



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16872/2016

THE IMMIGRATION ACTS

Heard at Birmingham
On 7th February 2019

Decision & Reasons Promulgated
On 13th March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR TAHIR MAHMOOD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Rashid (Counsel)
For the Respondent: Miss H Aboni (Counsel), Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Place, promulgated on 25th September 2017, following a hearing at Nottingham on 7th September 2017. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State, applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, and was born on 12th February 1985. He appealed against the decision of the Respondent dated 24th June 2016, refusing

him leave to remain in the UK as a spouse of Mrs Nazreen Khan. The basis of the refusal was that the Respondent had concluded that the English language certificate submitted by the Appellant at the time of his spouse's application of 3rd September 2013 had been obtained by deception and that the presence of the Appellant in the UK was therefore not conducive to the public good.

The Appellant's Claim

3. The essence of the Appellant's claim is that he now has a 2 year daughter born to him in 2015. Both the daughter, and Mrs Nazreen Khan, are British citizens. The Appellant had married Mrs Khan in June 2013 and had been granted a spouse's visa in October 2013. They continue to live together. He earns his living from his business as a barber. The Appellant maintained that he cannot go back to Pakistan as his wife and daughter would not be able to live there.

The Hearing

4. At the hearing before Judge Place, Mr Rashid, who had appeared as Counsel on that occasion as well, had

"Conceded that the documents documented by the Respondent meant that the Respondent had crossed the evidential threshold required to show that there is a reasonable doubt that there had been some kind of deception by the Appellant sufficient to put the burden of proof onto the Appellant ..."
(paragraph 3).
5. The judge went on to consider the evidence given by the Appellant, including his response to a question as to how many people were at the test centre when he replied "too many" (paragraph 12) which did not suggest that the Appellant had taken the tests himself. The judge went on to conclude that, "I find that the Appellant has not satisfied the burden upon him of showing that his certificate was not obtained by deception and that the decision made by the Respondent under the Rules was correct" (paragraph 22).
6. However, the judge then turned to the human rights aspect of the appeal. He observed that it was not in dispute that the Appellant and the Sponsor are married. It was not in dispute that the marriage was genuine and subsisting. The issue remained one of proportionality (paragraph 23). The judge went on to consider Section 117B of the 2002 Act (paragraph 24).
7. Consideration was given to the view of the Home Office representative that the Appellant had obtained the test certificate fraudulently, but that there had been a concession by the Respondent Secretary of State in this case, that the removal of the child of the Appellant and Mrs Khan would not be "reasonable" if she had to go and live in Pakistan.
8. Given that this was the case, the judge went on to consider Section 117B(6) and observed that the Appellant's 2 year old child "is a qualifying child for the purposes

of that Section” and that the Appellant continued to have a “genuine and subsisting parental relationship with her”.

9. The appeal was allowed.

Grounds of Application

10. The grounds of application state that the judge had failed to take into account the countervailing considerations of the Appellant’s proven deception, which wrongly led the judge to allow the appeal.
11. On 4th May 2018 permission to appeal was granted on this basis. However, the grant of permission also included a further basis, which had not been highlighted in the grounds by the Secretary of State, namely, that it was arguable that the judge had applied the wrong burden at paragraph 22 in stating that the burden of proof was on the Appellant.

Submissions

12. At the hearing before me on 7th February 2019, Miss Aboni, appearing as Senior Home Office Presenting Officer, stated that this was a case where the judge had found that the Appellant had used deception. Given that this was the case, it was incumbent upon the judge to then factor in the use of deception into the proportionality exercise that the judge had to undertake. Yet, the judge failed to do so. On that basis, the judge was not justified in allowing the appeal under Article 8.
13. Second, insofar as the Upper Tribunal raised an additional point about the standard of proof being on the Appellant, given that this was the wrong test, the entire decision was marred by a wrong approach to the appeal, such that the appeal stood to be set aside.
14. For his part, Mr Rashid submitted that there had been no error. The reason why the judge had expressed himself in the manner that he had, can only be understood if one reads the determination in its entirety. This makes clear at the outset, that

“Mr Rashid conceded that the documents submitted by the Respondent meant that the Respondent had crossed the evidential threshold required to show that there is a reasonable doubt that there had been some kind of deception by the Appellant ...” (paragraph 3).

15. In the light of that, the burden had then shifted onto the Appellant. It was for the Appellant now to demonstrate that he had not actually exercised deception. He failed to do so, it is on that basis that the judge had stated (at paragraph 22) that, “I find that the Appellant does not satisfy the burden upon him ...”. There was no error in this whatsoever.
16. Second, there could be no argument about the proportionality exercise having been deprived of a consideration of the Appellant’s fraudulent activity. This is because in this case the Respondent had already conceded that it would not be “reasonable” for

the Appellant's child to go to Pakistan with the Appellant. If that was the case, then inevitably the family will be split up if Mrs Khan and her daughter were to remain in the UK, but the Appellant were to be required to go back to Pakistan.

17. It was in this circumstance, that the judge concluded that a qualifying child, enjoying a genuine and subsisting parental relationship, would have to return to Pakistan with the breadwinner of the family, namely, the father, if he was to be required to go to Pakistan. It is in this respect, that the decision was ultimately correct.
18. In her reply, Miss Aboni submitted that it was by no means the case that the family would be split up. All that had happened was that the Respondent Secretary of State had conceded that the daughter would not be required to go to Pakistan. That did not mean that the Appellant could not himself return to Pakistan and make another application to come to this country to join his British citizen wife and his British citizen daughter. The failure to give consideration to this particular aspect of the facts before the judge was a material error of law.

No Error of Law

19. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.
20. First, the judge does give proper consideration to the exercise of fraud by the Appellant. Mr Rashid conceded that the evidential burden had been satisfied by the Respondent Secretary of State (at paragraph 3). Thereafter, the judge looked at the evidence and eventually concluded that the Appellant himself had not satisfied the shifting burden that had now been placed upon him (paragraph 22). That was the correct way of formulating the position. There is no error here.
21. Second, the judge had been particularly careful to take note of the Respondent Secretary of State's position. As he observed,

"Upon clarification being sought by Mr Rashid, he [the Respondent's representative] agreed that he was not seeking to withdraw the concession made in the refusal letter that exception EX.1(a) of the Immigration Rules applies and that the Appellant has a genuine and subsisting parental relationship with a British citizen child and that it would not be reasonable to expect the child to leave the UK" (paragraph 25).
22. The judge then observed that "the Appellant is not liable to deportation. Section 117B(6) states that the public interest does not require his removal" (paragraph 26). Ultimately, it is clear, the decision was made on the basis of Section 117B(6).
23. That was a conclusion that was open to the judge to make in the particular circumstances of this case, where a concession had already been made. The Appellant was the breadwinner. He had a 2 year old child. The child was a qualifying child. They lived as a family unit together.

24. The judge's conclusion that, "since the public interest does not require his removal, I find that it would be disproportionate to remove him and allow the appeal on human rights grounds" (paragraph 27) was an appropriate decision for this judge to reach.

Notice of Decision

25. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall stand.
26. No anonymity direction is made.
27. The appeal of the Secretary of State is refused.

Signed

Dated

Deputy Upper Tribunal Judge Juss

11th March 2019