Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19891/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 January 2019	**On 20 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

SK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Charlton, of Messrs Bhogal Partners Solicitors
For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. In a decision and reasons dated 6 November 2018 I set aside the decision of Judge of the First-tier Tribunal Wylie who had dismissed the appellant's appeal for leave to remain on human rights grounds. I wrote:-

> "1. The appellant appeals, with permission, against a decision of Judge of the First-tier Tribunal Wylie who in a determination promulgated on 22 January 2018 dismissed the appellant's appeal for leave to remain on human rights grounds.

2. The appellant is a citizen of India born on 27 August 1990. He had entered Britain in October 2010 with entry clearance as a student valid until 26 January 2014. On 20 July 2013 he married an Indian citizen who had indefinite leave to remain. In January 2014 he made an application for leave to remain as a Tier 4 (General) Student which was refused on 27 March 2014. He appealed that decision and his appeal was allowed in November 2014 on the basis that the Secretary of State reconsider the decision. On reconsideration the application was refused with no right of appeal. On 24 December 2014 before the application had been reconsidered, he made an application for leave to remain as the spouse of a settled person. That application was however voided on 15 February 2015. In December 2015 he was served with RED.0001 notifying him of his liability to be administratively removed from Britain.

3. On 16 January 2016 he made a human rights claim. He was refused on 2 August 2016 on the basis that he did not meet the suitability requirement for leave to remain as a spouse as it was not accepted the relationship was genuine and subsisting and furthermore that the appellant had submitted a TOEIC certificate from ETS with his application for the student extension dated 26 January 2014 which had been concluded had been fraudulently obtained and therefore he had used deception. It was determined that therefore his presence in the United Kingdom was not conducive to the public good as his conduct made it undesirable to allow him to remain in the United Kingdom. The appellant stated at appeal that he wished to remain in Britain with his wife and that they had a son born on 19 January 2016. The appellant's wife, who entered Britain in 2010, had been granted indefinite leave to remain in 2011 as a victim of domestic violence. The appellant's son is therefore British.

4. The appellant gave evidence regarding his attendance at the test centre and what had happened when he took the test. He also said that he had taken a further test in December 2014 because he had heard there was a problem with TOEIC tests and that they were not being accepted. He did this as his Tier 4 application for which he had sent the certificate for the earlier test had been refused and he was appealing that decision.

5. The judge in paragraphs 22 onwards of the determination set out her findings of fact and conclusions. She referred to relevant case law stating that it was accepted that the evidence provided by the Secretary of State was sufficient to pass the evidential burden to the appellant of raising an innocent application. The judge did properly take into account the report of Professor French and information from Project Façade - the criminal enquiry into abuse of TOEIC relating to the Premier Language Training Centre's test centre - which the appellant had attended. It was noted that that enquiry showed that out of 5,055 TOEIC tests 3,780 were invalid and 1,275 were questionable. The judge also had the look up tool showing tests taken in the morning of 14 January 2014 when the appellant had attended which indicated that one test was questionable and 13 were invalid.

6. The judge took into account the decision in **MA (ETS – TOEIC testing) [2016] UKUT 00450 (IAC)** where findings had been made about the look up tool and ETS source data and stated that the appellant's evidence about sitting the test was vague and that he had not given any explanation as to why he had chosen the test centre in Barking when he lived in Hounslow, when he had taken the second test at the Computer Learning Centre which was in Hounslow. The judge applied the various factors set out by the Upper Tribunal in **SM and Qadir (ETS – evidence – Burden of Proof) [2016] UKUT 229** and noted that the appellant had spoken English sufficiently fluently to enable him to proceed with the hearing without an interpreter but said that in any event that was four years after the test and therefore she placed little weight on that as the appellant had been living and working part-time in the United Kingdom since 2010. She noted that he had not attended college since 2011. She placed weight on the fact that the original scores of the appellant in the first test had been 190 out of 200, with speaking proficiency at level 8 - the highest level - and said that although she concluded that she could not say the appellant would not have passed the test in January and it was possible that he would have done it was unlikely that he would have attained a score of 190 out of 200.

7. The judge noted that the appellant said that he had taken the second test in December 2014 because he had seen in the news that the Home Office were refusing everyone who had sat a TOEIC test, but stated that her conclusion was that he took that test in the knowledge that his certificate in January 2014 had been obtained dishonestly. She concluded that she did not accept that the Appellant had discharged the evidential burden upon him to provide an innocent explanation. .

8. The judge, therefore, having found that the appellant did not meet the suitability requirement for leave to remain in the United Kingdom then considered the appellant's Article 8 rights outside the Immigration Rules. She referred to the test set out in **Razgar [2004] UKHL 24** and Section 117B of the Nationality, Immigration and Asylum Act 2002. She noted the fact that the appellant's wife was an Indian national and had indefinite leave to remain in the United Kingdom and that they had lived together since 2013. The judge accepted that the marriage was genuine and subsisting and that they had family life together with their son who was aged 2. She considered that the reasons given as to why the appellant and his wife said they could not go to live in India - they were of different castes and the appellant's wife said that her family were not happy with the marriage (although the could not describe why) - the judge concluded there was no information as to the problems they would have in India because of their marriage and went on to consider whether or not the appellant and his wife could return to India and continue their family life there.

9. In paragraph 51 the judge stated that she took into account Section 55 of the Borders, Citizenship and Immigration Act 2009 which requires the respondent should take into account the need to safeguard and promote the welfare of children in the United Kingdom the judge stated that that was a primary consideration rather than a paramount one. The judge took the view that the child was very young and his interests would be to

continue in the care of both his parents. The judge noted in passing that the child was a British citizen but stated in her view his interests would be safeguarded if he went to India with his parents. The judge concluded that Article 8 would not be engaged the family could enjoy family life together in India however in the alternative the judge went on to consider the proportionality of the decision stating that the maintenance of effective immigration control was in the public interest. She took into account the fact that the appellant's family life was established and whilst his immigration status was at best precarious noting that the appellant's son was a British citizen she stated that at his age he would be focussed on his parents and had yet to develop any independent life, it is accepted that he had extended family members in India and that he would be brought up accustomed to aspects of Indian culture in the United Kingdom. The judge stated briefly that she could only conclude that it was not disproportionate to require the appellant to leave.

10. The appellant appealed, referring to the conclusions of Beatson LJ in **Majumder and Qadir [2016] EWCA Civ 1167** and arguing that the findings of the judge regarding the appellant's TOEIC test were neither reasonable or sustainable. The grounds referred to the various positive factors which would indicate that the appellant would have no reason to use a proxy test taker and that he had given a sensible reason for taking the second test.

11. With regard to the issue of the best interests of the child it was argued that the judge erred when saying that the appellant's immigration status was at best precarious and that she was wrong to insinuate that he had a dubious immigration history when that was not the case. The grounds also argued that no detailed assessment had been made of the situation of the child, who was British and what was best for him beyond stating that he would be with his parents when they went to India. It was argued that was insufficient and merely paid lip service to the relevant test as set out that in **JO and Others (Section 55 duty) Nigeria [2014] UKUT 00517 (IAC)**. Similarly the grounds referred to the decision in **Kaur (children's best interests/public interest interface) [2017] UKUT 00014 (IAC)**.

12. At the hearing of the appeal before me Ms Charlton relied on the grounds of appeal and asserted that the assessment of the TOEIC certificate was flawed. She said that the judge should not have rejected the appellant's evidence particularly because the appellant had remained consistent in his narrative. Moreover, she emphasised that the judge had not taken into account the witness statements with regard to reasons as to why this family could not return to India.

13. In reply Mr Duffy stated that the judge had properly engaged with the TOEIC issue and gave detailed reasons as to why it was not accepted that the appellant had discharged the burden of proof which lay upon him. Mr Duffy stated that the judge's conclusions were not open to challenge. With regard to the issue of the reasonableness of the appellant being expected to leave when his son was British he stated that the judge had considered that issue, he accepted that the reasoning of the judge was slim and that he had

to accept that the judge had erred in not weighing up all relevant factors. In that regard he stated it would be appropriate that the appeal should be adjourned.

Discussion

14. I have considered in some detail the conclusions of the judge with regard to the validity of the TOEIC certificate. I do consider that the judge was correct to find that the Secretary of State had discharged the burden of proof upon her and I consider that detailed reasons were given for that conclusion in paragraphs 22 onwards of the determination. In reaching her conclusion the judge referred to relevant case law and I consider that she was entitled to place weight on the documentary evidence before her which included the report from Professor French and the look up tool. With regard to the reasons for the appellant taking the second test I consider that the judge was entitled to be sceptical about those. In all I can only conclude that the decision of the judge was open to her with regard to her conclusion that the appellant had not discharged the evidential burden on him to provide an innocent explanation and therefore to find that he did not meet the suitability requirement for leave to remain in the United Kingdom.

15. I note that Mr Duffy conceded that the judge had not properly or in sufficient detail considered the relevant factors regarding the British child going to India with his parents. Mr Duffy had conceded that there was an error of law therein and I consider that he was correct to accept that that was the case. The appeal will therefore proceed to a further hearing in the Upper Tribunal solely on the issue of the reasonableness of the qualifying child being expected to go to India with his parents. I adjourn this appeal as Ms Charlton indicated that there was further evidence that she would wish to put in before the hearing of this issue.

Directions

The appeal will proceed to a hearing in the Upper Tribunal solely on the issue of the reasonableness of the appellant's removal to India given that he has a qualifying child here. The findings of the First-tier Judge regarding the TOEIC test and the appellant's suitability under the Rules shall stand.

I make an anonymity direction in this case given that the appellant's child is a minor.

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."

2. As it will be seen from my decision, I found that the judge had not made any error of law when considering the allegation that the appellant had used deception when obtaining his TOEIC certificate. The decision was set aside on the limited ground that it was agreed by the Presenting Officer that the judge had not considered in sufficient detail the rights of the appellant's child. That child was born in Britain on 19 January 2016. As his mother had indefinite leave when he was born the appellant's child is British.

3. The relevant facts therefore are that it is now for me to consider the rights of this British child on the basis that he is now 3. His mother was born in India and did not come to Britain until she entered for marriage in 2010 and therefore both that child's parents - the appellant and his wife - are nationals of India who have lived the vast majority of their lives there. There is nothing to indicate that they would have any difficulty in re-integrating into life in India or that it would be unreasonable to expect them to return. The child who is just 3 will have as his focus his parents and will not yet have built up ties outside his immediate family. The test before me is to consider whether or not it might be reasonable to expect that child to leave Britain with his parents or, if his mother wishes to remain, for him to stay with her here while his father returns to India.

4. The appeal was adjourned so that all factors could be considered in this exercise, and it was indicated to me at the hearing in November that further evidence would be put forward. That further evidence is that the appellant's son is suffering from ichthyosis which is a condition that causes widespread and persistent thick, dry "fish scale" skin. There is no cure for that disease but it is said in the papers before me that a "daily skincare routine usually keeps the symptoms mild and manageable". Although the condition can vary in seriousness, it appears that the appellant's son has a relatively mild variation of the illness and that he has been prescribed a cream to ease the condition. There is nothing before me to indicate that he could not continue to receive treatment by use of a skin cream if he were in India.

5. The second further factor that was placed before me was related to speech and language difficulties which the child has. A report from Hounslow and Richmond Committee Healthcare NHS Trust contains an initial assessment report which states that he has severe to significant difficulties in attention and listening, some difficulties in play and understanding and severe significant difficulties in expression. His social communication is difficult. Targets were set by the Trust to help him ameliorate those problems. Again there was nothing in the report to indicate that such assistance, which appears to be given by the mother, should not continue in India.

6. I consider that it would not be unreasonable to expect this child to go to India with both his parents as a family unit should his parents decide that they wish to return to India together. As I have said above the child has not built up any significant relationships here and, sadly, from the papers it appears that he might have difficulty in doing so. Alternatively should the decision be made that the child's mother

remains in Britain as she is entitled to do, the child could live with her. In these circumstances, it would not be unreasonable to consider that the appellant could return to India on his own. I would add that there was nothing before me to indicate that the appellant would be able to meet the requirements of the Rules for leave to enter or remain as a spouse.

7. For the above reasons I consider that the decision of the Secretary of State to refuse to grant the appellant leave to remain is entirely reasonable and therefore if I have set aside in part the decision of the First-tier Judge I remake the decision and dismiss this appeal.

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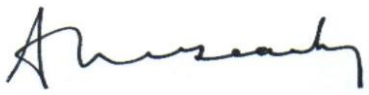
Signed:  Date: 9 February 2019

Deputy Upper Tribunal Judge McGeachy