



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19350/2016

THE IMMIGRATION ACTS

Heard at Field House
On 3rd July 2018

Decision & Reasons Promulgated
On 5th July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

A A
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Vokes, Counsel instructed by M & K Solicitors
For the Respondent: Mr Kotas Senior Home Officer Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge S Aziz promulgated on the 18th January 2018 whereby the judge allowed the appellant's appeal against the decision of the respondent. The decision of the respondent was to refuse the appellant's application for leave to remain in the United Kingdom on human rights grounds.
2. Whilst this is an appeal by the respondent, I have for the purposes of the present proceedings kept the designation of the parties as they appeared in the original decision.

3. I have considered whether or not it is appropriate to make an anonymity direction. The appellant has children, who are British citizens and are minors. As these proceedings concern and impact upon the rights of minors I consider it appropriate to make an anonymity direction.
4. Leave to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Holmes on 10th May 2018. Thus the case appeared before me to determine whether or not there was a material error of law in the decision.

Factual Background

5. The appellant is a national of Pakistan. The appellant entered the United Kingdom on 5 September 2010 with leave as a student. His leave was curtailed after his sponsor's licence was revoked. The curtailment took effect on 31st March 2011.
6. The appellant made application for leave to remain as a spouse on the 3rd July 2012 but that application was refused on 30th October 2012. The appellant made a further application on the 30th October 2013. The application was granted and the appellant was given leave until 29th May 2016.
7. On the 27th May 2016 the appellant applied for his leave to be extended. His application was refused by the respondent on the 22nd July 2016. It is against that decision that the appellant now appeals.
8. The grounds for refusal were that the appellant had submitted a fraudulent ETS language certificate in a previous application. By reason of that deception in the past, the present application was refused on suitability grounds under Appendix FM and by reason of the obtaining of leave by a false certificate it was considered that the appellant's presence in the UK was not conducive to the public good, which made it undesirable to allow the appellant to remain in the UK.
9. In making findings the judge considered whether the appellant had used deception in obtaining an English Language certificate in the past and followed the guidance given in the case of Shehzad and Chowdhury [2016] EWCA Civ 615. The judge, having found that the respondent had discharged the initial burden of proof such that the appellant had to adduce evidence to answer the case raised, considered in detail the evidence of the appellant from paragraph 70 onwards.
10. Having considered the appellant's account the judge was satisfied that the appellant had obtained the certificate by deception. Not only had the appellant been interviewed by the respondent post the present application and his English tested at that stage but also during the course of giving evidence the appellant's English was found to be wholly inadequate.
11. The judge was satisfied that the basis for refusing the application on suitability grounds (paragraph S-LTR.1.6 of Appendix FM) had been made out. The judge

clearly assessed this as a significant factor counting against the appellant. For the reasons identified the judge concluded that the appellant could not meet the requirements of the immigration rules.

12. In considering Article 8 outside the rules the judge noted the relevant provisions of the sections 117B and 117D provide :-

117B Article 8 : public interest considerations applicable in all cases

...

6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where-

a) the person has a genuine and subsisting parental relationship with a qualifying child, and

b) it would not be reasonable to expect the child to leave the United Kingdom

117D Interpretation of this part

1) in this part....

"Qualifying Child" means a person who is under the age of 18 and who

a) is a British citizen, or

b) has lived in the United Kingdom for a continuous period of 7 years or more

13. The appellant was not a person liable to deportation, in the sense that no deportation action had been taken against him.
14. At the commencement of proceedings before me the representative for the respondent indicated that the relevant IDIs to be applied to the present case with those of August 2015 as the more recent IDIs did not come into effect until 22 February 2018 and that was after the date of the hearing and judgement.
15. Thereafter it was argued that it was not the decision of the respondent which would force the British citizen children to leave the UK. The mother of the children was a British citizen and could remain in the United Kingdom with the children, were the father of the family required to leave the United Kingdom.
16. The respondent's representative acknowledged that in paragraph 93 and paragraph 95 the judge had concluded that the decision to remove the appellant would have the effect of forcing the 2 British children to leave the EU. However he made the point that paragraph 34 the evidence of the appellant was that his wife and children could not relocate to Pakistan. The point being

made was that they could remain in the United Kingdom with the mother even if the appellant were removed.

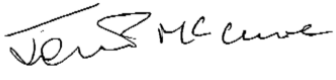
17. The judge accepted that the appellant could not succeed under the Immigration Rules. The appellant therefore had to rely upon article 8 outside the rules and the provisions of Section 117B.
18. The respondent's representative also submitted that there was a public interest point. In line with the case law of *Agyarko* 2017 UKSC 11 and *MM* 2017 UKSC 10 the Immigration Rules were accepted to be Article 8 compliant and were the starting point. Where an individual could not meet the Immigration Rules careful consideration had to be given as to whether or not there were other factors which warranted consideration of article 8 outside the rules.
19. It was submitted on behalf of the respondent that there were no other factors which would justify consideration of article 8 outside the rules.
20. Whilst I accept the approach suggested, that does not seem to take account of the provisions of section 117B.
21. The judge in assessing the facts of the case came to a specific conclusion that the consequence of removing the appellant would be to force the 2 British children to leave the United Kingdom. That would be the effect of removing the appellant. That was a finding of fact that the judge was entitled to make on the basis of the evidence presented.
22. Some recent guidance has been given upon what is the effect of the provisions cited and in the case of *MT & ET* it is indicated that strong reasons are required where the effect of the decision is the removal of either a British citizen child or other child that has had 7 years residence in the United Kingdom.
23. Did the judge consider whether or not there were strong reasons. The judge noted that the appellant did not have a criminal record. The appellant did not have a poor immigration history save and except for the submission of the fraudulently obtained document. The judge clearly considered the facts with regard to the certificate and the circumstances in which it had been submitted. In so doing the judge draws a clear distinction between the appellant himself and his rights and the rights of the children. Had the judge been dealing only with the appellant he gives a clear indication that there would be little to say if the appellant were to be removed.
24. Not so with regard to the children. The judge was clearly mindful of the best interests of the children. The judge clearly took into account the submission of the false document by the appellant and the appellant's continued assertion that he had taken the appropriate test. The judge considered that in detail. Thereafter the judge came to the conclusion that the effect of removing the appellant would be to force the family to move as well. The judge concluded in the circumstances that that was not proportionately justified. Having regard to the findings of fact made by the judge, the judge was entitled to come to the

conclusion that the decisions were not proportionately justified when assessing the article 8 rights of the children and therefore the article 8 rights of the family as a whole.

25. On the basis of the findings of fact made the judge was entitled to conclude that the decision to remove the appellant and refuse him further leave to remain in the United Kingdom would breach his article 8 and the rights of the children. Accordingly the decision of the first-tier Tribunal Judge to allow the appeal stands and I dismiss the appeal of the respondent.

Notice of Decision

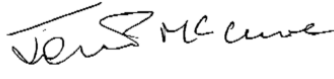
26. I dismiss the appeal of the respondent.

Signed 
Deputy Upper Tribunal Judge McClure

Dated 3 July 2018

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 the appellant or any member of the appellant's family. This direction applies both to the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings

Signed 
Deputy Upper Tribunal Judge McClure

Dated 3 July 2018