Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04138/2018

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 30th November 2018	**On 6th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

Y S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Shah (Counsel)
For the Respondent: Mr A McVeety (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Meyler, promulgated on 1st August 2018, following a hearing at Manchester on 9th July 2018. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, and was born on 29th November 1980. He appealed against the decision of the Respondent Secretary of State dated 22nd January 2018, refusing his human rights claim.

The Appellant's Claim

3. The essence of the Appellant's claim is that he married a Pakistani woman, Miss [FY], in Pakistan on 13th January 2007, and they had a daughter together in 2010, who was born in Pakistan. The Appellant then entered the UK on 17th March 2011, and his wife and daughter joined him later in January 2014. However, during his time in the UK, the Appellant had an extramarital relationship with a Portuguese national, following which he made an EEA application to remain in this country on that basis on 28th January 2013, which was refused on 17th September 2013. He made a further application which was then refused on 26th January 2014. The relationship then broke down.

4. In the meantime, the Appellant's wife formed a new relationship with a British man, and they had a child together. The Appellant's daughter lives full-time with her mother, stepfather, and half-sister, and the Appellant sees his daughter during the day on Saturdays. His daughter was in year 3 of primary school. She has certain special educational needs and receives speech and language therapy at school.

5. The basis of the Appellant's claim is that he has a family life with his daughter whom he sees and is in contact with. However, when the Appellant made his application on 31st March 2012 he relied on a speaking test taken on 22nd February 2012 at Metro College, which was subsequently declared as having been taken by a proxy test taker and the decision letter took this against the Appellant. Whilst it was accepted that the Appellant had a general relationship with his daughter, it was not considered disproportionate for the Appellant to make the appropriate entry clearance application to visit his daughter from Pakistan (paragraph 29). None of the requirements of paragraph 276ADE were considered to be met (paragraph 30). There were said to be no exceptional circumstances (paragraph 31).

The Judge's Decision

6. At the hearing before Judge Meyler, he was concerned with the Appellant's level of English, which he regarded to be insufficient to dispense without the use of the interpreter, but the Appellant decided to go alone without the interpreter, and he struggled repeatedly (paragraph 32). The judge observed that the Appellant nevertheless succeeded in getting the "maximum spoken score that can be achieved in the test" (paragraph 33). Moreover, his pronunciation was further recorded "as highly intelligible" (paragraph 34). Against this background, the judge held that the speaking

scores awarded to the Appellant on 22nd February 2012 "could not possibly have been in respect of the Appellant who gave oral evidence before me, some six years later, by which time one would expect his English to have improved considerably" (paragraph 35). The judge concluded that "the Appellant participated in an organised and serious attempt to use deception" (paragraph 36).

7. The judge further found that the Appellant was unable to meet the requirements of E-LTRPT.2.2 because his daughter is not British or settled and has not lived in the UK continuously for at least seven years (paragraph 37). The judge also held that the Appellant did not meet the requirements of paragraph 27ADE because he had not lived continuously in the UK for twenty years. Despite the past seven years that the Appellant had lived in the UK there would not be very significant obstacles to his integration into Pakistan either. He was 31 years old when he arrived in this country and his English "remains very broken and I deduce from this that Urdu and Punjabi remain the languages he uses with greatest ease" (paragraph 38).

8. However, it was in relation to Article 8, that the judge then proceeded to allow the appeal. He held that family life was engaged "between the Appellant and his daughter" and that he was shown some photographs of the Appellant with his daughter on his mobile phone. Moreover, "the Respondent concedes that there was a general relationship between father and daughter in the refusal letter". Indeed, the judge also "had regard to the family court order concerning contact between the Appellant and his daughter", and there was "the letter from the mother of the child" (paragraph 42).

9. Nevertheless, the daughter was not British, she was not settled, and she did not have refugee or protection leave. In addition, the judge also held that,

> "nor is the Appellant the primary carer of his daughter. His daughter has leave outside of the Rules until the end of the year, in line with her mother, who is now in another relationship with another man. The Family Court order gives the Appellant contact with his mother once per week during the day on a Saturday, between the hours of 11am and 5pm and more by mutual agreement" (paragraph 43).

10. That aside the judge held that "the best interests of the child are for her to remain with her mother, as she is doing at present". The judge also inferred from the letter from the school and the letter from the mother "that it is also in the best interests of the child to continue having contact with the father" (paragraph 44).

11. In the event, therefore, the judge went on to conclude that, "I find that the effect of removal would be that the Appellant would never be able to meet the requirements of the entry clearance Rule for entry as a parent on account of his wrongdoing in 2012", even though the decision against the Appellant was on the basis that his conduct was not conducive to the

public good (paragraph 45). The judge concluded that it will be disproportionate for the Appellant "not to enjoy face to face contact with his daughter unless his ex-wife, with whom he is now estranged, decides to take her to see her father in Pakistan, which seems a remote possibility.

12. The judge further found that,

> "although the Appellant's daughter only has limited leave to remain, the fact is that as long as the Appellant's ex-wife remains in a genuine relationship with her new partner and second British child in the UK, they are most likely to be granted further leave to remain. It therefore seems most unlikely that the Appellant's daughter will return to Pakistan for the foreseeable future and the Appellant cannot qualify for entry clearance as a parent" (paragraph 45).

13. Finally, the Appellant's own position was not overlooked by the judge, who concluded that he had taken into consideration the fact that the Appellant has been present in the UK for over six years but that

> "he has overstayed for most of those years and never held anything other than a short student visa. He has shown a blatant disregard for the immigration laws and Rules in the UK by engaging a proxy tester to sit his English exam for him and he did not return to Pakistan despite the assertions that he would have made in his student visa application" (paragraph 46).

14. In the end, the judge concluded that "this is a finely balanced decision", and that "weighing all the factors in favour of the Appellant and the public interest in removal, I find that in the end, despite the Appellant's conduct in 2012, it will be a disproportionate result for a genuine relationship between father and daughter to be indefinitely severed as a result of the decision" (paragraph 51).

15. The appeal was allowed on human rights grounds.

Grounds of Application

16. The grounds of application state that the judge had found that the Appellant had employed deception and his remaining in the UK was not conducive to the public good (paragraph 36). However, the judge's conclusions that, "I find that the effect of removal would be that the Appellant would never be able to meet the requirements of entry clearance Rule for entry as a parent on account of his wrongdoing in 2012", was wrong because it is not for the court to speculate on the outcome of future entry clearance applications. Second, the judge had failed to explain why the maintenance of law and order and prevention of fraud, such as that displayed by this Appellant in attempting to gain leave here through deception, should be set aside in favour of a perpetrator of these actions. Third, the judge embarked on further speculation in stating that it was unlikely that the Appellant's ex-partner would take his daughter for visits to Pakistan because there was no evidence before the court to that effect in the judge coming to that conclusion.

17. On 14th September 2018, permission to appeal was granted by the Tribunal.

Submissions

18. At the hearing before me on 30th November 2018, Mr McVeety, appearing as Senior Home Office Presenting Officer, relied upon the judge's conclusions at paragraph 45, to point out that the reasons for why the judge had allowed the appeal were entirely speculative, because one could not say whether the Appellant's ex-wife, who was now in another relationship with her British citizen, would herself be granted further leave to remain. In the same way one would not say whether in the future the Appellant's ex-wife would take the Appellant's child to Pakistan for visits to see him. What was, however, entirely certain, was the fact that none of these people had settled status in the UK. Second, and even more importantly, none of the findings that the judge makes in favour of the Appellant in this speculative fashion, are actually set out in the Appellant's witness statements or the witness statement of any other person. Accordingly, the judge could not have come to a firm finding of fact on this basis.

19. For his part, Mr Shah relied upon his skeleton argument, and in particular pointed out that the judge had stated (at paragraph 51) that, "this is a finely balanced decision" and that he had proceeded on the basis of "weighing all the factors in favour of the Appellant and the public interest in removal", so that nothing was left unconsidered. The judge took into account the best interests of the child. He took into account the fact that the daughter needs therapy and has special needs. He took into account that there was a Family Court order in the Appellant's favour. He took into account the fact that the Appellant's parental relationship with his child started at birth. He took into account the fact that the Appellant's former wife wanted the Appellant to play a role in the upbringing of his daughter (paragraph 11).

20. Second, in granting permission to appeal, the Tribunal had relied upon the case of **Ekenci [2003] EWCA Civ 765**, but that was an entirely different case. In that case, **Ekenci** was an asylum seeker, who had lied about his application for asylum in Germany on 1st October 1991, before seeking asylum in the UK, and the Court of Appeal observed (at paragraph 3) that, in response to a request from the United Kingdom, Germany had accepted responsibility for the examination of the Appellant's asylum claim on the basis of the Dublin Convention. Mr Ekenci had also formed a relationship with a British citizen when his immigration status was precarious, which is not the case here for the Appellant. Mr Ekenci's child also did not require special needs at school or otherwise. Moreover the nature and degree of involvement of the Appellant with his daughter is far greater than that of Mr Ekenci.

21. In reply, Mr McVeety submitted that the weight to be granted to evidence is a matter for the judge, but the Statute requires the decisionmaker to put

in the balance of considerations the public interest in favour of immigration control, and the statement by the judge that the "Appellant would never be able to meet the requirements of the entry clearance" (paragraph 45), but this very fact is surely something that, has to weigh against the Appellant in any proportionality exercise. If the judge had found in favour of the Appellant, he had done so on a purely speculative basis. As against that, what needed to be taken into account was the fact that the Appellant was an immigration offender, an overstayer, and had cheated in an exam.

Error of Law

22. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. I come to this conclusion, notwithstanding the judge's comprehensive, detailed, and careful assessment of the facts that were before him. This is a decision that is moreover sensitive to the needs of the parties concerned, and not least to the Appellant's child, with whom the Appellant has an existing contact order, and an accepted family life. Moreover, I note Mr Shah's carefully compiled skeleton argument before me, and is a commendable effort to persuade me otherwise.

23. However, this is a case where the Appellant could not succeed under the Immigration Rules, for reasons that were very carefully laid out by the judge in considerable detail (from paragraphs 32 to 40). The judge then, however, allowed the appeal on the basis of Article 8. However, that decision failed to give the requisite attention to the interests in immigration control as a matter of public interest, with respect to parties none of whom had settled status in the UK.

24. First, the Appellant's daughter is not British and she is not settled in the UK and has not lived in the UK for at least seven years (see paragraph 37). Second, the Appellant himself is not the primary carer of his daughter. He has contact with his daughter only once a week on a Saturday (paragraph 43). Third, as against these two important facts, the judge speculated that as long as the Appellant's ex-wife remains in a relationship with her new partner and the second British child born to them in the UK, "they are most likely to be granted further leave to remain" (paragraph 45). Fourth, there was similar speculation on the basis that, "it therefore seems most unlikely that the Appellant's daughter will return to Pakistan for the foreseeable future and the Appellant cannot qualify for entry clearance as a parent", as there is speculation also in the assertion that, with respect to the Appellant's ex-wife, "it is likely that visits will be infrequent, not least because of the cost involved" (paragraph 45). Fifth, and as against all of the above considerations, the judge had observed that the Appellant had overstayed for most of the years that he had been in this country, had demonstrated a blatant disregard for the immigration laws, and have engaged a proxy test taker to sit his English exam for him (paragraph 46).

25. Most importantly, however, although the judge concludes that "this is a finely balanced decision", there is no basis for the assertion that "a genuine relationship between father and daughter [will] be indefinitely severed as a result of the decision" (paragraph 51). For that conclusion to have been drawn, there had to be a statement to that effect by the Appellant in his witness statement, or orally in evidence before the judge, and even then it had to be properly evaluated as against the other considerations. The fact that the judge had to speculate with respect to the two important matters set out above, indicates that the evidence was not to this effect. It was reliant upon someone having to make a speculation to that effect. Therefore, notwithstanding the care with which the judge has approached the matter before him, the appeal could not have succeeded, either under the Immigration Rules, or outside those Rules on the basis of freestanding Article 8 jurisprudence.

Re-Making the Decision

26. I have remade the decision on the basis of the findings before the original judge, the evidence before him, and the submissions that I have heard today. I am allowing the appeal of the Respondent Secretary of State for the reasons that I have set out above.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law, such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal of the Secretary of State is allowed.

Anonymity

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 him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Juss 15th January 2019