



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00301/2017

THE IMMIGRATION ACTS

Heard at Field House
On 25 April 2019

Decision & Reasons Promulgated
On 07 June 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

HASSAN ALI ZAHID
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Iqbal, counsel instructed by Makka Solicitors Ltd

For the Respondent: Mr D Clarke, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Pakistan, date of birth 14 November 1971, had appealed against a Secretary of State's decision to refuse leave to remain on 8 December 2016. His appeal came before First-tier Tribunal Judge Samimi who allowed the appeal on 15 March 2018. The Secretary of State challenged that decision and on 23 January

2019 I published my decision in which I set aside the Original Tribunal's decision and directed for the matter to be re-made in the Upper Tribunal.

2. At the hearing before me I identified the two issues to be addressed. First, whether or not the Appellant had, as the Respondent had argued, used a proxy test taker to take his ETS TOEIC test. Secondly, whether or not considerations outside of the Rules gave rise to circumstances that indicated Article 8 ECHR was engaged and whether or not, in the circumstances, the Respondent's decision was proportionate, at least in terms of its impact upon the Appellant's wife. The Appellant's wife was a Jamaican national, date of birth 26 June 1991 from Jamaica and her name was [RS].
3. The Appellant's wife is entered into a marriage with the Appellant and essentially argued for her part that she has no wish to go and live in Pakistan and that expecting her to do so would simply be a breach of her human rights and would so adversely impact upon her that it would be utterly disproportionate.
4. At the hearing of the appeal it had been conceded that the Appellant had married his wife on 5 March 2015 and that they had undergone an Islamic marriage at a mosque. The Appellant's wife was not a Muslim, but Christian, and has no experience or knowledge of life in Pakistan as a woman or indeed as a spouse.
5. The Appellant's wife was granted indefinite leave to remain on 23 February 2011 and works as a care worker. She was effectively the sole source of income for her husband and herself. As a care worker she did not and still does not earn £18,600 which would be the required level of maintenance for her and her husband were he to apply to return to the UK from Pakistan and seek a spousal visa.
6. In terms of the taking of the TOEIC test a statement was produced by the Secretary of State and all the generic evidence produced in the ETS cases including the look-up tool, the evidence of Professor French and of the witnesses Collings and Millington, as well as the relevant case law of SM and Qadir [2016] UKUT 00229, Shehzad [2016]

EWCA Civ 615 and MA [2016] UKUT 00450. Those matters have been further supplemented by the case of Qadir and Majumder [2016] EWCA Civ 1167.

7. The explanation that the Appellant had given in connection with the taking of the test in the face of the generic evidence, which asserted he had not, was that essentially he had taken the test. When the matter came to be considered by the Judge [D3-5] the evidence had not been substantively criticised. Thus, the Appellant had given evidence of him having previously taken an IELTS test, categorically rejecting the suggestion of using a proxy test taker and essentially urging that his English language abilities before he took the test were a fair indicator of his actual abilities. He iterated his arguments that he had taken the TOEIC test himself. Although his wife was not present when he undertook the TOEIC test she was essentially supporting his position. The Judge found that the Appellant and his wife had in the course of their evidence been truthful and consistent witnesses. Accordingly the Judge accepted that the Appellant had not used a proxy test taker.
8. More importantly, unchallenged by the Secretary of State, was that the Judge went on to address the evidence of the Appellant and his wife concerning their families, their relationships, living circumstances, and the genuineness and subsistence of their marriage. The Judge stated [D16]:

“... I find that given the Appellant’s wife’s ethnic background as a Jamaican, this is a matter that would attract discrimination against the couple’s interfaith/interethnic marriage. ... I find the Appellant’s wife who is a British citizen of Jamaican ethnicity would be subject to discriminatory treatment on account of the couple’s interfaith marriage. I find that on balance it is likely that she will be subjected to harassment and find it difficult to find a job in an environment where mixed marriages are rare. I find that the social attitudes towards interfaith and mixed race marriage together with cultural and social isolation that the Appellant will inevitably suffer will create insurmountable obstacle (sic) and undue hardship to the Appellant’s wife’s ability to integrate to a family and private life in Pakistan”.

9. The Judge continued [D17]:

“In the alternative, I find that having regard to Article 8 of the ECHR, given the fact that the Appellant’s family and private life has been established in the United Kingdom over the course of the entirety of her life are factors that I attach considerable weight to, and which I find does render the Appellant’s removal disproportionate to the public interest of immigration control. The evidence given by the Appellant and his wife makes it clear that if the Appellant did apply for entry clearance from abroad they would, with the assistance of their friend who has offered third party support ... be able to meet the financial requirements of the Rules”.

The Judge allowed the appeal as well under Article 8 ECHR, albeit the appeal was only being made, and could only be made, under the ECHR and not on the basis of the Immigration Rules.

10. I concluded that the Judge was entitled to come to the view that he did in relation to the taking of the TOEIC test and the use of a proxy test taker. The explanation the Appellant gave of that matter did not get close to showing that there was an innocent explanation or that the evidential burden of proof had shifted back to the Respondent. I concluded that the evidence when looked again simply showed that the explanation tendered really did not get close to being fairly described as an innocent explanation.

11. However, I agreed with the Judge that the position faced by women in Pakistan was of itself recognised as problematic, and returning as a partner in a mixed marriage relationship as well as being a mixed religious partnership, of a lady to Punjab, who has no knowledge of Punjabi, no evident options to find employment in her area of work which is remunerated, nor is there anything to indicate the likelihood of acceptance within the community of women in Pakistan that gives rise to the real concern that the Appellant would not find integration with his wife a practical reality and that she would face isolation and a lack of opportunity as well as the obvious constraints on dress, custom and expected conduct of women in Pakistan.

12. In reaching the findings I was assisted by the Country Information and Guidance on interfaith marriage 2016, family gender violence 2016, Pakistan Christian and Christian converts 2018, two articles in 2016 and 2018 on interfaith relationships and Women in Pakistan.
13. Accordingly, I concluded in the light of the material before me that the evidence showed that the appeal should be allowed on Article 8 ECHR grounds and it was disproportionate in terms of the interference in family life. The Respondent's expectation that the Appellant's wife could have a reasonable life in Pakistan was not made out on the evidence before me or the Judge.

NOTICE OF DECISION

The appeal is allowed on Article 8 ECHR grounds.

ANONYMITY

No anonymity order was sought nor is one required.

FEE AWARD

The appeal has succeeded much in the light of the particular later information provided concerning the Article 8 issues and in the circumstances, I do not find that a fee award is appropriate.

Signed

Date 14 May 2019

Deputy Upper Tribunal Judge Davey