Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/23623/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 October 2019	**On 11 October 2019**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

AHSAN [D]
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Haywood, of Counsel, instructed by Sky Solicitors Ltd.
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before me following the grant of permission to appeal by both First-tier Tribunal Judge Boyes (on limited grounds) and Upper Tribunal Judge Kebede (on the remaining ground) on 22 August and 17 September 2019 respectively, against the determination of First-tier Tribunal Judge Devittie, promulgated on 14 June 2019 following a hearing at Taylor House on 26 April 2019.

2. The appellant is a Pakistani national born on 6 September 1983. He entered the UK as a student on 31 October 2006 and subsequently

obtained leave as a Tier 1 as a post study migrant until 9 September 2010. Thereafter, all attempts to obtain further leave failed and on 29 July 2015 he was served with enforcement papers. On 26 August 2015, he made a family/private life application which was refused, and his appeal rights were exhausted on 7 November 2016. On 8 February 2017, he then made a further human rights application based on his relationship with a Pakistani woman he claimed to have known since childhood, whom he re-met in January 2013 and with whom he entered into an Islamic marriage in September 2013. The marriage was registered in Pakistan by the appellant's wife in August 2015. On 8 February 2017 the appellant and his partner married at Redbridge Register Office. The appellant's partner has two children from a previous relationship (it is unclear if she was previously married) and has limited leave to remain until 27 April 2021 as the primary carer of those children. Both children were born in the UK (in December 2010 and May 2012) and are British nationals. The appellant was previously married, but that marriage ended in 2009.

3. The application was refused under S-LTR 1.6 on the basis that the appellant had not met the suitability grounds because of his undesirable conduct. It is maintained by the respondent that the appellant obtained a TOEIC certificate from ETS by using a proxy test taker. The application was also refused on eligibility grounds because of his partner's immigration status, because he was not a parent as defined by paragraph 6 of Appendix FM and because he had been in the UK without leave for six years. Further, he had not lived here for 20 years or more, had not shown there would be very significant obstacles to re-integration into Pakistan, and the decision did not result in unjustifiably harsh consequences for him, his partner or any children. A s.55 assessment was also carried out.

4. The appeal was heard by Judge Devittie. He noted that the appellant had claimed to have been a victim of identity fraud, that he had never taken the test and, indeed, had not known about it and, as far as he had been concerned, his passports (current and expired) had been with the Secretary of State when the test had been taken in July 2012. The judge rejected that explanation. He also considered the argument that the claim of deception was not made out on the basis that the appellant had never used the certificate in support of any application, but he found that it was not for him to speculate on why it had not been used. He considered the claim of family life but found that the biological father of the children was in the UK and that the appellant did not have a genuine parental relationship with his partner's children. He found that the appellant's removal would not require the children to leave the UK and that interference with family life was proportionate. Accordingly, the appeal was dismissed.

The Hearing

5. Mr Haywood relied on and expanded the grounds in his submissions at the hearing on 3 October 2019.

6. Three grounds are put forward. First, it is argued that the judge failed to engage with the respondent's policy guidance with reference to S-LTR 1.6. It is argued that the policy guidance stated that an individual had to actually deceive or be dishonest with a government department for the allegation of deception to be made out. In this case, the appellant had not used the certificate to support any application. It had only come to light when the Secretary of State received a number of cancelled test results from ETS. The grounds argue that the judge did not explain why the submissions on the policy had been rejected.

7. The second ground is much wider and, in fact, covers several complaints. It is argued that the judge failed to consider arguments and evidence. The first part of this assertion focuses on the issue of whether the appellant had his passports at the date the test was taken (July 2012). It is maintained that the respondent's evidence on whether the passports were returned to the appellant was wholly unclear. The CID notes refer to the return of two passports, the decision letter refers to one and there is a contradiction over whether they were sent to the appellant or to his representative or, indeed, sent out at all. It is also argued that, contrary to the directions issued by the judge, there was no witness statement from the respondent and no proof of posting of the passport(s). It is argued that the judge failed to properly grapple with these inconsistencies and difficulties in the evidence.

8. As part of this point, it is also argued that it was unusual for the respondent to return passports to an appellant after refusal where he would become liable for removal (s. 17 of the Asylum and Immigration (Treatment of Claimants) Act 2004) and that the passports would, in any event, have been needed for the reconsideration of the application, which was then refused again in December 2013. It is also argued that the respondent was wrong to have stated that the passports were issued in Pakistan when they were issued in London and that there was evidence to show that the respondent was known to lose important documents including passports.

9. It is argued that S-LTR 1.6 is a discretionary ground of refusal and there was no indication in the decision letter that discretion had been applied as part of the decision-making process. There were several issues that should have been taken into account such as the appellant's period of residence in the UK, his family life, the best interests of his step children, the passage of time since the alleged deception and his ability to speak English. It is argued that the judge did not take this argument into account and that he relied on matters on which there had been no oral examination. It is maintained that the judge had been factually wrong to say that there had been an appeal against the October 2010 refusal when the only appeal had been in respect of the 2015 decision.

10. Thirdly, it is argued that the judge was procedurally unfair as he went behind a concession given by the Presenting Officer at the hearing as

to there being a genuine parental relationship between the appellant and his step children. It is argued that the judge made erroneous findings about the children's relationship with their biological father as there had been no evidence taken on that and indeed the evidence all pointed to the fact that the appellant was responsible for their daily care.

11. For the respondent, Mr Melvin relied upon the Rule 24 response. He submitted that the first argument was without merit as the policy referred to by the appellant related to the general grounds of refusal under paragraph 322 and not to Appendix FM. The refusal on suitability grounds was a mandatory refusal and not discretionary so it was difficult to see what relevance the submissions made about the policy had to do with this appeal. He also made the point that the decision was not just based on suitability grounds but was made on parent and partner eligibility as well as on private and family life grounds. As the partner only had limited leave, the appellant could not meet the requirements of the rules.

12. Mr Melvin stated that there was no note on the Home Office file as to any concession made on parental relationship. He referred to the decision in Ortega [2018] UKUT 00298 (IAC) which held that: "*It is unlikely that a person will be able to establish that they have taken on the role of a parent when the biological parents continue to be involved in the child's life as the child's parents*" (Headnote 3).

13. With regard to the complaint over the failure of the respondent to comply fully with the Tribunal' s direction, Mr Melvin submitted that after so many years it was not possible for the respondent to prepare a witness statement on events from 2010. The respondent had done the best possible and had adduced all the records she had that were pertinent to the matter at hand.

14. In response, Mr Haywood relied on Balajigari [2019] EWCA Civ 673 which emphasised the need to have regard to several factors when assessing the issue of discretion and set out the correct approach to be followed. He submitted that the burden was on the respondent to demonstrate that the appellant's passports had been returned to him and that he had them at the time the test was taken. On Ortega, he submitted that there was a need for "*all the circumstances*" to be taken into account when deciding the issue of a parental relationship and this had not been done. The decision should be set aside and the matter remitted to the First-tier Tribunal for a fresh decision to be made.

15. That completed submissions. At the conclusion of the hearing, I indicated that I would be setting aside the decision of the First-tier Tribunal. I now give my reasons for so doing.

Discussion and Conclusions

16. Having considered all the evidence and the submissions made, I find that there are the following difficulties with the judge's determination.

17. Although I take Mr Melvin's point that the policy guidance referred to by the appellant related to grounds of refusal under paragraph 322 and not section S-LTR, the policy was referred to at the hearing, the principle to be applied is arguably the same and it was for the judge to engage with the submission and reach a reasoned conclusion, even if it was that the policy did not apply and the submission was without merit. He failed to do so.

18. The next submission related to the matter of the language test and whether the appellant had his passports in July 2012 when the test was taken. The judge was asked to find that due to the lack of clarity in the respondent's evidence, it had not been demonstrated that the appellant had received both passports in 2010 or that he had them in 2012 when the test was taken. The judge does, it is fair to say, make a valid point about what the benefit would be to a third party to arrange a proxy test using the appellant's identity, pay the course fee and follow the course of studies (at 14(3)(a)). He also properly observes (at 14(3)(b)) that the absence of one or more passports from the envelope containing the decision letter would surely have been queried by the appellant who did indeed receive the letter itself (the appellant confirmed before me that he had received the letter but astonishingly done nothing about the missing passport(s)). He also correctly rejected the appellant's argument that he had no need to obtain a TOEIC certificate, noting that the October 2010 decision had been solely based on the lack of evidence to show a proficiency in the English language (at paragraph 14(1) and 14(3)(c)). However, the judge does not adequately deal with the submissions made as to the apparent contradiction in the respondent's evidence about how many passports were returned and to whom they were sent. Further, he makes the finding that the appellant had practised deception as alleged by the respondent (by using a proxy test taker, at paragraph 13) but confusingly also finds that the appellant *had* sat the test himself (at paragraph 15(a)). These issues, therefore, require fresh consideration and decision making.

19. I accept Mr Melvin's submission that the respondent cannot be criticised for not fully complying with the issued directions. Given the many years that have passed since the time the passports were allegedly returned, I accept that it would not be possible for the respondent to provide proof of posting and a witness statement. I do not see that anything would be achieved by re-issuing directions to the respondent to produce any more than she has done, and I do not propose to make any.

20. I find there is nothing helpful in the appellant's submission about section 17 as, at its highest, that section only gives the respondent the option of retaining passports by referring to "*may*" and not "*shall*". It, therefore, takes matters no further for the appellant. It is also relevant, in my view, that the appellant was not immediately liable to removal, having been given an in country right of appeal (as the decision letter of October 2010 confirms).

21. It is also argued that the Secretary of State would have required the appellant's passport in order to reconsider her refusal of October 2010. I have not been provided with any evidence as to the nature of the request for consideration of that decision (made on 23 February 2012, according to the respondent) or whether the matter of a passport was referred to within that request. Nor was I referred to anything in support of the contention that a passport would have been required at that stage. Indeed, if anything, this argument goes against the appellant as if it is the case that a passport had to be adduced, then the appellant would have produced one at that time (or else his application would not have been entertained) which rather defeats his argument that one or both passports had not been returned to him in 2010 or at any subsequent date.

22. The place of issue of the passports has no bearing on any material issue. The Secretary of State is criticised for maintaining that the passports were issued in Pakistan when in fact it is said they were issued in London but the relevant pages of the A7634523 passport shows the issuing authority to be "*Pakistan*" (at p.4 of the respondent's supplementary bundle) and the KC860931 passport is "*given at Gujranwala*" (at p.10). I accept that the endorsement on the earlier KC passport shows that passport AH7996761 was issued at the Pakistan High Commission in London (at p.10) but without a copy of that passport it is not possible to see who the issuing authority is said to be. A copy of passport AH7996762 appears at p. 61 of the respondent's appeals bundle. It is unclear whether this is the passport incorrectly referred to at p.10 above or another document. Indeed, AH7996761 and not AH7996762 is the passport given on the ETS Look Up Tool. However, this confirms the issuing authority to be Pakistan. In his application form, the appellant confusingly, gives the country of issue of his passport AH7996762 as Pakistan, London (at p. 47 RB). Passports are, of course, often returned to the country of origin for issue/renewal by diplomatic departments even if the application is made in the UK. For the respondent to record that the passports were issued in Pakistan shows no error, in my view. The confusion over the two similar passport numbers is, however, a matter that does not appear to have been addressed by either party and may be relevant. AH7996761 appears to be the passport allegedly returned by the respondent to the appellant (at 14(3)).

23. Nor was I referred to anything to support the claim that there is a "*policy document and objective evidence which indicates that the respondent is known to lose important documents*". I find that in the absence of such evidence, this point does not assist the appellant either.

24. Likewise, the contention that two passports would not have been required by ETS for the language test is not supported by any authority or evidence. It is not for me to speculate but possibly the expired passport was adduced to show that previous leave to

enter/remain had been granted. I do not consider that this argument assists the appellant in any way.

25. There is also no merit in the criticism of the judge's reference to an appeal following the October 2010 decision. It is maintained the judge was factually incorrect to have said there had been an appeal but the evidence supports his statement. The decision letter of October 2010 makes it clear that an in country right of appeal was given to the appellant (at p. 30 of the respondent's supplementary bundle). The decision letter notes that an appeal was lodged on 8 November 2010, that it was dismissed, and that the appellant eventually withdrew his application for permission to appeal in November 2011 (at p.104). This is confirmed in the immigration history set out in the respondent's appeals bundle and indeed in the grounds of appeal prepared by the appellant's own representatives on 20 November 2018 (at 6). The appellant's own evidence in his witness statement (at paragraph 9) was that his appeal against the October 2010 decision had been dismissed (also at paragraph 5(1) of the determination) and he gave oral evidence to Judge Devittie that he had appealed but had later withdrawn his appeal (at paragraph 14(2)). Plainly, given the evidence above, he was in the latter instance referring to the withdrawal of the application for permission to appeal. It would, therefore, appear that Counsel was mistaken on this point and not the judge.

26. The judge was also criticised for procedural unfairness. It is alleged that he went behind the concession made at the hearing by the Presenting Officer that there was a genuine parental relationship between the appellant and his partner's children. I indicated to the parties at the hearing, that the 'concession' described in the grounds as an acceptance by the PO "*that the relationship between the appellant and his partner was not in dispute and the relationship between the appellant and his two minor step-children was not in dispute*" did not necessarily mean that the appellant had proved that he had a genuine parental relationship with his partner's children to the extent that the requirements of s.117B(6)(a) had been met. However, having considered the matter further and having had the time to read through all the evidence and, most importantly, the decision letter, I am inclined to agree with Counsel's contemporaneous notes and the submissions made by Mr Haywood and in the grounds that this concession was consistent with the decision letter where the appellant's claim to be "*the step father of two British children living in the UK...has been carefully considered*".

27. Although Mr Melvin stated that he had no record on the Home Office file of the PO's concession, Counsel's Record of Proceedings show that the PO's acceptance of the relationships and the absence of any cross-examination on this matter was in line with the approach that the requirements of s.117B(6)(a) had been met, and the fact that the appellant's partner had not been required to leave the hearing during the appellant's evidence further confirmed that the genuineness of

the relationships were not an issue. I am reinforced in this view by the absence of any reference in the decision letter to there being an issue over whether there was a genuine parental relationship. Certainly, there was no suggestion by the respondent that because the children had a biological father in the UK, and because the appellant did not meet the definition of a parent under paragraph 6 of Appendix FM, that there was no such relationship between the appellant and the children. I also note that the only basis on which this limb of the application had been refused (under the exceptional circumstances sub-heading) was that it had not been established that the children would have to leave the UK. I can see no consideration of whether it would be reasonable to expect them to leave the UK (s. 117B(6)(b)).

28. In these circumstances, I agree with Mr Haywood and the author of the grounds that the judge erred in raising the issue of a genuine parental relationship without alerting the parties to the fact that he intended to do so and without giving them the opportunity to call evidence and/or make submissions on the matter. I also find that the judge erred in the findings he did make about the children and their biological father. No evidence on this point was called and there was little, if any, positive documentary evidence about that relationship. As such the findings he did make are unsustainable as they are not based on any evidence.

29. Finally, on the issue of whether the respondent considered applying her discretion when refusing the application, I note that although there was consideration of whether the appellant should be entitled to leave outside the rules (at paragraph 61 of the decision letter), all the factors raised on his behalf were not considered and the judge did not engage with this issue adequately or at all.

30. For all these reasons, therefore, I conclude that the judge's determination contains material errors of law such that the decision cannot be saved. It is set aside in its entirety except as a record of proceedings and summary of the paper evidence.

31. I preserve the representative's concession that the appellant has met the terms of s. 117B(6)(a).

32. The appeal is remitted to the First-tier Tribunal for fresh findings on all other matters. The observations I have made earlier in this determination may assist the First-tier Tribunal in its future assessment and decision making.

Decision

33. The decision of the First-tier Tribunal is set aside. The matter is remitted for a fresh hearing to the First-tier Tribunal at Taylor House or Hatton Cross at a date to be arranged.

Anonymity

34. No request for an anonymity order was made.

Signed

Upper Tribunal Judge

Date: 7 October 2019