



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14939/2017

THE IMMIGRATION ACTS

Heard at Manchester CJC
On 26 March 2019

Decision & Reasons Promulgated
On 02 April 2019

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD CHAUDHARY

Respondent

Representation:

For the Appellant: Mr Tan, Senior Home Office Presenting Officer

For the Respondent: Mr Brown, Counsel

DECISION AND REASONS

Introduction

1. In a decision sent on 24 January 2019 I concluded that the decision of the First-tier Tribunal ('FTT') allowing Mr Chaudhary's appeal contains an errors of law, such that it was set aside. I now remake the decision.

Background facts

2. Mr Chaudhary is a citizen of Bangladesh who entered the UK as a student on 7 April 2010. The FTT found that in an application to extend his leave as a student dated 16 July 2012, Mr Chaudhary relied upon an English language test certificate from the Educational Testing Service ('ETS'), which he received after exercising deception ('the 2012 certificate'). His leave as a student was extended until 13 January 2014 as a result of that application.
3. Mr Chaudhary's leave as a student was extended on two further occasions but curtailed to expire on 14 May 2016. He made an in-time application to remain as a Tier 2 skilled worker but this was rejected on 6 January 2016. He made a further application (in-time on 13 May 2016) in order to remain outside the Immigration Rules.
4. Mr Chaudhary married Mrs Chaudhary, a British citizen, on 7 May 2016 and on 5 November 2016 varied his application in favour of an application for leave to remain as a spouse. This application was refused and certified in a decision dated 23 March 2017. This was overtaken by a decision dated 2 November 2017 in which the SSHD comprehensively rejected Mr Chaudhary's application to remain as the spouse of a settled person in the UK.
5. After hearing evidence from Mr Chaudhary and his wife at a hearing in late 2017, the FTT accepted that they are in a genuine and subsisting relationship but rejected Mr Chaudhary's claim, maintained during the course of the hearing, that he did not exercise deception in obtaining the 2012 certificate. The FTT concluded that the SSHD met the legal burden of establishing that Mr Chaudhary used deception in obtaining and relying upon the 2012 certificate. These are preserved findings of fact. However, the FTT allowed the appeal on the basis, inter alia, that the couple would face insurmountable obstacles in Bangladesh, particularly in the light of Mrs Chaudhary's then pregnancy.
6. Mrs Chaudhary is employed on a permanent contract on a salary of £19000 pa, since June 2016 and has provided pay slips and an employment letter in support of this. The couple are now considering IVF treatment following Mrs Chaudhary's unfortunate miscarriage in 2018. They do not have any children. They wish to remain in the UK and believe that there are insurmountable obstacles to family life in Bangladesh.

Preliminary issue

7. At the beginning of the hearing Mr Brown made an application for a stay to enable him to make an application to cross-appeal against the FTT's finding of fact that Mr Chaudhary exercised deception, out of time. I refused the application. In my view any application for an extension of time is bound to fail in the light of the serious and significant delay, together with the stage these

proceedings have reached. The SSHD was granted permission to appeal against the FTT's decision as long ago as 13 July 2018. In directions dated 2 August 2018, it was made clear that any response to the grant of permission pursuant to rule 24, should be served within a month. At the error of law hearing on 18 January 2019, Counsel who then appeared before Mr Chaudhary relied upon a skeleton argument. This focussed upon the proposition that the FTT was entitled to find that the 'suitability' requirements in the Immigration Rules did not apply to this case, notwithstanding the FTT's factual finding that Mr Chaudhary failed to provide an innocent explanation for participating in an English test found to be fraudulent. In my error of law decision sent on 24 January 2019, I made it clear that this is a preserved finding of fact.

8. It follows that for the first time at the hearing on 26 March 2019, and without giving any prior notice, Mr Chaudhary has sought to impugn a preserved finding of fact, uninfected by any error of law. This comes over seven months after permission was granted. In addition, there is no explanation for the delay. Mr Chaudhary has been legally represented throughout. There are no compelling reasons for the matter to be raised so late in the proceedings, and after the issues in dispute were the subject of submissions and delineated at the error of law hearing.

Issues in dispute

9. Given my refusal of his application for a stay, Mr Brown accepted that the hearing had to be approached on the basis that there was a preserved finding of fact that Mr Chaudhary had exercised deception.
10. After further preliminary discussions, both representatives agreed that the factual matrix was mostly agreed but Mr and Mrs Chaudhary should both be called as witnesses to clarify the nature and extent of the claimed insurmountable obstacles to family life in Bangladesh. I indicated that I was particularly interested in further evidence relevant to the claim that Mrs Chaudhary would have language difficulties in Bangladesh and would not be able to obtain employment. I permitted Mr Brown to submit a handwritten statement for Mrs Chaudhary to supplement a previous statement before the FTT.
11. Given the factual matrix set out above and the concerns articulated by the SSHD in the decision subject to this appeal, the representatives agreed that the following legal issues are in dispute and must be determined by me.
 - (1) Mr Chaudhary is unable to meet the specified financial requirements of the Immigration Rules and as such I must assess whether he can meet the insurmountable obstacles test set out in EX.1. pursuant to section EX of Appendix FM to the Immigration Rules. Even if he can meet the insurmountable obstacles test, he must still meet the suitability requirements in order to succeed under the Immigration Rules.

- (2) The parties agreed that if Mr Chaudhary is able to meet both requirements, his appeal should be allowed under Article 8 of the ECHR. If he is unable to meet at least one requirement I must go on to make a decision entirely outside the Immigration Rules. Mr Brown pragmatically did not make a discrete submission under Article 8, as he accepted that if the insurmountable obstacles test could not be met within the Immigration Rules, Article 8 would be of no additional benefit to Mr Chaudhary, given the particular factual matrix.

Evidence

12. Mr and Mrs Chaudhary confirmed their witness statements and were cross-examined. After hearing their evidence I stood the matter down to enable the parties to submit country background evidence relevant to Mrs Chaudhary's claim that she would not be able to obtain employment in Bangladesh because of language barriers.

Submissions

13. Mr Tan invited me to find that Mr Chaudhary's use of deception and his maintenance of the lie for many years was such that he does not meet the suitability requirements. He also submitted that when all the circumstances are considered in the round there are no insurmountable obstacles preventing family life between the couple being exercised in Bangladesh. He took me to country background evidence in support of his submission that Mrs Chaudhary would be able to use her limited Bengali skills together with her English to obtain employment in Bangladesh.
14. Mr Brown reminded me that the use of deception in this case is based solely upon a "cheating incident" in 2012. He submitted that this may be reprehensible but it did not meet the criminal threshold. He urged me to find that Mr Chaudhary was in a difficult position as he could not admit the deception because he maintained his innocence, yet there was a finding of fact by the FTT that he was stuck with. Mr Brown argued that I should be very cautious about finding that because of the cheating incident, Mr Chaudhary's presence in the UK would not be conducive to the public good, otherwise all ETS cases would fail for reasons relating to 'suitability'.
15. Mr Brown invited me to find that Mrs Chaudhary's inability to read and write in Bengali would place her at a substantial disadvantage in the Bangladeshi labour market and constitutes an insurmountable obstacle when assessed cumulatively alongside her health concerns and absence of any family in Bangladesh.
16. After hearing from both representatives, I reserved my decision, which I now give with reasons.

Discussion

General approach to the Immigration Rules

17. I begin with consideration of Mr Chaudhary's family life application within the Rules. It was not contended on Mr Chaudhary's behalf that he should be permitted to remain in the UK on the basis of his private life (within or outside the Immigration Rules).
18. The representatives agreed that Mr Chaudhary is unable to meet the financial eligibility requirements of the Immigration Rules, because the SSHD was not provided with the requisite specified evidence with the application. Mr Tan did not however dispute Mrs Chaudhary's claim that she has worked full-time as an analyst at the Bank of New York Mellon since June 2016 and now earns £19,000 pa (in excess of the minimum threshold). As the eligibility requirements cannot be met, I turn to R-LTRP.1.1(d). Given the facts that are agreed, the representatives accepted that Mr Chaudhary can only benefit from the exception at EX.1 if the following matters are established: (i) he does not fall for refusal under the suitability requirements and (ii) there are insurmountable obstacles to family life with Mrs Chaudhary continuing in Bangladesh – see Sabir (Appendix FM – EX.1 not free-standing) [2014] UKUT 00063 (IAC).

Suitability

19. I turn firstly to the suitability requirements. The FTT has already found that the appellant has not established an innocent explanation, and this is a preserved finding – see [23] of my error of law decision. The respondent has relied upon S-LTR.1.6, which states as follows:
- “**S-LTR.1.6.** 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-LR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.”
20. The appellant has been found to have exercised deception. I appreciate that he was not the organiser of the fraud, that this was a widespread fraud and that many others took advantage of the fraudulent enterprise. In my view the deception is nonetheless serious as it was perpetrated with a view to circumventing the requirements of the Rules and therefore undermining the system of immigration control. The FTT considered it to be beyond any doubt that such conduct is of a type relevant for the purposes of S-LTR.1.6. at [27] of its decision. I agree with the FTT's decision at [29] that I must make my own assessment of the gravity of the conduct and the extent to which it damages the appellant's character. I acknowledge that the “cheating incident”, as Mr Brown put it, took place nearly seven years ago. The 2012 certificate was used in support of only one application for leave. It is difficult to understand why the appellant took part in this fraud when he had sufficient command of English to be awarded

a degree from the University of Sunderland in October 2014. This and a host of other factors were considered by the FTT at [20] and [23] of its decision, but were considered insufficient to support an innocent explanation. As I have explained above, this is an unappealed factual finding that has been preserved.

21. I also acknowledge, as the FTT observed at [30] and [31] of its decision, that Mr Chaudhary's conduct involves no criminal behaviour and cannot be said to be as serious as that set out in the SSHD's guidance. However, Mr Chaudhary's deceptive conduct is not limited to the "cheating incident". He relied upon the fraudulently obtained certificate in an application for leave but more significantly, has maintained the lie about the 2012 certificate before the FTT and before me. He maintains his innocence but this does not mitigate his use of deception and continuing denial of that deception over many years. His maintenance of his innocence is inconsistent with his failure to seek to cross-appeal the FTT finding that he did not provide an innocent explanation. The appellant has been represented by experienced solicitors and Counsel throughout these proceedings. He is tertiary educated. If, as Mr Brown (who did not appear on behalf of Mr Chaudhary in previous proceedings) submitted, it was an oversight not to cross-appeal, I have been provided with no clear explanation for the failure to do so at each of the many opportunities available to Mr Chaudhary. This means that Mr Chaudhary continues to maintain a lie, notwithstanding the FTT's finding and his failure to cross-appeal that finding. When that is considered in the round with the use of deception in 2012, I am satisfied that the appellant's conduct and character make it undesirable for him to remain in the UK and his presence is not conducive to the public good.
22. Since the appellant is unable to meet the suitability requirements, it follows that he is unable to benefit from paragraph EX.1. of Appendix FM. I nonetheless go on to address the insurmountable obstacles test on the basis that I am wrong about the suitability requirements.

EX.1 - Insurmountable obstacles

23. In SSHD v R (Kaur) [2018] EWCA Civ 1423, [2018] Imm AR 5 (24 May 2018), the Court of Appeal emphasised how high the bar of insurmountable obstacles was for the purposes of paragraph EX.1.(b) of Appendix FM to the Immigration Rules and the distinction between evidence of the same (particularly as to the situation in the proposed country to which the parties would return, rather than the situation in the UK) and mere assertion. I have considered the evidence adduced cumulatively but do not accept there would be very serious difficulties which either could not be overcome or would entail very serious hardship.
24. I accept that Mrs Chaudhary will face difficulties in obtaining employment. These cannot be properly described as very serious. I acknowledge that the FTT regarded her to be a truthful witness. She was a largely truthful witness before me but unfortunately exaggerated her likely linguistic difficulties in Bangladesh.

She explained that she could speak (but could not read or write) Bangla, which she described as the language of the villages in Bangladesh. She also explained that she could not speak Dahkia, the language used in more formal employment settings in Bangladesh. I asked her to spell both languages to ensure that there was no misunderstanding. Mr Brown accepted that there is no evidentiary foundation in the country background evidence for the assertion that Bangla is spoken in the villages and not in more formal settings, wherein Dahkia is spoken. Mr Brown speculated that Mrs Chaudhary might have meant Sylheti not Dahkia. I do not accept this. The information provided to me establishes that Sylheti is a language spoken in Habiganj District and other regions of Bangladesh (by about 10 million people). It is not a language that is said to be used in more formal settings. Bengali (also known as Bangla), is the primary language spoken (nearly 230 million people) and serves as the *lingua franca* of Bangladesh. It is not limited to rural Bangladesh, as maintained by Mrs Chaudhary. English has no official status but is prevalent across government, law, business and education and regarded as the de facto co-official language of Bangladesh. The information provided to me by Mr Tan makes it clear that English is important and prevalent in the Bangladesh employment sector.

25. Although Mrs Chaudhary may initially find life and gaining employment difficult in Bangladesh, I am satisfied that she has the necessary skills and experience to settle into Bangladesh. She was born in Bangladesh as were both her parents, albeit she came to the UK as a very young child. She has returned to Bangladesh in 2008 when her grandfather died and stayed for four months. She may no longer have any family members living in Bangladesh, but she has an awareness and understanding of Bangladeshi culture and identity. Mrs Chaudhary has experience of working in the banking industry in the UK. Her first language is English. These are likely to serve her well when seeking employment in Bangladesh. I appreciate that Mrs Chaudhary is unable to read and write in Bengali. I am confident that these are skills that she can acquire quickly given her ability to speak the language. She is unlikely to need to read and write in Bengali to any great extent in the banking sector and her proficiency in English is likely to compensate for this.
26. In any event, I am satisfied that Mr and Mrs Chaudhary will be able to support each other through any difficulties they may encounter. There is no reason why Mr Chaudhary cannot work whilst Mrs Chaudhary improves her Bengali skills. He is a University graduate with employment experience in the UK, and able to speak English. He is very familiar with the Bangladeshi way of life, having lived there for most of his life.
27. I appreciate that Mrs Chaudhary shall be leaving her entire family in the UK. I have considered her brother's statement and I accept she is close to her parents and brothers. It will be difficult to live away from them, but they can visit each other and maintain contact online. This will be difficult but Mrs Chaudhary would be able to cope with the love and support of her husband. Mr Chaudhary's

immediate family no longer reside in Bangladesh. Many couples are able to cope without family members living in the same country as them. It may be difficult at first, but they will be able to settle and make friends with time.

28. I also accept that Mrs Chaudhary has had to cope with a miscarriage in 2018 and the difficult news that she may not be able to conceive a child naturally, for health reasons. She clarified in her oral evidence that they were considering IVF but had not made any firm plans. This is because she has been advised that she must lose weight before she can begin treatment. She does not believe this will be possible because of other health concerns. Mr Brown submitted that without employment in Bangladesh, the couple would not be able to access IVF. I do not accept that the couple will be unable to gain decent employment for the reasons I have set out above. Mr Tan has provided evidence that IVF is available in Bangladesh. Mr Brown did not rely on any evidence to call this into question. I am satisfied that should they wish to commence IVF treatment in Bangladesh, take course is open to them. The claim that IVF would be unaffordable in Bangladesh is not supported by any evidence. I also reject Mr Chaudhary's claim that in the UK Mrs Chaudhary's employer would contribute to the cost of IVF treatment. There was no support for this assertion from Mrs Chaudhary or the documentary evidence, and Mr Brown did not rely on this during submissions. In any event, the employer's contribution to IVF in the UK, when this is a course Mrs Chaudhary has not yet committed to does not either by itself or when considered in the round change my conclusion regarding the absence of insurmountable obstacles.
29. When all the evidence is viewed together, it is insufficient to meet the high threshold required by the insurmountable obstacles test.

Article 8 and section 117B considerations

30. Mr Brown did not make any discrete submissions under Article 8 more generally but I address it for the sake of completeness.
31. In TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109, [2018] Imm AR 1301 (17 May 2018) the Court of Appeal gave further consideration to the principles set out in R (Agyarko) v SSHD [2017] UKSC 11 concerning the application of Article 8 in situations where non-settled migrants sought leave to remain outside the Immigration Rules, relying on relationships established with British citizens when their immigration status was precarious. Proportionality is the "public interest question" within the meaning of Part 5A of the Nationality and Immigration Act 2002. By section 117A(2) I am obliged to have regard to the considerations listed in section 117B, and do so below.
32. The public interest in the maintenance of effective immigration controls is directly engaged in this case. There is a strong public interest in removing Mr Chaudhary, irrespective of my assessment of the suitability requirements. Mr

Chaudhary has always been in the UK on a temporary and precarious basis. He was in the UK in a temporary capacity when commenced a relationship with Mrs Chaudhary. They married on 7 May 2016 in the full knowledge that his leave was curtailed to expire on 14 May 2016. He has also employed deception in the past and maintained a lie about this. He is unable to meet the requirements of the Immigration Rules. The evaluation of the insurmountable obstacles test I have undertaken above, informs the evaluation outside the Immigration Rules because that formulated the strength of the public interest in immigration control – see TK (Pakistan) (supra) at [32-34].

33. On the other hand, Mrs Chaudhary has lived in the UK for the vast majority of her life and has extensive family and employment links to the UK. There is no infringement of the "English speaking" public interest. The economic interest is not engaged, given the income of the family unit. I attach limited weight to Mr Chaudhary's private life given his precarious status throughout and the absence of any particularly compelling circumstances – see Rhuppiah v SSHD [2018] UKSC 58 (14 November 2018). Mrs Chaudhary has suffered a miscarriage in 2018 but the option of IVF available to her in the UK is likely to be available in Bangladesh, and she will be able to cope even without the support of her own family, with the love and support of her husband. The strength of the public policy in immigration control is not outweighed by the Article 8 matters which militate in favour of the couple.

Decision

34. I dismiss the appeal on Article 8 of the ECHR grounds.

Signed: *UTJ Plimmer*

Upper Tribunal Judge Plimmer

Dated:

28 March 2019