS.”

That is a correct recitation of the legal burden and standard on the respondent.
21. The judge did not err in law; her reasoning is detailed and extensive.
22. Section 117B(6) states that in the case of a person who is not liable to deportation the public interest does not require the person’s removal where –

- (a) the person has a genuine and subsisting parental relationship with a qualifying child; and
- (b) it would not be reasonable to expect the child to leave the UK.
23. The case of SZ cited by the judge is a deportation case, and has no relevance to this one.
24. I consider Mr Avery's interpretation of paragraph 117B(6) to be simply wrong. In SR (subsisting parental relationship - s117B(6)) Pakistan [2018] UKUT 00334 (IAC) at paragraph 55 the Tribunal said:-
- (a) "The proper application of section 117B(6) when resolved in an individual's favour is determinative of the issue of proportionality. As Sales LJ made clear in Rhuppiah v SSHD [2016] EWCA Civ 803, [2016] 1 WLR 4204 at [45], sections 117A-117D of the 2002 Act provide a structured approach to the application of Article 8 which produces in all cases a 'final result' compatible with Article 8. Where Parliament has declared that the public interest does not require a person's removal in specified circumstances, and those circumstances are present, that is the end of the matter."
25. In this case the unchallenged conclusion of the Immigration Judge was that it would not be reasonable to expect the child to leave the UK.. No argument has been made to the contrary Paragraph 117B(6) states that in these circumstances the public interest does not require the person's removal.

Notice of decision

26. The original judge erred in law. His decision is set aside. It is remade as follows. The appellant's appeal is allowed on Article 8 grounds.
27. No anonymity direction is made.

Deborah Taylor

Signed

Date 10 March 2019

Deputy Upper Tribunal Judge Taylor