



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13616/2015

THE IMMIGRATION ACTS

Heard at Field House
On 19th June 2018

Decision & Reasons Promulgated
On 3rd July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

CTN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Sowerby of Counsel, instructed by the Chancery Partnership
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appealed against a decision of Judge Davey (the judge) of the First-tier Tribunal (the FtT) promulgated on 27th November 2017.
2. The Appellant is a Malaysian national born 1st June 1977 who on 26th August 2015 applied for leave to remain in the UK, relying upon his family life with his wife and two children. The application was refused on 26th November 2015.

3. The reasons given for refusing the application were that the Appellant failed the suitability requirements in Appendix FM because he had used a proxy to obtain a TOEIC certificate from Educational Testing Service. The Respondent invoked S-LTR.1.6 which states that an application will be refused if the presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3 to 1.5), character, associations or other reasons, make it undesirable to allow them to remain in the UK.
4. Because the Appellant had used a proxy test taker, his scores from the tests taken on 21st August 2012 at Elizabeth College had been cancelled by ETS. This certificate had been used by the Appellant in his application for leave to remain dated 3rd December 2012 and the Respondent was therefore satisfied that deception had been used in that application.
5. Because deception had been used the Respondent decided that the Appellant could not benefit from any of the provisions contained within Appendix FM. It was not accepted, in relation to private life, that the Appellant could rely upon paragraph 276ADE of the Immigration Rules, because he did not satisfy the suitability requirements, specifically S-LTR.1.6.
6. The Respondent did not consider that the application raised any exceptional circumstances which would warrant granting leave to remain outside the Immigration Rules, although it was accepted that the Appellant has a parental relationship with his children, who are British citizens born 10th December 2011 and 18th November 2014.
7. The appeal was heard by the FtT on 20th July 2017. The judge found that the Appellant had used a proxy test taker to obtain an English language certificate, and had acted dishonestly in so doing.
8. The judge found that very little information had been provided about the Appellant's family life and noted the lack of evidence from the Appellant's wife and that it had not been proved that the best interests of the children would be for the Appellant to remain in the UK, as evidence had not been adduced addressing Article 8 in relation to private and/or family life or exceptional circumstances. The judge found that the Appellant's removal would not be disproportionate, and while the children could not be removed, as British citizens, the family could relocate as a whole to Malaysia, as the children are at an age when leaving the UK remains reasonable. The appeal was dismissed.
9. Following dismissal of the appeal the Appellant applied for and was granted permission to appeal to the Upper Tribunal.

Error of Law

10. On 26th April 2018 I heard submissions from both parties in relation to error of law. On behalf of the Appellant it was submitted that the judge had erred in finding that the Appellant had used deception in relation to his English language tests, and had erred in his consideration of the best interests of the children, whether it would be reasonable to expect British children to leave the UK, and in relation to Article 8 generally. The Respondent contended the judge had not materially erred.
11. I found a material error of law disclosed in the FtT decision, which I set aside but preserved the findings in relation to deception, as I found no error of law in relation to the judge's consideration of that issue. Full details of the application for permission, the grant of permission, the submissions made by both parties, and my conclusions are contained in my decision promulgated on 15th May 2018. I set out below paragraphs 24-36 of that decision, which contain my conclusions and reasons for finding an error of law and setting aside the FtT decision;
 24. I find no merit in the first ground which relates to the English language test. The judge correctly pointed out at paragraph 5 that there is an evidential burden on the Respondent to show that deception was used, and if that evidential burden is discharged, there is then an evidential burden on the Appellant to provide an innocent explanation.
 25. The evidence submitted by the Respondent was sufficient to discharge the evidential burden of proof. There was the generic evidence of Mr Millington and Ms Collings, together with evidence from ETS indicating that the Appellant's test results had been found invalid. The judge did not err at paragraph 11 in finding the Respondent's evidential burden discharged, and this finding has not in fact been challenged. The challenge relates to whether the judge considered the Appellant's evidence which the Appellant contends amounts to an innocent explanation.
 26. In my view the judge did consider the Appellant's evidence and it cannot fairly be said that he ignored evidence. The judge gave adequate and sustainable reasons for finding that the Appellant had not provided an innocent explanation. By way of example the judge at paragraph 8 found that the Appellant was unable to explain how the test had proceeded. The Appellant frankly acknowledged this in interview. The Appellant had claimed that he had attended lessons and paid for them, but there was no evidence of payments other than the Appellant's assertion. There was no evidence from the Appellant's partner of her recollection of the Appellant studying or taking the test. There was no documentary evidence to confirm that the Appellant had attended lessons prior to the test. In addition the Appellant's evidence was that he had taken tests on two consecutive days, which was contradicted by the test certificates, which showed that not to be the case.
 27. The judge did not err in law at paragraph 11 in finding 'I have therefore considered what the Appellant has said of this matter and he has not sought to explain away the matter as opposed to simply assert and reassert that he took the speaking test.' I am satisfied that the judge considered all the evidence placed before him, and he was entitled to reach the conclusion that the Appellant had

used a proxy test taker, and sustainable and adequate reasons were given for this conclusion. The judge did not err in law on this point.

28. I find that the challenges in the second, third, and fourth grounds of appeal are linked. The Respondent accepted in the refusal decision that the Appellant has a parental relationship with his children who are British citizens. The Respondent's position in that decision was that it would be reasonable to expect the children to remain with their other parent in the UK.
29. When considering proportionality and Article 8, the best interests of children should be considered as a primary consideration, but not the only consideration, and the best interests of children can be outweighed by countervailing factors.
30. In my view, the judge was incorrect at paragraph 19 to find that evidence had not been adduced addressing Article 8, and private/family life or exceptional circumstances. The Appellant produced a witness statement as part of his evidence, and as submitted by Mr Sowerby, part of that statement relates specifically to the Appellant's family life with his wife and children. The relevant paragraphs are 6-8 and 27-31. There was also produced a school report in relation to the Appellant's daughter, and numerous photographs of the family together contained at pages 61-78 of the Appellant's bundle. The witness statement was relied upon by the Appellant and in my view the judge erred in making a finding that evidence had not been adduced in relation to family life.
31. I therefore conclude that the FtT decision discloses an error of law, as material evidence has not been considered, and therefore adequate reasons have not been given for concluding that it would not be in the best interests of the children for the Appellant to remain in the UK, and to live with his family. The evidence indicates that it is the Appellant who is the financial provider for the family.
32. The question of whether it is reasonable for British children to leave the UK is a separate issue from considering the best interests. There may be cases where it is in the best interests of children to remain in the UK but it may still be reasonable for them to leave the country. I find that the judge erred in considering the issue of reasonableness. Little weight appears to be given to the fact that the children are British. ZH (Tanzania) [2011] UKSC 4 makes it clear (at paragraph 30) that although nationality is not a 'trump card' it is of particular importance in assessing the best interests of any child. At paragraph 32 of that decision guidance is given that the intrinsic importance of citizenship should not be played down. British children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. The Respondent has issued guidance dealing specifically with the reasonableness of requiring British children to leave the UK, and there is no reference to this guidance in the FtT decision nor is there any reference to SF (Albania) which confirms that the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. I find that the failure to consider and analyse the Respondent's guidance amounts to an error of law.

33. I therefore conclude that the judge erred in law in considering Article 8 and the best interests of the children, and whether it would be reasonable to expect the British children to leave the UK. The decision is therefore set aside and must be re-made.
34. I do not set aside findings made by the judge in relation to the English language test. Those findings are therefore preserved, including the finding that dishonesty was used in employing a proxy test taker. Therefore the Appellant cannot satisfy the suitability requirements of Appendix FM or paragraph 276ADE(1).
35. I do not find it appropriate, having considered the Senior President's Practice Statements at paragraph 7, to remit this appeal to the FtT.
36. There will be a further hearing before the Upper Tribunal. It is a matter for the Appellant as to whether any further evidence is called. The Tribunal will arrange for a Cantonese interpreter. If further oral evidence is not required the Appellant must notify the Tribunal immediately that the interpreter is not needed. The next hearing will focus upon the best interests of the children, and whether it is reasonable to expect the British children to leave the UK.

Re-Making the Decision - Upper Tribunal Hearing 19th June 2018

Preliminary Issues

12. At the commencement of the hearing Mr Sowerby indicated that the issue to be considered in this appeal had been considered by the Supreme Court in April 2018, although it was unknown when the decision would be published. Mr Sowerby suggested that it may therefore be appropriate to adjourn this hearing, until publication of the Supreme Court decision.
13. Mr Kotas submitted that it would be appropriate to proceed with the hearing, as it was not known when the Supreme Court decision would be published.
14. I decided that it would be fair and appropriate to proceed with the hearing and refused the adjournment request. There was no indication as to when the Supreme Court decision would be published, and my view was that the interests of justice would best be served by proceeding with this appeal and making a decision, particularly taking into account that the Respondent's refusal decision was dated 26th November 2015.
15. I ascertained that the Tribunal had all documentation to be relied upon. This consisted of the documentation that was before the FtT, which was the Respondent's bundle with Annexes A-J, the Respondent's supplementary bundle indexed 1-6, the appeal grounds to the FtT, and the Appellant's bundle comprising 78 pages.
16. In addition the Tribunal had received a supplementary bundle from the Appellant comprising 14 pages, and an undated skeleton argument containing 50 paragraphs.

17. Mr Kotas supplied pages 70-77 of the Respondent's guidance on whether it would be reasonable to expect a child to leave the UK, dated 22nd February 2018. Mr Kotas indicated that the Respondent accepted that the Appellant's wife has indefinite leave to remain in the UK, and both the Appellant's children are British, and the Appellant has a genuine and subsisting parental relationship with his children.

The Oral Evidence

18. The Appellant gave oral evidence with the assistance of an interpreter in Cantonese. There were no difficulties in communication. The Appellant adopted as his evidence his witness statement dated 18th July 2017.
19. The Appellant's wife gave oral evidence with the assistance of the interpreter in Cantonese, and there were no difficulties in communication. She adopted as her evidence her witness statement dated 19th June 2018.
20. The Appellant and his wife were questioned by the representatives and I have recorded all questions and answers in my Record of Proceedings, and it is not necessary to reiterate them here. If relevant I will refer to the oral evidence when I set out my conclusions and reasons.

The Oral Submissions

21. I heard oral submissions from the representatives which are set out in my Record of Proceedings and briefly summarised below.
22. Mr Kotas submitted that the Tribunal had to consider a narrow issue, that being whether it was reasonable to expect the British children to leave the UK. Mr Kotas confirmed that it was accepted that the best interests of the children would be to remain in the UK. Mr Kotas referred to the Respondent's guidance at page 73, submitting that the departure of the Appellant from the UK would not mean that the children would have to leave the UK. On that basis the issue of reasonableness did not arise because the children would not be required to leave the UK.
23. In the alternative if it was found that the children would have to leave the UK, Mr Kotas submitted that the decisions in MA (Pakistan) [2016] EWCA Civ 705, and MT and ET Nigeria [2018] UKUT 00088 (IAC) did not assist, as in those cases the children involved were qualifying children having lived in the UK in excess of seven years, and were not young British children, as is the case in this appeal.
24. It was submitted that very significant weight must be given to the fact that the Appellant cheated in obtaining an English language certificate and committed fraud. He therefore cannot satisfy the Immigration Rules. The children are at a very young age, and if they had to leave the UK and live in Malaysia, this would not be unreasonable.

25. Mr Sowerby relied upon his comprehensive skeleton argument. He submitted that the Respondent's guidance was incorrect in concluding that if children could remain in the UK, then the issue of reasonableness need not be considered. Mr Sowerby's point was that the wording in section 117B(6) is "it would not be reasonable to expect the child to leave the United Kingdom." In any event Mr Sowerby submitted that the oral evidence given was that if the Appellant had to leave the UK, then his wife and children would have to leave with him.
26. Mr Sowerby submitted that British citizen children must be in a stronger position than the children considered in MA (Pakistan) and MT and ET, as the children in those cases were foreign nationals.
27. Mr Sowerby relied upon the Respondent's guidance at paragraph 76 and submitted significant weight must be given to the British citizenship of the children, and submitted that the Appellant had not committed significant or persistent criminal offences, and it could not be said that he had a very poor immigration history.
28. It was conceded by the Respondent that the best interests of the children would be to remain in the UK, and it was submitted that in the case of British children the correct approach would be to find that they should remain in the UK unless there were powerful reasons to the contrary, and in this case there were no such powerful reasons. Therefore it would be unreasonable to expect the Appellant's British children to leave the UK and the appeal should be allowed on that basis.
29. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

30. The finding made by the FtT that the Appellant used deception in an ETS test is preserved and therefore he cannot satisfy the suitability requirements and cannot rely on Appendix FM and paragraph 276ADE(1).
31. The Supreme Court confirmed at paragraph 48 of Agyarko [2017] UKSC 11 that if an Appellant cannot satisfy the Immigration Rules but refusal of the application would result in unjustifiably harsh consequences such that refusal would not be proportionate, then leave may be granted outside the rules on the basis of exceptional circumstances.
32. The Appellant relies upon Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention). I find that Article 8 is engaged on the basis that the Appellant has established family and private life in the UK. In considering Article 8 I adopt the balance sheet approach recommended at paragraph 83 of Hesham Ali [2016] UKSC 60, and in so doing have regard to the guidance as to the functions of the Tribunal given at paragraphs 39 to 53. It was confirmed in Hesham Ali at paragraph 41 that a failure to qualify under the rules is the point at which to begin, not end consideration of the claim under Article 8. The terms of the rules are

relevant but not determinative. At paragraph 53 it is confirmed that the rules are a relevant and important consideration for a Tribunal determining appeals brought on Convention grounds but the rules do not govern the determination of appeals.

33. I decide this appeal on the following factual matrix.
34. The Appellant is a Malaysian citizen. He entered the UK with leave on 3rd August 2002. His leave was subsequently extended on various occasions, until 8th September 2015. His last period of leave was granted on family and private life grounds.
35. Before his leave expired he made an application on 26th August 2015 for further leave to remain using form FLR(P). He used a proxy in an ETS test in August 2012.
36. The Appellant is married to a Malaysian citizen. The marriage took place in the UK on 31st January 2012. The Appellant's wife has indefinite leave to remain in the UK which was granted on 8th May 2008.
37. The Appellant and his wife have two children, both of whom are British citizens. Their daughter was born 10th December 2011 and is now 6 years of age, and their son born 18th November 2014 and is now 3 years of age.
38. Both the Appellant and his wife confirmed in oral evidence that they have relatives in Malaysia. The property in which the family live is owned by the Appellant's wife, according to Land Registry documents, and there is a mortgage upon that property. The Appellant owns a takeaway food business and is sometimes assisted in that business by his wife. The Appellant is the financial provider of the family.
39. There are no relevant medical issues for any of the family members. The Appellant's daughter attends school.
40. The Respondent has conceded that the best interests of the children would be to remain in the UK, and that concession is rightly made. It is also conceded and I find as a fact that the Appellant has a genuine and subsisting parental relationship with his children.
41. In considering Article 8 the burden of proof lies on the Appellant to establish his personal circumstances and to establish that family and private life exists, and he must show why the decision to refuse leave to remain interferes disproportionately in his family and private life rights. It is for the Respondent to establish the public interest factors weighing against the Appellant. The standard of proof is a balance of probabilities throughout.
42. In considering proportionality I must have regard to the considerations in section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). Sub-section (1) confirms the maintenance of effective immigration controls is in the public interest.

43. Sub-section (2) confirms that it is in the public interest that persons seeking to remain in the UK can speak English. The Appellant has not proved his ability in English.
44. Sub-section (3) confirms that it is in the public interest that a person seeking to remain in the UK is financially independent. I accept that the Appellant is financially independent, although that is a neutral factor in the balancing exercise.
45. Sub-section (4) is not applicable in this case, as the Appellant has not been in the UK unlawfully. Sub-section (5) confirms that little weight should be given to a private life established by a person whose immigration status is precarious. The Appellant's immigration status has been precarious in that he has only ever had limited leave to remain. This is not however a case based upon his private life, to which I find I must attach little weight because of his immigration status.
46. Sub-section (6) is set out below;

In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -

- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
 - (b) it would not be reasonable to expect the child to leave the United Kingdom.
47. Having considered the evidence I conclude that if the Appellant has to leave the UK his wife and children will also have to leave. In my view that was the evidence given by both the Appellant and his wife. It is clear that the Appellant is the financial provider. The wife's evidence was that she would not be able to financially support herself and the children without the Appellant in the UK. I therefore must consider whether it would be reasonable for the children to leave the UK. I follow the guidance given in MA (Pakistan) to the effect that a Tribunal must not focus on the position of the children alone, but must have regard to the wider public interest, including the immigration history, if relevant, of the parents.
 48. The fact that the children are British is a weighty consideration and was described in ZH (Tanzania) [2011] UKSC 4 as being of particular importance.
 49. At paragraph 49 of MA (Pakistan) guidance is given that in relation to a qualifying child by reason of in excess of seven years' residence, the residence must be given significant weight in the proportionality exercise for two related reasons. Firstly because of its relevance in determining the nature and strength of the best interests of a child, and secondly because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.
 50. In MT and ET at paragraph 34 the Upper Tribunal decided that on the facts of that case, there were no such powerful reasons. The parent in that case had committed a criminal offence and received a community order for using a false document to obtain employment, had overstayed having been granted entry clearance as a visitor, and made an asylum claim that was found to be false. That immigration history was

found to be “not so bad as to constitute the kind of powerful reason that would render reasonable the removal of ET to Nigeria.”

51. I also take into account SF and others (Albania) [2017] UKUT 00120 (IAC) which indicates that a Tribunal ought to take the Secretary of State’s guidance into account if it points clearly to a particular outcome in the instant case. In this case I find it is appropriate to take the Respondent’s guidance into account. I refer specifically to page 76 of that guidance. In summary the guidance is that it will not be reasonable to expect a British citizen child to leave the UK with an applicant parent or primary carer facing removal. In particular circumstances it may be appropriate to refuse to grant leave to a parent or primary carer if their conduct gives rise to public interest considerations of such weight as to justify their removal if the British citizen child could remain in the UK with another parent or alternative primary carer. Those circumstances would be where an applicant parent has committed significant or persistent criminal offences falling below the threshold for deportation set out in paragraph 398 of the Immigration Rules, or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules.
52. I also take into account that the Appellant was interviewed by an Immigration Officer when he returned to the UK from a holiday on 7th August 2014. The views of the immigration authorities are contained in a CID record contained at page 53 of the Appellant’s bundle. The Immigration Officer was aware that the Appellant’s ETS certificate had been declared invalid. The following was found;

“In this case the marriage was subsisting before the certificate was obtained. I am doubtful that the certificate was pertinent to the grant of LTR, rather the subsisting marriage and the best interests of the GBR child were the main factors in the grant, therefore it seems appropriate to reinstate the continuing leave.”
53. I attach significant weight to the fact that the Appellant committed deception in August 2012 by having a proxy test taker undertake an English language test. This means that the Appellant cannot satisfy the Immigration Rules in order to be granted leave to remain and I place significant weight upon that.
54. However, in conducting the balancing exercise, I must take into account that the Appellant does not have a criminal record. He therefore cannot be described as having committed persistent criminal offences, and I find that it cannot be said that he has a very poor immigration history, as it has not been shown that he has repeatedly and deliberately breached the Immigration Rules. There is one significant breach, which relates to the deception committed in August 2012 and there have been no further breaches of the Immigration Rules since that time. I conclude that the weight that should be attached to the best interests of the children in remaining in the UK, and their British citizenship, outweighs the weight to be attached to the act of deception almost six years ago, and I find in the circumstances of this case, that it would not be reasonable for the children to leave the UK. Therefore the appeal is allowed on that basis with reference to Article 8 of the 1950 Convention.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and was set aside. I substitute a fresh decision as follows.

The appeal is allowed on human rights grounds with reference to Article 8 of the 1950 Convention.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

I have decided to make an anonymity direction because this appeal involves considering the best interests of minor children. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 28th June 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

Because I have allowed the appeal I have considered whether to make a fee award. I make no fee award as the appeal has been allowed because of evidence presented to the Tribunal that was not before the initial decision maker.

Signed

Date 28th June 2018

Deputy Upper Tribunal Judge M A Hall