



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

Appeal Number: IA/33518/2015

THE IMMIGRATION ACTS

Heard at Field House

On 6 March 2018

**Decision & Reasons
Promulgated
On 27 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

**MR KEAN LIONG LEOW
(ANONYMITY DIRECTION NOT MADE**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Lam, Counsel instructed by Ashtons Solicitors
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in this case is a citizen of Malaysia born on 20 December 1973 who appeals the decision of the respondent to refuse the appellant's application for indefinite leave to remain on the grounds of long residence.
2. The respondent refused the appellant's application on the single ground that the respondent concluded that the appellant had obtained his ESOL qualification by deception and was satisfied that his presence was not conducive to the public good. Therefore his application fell to be refused under paragraph 322(1A), 276B(iii) and (iv) of the Immigration Rules.

3. The appellant's appeal to the First-tier Tribunal was dismissed by Judge of the First-tier Tribunal O'Brien in a decision promulgated on 7 June 2017 on human rights grounds.
4. The appellant appealed with permission on the grounds that:
 - (1) The judge arguably made a misdirection on a material matter of law, as identified by **R (Iran) Court of Appeal [2005]**, on the basis that at paragraphs [43] to [45] the First-tier Tribunal concluded that the respondent had not established on the balance of probabilities the appellant was deceitful in the way alleged and therefore the Tribunal erred in going on to state that the appellant was unable to adequately communicate in English in his interview in January 2014. It was submitted that this was flawed because the appellant had provided what the judge found to be a plausible explanation which satisfied the plausibility test in **Shen (Paper Appeals: Proving Dishonesty) [2014] UKUT 236 (IAC)**; and **SM & Qadir v SSHD (ETS - evidence - burden of proof) [2016] UKUT 00229**.
 - (2) It was an error for the judge to require an additional English language ability over and above what the judge had accepted was not a dishonestly or fraudulently obtained certificate.
5. Ms Fijiwala accepted that the judge was wrong about the deception point, having found that he was unable to conclude on the balance of probabilities that the appellant was deceitful.
6. In light of the judge's findings, at [45], that deceit had not been proved, the Tribunal made a material error of law in failing to consider whether, given that finding, the appellant in effect met the requirements of the Rules. The Tribunal was correct in its direction that the only appeal was under human rights grounds. However, the fact that, given the judge's findings, that there was no deception and therefore that the appellant appeared to satisfy the Immigration Rules, ought to have been a weighty consideration under Article 8. I am satisfied that the Tribunal additionally erred in finding that it would have been open to the Secretary of State to refuse the application on different grounds and that it was in the public interest to do so.
7. The decision of the First-tier Tribunal contained an error of law and I set aside the conclusions reached whilst preserving the findings of fact of the First-tier Tribunal up to and including paragraph [48] of the decision and reasons.

Remaking the Decision

8. Both parties accepted that I could remake the decision and no further evidence, oral or otherwise was to be produced. It was not contended by Ms Fijiwala that the general grounds of refusal could be made out, given the preserved findings that deception had not been proved.

9. It was Ms Fijiwala's submission that the fact that it was recorded that the appellant struggled at his interview on 20 January 2015 was a relevant factor, when considering if the appellant could meet all the requirements of the immigration rules. Ms Fijiwala submitted that the judge noted, at [43], that the appellant had difficulties with English at the hearing. Therefore it was Ms Fijiwala's submission that under Section 117B his inability to speak English was relevant and a factor in the public interest and that under paragraph 276B that she relied on paragraph 276B(ii)(b) strength of connections to the United Kingdom, given his difficulties with the English language.
10. Mr Lam submitted that that was an incorrect approach particularly given the finding of the First-tier Tribunal that the English language certificate was accepted. The appellant had provided an adequate explanation for his difficulties at the interview. In his witness statement the appellant had blamed the interviewer's accent and at his hearing he had blamed the speed at which the questions were asked. The judge noted that at [43] that at the appeal the appellant struggled to understand some of the questions even when translated into Mandarin and that he was clearly an unsophisticated individual and "this might explain some, but not all of the problems he faced in interview; however it also calls into question the appellant's ability effectively to speak English".
11. I accept in terms of the appellant's connections to the UK, the appellant had provided evidence of the length of his stay in the UK and that he had established strong ties and connection to the United Kingdom and also that he had not lived in Malaysia for a long time. He indicated in his witness statement, which was not substantively challenged, that he was a hard-working, law abiding person with no criminal or civil liabilities against him and he was a person of good character.
12. I am not satisfied that Ms Fijiwala made out her submissions that the strength of the appellant's connections to the United Kingdom were damaged by his more limited English and I must take into account that the First-tier Tribunal Judge found that the ESOL certificate stands and that the appellant was found to have provided a plausible explanation for his difficulties at interview with the respondent. In addition, the First-tier Tribunal Judge found that the appellant was an unsophisticated individual who struggled in Mandarin as well as English at the hearing which provided a partial explanation for his difficulties.
13. I have applied the five stage test set out in **Razgar v SSHD [2004] UKHL 27** and adopt the finding of the First-tier Tribunal that the appellant has a private life in the United Kingdom and removal would constitute interference of sufficient gravity to engage Article 8. The decision is in accordance with the law and for the legitimate aim of maintenance of effective immigration control. I go on to consider whether such a decision is proportionate.

14. In so doing, I have considered Section 117 of the Nationality, Immigration and Asylum Act 2002 Act. Maintenance of effective immigration control is in the public interest. However, even if I were to give weight to the appellant's difficulties with English, which arguably is in some doubt given his accepted ESOL certificate, I am not satisfied that this outweighs the fact that the appellant meets all the requirements of the relevant Immigration Rules, paragraph 276B which provides as follows:

"276B The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

- (i)(a) he has had at least ten years' continuous lawful residence in the United Kingdom.
- (ii) Having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
 - (a) age;
 - (b) strength of connection with the United Kingdom;
 - (c) personal history, including character, conduct, associations and employment record;
 - (d) domestic circumstances;
 - (e) compassionate circumstances; and
 - (f) any representations received on the person's behalf; and
- (iii) the applicant does not fall for refusal under the general grounds of refusal.
- (iv) The applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.
- (v) The applicant must not be in the UK in breach of Immigration Rules except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days, and any period of overstaying pending the determination of an application made within that 28 day period."

15. Although this is not an appeal under the Immigration Rules, I accept that the appellant's ability, in my findings, to meet the Immigration Rules is a weighty factor which should be taken into account.

16. Whilst I take into consideration that little weight should be placed on a person's private life whilst their immigration status as precarious, I take into account that he met the requirements of the Immigration Rules and that there are no other elements in the public interest (it not being disputed that he is financially independent). In applying the 'little weight'

provision, the principle is not a rigid one and involves a spectrum in a fact sensitive approach (see **Kaur (children's best interests/public interest) [2017] UKUT 14**).

17. I am satisfied therefore that the respondent's refusal in this case was disproportionate in all the circumstances.
18. The decision of the First-tier Tribunal contains an error of law such as the conclusion is set aside. I remake the decision allowing the appellant's appeal.

Notice of Decision

19. The appellant's appeal is allowed on human rights grounds.

No anonymity direction was sought or made.

Signed

Date: 23 March 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

No fee award application was sought or is made.

Signed

Date: 23 March 2018

Deputy Upper Tribunal Judge Hutchinson