



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16310/2017

THE IMMIGRATION ACTS

Heard at Field House
On 7th January 2019

Decision & Reasons Promulgated
On 5th February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

JIGNESHKUMAR [P]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Sharma (counsel for Pasha Law Chambers Solicitors)

For the Respondent: Mr Tufan (Home Office Specialist Appeals Team)

DECISION AND REASONS

1. This is the appeal of Jigneshkumar [P], a citizen of India born [~] 1984, against the decision of the First-tier Tribunal of 4 September 2018 dismissing his appeal, itself brought the refusal (of 20 November 2017) of his human rights claim.
2. The immigration history supplied by the Respondent sets out that the Appellant entered the UK on 27 October 2006 as a student with leave that was ultimately extended until 31 December 2010; an application of that date was refused, on 11 May

2012, and on 27 December 2013 the Appellant was subsequently granted leave to remain until 30 May 2015. On 23 October 2014 he was served with notice of removability for having obtained his leave by deception. On 2 May 2015 he applied for leave to remain on private and family life grounds, though the application was rejected as invalid for want of a passport on 13 August 2015; on 9 September 2015 he re-applied, and the application was refused on 7 December 2015. He exercised his right of appeal, though the December 2015 decision was withdrawn on 9 March 2017 for his September 2015 application to be reconsidered. This led to the November 2017 decision against which the present appeal lies.

3. The Appellant's application was predicated on his length of residence in the UK combined with his relationship with Ms [P], his partner, and her son who had entered the UK in June 2008 (to whom he was now stepfather); they had had a daughter together, born [~] 2011. Ms [P]'s former husband had died in February 2014, and she and the Appellant had begun living together in April 2014.
4. The application was refused because the Respondent suspected the Appellant had submitted falsely obtained English language test results in July 2012, because he had not cohabited with his partner for 2 years at the application date, and as he and his partner had not demonstrated that they would face insurmountable obstacles to life together in India. At an earlier hearing, the Tribunal had required the Secretary of State to provide clearer reasons for refusal, and further reasons were subsequently provided, now explaining that the requirements of the 10-year long residence route were not considered to have been met due to a gap in the Appellant's leave from 12 May 2012 until 27 December 2013, and additionally because in any event the notice of removal of 23 October 2014 automatically curtailed his leave. The other refusal reasons were maintained.
5. Before the Tribunal the Appellant gave evidence on various issues, including the circumstances behind his May 2015 application. He explained that the Home Office had not returned his passport to his former Solicitors; he had contacted them and they had confirmed this. Given he was not represented at the time he made this application, there should not have been any prospect of correspondence or documents being returned to any representative.
6. The First-tier Tribunal noted that the ostensible gap in the Appellant's leave from May 2012 until December 2013 had in fact followed a refusal which had been withdrawn following the settlement of judicial review proceedings on that basis. Accordingly his last application, of December 2010, had in truth remained extant over that period; any other approach would fail to give effect to the terms on which the judicial review application was settled. As to the October 2014 notice of the curtailment decision, there were concerns as to whether it had been notified to the Appellant. Notably the copy in the Respondent's bundle was unsigned, surprisingly for a significant document, the subsequent decisions had not referred to it, and other refusal letters were inconsistent as to whether the Appellant satisfied the Suitability criteria of the relevant route or not; on balance, the Judge did not accept that the removal notice had been served on the Appellant. Thus the Tribunal considered the

Appellant to have been present lawfully until August 2015, when his application was returned to him as invalid.

7. Moving on to the English language test fraud allegation, the First-tier Tribunal accepted that the Home Office had satisfied the initial burden necessary to raise the issue via the generic material they had provided in relation to the information received from the testing body, ETS, plus the Project Façade document relating to Synergy College. The Appellant's evidence regarding the test day was vague and inconsistent, and there was no other evidence to assist him, such as prior successful English test results. Accordingly he had not provided a sufficiently cogent explanation to rebut the Secretary of State's concerns, the latter having accordingly satisfied the ultimate burden of proof on him to make good his dishonesty allegation.
8. However, the Appellant had been subsequently granted leave, it had to be assumed, given the occasional reference to the ETS fraud allegation in subsequent decision making, in the Respondent's full knowledge of that aspect of his history. Although providing fraudulent test results was a serious matter, given the convoluted history of the case, the Tribunal considered it appropriate to treat his case on the basis that he satisfied the Suitability requirements. As to the Eligibility requirements of Appendix FM's partner route, the Appellant was not a partner given the lack of sufficient cohabitation at the date of application, and there was no qualifying child in the family unit, his stepson having in any event become an adult by now. His relationship with Ms [P] had now ended. She appeared to hold limited leave, and had no expectation of remaining in the UK on a long-term basis. There was no evidence suggesting he had any ongoing family life with Ms [P]; she had produced a brief witness statement, though did not attend the hearing. He might well have family life with their daughter, though there was no evidence of its depth, strength and regularity, and indeed even the daughter's immigration status was unclear, there being a reference to an appeal having been allowed and the consequent grant of leave being pending. It had to be assumed that her best interests would be to remain with her mother, her primary carer.
9. In conclusion, although the best interests of the child were a primary consideration, it was not established that those interests required the Appellant to remain in the UK.
10. Grounds of appeal argued that the Appellant's long residence application having been refused only due to gaps in residence and suitability, and those issues having been resolved in his favour on appeal, the appeal should have been allowed. He had been determined to have met the relevant Immigration Rules and thus, for that reason alone, his expulsion would be disproportionate to the private and family life he had established in the UK.
11. Permission to appeal was granted on 22 November 2018 by the First-tier Tribunal, on the basis that the Judge had failed to address the implications of whether the Appellant had satisfied the requirements of the long residence route.
12. A Rule 24 response of 7 December 2018 argued that

- (a) The First-tier Tribunal was wrong to hold that the Appellant's section 3C leave could be "resurrected" by the setting aside of decisions by consent;
 - (b) The Tribunal was also wrong to find that leave to remain had not been curtailed in October 2014 via the IS151A, given that the very reason why the December 2015 decision was withdrawn, was because of the failure to mention the allegation of TOEIC fraud: indeed the Secretary of State's records demonstrated that the decision had been "served to file" as the Appellant was not believed to have updated the Home Office with his current address;
 - (c) In any event, the rejection of the application in August 2015 for want of a passport unequivocally ended the possession of leave;
 - (d) It was untenable for the Judge to have held that the confusion in the decision letters could override the public interest in refusing the Appellant indefinite leave to remain given the serious nature of TOEIC fraud.
13. Much of this response was expressed to be raised by way of cross-appeal; Mr Tufan candidly accepted that not every point made therein was tenable, though pointed to *EG Ethiopia* as entitling a respondent to an appeal to challenge findings notwithstanding they had lodged no appeal grounds themselves. He acknowledged that point (a) was misguided given the clear findings of the Tribunal on the issue: there was in fact no break in leave prior to 2015 given the Consent Order had set aside the adverse decisions that would otherwise have broken the Appellant's continuous residence. Nevertheless, he maintained that the First-tier Tribunal was justified in dismissing the Appellant's appeal, and had in fact come to perverse conclusions in approaching the case as favourably as it had done: once English language fraud was established, it would be very difficult for the public interest in maintaining immigration control to be overcome. In any event, the Tribunal could not reasonably have found the Appellant to have accumulated a decade of lawful residence, given the invalidity of the May 2015 application had stopped the clock.
14. Mr Sharma submitted that the First-tier Tribunal had effectively found that ten years lawful residence were established, as it had not rejected the Appellant's evidence regarding the circumstances surrounding the declaration of his application as invalid. The appropriate course of action would be to allow the appeal, given that the only issues that had defeated the application were eligibility and suitability for the long residence route; once the Rules were met, a decision should be recognised as disproportionate to any subsequent interference with private and family life. Given the Respondent now wished to take further points, the lawfulness of the ETS finding should be treated as open to challenge too: no adequate finding had been made on the Appellant's responses in oral evidence. He informed the Tribunal that the Appellant's son had been granted indefinite leave to remain recently; he understood that this was on the same basis as the mother's application. This, he submitted, would be an important consideration in the event of any continuation hearing.
15. Mr Tufan maintained that the First-tier Tribunal had come to a reasonable decision, albeit one that in some respects was overly generous to the Appellant. He noted that

no challenge to the findings on the TOIEC fraud allegations had been raised in the grounds.

Findings and reasons

16. This is an appeal where the Appellant's essential submission was that he qualified for the ten years long lawful residence route. He also relied on his extant relationship with his partner and child, who were present in the UK. Thus these issues arose for the First-tier Tribunal to determine: whether the Appellant:
 - (a) Had acquired ten years of continuous lawful residence;
 - (b) Had deceived the authorities in obtaining the English language qualification upon which he based an earlier application for leave to remain;
 - (c) Was suitable for the grant of leave in the light of the allegation of deception made against him;
 - (d) Was eligible for any grant of leave under the Rules (eg the "long residence" or "parent" route), or outside them (which encompassed the question as to whether, if he departed the UK, he would suffer a disproportionate interference with his private and family life with his partner and her adult son, and his daughter from another relationship);
 - (e) Should in consequence succeed in his appeal on human rights grounds.
17. The answers given by the First-tier Tribunal to those questions were:
 - (a) Unclear: there is no clarity as to whether the Tribunal considered that the Appellant had achieved a decade of lawful residence;
 - (b) The Appellant had not succeeded in rebutting the Secretary of State's allegation of dishonesty against him;
 - (c) The confusion in the immigration history and the decisions made by the Secretary of State in relation to the Appellant suggested that he had, subsequent to the ETS fraud, been granted leave in full knowledge of that misdemeanour: thus he should be treated as "Suitable" for the immigration route in question;
 - (d) However, his application's refusal would not result in any disproportionate interference with his private and family life, as there was no evidence as to him having any significant relationship with his daughter, or that Ms [P] and the Appellant's step-son held leave in the UK, and so it could be presumed that his current family unit would have the option of departing the country together;
 - (e) Accordingly his appeal failed.
18. Unsurprisingly, the Secretary of State contests the third of those conclusions with particular vigour, given the public interest in defending immigration control by discouraging others from seeking to dishonestly obtain leave by deception.

19. As heralded in the summary of the Response and related submissions above, the Secretary of State contends that some of the findings made in the Appellant's favour were in fact misdirected. It is open to the Respondent to make points of this nature: in *EG & NG Ethiopia* [2013] UKUT 143 (IAC) (a decision pre-dating the amendments to the appeals system introduced by the Immigration Act 2014, though it was not suggested before me that those amendments rendered it inapplicable to modern appeals) the Upper Tribunal stated:

“46. Suppose a man seeks entry clearance as a husband and suppose that the Entry Clearance Officer finds that he has not shown that he can be either accommodated or maintained in accordance with the rules. A First-tier Tribunal Judge may decide, arguably wrongly, that the husband can satisfy the accommodation requirements but not the maintenance requirements. In that event the judge would dismiss the appeal. The Entry Clearance Office would have no interest in appealing. He is content with the decision to dismiss the appeal. The husband however may want to challenge the decision. He might want to argue that the decision that he did not satisfy the maintenance requirements was wrong in law and he may be given permission to appeal. In that event the Entry Clearance Officer may well want to argue not only that the decision that the husband did not meet the maintenance requirements was right but that the decision that he did meet the accommodation requirements was wrong. In short, without wanting to appeal the decision, the Entry Clearance Officer may want to rely on a ground that failed before the First-tier Tribunal. Rule 24 permits the Entry Clearance Office to give notice of his intention to raise such a point in a reply. In short rule 24 does have a meaning that does not depend on Ms Dubinsky's premise and we reject the construction that she urged on us. Rule 24 does not create a right of appeal to a party who has not asked for permission to appeal. Rule 24 is not in any way to do with seeking permission to appeal and it is not an alternative to seeking permission where permission is needed. It is to do with giving notice about how the respondent intends to respond to the appeal that the appellant has permission to pursue. If a respondent wants to argue that the First-tier Tribunal should have reached a materially different conclusion then the respondent needs permission to appeal.

47. This is probably more significant in international protection cases than entry clearance cases because an appeal can be allowed on different grounds. An appellant may have shown, for example, alternatively, that he is a refugee, or entitled to humanitarian protection or that removal is contrary to his rights under article 8 of the European Convention on Human Rights. The beneficial consequences of success would be different in each case. For example a person found to be entitled to humanitarian protection may want to argue that he should have been recognised as a refugee whilst the Secretary of State may want to argue that the appeal should only have been allowed with reference to article 8. In such cases both parties would want a result materially different from the one decided by the Tribunal and both should seek permission to appeal.”

20. In the light of the relatively complex set of findings in play and the party's approach to them, it is appropriate to address them in stages.
21. Firstly there is the Appellant's claim to have met the requirements of the long residence route. Of course, modern appeals are brought on Human Rights

Convention grounds rather than simply against immigration decisions, and so the mere fact a person might meet the Rules would not inevitably entail their appeal's success. However, Sir Ernest Ryder in *TZ (Pakistan) and PG (India)* [2018] EWCA Civ 1109 §35 explained:

“The policy of the Secretary of State as expressed in the Rules is not to be ignored when a decision about article 8 is to be made outside the Rules ... where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed.”

22. Accordingly it is always important for the First-tier Tribunal to make an accurate assessment of the extent to which an immigration application meets the requirements of the Rules. In this appeal, the consequence of the Judge's acceptance that the Respondent had not served any notice of illegality or curtailment upon the Appellant was that he held leave until mid-2015. Rule 276B provides:

“Long residence in the United Kingdom

276A. For the purposes of paragraphs 276B to 276D and 276ADE(1).

...

(b) “lawful residence” means residence which is continuous residence pursuant to:

(i) existing leave to enter or remain; or

...

Requirements for an extension of stay on the ground of long residence in the United Kingdom

276A1. The requirement to be met by a person seeking an extension of stay on the ground of long residence in the United Kingdom is that the applicant meets each of the requirements in paragraph 276B(i)-(ii) and (v).

...

276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

(i) ... he has had at least 10 years continuous lawful residence in the United Kingdom.

(ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:

(a) age; and

(b) strength of connections in the United Kingdom; and

(c) personal history, including character, conduct, associations and employment record; and

- (d) domestic circumstances; and
- (e) compassionate circumstances; and
- (f) any representations received on the person's behalf; and

(iii) the applicant does not fall for refusal under the general grounds for refusal.

(iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.

(v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where –

- (a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or
- (b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied.”

23. Notwithstanding the finding that his leave continued after the failure to serve the 2014 decision upon him, the Appellant had still not acquired a decade of lawful residence before his leave ran out in 2015. The notification of his May 2015 application's invalidity (in August 2015) meant that his leave to remain had in fact expired on 30 May 2015. His argument is essentially that the policy objective in the Rule, of rewarding a period of ten years' lawful residence, is not inconsistent with granting him leave, as he was innocent of any contribution to the invalidity of his application; he could not have made a valid application as the Secretary of State had failed to take the appropriate steps to return his passport to him.
24. There is a line of authority, ranging from *Patel* to *MM (Lebanon)*, that holds that satisfaction of the policy imperatives of the Rules should be taken into account in a migrant's favour when assessing proportionality. So it requires no great leap in reasoning to conclude that the Appellant, having done everything he could to secure his passport's return so that he could make a timely and thus valid application, should not be treated as if there was a significant break in his leave. Had it not been for the Secretary of State's retention of his passport, there is no reason to think the decision making timetable on his case would have been any different, and indeed his leave would have continued until the present appeal was finally determined, taking him well over a decade of lawful residence.
25. As it happens, the First-tier Tribunal gave no overt consideration to this issue, though I appreciate that the Appellant had put a reasoned case forward which might have succeeded had it been considered. Mr Sharma argued that the Tribunal should have been taken as accepting the Appellant's arguments on this point, given the general tenor of its reasoning. I do not think one can reasonably go that far; one has the impression that the Tribunal was oblivious to the point. I am willing to accept

that this is a tenable argument, and so I shall not treat the absence of findings upon it as fatal to the Appellant's chances.

26. The next question to be determined is the Appellant's good character, in the light of the Judge's acceptance that the Secretary of State had discharged the burden of proof that the Appellant had provided fraudulent English language test results. The question of "character" has two potential reference points in Rule 276B: firstly as a positive requirement for the grant of leave (276B(ii)(c)), and secondly as a potential block on the grant of leave under the general refusal reasons (276B(iii)). As stated by Sir Patrick Elias in *Babar* [2018] EWCA Civ 329 §12:

"Paragraph 276B(ii) is poorly drafted; the words "there are no reasons why" are confusing. There will often be something in the character or conduct of the applicant which, taken on its own, would constitute a reason why it would be undesirable to grant ILR. But it is well established that rules of this nature should be read sensibly, recognising that they are statements of the Secretary of State's administrative policy ... and the paragraph plainly envisages that there will be cases where, assessing the factors as a whole, it would not be in the public interest to refuse indefinite leave even though some factors may point in favour of refusing it. A recent policy statement from the Secretary of State issued to staff and entitled "Long Residence" confirms that this is the correct approach. When dealing with the public interest it states:

"You must assess the factors in paragraph 276B(ii) to decide whether a grant of indefinite leave would be against the public interest. You must look at reasons for and against granting indefinite leave using the factors listed and, where necessary, weigh up whether a grant of indefinite leave would be in the public interest."

27. It seems to me that the First-tier Tribunal's reasoning addresses the second of these issues (i.e. "suitability" by reference to the general refusal reasons), but not the first (i.e. "character", necessarily "good character", as an affirmative requirement).
28. I accept, applying the reasoning set out in *EG & NG Ethiopia*, that the Secretary of State is entitled to challenge the approach taken to the second issue notwithstanding that he is the Respondent to the appeal, and without applying for permission to appeal. Appropriate notice has been given via the Rule 24 Response.
29. It seems to me that given the history of confusion in the decision making to which the First-tier Tribunal alluded, it was open to the Judge to find that the Home Office had, however surprisingly, condoned the Appellant's fraud by granting further leave. That was a very generous finding but not an irrational one.
30. However, that is not the end of the matter. On appeal matters of proportionality, and in that question's assessment the meeting of the Rules, are matters for the Judge, not the Secretary of State. The posture struck by the Secretary of State may be relevant, but the Judge needed to make his own distinct evaluation of whether the Appellant had satisfied the requirement that his character and conduct presented no obstacle to the grant of leave. That requirement of independent judicial evaluation is all the greater when the cogency of the Secretary of State's thinking is questionable, as was

the finding here. The failure so to do represents a significant flaw in the finding on the “general refusal reasons” element of the case.

31. There is then the question of the Appellant’s qualification for the ten year route on the basis of having affirmatively established himself as a person of good character. It is one thing to say that the general refusal reasons should not be held against the Appellant because he has subsequently been granted limited leave without those reasons having been invoked. But it is quite another to say that he should be granted indefinite leave to remain in a category which expressly assesses one’s character as part of an overall balancing exercise before the general refusal reasons are even reached. It would mock the requirements of immigration control to conclude otherwise.
32. As it happens, I have already found that the Judge’s consideration of “character” in so far as that was considered below is flawed, so the question of the thinking on the “general refusal reasons” carrying over to the affirmative establishment of good character does not arise.
33. Where does that leave the appeal? The Appellant has established that he was a *potential* candidate for the long residence route by virtue of his length of lawful residence. However, the Respondent has challenged the findings on suitability for the grant of leave, and I have found those findings wanting.
34. As stated in *Babar*, there is a need to balance the various factors present in the case. The parties before me did not suggest that a continuation hearing was required to finally determine the issues that are open to re-determination. I accordingly conduct the balancing exercise now. The Appellant's UK links must be measured against the public interest in his departure from the UK.
35. Of course, those links do not include any tangible interference with the Appellant's family life with his partner and his adult step-son, or with his own daughter, given that no challenge has been brought to the finding that he had not demonstrated that he played any significant role in his daughter’s life, nor to the conclusion that it was not established on the evidence previously available that his former partner and daughter would be remaining in the UK. It was intimated before me that the daughter may now have been granted leave. However, given the unchallenged findings on family life, that does not alter the situation. It is always open to the Appellant to make a further application if his family life situation has materially changed.
36. The Appellant's other links with the UK appear slight. He has resided here for a significant period. He can be assumed to have made friends at college and to have developed social connections in the UK. He has family connections in the UK, but limited ones, for the reasons just discussed. I do not consider that connections of this modest nature are sufficiently weighty to outweigh his involvement in English language testing fraud. So the balancing exercise is resolved against him, so far as the Rules are concerned.

37. The same considerations animate the consideration of the ultimate question on this appeal, ie whether the immigration decision against which it is brought represents a disproportionate interference with his Article 8 rights. I have treated the Appellant's UK links as part of the Rule 276B balancing exercise so far, but they are also the basis for the necessary consideration of his case outside the Rules. As stated by Underhill LJ in *Ahsan and Ors* [2017] EWCA Civ 2009 §86, concisely summarising the authorities governing the approach to private life in recent years, "persons admitted to this country to pursue a course of study are likely, over time, to develop a private life of sufficient depth to engage article 8."
38. However, Underhill LJ also pointed out at §87 that a student's removal would normally be proportionate unless they could qualify for some route under the Immigration Rules. The same thinking must apply to a former student who has not subsequently regularised their status, and much of whose UK residence is down to extended periods of section 3C leave rather than having affirmatively established an entitlement based on presently having a viable case under the Rules.
39. The Appellant can only receive limited credit for any English language facility having cheated in a past language test. There is no evidence that he is dependent on public funds. At best these factors are essentially neutral. He has also resided in the UK on a non-permanent basis, without indefinite leave to remain, and so his presence has always been precarious. I conclude that his Article 8 rights will not be the subject of disproportionate interference by the immigration decision being upheld.
40. I accordingly dismiss the appeal.

Decision

The appeal is dismissed.

Signed:

Date: 28 January 2019



Deputy Upper Tribunal Judge Symes