Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14671/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 February 2018	**On 6 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

NARESH [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Afzal, A-R Law Chambers
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge NMK Lawrence) dismissing his appeal against the decision of the respondent made on 25 May 2016 to refuse to grant him leave to remain on family or private life grounds because, among other things, he was not considered to meet the suitability and eligibility requirements contained in Appendix FM. Although the First-tier Tribunal made an anonymity direction, I do not consider that the appellant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

Relevant Background

2. The appellant is a national of Nepal, whose date of birth is [ ] 1987. He first entered the United Kingdom on 5 May 2011 with valid entry clearance as a student. His leave in this capacity ran until 7 October 2013. He made an in-time application to extend his stay as a student, but the application was refused on 5 June 2014, and on 6 June 2014 he was served with an IS151A notice informing him of his liability to removal. The reason for the refusal of further leave as a student was that the appellant was considered to have used a proxy in an English language test.

3. The appellant remained in the UK without leave. On [ ] 2015 the appellant's partner, 'P', a national of the Philippines, gave birth to a daughter by the appellant. As P had indefinite leave to remain, their daughter was a British national by birth. On 25 November 2015, the appellant applied for leave to remain on the basis of his Muslim marriage to P.

4. On 25 May 2016, the respondent gave her reasons for refusing the appellant's application. His application was considered under the partner route in Appendix FM. He did not meet either the eligibility or suitability requirements. He was not eligible for leave to remain as a partner, as he had remained in the UK in breach of Immigration laws. While he had a qualifying relationship for the purposes of EX.1, there were not very significant obstacles under Rule 276ADE(1)(vi) - or (by implication) insurmountable obstacles under EX.1 - to him carrying on the role of a father-figure in his daughter's life in Nepal, if that was his partner's wish.

5. The application also fell to be refused under section S-LTR.1.6 which stated that an application would be refused if the presence of the applicant in the UK was not conducive to the public good because of their conduct, character, associations or other reasons, making it undesirable to allow them to remain in the UK. In his application dated 27 September 2013, he had submitted a TOEIC certificate from the Educational Testing Service. ETS had a record of his speaking test. Using voice-verification software, ETS was able to detect whether a single person was undertaking multiple tests. ETS had undertaken a check of his test, and had confirmed to the Secretary of State that there was significant evidence to conclude that his certificate was fraudulently obtained by the use of a proxy test-taker. His scores from the test taken on 28 August 2013 at Premier Language Training Centre had now been cancelled by ETS. On the basis of the information provided by ETS, the SSHD was satisfied that his certificate was fraudulently obtained and that he had used deception in his application of 27 September 2013. In fraudulently obtaining a TOEIC certificate, the appellant had willingly participated in what was clearly an organised and serious attempt to defraud the SSHD and others. He had thereby displayed a flagrant disregard for public interest, according to which migrants required a certain level of English language ability in order to facilitate social integration and cohesion, as well as to reduce a likelihood of them being a burden on the taxpayer.

The Decision of the First-tier Tribunal

6. Both parties were legally represented before Judge Lawrence. The Judge received oral evidence from the appellant and his partner.

7. In his subsequent decision, the Judge found that the appellant did not meet the eligibility requirements of Appendix FM, but that the respondent had not made out a case that the appellant had used a proxy in his English Language test, and hence had not made out a case that he had obtained his TOEIC test result certificate by deception.

8. The Judge then turned to address the best interests of the couple's daughter. He found that there was no evidence that the couple could not lawfully settle in either Nepal or the Philippines. He bore in mind that the child should not be denied the benefit of being brought up in the country of her nationality. But he also said that he had to bear in mind that being parents of a British child would not automatically lead to settlement status in the UK. He had not been presented with any evidence to make a finding that it was not reasonable for the daughter to live in either Nepal or the Philippines. She was young enough to adapt. She could access education and healthcare needs in either of the two countries.

9. The Judge noted that Mr Afzal had raised the issue of the appellant's conversion to Islam and had submitted that it might be difficult for him to live in the Philippines. The Judge said that there were Muslims living in the Philippines and in Nepal, and he did not find that the appellant's conversion to Islam demanded that he should be granted leave to remain in the UK.

10. The Judge held that it was open to the appellant to return to Nepal to make the relevant entry clearance application. His wife earned more than £19,000 a year, and the appellant had passed the English Language requirement. It appeared that on an entry clearance application the appellant was likely to meet the eligibility requirements. He was mindful of the fact that there was a child, but the child was only 2 years old, and the separation from her father was unlikely to be lengthy one.

The Reasons for the Grant of Permission to Appeal

11. On 24 November 2017, designated First-tier Tribunal Judge McCarthy granted permission to appeal for the following reasons:

> "(2) Although the grounds are somewhat rambling, they argue amongst other points that the Judge failed to have proper regard to S.117B6 of the 2002 Act, the appellant having a genuine and subsisting relationship with his British citizen daughter; and that the Judge erred in his application of the Supreme Court's judgment in **Agyarko**.
>
> (3) I am satisfied these grounds are arguable. As evidenced from the Upper Tribunal's decision in **SF and Others (Guidance, post-2014 Act) [2017] UKUT 120** that there is more to be considered in relation to the rights of the appellant's child. In the light of that case, it is arguable that the Judge has not properly assessed the public interest factors in light of S117B(6).

(4) I do not see the argument related to whether the Judge should have considered paragraph EX.1 of Appendix FM to be material because the Judge looked at [Rule 276ADE] which is in similar terms. I remind the parties that the appeal was not an appeal against the Immigration Rules but an appeal against the refusal of a human rights claim; the grounds of appeal were restricted. For clarity, I do not exclude these arguments but find they add little to the primary arguments."

The Appeal Hearing

12. At the hearing before me to determine whether an error of law was made out, I drew the attention of the representatives to the fact that the Judge's reasoning on the suitability issue appeared to be in direct conflict with the guidance given by the Court of Appeal in **SSHD v (1) Mohammed Shehzad and (2) MD Chowdhury [2016] EWCA Civ 615**.

13. The Judge held that the generic evidence of Mr Millington and Ms Collings, coupled with specific evidence supplied by ETS that the speaking and writing test taken by the appellant had been invalidated by ETS, failed to discharge the evidential burden. However, according to the Court of Appeal, this evidence should have been treated by the Judge as establishing a *prima facie* case, with the consequence that the onus shifted to the appellant to produce an innocent explanation for his test result being declared invalid.

14. Mr Afzal did not dispute that the Judge had erred in law on this issue. But since the Judge had found in the appellant's favour that the allegation of unsuitability was not proven, he submitted that the Judge had failed to give adequate reasons as to why it was proportionate to require the appellant to return to Nepal to apply for entry clearance. Mr Afzal relied on **Agyarko** for the proposition that, "*where it was certain that the appellant would be granted leave to enter if the application was made outside the United Kingdom, there might be no public interest in his removal.*"

Discussion

15. I do not consider that the decision of the Upper Tribunal in **SF and Others** exposes a flaw in the Judge's reasoning on the weight to be attached to the fact that the couple's child is a British citizen.

16. As noted by the Tribunal in **SF** at paragraph [7], the IDIs on family migration - Appendix FM, section 1.0(b), headed "Family life as a partner or parent and private life, 10 year routes", and dated August 2015, contain at paragraph 11.2.3 guidance on the following question: "*Would it be unreasonable to expect a British citizen child to leave the UK?*" The relevant parts of the guidance are as follows:

> 'Save in cases involving criminality, the decision-maker must not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision would be to force that British citizen to leave the EU, regardless of the age of that child. This reflects the European Court of Justice Judgment in **Zambrano** …

> Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer.
>
> In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.
>
> It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if a child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.
>
> The circumstances envisaged could cover amongst others:
>
> - Criminality falling below the threshold set out in paragraph 398 of the Immigration Rules;
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> - a very poor immigration history, such as whether a person has repeatedly and deliberately breached the Immigration Rules.
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> *In considering whether refusal may be appropriate, the decision-maker must consider the impact on the child of any separation* (my emphasis). If the decision-maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the office of the children's champion on the implications for the welfare of the child, in order to inform the decision.'

17. The prohibition stipulated in the policy is against assessing a case on the basis that it would be reasonable to expect a British citizen child to leave the UK *with the parent or primary carer who is facing removal*. There is no express prohibition against assessing the case on the basis that it would be reasonable to expect a British citizen child to leave the UK *with both parents*. In such a scenario, there would be no separation, no break-up of the family unit, and so the need to justify separation would not arise. It is important to distinguish between expectation and choice. A narrow construction of the policy is consistent with Appendix FM, under which a person in the appellant's position cannot take the benefit of EX.1(a) because he shares parental responsibility for his British national child, rather than having sole responsibility for the child.

18. The appellants in **SF** were a mother and her two young children. Each of them had entered the United Kingdom unlawfully in 2012. Prior to that, they had lived in Albania. The first appellant's husband had come to the UK much earlier. He had obtained ILR and subsequently by false representations, a grant of British citizenship. He was currently serving a sentence of seven and a half years' imprisonment for offences connected with people-trafficking. After the appellant arrived in the UK, she gave birth to a further child. The youngest child was born when the child's father had indefinite leave to remain, and as a result, this youngest child was a British citizen. On 29 April 2015, the appellants were served with notices refusing

their asylum claims and deciding that they should be removed from the UK as illegal entrants.

19. The First-tier Tribunal dismissed the appeals on all grounds raised. The issue that was pursued before the Upper Tribunal was an argument that because of the nationality of the youngest child, it would be unreasonable to expect that child to leave the UK; and that this had an impact on the merits of the decision that the appellants should be removed. Mr Wilding drew the attention of the Upper Tribunal to the policy. He accepted that this was not a case in which the conduct of the mother of the other three children was such as to give rise as to considerations of such weight as to justify separation. The Tribunal also observed that it did not appear that consideration had been given to the possibility of the British citizen child staying with another parent or alternative primary carer in the EU. The Tribunal held, at paragraph [9], that it appeared inevitable that if the guidance to which Mr Wilding had drawn their attention had been applied to the present family, at any time after it was published, the conclusion would have been that the appellants should have been granted a period of leave to remain in order to enable the British citizen child to remain in the UK with them.

20. The facts of **SF** are significantly different from the facts of the present case. The effect of the decision under appeal in **SF** was to compel a British citizen child to leave the EU. This was because his father was in prison, and his other parent and primary carer was facing removal. So, the case plainly fell within the scope of the policy. There was no question of choice. The parents did not have the choice of voluntarily relocating to Albania to continue family life there with their children, as one of them was in prison. Thus it was unreasonable to expect the British citizen child to leave the EU with his mother, in circumstances where the conduct of the mother did not give rise to considerations of such weight as to justify separation from the father; and in any event the child could not otherwise stay with his father in the UK or elsewhere in the EU.

21. Here, as the Judge recognised, the parents had a choice. They could choose to relocate abroad with their child or the mother could remain in the UK with the child, and support an application for entry clearance by the father.

22. However, having found that the appellant was likely to be successful in an application for entry clearance, the Judge did not address the **Chikwamba** line of authorities which are to the effect that in such circumstances it will rarely be proportionate to split up a family, even on a temporary basis. The immigration history of the parent does not have to be as bad as that set out in the policy in order to supply a sufficient reason for requiring the parent to go back and seek entry clearance. But it is doubtful that the appellant's relatively short period of overstaying constituted a sufficient reason, and in any event the Judge did not adequately explain why it did.

23. If this had been the Judge's only error, I could have proceeded to remake the decision. However, the decision is fundamentally flawed as the Judge proceeded on an erroneous premise.

24. The probative value of the generic evidence relied on by the Secretary of State in the form of witness statements from Rebecca Collings and Peter Millington has been considered by the Upper Tribunal and the Court of Appeal in, respectively, **SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC)** and **Secretary of State for the Home Department and (1) Muhammad Shehzad and (2) MD Chowdhury [2016] EWCA Civ 615**.

25. The *ratio decidendi* of **SM and Qadir** is that, despite the serious shortcomings in the evidence relied on by the Secretary of State, it was sufficient to discharge the evidential burden of raising a prima facie case, such that the evidential burden shifted to SM and Qadir to produce an innocent explanation for their test results being invalidated by ETS.

26. Of particular significance is the following passage in the decision:

> "68. As our analysis and conclusions in the immediately preceding section make clear, we have substantial reservations about the strength and quality of the Secretary of State's evidence. Its shortcomings are manifest. On the other hand, while bearing in mind that the context is one of alleged deception, we must be mindful of the comparatively modest threshold which an evidential burden entails. This calls for an evaluative assessment on the part of the tribunal. By an admittedly narrow margin we are satisfied that the Secretary of State has discharged this burden. The effect of this is that there is a burden, again an evidential one, on the Appellants of raising an innocent explanation."

27. The significance of the Court of Appeal decision is that this crucial finding by the Presidential panel has been endorsed by higher and thus binding authority. Beatson LJ, giving the leading judgment of the court, summarised the central issue which the court was addressing at paragraph [19]:

> "These appeals are only concerned with whether their evidence (the generic evidence of Mr Millington and Ms Collings regarding ETS's analysis of the spoken English component of the TOEIC test), together with evidence that the tests of the individual under consideration has been assessed as 'invalid' rather than as 'questionable' because of problems at the test centre, suffices to satisfy the evidential burden of showing dishonesty that lies on the Secretary of State and to impose an evidential burden on the individual to raise an innocent explanation. The question before us is thus not the ultimate reliability of the evidence or the ultimate disposition of the appeals."

28. In Mr Chowdhury's case, discussed by Beatson LJ at paragraphs [24] and [25], the first instance judge held there was no evidence identifying Mr Chowdhury as a person whose test was invalid. But in fact, the evidence included a screenshot of the results which stated that this was the position. The same first instance judge held there could be multiple reasons for invalidation, some of which might not involve fraud or deception. Beatson LJ went on to hold that both the first instance judge and

the Deputy Upper Tribunal Judge who dealt with the appeal to the Upper Tribunal had misunderstood the nature of the evidence. Beatson LJ continued in paragraph [26]:

> "The reason for the misunderstandings by the Tribunals may be that the language used by Mr Millington and Ms Collings in their statements to explain a technical process is not altogether clear. But, whatever the reason, in these circumstances, in my judgment the *in limine* rejection of the Secretary of State's evidence as even sufficient to shift the evidential burden was an error of law."

29. The same evidence that was deployed by the Secretary of State in **Chowdhury** was deployed in this appeal. This is the generic evidence of Mr Millington and Ms Collings coupled with specific evidence supplied by ETS that the speaking and writing test taken by the appellant was designated by ETS as invalid.

30. Accordingly, applying the reasoning of Beatson LJ with respect to Mr Chowdhury's case, the evidence in the Home Office bundle raised a prima facie case of fraud, so as to impose an evidential burden on the appellant to raise an innocent explanation.

31. The Judge wrongly held that the evidence provided by the respondent did not raise a *prima facie* case of deception. The Judge also did not take into account that the respondent's case was potentially reinforced by the expert evidence of Professor French. As a result of rejecting the respondent's case "*in limine*", the Judge failed to engage with the evidence put forward by the appellant in rebuttal of the allegation of deception. Among other things, the appellant said that he had passed other English Language tests around the same time.

32. In conclusion, both parties were deprived of a fair hearing on the suitability issue, and the decision of the First-tier Tribunal is vitiated by a material error of law, such that it must be set aside in its entirety and re-made.

Future Disposal

33. As discussed at the hearing, this is not an appropriate case for disposal in the Upper Tribunal due to the extent of further fact-finding that is required. Accordingly, for that reason, this appeal is remitted to the First-tier Tribunal for a fresh hearing, with none of the findings of fact made by the previous Judge being preserved.

34. In resolving the suitability issue, the First-tier Tribunal is likely to be assisted by the production of the other English Language test certificate results relied upon by the appellant, as well as a schedule setting out how each test result – including the disputed ETS result - corresponds to the CEFR scale. Without a common point of comparison, it will be virtually impossible to understand the full implications of the various test results. The Tribunal is also likely to be assisted by the appellant giving as detailed an explanation as possible as to how he came to choose the Testing Centre for his ETS test, and what he can recall of the process of taking the test.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and as such the decision must be set aside and re-made.

Directions

This appeal is remitted to the First-tier Tribunal at Hatton Cross for a fresh hearing before any Judge apart from Judge NMK Lawrence.

None of the findings of fact made by Judge Lawrence will be preserved.

Signed Date 27 February 2018

Judge Monson
Deputy Upper Tribunal Judge