



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA333312015

THE IMMIGRATION ACTS

**Heard at Field House
On 9 June 2017**

**Decision & Reasons
Promulgated
On 31 July 2017**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

**MR BALWINDER SINGH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Chakmakjian, Counsel, instructed by Lawise Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. The applicant in this case is a national of India who was born on 15 July 1990. He arrived in this country in July 2010 with leave as a student until 10 February 2012. In March 2012 he applied for further leave to remain in the course of which he submitted an English language certificate which had been issued by ETS as evidence that he had the required level of

English proficiency. His application was refused on 17 July 2012 without a right of appeal following which the appellant remained without leave.

2. Subsequently on 13 February 2015 the appellant made a new application for leave to remain on the basis of his family and private life in this country. By this time he had a partner (the couple had been religiously but not civilly married) and had one child who had been born in 2013. They subsequently had another child born in 2016.
3. The application was refused by the Respondent, who also found after very careful consideration that the English language certificate had been produced by fraud because the appellant had used a proxy to take the exam on his behalf. It is not necessary for the purposes of this decision for the reasons which appear below to go into the merits of this aspect of the decision.
4. The appellant appealed against this decision. His appeal was heard before First-tier Tribunal Judge A J Parker sitting at Bennett House, Stoke-on-Trent on 7 November 2016 and in a Decision and Reasons promulgated on 23 November 2016 Judge Parker dismissed the appeal.
5. Essentially he found that the appellant had indeed exercised deception in obtaining the English language certificate and as a result there was a large public interest in removing him from the country. The findings with regard to the test certificate are essentially contained at paragraph 33 in which the reasons are given. In this paragraph, the judge found as follows:

“He says the test was taken over two days. The appellant, for the reasons explained, has manifestly failed to raise an innocent explanation of any element of the prima facie case of deception established against him. It follows that there is no further transfer of proof to the Secretary of State. We have no further evidence on this point and I therefore have to find that I uphold the refusal on suitability grounds.”

6. I should mention at this stage that in evidence submitted by the respondent there is a printout from the ETS SELT source data which shows that the test relied on had in fact only been taken on one day, which was 21 March 2012, and not two days, as the appellant had given evidence it had.
7. The appellant now appeals with limited leave against this decision. Although the appellant has sought to challenge the finding that deception was used in obtaining the English language certificate he was refused permission to argue this, in my opinion rightly so because it is clear that it was open to the judge on the evidence before him and especially the discrepancy between the appellant’s evidence and the material which is in the file to reach this finding. I note also that the judge did make a finding that the relationship with Ms Kaur, his partner/wife, was a genuine one and the couple have two children as claimed.

8. Ms Kaur has indefinite leave to remain in this country and accordingly her children, who were born in this country at a time when she was a settled migrant, are British citizens. A decision which will have the effect of requiring the appellant to return to his country of nationality would have the effect that either his “wife” and children would have to leave with him or, if they do not, the family would be separated. It may be that the respondent would be able to argue that in the circumstances of this case separation would be proportionate because of the large public interest in preventing people who use deception from behaving in this way but before a decision can be taken as to whether or not such a separation would be lawful/proportionate it is necessary to consider properly the best interests of the children. It is argued in the grounds that it is plain from the decision that the judge failed properly to consider the best interests of the children.
9. Acting on behalf of the respondent, when considering this objection, Mr Wilding said as follows:

“When the position of one family member is considered, there are two possible outcomes; either the entire family go to India or is it proportionate to separate the family? The appellant has to establish both that it would not be proportionate to require the entire family to go to India and that it would not be proportionate to separate them either.

The difficulty I have with this determination is, on reflection, that I cannot point to any findings to show that the failure to consider the best interests of the children and the knock-on effects, is not material. The judge has effectively made a finding of deception and held this against the appellant, without considering anything else, and in particular the effect on the children.

While we can argue that separation is proportionate, that has not been considered in the decision. There is also a slight tension as to how Section 117B(6) applies – we would say that there is no expectation that a child would be expected to go to India, but within the Immigration Rules the respondent would not argue that a British citizen child should leave the UK. The Act presupposes that it is not offensive for a British citizen child to leave.

So, on reflection, over the midday adjournment, I would say that this decision is not sustainable.”

10. I agree. The judge was required to consider carefully whether or not in light of the disruption to the family, and in particular to the two British children, which would be occasioned by the decision which would necessitate the appellant leaving the UK, such upheaval was proportionate in terms of the public interest of making him leave. In order to give proper consideration to this, the judge needed to consider the best interests of the two children, which plainly he has not done.

11. Accordingly, the decision must be remade, and in the circumstances, on application on behalf of the appellant that this is a course that he would invite the Tribunal to follow, I consider that it is appropriate to remit this appeal back to the First-tier Tribunal, sitting at Taylor House, (because the family now live in Ilford), for consideration by any First-tier Tribunal Judge other than First-tier Tribunal Judge A J Parker.
12. As in my judgment the findings of fact both with regard to deception having been used in obtaining the English language certificate and also that there is a genuine family relationship between the appellant, Ms Kaur and their children is wholly sustainable, I will also direct that these findings be retained for the purposes of the rehearing. I accordingly make the following decision:

Decision

The decision of First-tier Tribunal Judge A J Parker is set aside as containing an error of law. The appeal will be remitted to the First-tier Tribunal sitting at Taylor House, to be reheard by any First-tier Tribunal Judge other than Judge A J Parker.

For the purposes of this appeal, the finding at paragraph 33 of Judge Parker's decision, from the third sentence onwards is retained, and may not be reopened. The effect is that for the purposes of this appeal, the appellant must be taken to have used deception in order to obtain his TOEIC certificate.

The finding that the family relationship between the appellant, Ms Kaur and their children is a genuine and subsisting one, is also preserved.

No anonymity direction is made.

Signed:

A handwritten signature in black ink that reads "Ken Craig". The signature is written in a cursive style with a long, vertical tail on the letter 'g'.

Upper Tribunal Judge Craig

Date: 25 July 2017