IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17970/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 November 2018	**On 3 December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

S R A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Basith, Solicitor, Taj Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a male citizen of Bangladesh born on 15 December 1977 who appealed to the First-tier Tribunal against the decision of the respondent dated 8 July 2016 to refuse the appellant further leave to remain. The First-tier Tribunal in a decision promulgated on 27 December 2017 dismissed the appellant's appeal on human rights grounds. The

appellant appeals with permission from the Upper Tribunal. The appellant's grounds were as follows:

(1) that the judge erred in this assessment of the evidence in relation to the TOEIC certificate and in finding the appellant had procured the certificate by deceit;

(2) in relation to the reasonableness test in respect of the appellant's British child. It was submitted that the judge erred in failing to attach appropriate weight to the fact that the appellant's minor child is a British citizen; it was further submitted that the assessment of very significant obstacles test was insufficient;

(3) it was submitted the judge failed, in assessing proportionality, to apply the correct test.

2. In granting permission Judge of the Upper Tribunal Storey found that the judge had given cogent reasons for concluding that the respondent had discharged the burden of proof on her to prove the appellant had used deception in a TOEIC test and additionally that there was nothing in the challenge to the judge's findings that the appellant had not shown that there would be very significant obstacles to his integrating in Bangladesh. However, the sole ground for granting permission was on the basis that the judge had arguably failed to apply the relevant Home Office guidance with respect to parents of British children, see **SF and others [2017] UKUT 120 (IAC)**.

Error of Law Discussion

3. I share the view, of both the First-tier Tribunal permission judge and the judge granting permission in the Upper Tribunal, that the judge's findings in respect of the TOEIC certificate are unimpeachable. The judge directed himself correctly to the appropriate test and assessed the evidence in light of the guidance in the Court of Appeal in **Shehzad and Chowdhury [2016] EWCA Civ 615**.

4. The judge made a comprehensive consideration of all the evidence from [19] onwards and reminded himself that the burden was on the respondent to discharge the evidential burden of proving the appellant was guilty of dishonesty. The judge recounted the appellant's evidence, including in his witness statement, in oral evidence, and his difficulties in the June 2016 interviews, which was considered by the respondent and by the First-tier Tribunal. For all the adequate reasons given, which could not be said to be irrational, the judge concluded, at [31] that the respondent had adduced sufficient evidence to raise the issue of fraud, and that no innocent explanation, which satisfied the minimum level of plausibility had been provided by the appellant.

5. The judge found himself satisfied on the civil standard that the appellant's explanation should be rejected for the comprehensive reasons he had given. Similarly in respect of the remaining grounds, again the judge considered all of the issues and made adequate sustainable findings on

those issues. The appellant's grounds amount to no more than a disagreement with those findings.

6. It was not disputed therefore, before me, that the key remaining issue was in relation to the treatment of the qualifying British child. It was not disputed that the appellant married his spouse in Bangladesh in June 2008 and that she entered the United Kingdom in 2012 and became a British citizen by way of right of abode. On 10 May 2016 their son Master S was born and it was submitted that he is a British citizen.

7. Mr Basith conceded that the Home Office guidance in relation to British children changed in 2018 and considered it curious that this would have been the case when permission was granted, although I accept that at the time of the hearing, the previous guidance would have been in force. Mr Basith submitted that the judge accepted a genuine subsisting relationship with a qualifying child and the question the judge should have asked is why the child should be asked to leave and the effect that it would have on the child.

8. Somewhat surprisingly Mr Basith submitted before me, as had been submitted before the First-tier Tribunal, that the appellant was the primary carer. As I indicated at the hearing, that submission had been comprehensively rejected and had not been challenged in any meaningful way. Indeed, as noted at paragraph [38], despite Mr Basith's initial suggestion that the appellant was the primary carer of the child, it was 'quite properly conceded' before the First-tier Tribunal that this was not the basis on which the appellant's claim was being presented.

9. I was referred to **KO (Nigeria) [2018] UKSC 53**. Mr Basith submitted that had the judge adopted the approach adopted by the Supreme Court he would have found in favour of the appellant. He submitted that the assessment was flawed by a failure to assess reasonableness correctly. He submitted that had adequate findings been made on reasonableness then the judge would have found it unreasonable for the child to follow the appellant. It was further submitted that the rights of the child as a British citizen were not necessarily taken into consideration.

10. Although the judge made a best interests' assessment Mr Basith submitted that there was no specific reference to Section 55 and it was his submission that the judge did not have in mind the welfare considerations.

11. Mr Whitwell submitted that the judge, at [42], made a best interests assessment that the appellant's son was 18 months of age and that his best interests were served in remaining with his parents. However, the judge also considered, in the alternative, that there was nothing unreasonable and that there would be little impact upon the appellant's wife and young son if the appellant's son and his mother remained in the UK.

12. Although the judge had found that it was ultimately not unreasonable to expect the British child to accompany the appellant to Bangladesh the judge made alternative findings that it was not disproportionate to require the appellant to return and for there to be a temporary separation and the judge did not accept the submissions that the appellant's spouse would not be able to cope given her health difficulties and took into consideration her family in the UK. The judge found at [56]:

> "There is no reason to suggest or suspect that she would not be able to call upon them for assistance during any temporary separation. It is unclear as to why the appellant and his spouse have not made enquiries of Social Services to identify any specific need that can be supported by them including but not exclusive to home help, and adaptions."

13. In terms of what was said in **SF and others (Guidance, post–2014 Act) Albania [2017] UKUT 0012,** that case refers to the respondent's 2015 guidance as follows:

> "Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the UK, regardless of the age of that child. This reflects the European Court of Justice Judgment in **Zambrano**.
>
> …
>
> Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.
>
> In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.
>
> It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.
>
> The circumstances envisaged could cover amongst others:
>
> - criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
> - a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.
>
> In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation. If the decision maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the Office of the Children's Champion on the implications for the welfare of the child, in order to inform the decision."

14. Mr Whitwell also directed me to the respondent's current guidance on Family Migration, published in February 2018, including at page 76 where it might be appropriate to refuse when a child had been here for seven years or more and where a child is a British citizen:

> 'Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave the UK because, in practice, the child will not, or is not likely to, continue to live it he UK with another parent or primary carer, EX.1(a) is likely to apply.
>
> In particular circumstances, it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal, where the British citizen child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settle in the UK or who has or is being granted leave to remain. The circumstances envisaged include those win which to grant leave could undermine our immigration controls, for example where the applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out I paragraph 398 of the Immigration Rules or has a very poor immigration history having repeatedly and deliberately breached the Immigration Rules'.

15. It was Mr Whitwell's submission that the Secretary of State was not suggesting that the child would have to leave in this case and he argued there was no material error including taking into account the current guidance.

16. In reply Mr Basith submitted that page 77 of the new guidance clearly says that the appellant has committed a criminal offence (although, as Mr Whitwell points out the guidance is not exhaustive). He submitted that the TOEIC issue was not a significant breach of the immigration rules nor a significant criminal offence and argued that the guidance in force in 2015 did not have the caveat about significant or persistent criminal offending.

Conclusion on Error of Law

17. Although the judge did not directly cite the respondent's guidance as it then was in 2015, as the judge correctly identified, the decision of whether the child should stay with his mother or return with his parents will be a choice for the appellant and his partner to make on behalf of the child as identified by the judge at [53].

18. The British Citizen child was 18 months of age. The judge carried out an appropriate best interests' assessment, including at [55] that there was no suggestion of any physical or mental difficulties and the judge was satisfied, given his age, that his best interests were served in remaining with his parents, (whether that is in Bangladesh or the UK) and that he was of an age where he would be primarily focussed on his mother. Given

the very young age of the child, it is difficult to see what other reasoned conclusion the judge could have come to.

19. The judge also took into account that the appellant's spouse was a British citizen and had a physical disability and was in receipt of benefits and receiving physiotherapy but did not consider these insurmountable obstacles to return. The judge was satisfied that there were no insurmountable obstacles in respect of the temporary separation and did not accept that the appellant's wife did not have the assistance of family and/or Social Services.

20. The respondent's 2015 guidance (the applicable guidance given the First-tier Tribunal decision was promulgated in December 2017) considered that it may be appropriate to refuse leave if the child could otherwise stay with another parent and this is precisely the scenario which the judge considered, including at [56]. The reference in that guidance to the type of circumstances where it might be appropriate to refuse leave if the child could otherwise stay with another parent is not exhaustive, referring specifically to the fact that the 'circumstances envisaged could cover "amongst others".

21. In finding ultimately that the fact that the appellant utilised deception in obtaining his TOEIC certificate was sufficient to require him to leave, the judge made no material error in finding ultimately that the appellant's personal circumstances were insufficient to outweigh the public interest considerations. I do not accept that there was any material error in the judge's reasoned conclusions, that in effect, the appellant's circumstances in practicing deception were sufficient to justify separation from a British citizen child.

22. In taking into account that the appellant's conduct and that he had been dishonest, in considering the reasonableness of removal, the judge was considering the appellant's conduct relevant in so far as it meant that the appellant had to leave the country (see **KO [2018] UKSC 53,** paragraph 51).

23. The judge was cognisant of the fact that the appellant's child was a British citizen, including as cited at [38]. In finding, in the alternative, that it would not be unreasonable to expect the child to return with his parents, the judge expressly makes his finding only in the context where that decision might be made by the appellant's mother and father and considers the circumstances the family would find themselves in and that the family would have a choice of either the appellant returning to Bangladesh on his own and his wife and child remaining in the UK or the family choosing to return together.

24. There was no material error, despite the lack of any specific consideration of the respondent's guidance, as, in effect the judge has applied the Home Office policy in finding the appellant's deception was sufficient to render separation of the family proportionate.

25. The judge at [42] found that there was nothing unreasonable in the respondent's decision to refuse the appellant leave, having found that the appellant had utilised deception and could not meet the suitability requirements under Appendix FM (at [32]) and that there would be little impact upon the appellant's wife and young son who would continue to be supported and directed by his mother in the absence of his father, who ultimately could make an application to join his family if that is what they desired, so long as the Immigration Rules were met. The judge took into consideration the impact of separation on the family and in all the circumstances found it to be proportionate. There is no error in that reasoning.

Notice of Decision

26. The First-tier Tribunal did not materially err and the decision shall stand. The appellant's appeal is dismissed.

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

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 their 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: 20 November 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

As the appeal is dismissed, I make no fee award.

Signed Date: 20 November 2018

Deputy Upper Tribunal Judge Hutchinson