



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: HU/17102/2017

THE IMMIGRATION ACTS

Heard at Field House
On 31 May 2019

Decision & Reasons promulgated
On 5 June 2019

Before

Upper Tribunal Judge Gill

Between

Fahmida [Y]
(ANONYMITY ORDER NOT MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Ms F Shaw, of Counsel, instructed by City Heights Solicitors.
For the respondent: Mr S Walker, Senior Presenting Officer.

Decision and Directions

1. The claimant appeals against the decision of Judge of the First-tier Tribunal C H O'Rourke who, following a hearing on 26 April 2018, dismissed her appeal in a decision promulgated 2 May 2018 against a decision of the respondent of 21 November 2017 to refuse her human rights claim of 29 September 2016.
2. In his decision letter, the respondent stated that he was not satisfied that the appellant satisfied the suitability requirement in S-LTR.4.2 because he considered that she had submitted a fraudulently obtained TOEIC certificate from Educational Testing Service ("ETS") in her application of 19 November 2013 for leave to remain. The respondent considered that she therefore could not benefit from the exceptions

in EX.1 of Appendix FM and she could not meet para 276ADE of the Immigration Rules. He therefore considered the appellant's Article 8 claim outside the Immigration Rules on the basis that she did not satisfy the requirements for leave to remain under the Immigration Rules. He concluded that there were no exceptional circumstances in the appellant's case that warranted the grant of leave to remain on the basis of Article 8 outside the Immigration Rules.

3. The judge found that the appellant had fraudulently obtained her TOEIC certificate for reasons which he set out at para 21(i)-(v) of his decision. He therefore found that she did not meet the suitability requirement in S-LTR.4.2. He also concluded that she could not rely upon EX.1 of Appendix FM or para 276ADE of the Immigration Rules. He concluded that she could not meet the requirements of the Immigration Rules.
4. The judge then considered her Article 8 claim outside the Immigration Rules. In his consideration of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") and the circumstances of the appellant's child who was a qualifying child as a British citizen, he considered the guidance of the Court of Appeal in MA (Pakistan) [2016] EWCA Civ 705. This included guidance to the effect that "*a court or Tribunal should not simply focus on the child but should have regard to the wider public interest considerations, including the conduct and immigration history of the parents*".
5. The judge considered the appellant's Article 8 claim outside the Immigration Rules in detail, as well as the circumstances of the appellant's child and whether it was reasonable for the child to leave the United Kingdom. He concluded that the decision was proportionate stating, inter alia, that "*The strong public interest in requiring those who would wish to obtain leave to remain in the UK to comply with and respect the Rules and the appellant's flaunting of that requirement provides the 'good, cogent reasons' for the child's removal from [sic] UK*" (para 29(viii) of his decision).
6. At the hearing before me, Ms Shaw and Mr Walker agreed that the judge had erred by failing to consider whether to exercise his discretion under S-LTR.4.2 in the appellant's favour. It was also agreed that, through no fault of his own, he erred in his consideration of whether it would be reasonable for the appellant's child to leave the United Kingdom, in that, he took into account the appellant's conduct in obtaining a fraudulently issued TOEIC certificate, contrary to the guidance of the Supreme Court in KO (Nigeria) [2018] UKSC 53 which was delivered on 24 October 2018, i.e. after his decision was made.
7. I entirely agree with the parties that the judge did err in law as described in the preceding paragraph.
8. Mr Walker also agreed with Ms Shaw's submission that the judge had erred in law in his consideration of whether the appellant had fraudulently obtained the TOEIC certificate. Mr Walker agreed with Ms Shaw that the judge had not applied the guidance in SM and Qadir [2016] UKUT 229 (IAC). Although the question whether the judge had erred in law in this respect was a matter for me, I was nevertheless in a difficult position. After having carefully considered the position, I decided that, the errors described at para 6 above were sufficient for the Upper Tribunal to set aside the judge's decision. I therefore set his decision aside.

9. In deciding the extent to which any findings should stand, I took into account the fact that Mr Walker had agreed with Ms Shaw that the judge had erred in his consideration of whether the appellant had fraudulently obtained her TOEIC certificate. On that basis, I decided not to preserve any findings of fact and to remit the appeal to the First-tier Tribunal, as Ms Shaw had requested and as Mr Walker had agreed, for a fresh hearing on all issues.

Notice of Decision

The decision of Judge of the First-tier Tribunal O'Rourke involved the making of errors on points of law such that his decision falls to be set aside. The decision was set aside.

The appellant's appeal against the respondent's decision is remitted to the First-tier Tribunal for a fresh hearing on the merits on all issues.



Signed
Upper Tribunal Judge Gill

Date: 2 June 2019