



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

Appeal Number: HU/11546/2016

THE IMMIGRATION ACTS

**Heard at: Field House
On: 1 October 2018**

**Decision & reasons Promulgated
On 31 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR YOGARAJ [S]
(NO ANONYMITY DIRECTIONS MADE)**

Respondent

Representation:

For the Appellant: Mr Candola, Senior Presenting Officer
For the Respondent: Mr M.Z. Judge of Counsel

DECISION AND REASONS

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department and the respondent is a citizen of Sri Lanka born on 17 November 1974. However, for the sake of convenience, I shall continue to refer to the latter as the “appellant” and to the Secretary of the State as the “respondent”, which are the designations they had in the proceedings before the First-tier Tribunal.

2. The appellant appealed to the First-tier Tribunal against the decision of the respondent dated 18 April 2016 refusing his application for leave to remain pursuant to immigration rules and Article 8 of the European Convention on Human Rights. First-tier Tribunal Judge Pears I dismiss the appeal under the immigration rules but allowed it pursuant to Article 8 of the European Convention on Human Rights.
3. Permission to appeal was granted by PJM Hollingworth on 17 August 2018 who stated that it is arguable that the Judge attached too little weight to the immigration history of the appellant in respect of his deceptively obtained English test certificate. The permission Judge found that as the requirements of Appendix FM were not met, found it arguable the Judge the public interest consideration was not properly analysed when carrying out the proportionality exercise. The Judge having found that relation in to the immigration rules the Judge found that the appellant was not able to demonstrate very significant obstacles to integration into Sri Lanka and his insufficient analysis of the application 117B (6) and assessment under section 55 of reasonableness of return against the public interest factors.
4. The First-tier Tribunal found the appellant's wife is a British citizen and he has two British citizen children born on 2 February 2015 and 2 February 2015 and therefore they are under the age of seven. The respondent asserts that because the appellant used deception for the English language test certificate and used it in connection with a student visa application the terms of S - LTR 1.6. apply. The appellant contends that he did not use fraud even if he did the respondent's guidance as set out in the appellant skeleton argument states that such action does not meet the threshold to apply as section's S- LTR. 1. 6.
5. Evidence provided by the respondent demonstrates that the respondent has discharged his evidential burden of proof that the appellant had provided a false English test certificate with his application for further leave. The appellant however has not discharged his evidential burden by raising an innocent explanation and found that on the balance of probabilities and on the basis of all the evidence that the appellant used deception in obtaining his test certificate six years ago.
6. In respect of EX1, the appellant had to show that there are insurmountable obstacles to family life with his partner continuing outside the United Kingdom. The appellant does not suggest that there would be insurmountable obstacles to family life with his wife continuing in Sri Lanka but in any event the evidence set out has not succeeded in showing that there would be any.

7. Section 117B of the 2002 act provides that little weight should be given to a private life which has been established when the appellant's immigration history is precarious. The appellant's immigration was always precarious and although he had leave to remain part he did not for 37 days. The appellant has not been convicted of an offence and the test was six years ago. The Judge did not accept that this amounts to a level of seriousness that warrants the application of S - LTR 1. 6.
8. The respondent has contended that first, the appellant should return to Sri Lanka without his family and secondly, that they should all go to Sri Lanka as a family and rejected both propositions. As there is no criminality on the part of the appellant nor a sufficiently poor immigration history, section 117B (6) of the 2002 applies because they are an integrated family unit in the United Kingdom each having Article 8 rights. Therefore, it will not be proportionate for the appellant to leave the United Kingdom. The Judge allowed the appeal outside the immigration rules but pursuant to article 8.
9. The respondent's grounds of appeal state the following which I summarise. The Judge has erred in treating the child's best interests as a trump card because their interest is not *the* primary consideration part a primary consideration respect of the public interest. In doing so his balancing exercise was flawed and therefore unreliable.
10. The interplay between section 117B (6) and the best interests of children analysis requires an assessment as to whether it is reasonable to remove a child or one of their parents must encompass all of the relevant public interest factors set out in section 117B. The best interests of children are served purely by remaining with their parents and it is a choice for the adults whether that is with them both to go to Sri Lanka or to remain in the United Kingdom with their mother alone. The Judge has fallen into error in respect of the best interests of the child when conducting the balancing exercise. It must be reasonable to remove a child, if the actions of their parents are sufficiently damaging to the public interest. Given that the appellant has committed fraud, the public should be given more weight in regard to maintaining a fair system of immigration and also as a mechanism to deter future fraudulent acts against the rules.
11. The appellant's rule 24 response states the following which I summarise. The appellant's parental relationship with his British citizen children and wife was accepted. Therefore, he meets the requirements of section 117B (a). The next requirement to be met is whether it would be reasonable to expect the children to leave the United Kingdom with the appellant. Notwithstanding the English test certificate, the Judge found that the appellant's conduct does not meet the application of S - LTR. 1. 6. The respondent's position is that because the appellant has a very poor recent history that the appellant's wife and two children should leave the United

Kingdom. The Judge's right not to find so. There is no material error in the decision.

12. At the hearing I heard submissions from both parties as to whether there is an error of law. Mr Candola on behalf of the respondent stated that a false certificate is a weighty matter when considering the public interest. The children are British citizens and they can remain with their mother in the United Kingdom. Mr Judge adopted his rule 25 response and said that the Judge has made a proper evaluation of all the evidence and come to a sustainable conclusion. He emphasised that the appellant has only been without leave for 37 days and has never been convicted of any offence.

Decision as to whether there is an error of law

13. The ultimate question in this appeal was whether it would be reasonable for the appellant to return to Sri Lanka with or without his children. It was accepted that the appellant's wife and two children are British citizens and cannot be required to leave the United Kingdom. The respondent's position is that it would be a matter for the appellant and his wife to decide whether to divide their family with the appellant going to Sri Lanka alone or keep the family together by returning to Sri Lanka together.
14. The respondent's main complaint is that the appellant has committed fraud in his English language test six years ago and that should trump the best interests of the children which is only a consideration and not *the* consideration. The Judge however found that the appellant's conduct does not attract the consequences of paragraph 5 - LTR. 1. 6. of the immigration rules. What remains therefore in respect of the appellant's immigration history is that he has been in this country without leave for 37 days. Having so found, the Judge was entitled to treat the appellant's immigration history as not being a decisive factor or fatal to his continued stay in this country within his proportionality exercise.
15. The Judge in a careful and reasoned decision considered all the evidence in the appeal and considered the jurisprudence and the respondent's policy. This included that the appellant had used deception in obtaining a false English language certificate six years ago.
16. The respondent's argument is merely quarrel with the Judge's findings. The Judge reached conclusions to which he was entitled on all the evidence before him. There is no perversity in the findings made by him because he gave clear reasons for allowing the appellant's appeal. The judge found that the appellant's children are British citizens who were born in the United Kingdom. He found that the eldest child has aspects of autism and the youngest child has impaired hearing and other issues set out in the medical evidence. The Judge was entitled to find in that regard

that their best interests is to remain in the United Kingdom and strong reasons would be necessary to require them to leave and found that the respondent has not provided any.

17. In his balancing exercise, the Judge found that the appellant does not meet the requirements of the immigration rules as he has not demonstrated significant obstacles with his reintegration in to Sri Lanka and neither has he suggested that would be the case. The Judge was entitled to find notwithstanding that finding that it could not be reasonable for the appellant to return to Sri Lanka. He found that the appellant has not been convicted for any offence nor does he have a sufficiently poor recent immigration history. The Judge found that the best interests of the children demonstrate that it would not be reasonable to expect the appellant to leave his family in the United Kingdom and go to Sri Lanka alone.
18. This was the conclusion that the Judge was entitled to on the bases that to require the appellant to leave the United Kingdom would result in the breakup of this family who are all, other than the appellant, British citizens. I find no material error of law in the decision and I uphold it.
19. I dismiss the respondent's appeal. That finalises this appeal.

DECISION

The Secretary of State's appeal is dismissed.

Signed by

Mrs S Chana
A Deputy Judge of the Upper Tribunal

Dated this 22nd day of October 2018