



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

Appeal Number: IA/38583/2014

THE IMMIGRATION ACTS

**Heard at Birmingham
On 3 November 2015**

**Decision & Reasons
Promulgated
On 18 November 2015**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A D

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mrs R Pettersen (Home Office Presenting Officer)
For the Respondent: Mr I Hussain (of Syeds Solicitors)

DECISION AND REASONS

1. I shall refer to the Appellant in this appeal to the Upper Tribunal as the Secretary of State. I shall refer to the Respondent as the Claimant. The Secretary of State has appealed, with permission, to the Upper Tribunal in respect of a decision of the First-tier Tribunal (Judge V A Cox) promulgated on 13 January 2015, allowing the Claimant's appeal against a decision of 22 September 2014 refusing to vary leave to remain and deciding to remove him from the UK by way of directions.

2. By way of background, the Claimant, who is a national of Pakistan, came to the UK as a student. He entered on 26 October 2010 having obtained entry clearance abroad. He subsequently obtained further leave as a student which was granted until 21 June 2014. During the currency of his leave he formed a relationship with S A. She is also a national of Pakistan but she is present and settled in the UK having come here for the purposes of marriage though that marriage has ended and there had been a divorce in 2011. There is one child of that marriage, a daughter, born on 6 March 2009 and it has been said by the Claimant and S A that the three of them live as a family unit though the daughter, who is a British national through virtue of her father being such a national, is said to still see her father. The Claimant and S A married each other in the UK on 9th July 2013 and he applied for leave to remain as a spouse within the currency of his previous leave as a student, that application having been made on 29 November 2013.
3. On 27 September 2015 the Claimant took an English language test, or at least that is what he says he did though the Secretary of State has contended that a third party took the test on his behalf. He was, originally awarded a TOEIC certificate in recognition of his apparent success but, subsequently, the Educational Testing Service (ETS), an organisation which administers tests and reviews test results, reported its view that the test result had been obtained through deception. This led to the certificate, which the Claimant was relying upon for the purposes of his application, being cancelled. He was notified of this by the Home Office and he responded by taking and passing an ESOL English language test though the cancellation of his certificate meant there was no valid certificate before the Secretary of State at the date of application.
4. The Secretary of State decided to refuse the application. In a “refusal letter” of 22 September 2014 she said that the Claimant did not satisfy the “Suitability” section of the Immigration Rules because of the deception surrounding the test. As a consequence he did not meet the “Eligibility” section either though it was accepted that the relationship was genuine. The Secretary of State went on to consider the possible application of Paragraph EX.1 of Appendix FM to the Immigration Rules but decided the requirements contained therein were not met either. It was said there were no exceptional circumstances such as to justify granting the application under article 8 of the ECHR in circumstances where the requirements of the Immigration Rules were not met so the application was refused.
5. The Claimant’s appeal was heard by the First-tier Tribunal on 7 January 2015. The Claimant and his wife gave oral evidence. Documentary evidence concerning the test certificate was produced on behalf of the Secretary of State and this consisted of two witness statements made by high ranking officers within the Home Office and a document referred to as an “ETS look up tool document”.
6. The First-tier Tribunal recorded that, whatever the position regarding the “Suitability” requirements, the “Eligibility” requirements could not be met

for financial reasons. That was agreed between the parties. However, the appeal succeeded because it was concluded that the Claimant had not fallen foul of the "Suitability" requirements and that he met the requirements of paragraph EX.1 because there were insurmountable obstacles to family life continuing outside the UK.

7. The Secretary of State applied for and obtained permission to appeal to the Upper Tribunal. Permission was granted by a Judge of the First-tier Tribunal in these terms:

"2. It is arguable that the Judge erred in law by finding that the statements lodged by the Respondent in support of the contention that the Appellant had used deception were generic and that no specific evidence related to the test taken by the Appellant when the grounds clearly show that the ETS look up tool document which was lodged shows that the Appellant's test had been categorised by the ETS as invalid.

3. While the ground relating to the Judge's failure to provide adequate reasons why there are insurmountable obstacles to his family life continuing in Pakistan are clearly less persuasive, I am disinclined to reject it particularly if the Appellant is found to have used deception."

8. There was a hearing before the Upper Tribunal and the initial purpose of that hearing was to consider whether or not the First-tier Tribunal had erred in law such that its determination ought to be set aside. Mrs Pettersen relied upon her grounds of appeal but, perhaps not surprisingly in view of the terms of the grant, focused mainly upon the first ground. The evidence did, in part, she said, relate to the actual test the Claimant had claimed to have taken. Mr Hussain contended that there had been no misunderstanding as to the nature of the evidence. He suggested that the sort of evidence advanced by the Secretary of State in cases such as this was generally unpersuasive and referred me to **R v Secretary of State for the Home Department (ETS-judicial review) IJR [2015] UKUT 00327 (IAC)**. I indicated to the parties I would reserve my decision as to the error of law issue. Having considered matters I have concluded that the First-tier Tribunal did not err in law and that its decision shall, therefore, stand. I set out my reasoning below.

9. The First-tier Tribunal gave very full and careful consideration to the question of whether or not the Claimant had used deception with respect to the test he claimed to have taken. It did so in a passage of its determination running from paragraph 31 to 40. Amongst the points it made were these: The Claimant had given evidence in English before it and his level of English appeared to accord with the sort of standard which would have given him the certificate and grading he had received, he had subsequently been able to obtain a further certificate which had been awarded with distinction (the point here being there was no reason he would need to use deception if his English was that good), both the Claimant and his wife had given what it found to be credible evidence

concerning the taking of the test and that the Claimant had given some specific detail regarding the events on the day of the test.

10. Further, the First-tier Tribunal noted the submission made to it by the representative for the Secretary of State to the effect that certificates would only be cancelled where the administrator of the tests was “certain” there had been deception. It did refer to the evidence as being “generic” but, in terms of the witness statements, it was not inappropriate or inaccurate to say that. It is clear from what it said at paragraph 34 that it only stated the statements were generic. The supposed significance of the document described as the “ETS look up tool document” does not appear to have been explained to the First-tier Tribunal by the Secretary of State’s representative or, at least, the determination which does summarise the submissions made does not say it was. In these circumstances I do not conclude that the First-tier Tribunal erred in law in its consideration of the evidence concerning the allegation of deception.
11. Accordingly, I turn to consider the second ground.
12. The second ground was not pursued before me other than by way of a general indication that the written grounds were relied upon. What is said in those written grounds fails to properly identify an arguable error and simply amounts to an attempt to re-argue matters. The First-tier Tribunal considered the application of paragraph EX.1 from paragraph 43 to 67 of its determination. It noted that the relationship was accepted as being genuine. It accepted that the Claimant, his wife and the child were living together as a single family unit and that the child continued to have contact with the UK based father. It pointed out that the interests of the child were a primary consideration but that the child’s nationality could not be regarded as a “trump card”. It reminded itself of the need to take into account the content of section 117 of the Nationality, Immigration and Asylum Act 2002. Having done all of that it concluded in favour of the Claimant. Whilst it may be that a differently constituted First-tier Tribunal might have reached a different view on the same facts I really cannot see that the grounds go beyond a mere disagreement with the outcome.
13. I conclude, therefore, the First-tier Tribunal did not err in law so that its decision shall stand.

Conclusions

The making of the decision by the First-tier Tribunal did not involve the making of an error of law.

The decision shall stand.

Anonymity

The First-tier Tribunal did make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I am not wholly sure that such an order was necessary but, since nothing was said about it before

me, I shall continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Date

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed

Date

Upper Tribunal Judge Hemingway