



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

Appeal Number: IA/43963/2014

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 9 November 2015

Promulgated

On 12 November 2015

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SHAH KHALID

Claimant

Representation:

For the Appellant: Ms A Holmes, Presenting Officer

For the Respondent: Mr M Iqbal, Counsel, instructed by Britain Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the determination of First-tier Tribunal Judge Thanki, promulgated on 9 April 2015, in which he allowed the claimant's appeal against a decision of the Secretary of State made on 18 October 2014 to refuse grant him leave to remain as the spouse of a person settled here.

Factual background to the appeal

2. The respondent had previously had leave to remain in the United Kingdom as a Tier 4 (General) Student migrant, last granted on 20 April 2011 until 14 August 2014. On 14 August 2014, he applied for further leave to remain but as the partner of a person settled here. That application was refused on 18 October 2014 on the basis that the Secretary of State considered that he did not meet the suitability requirements of Appendix FM of the Immigration Rules as he had in the past submitted with an application an English Language certificate issued by ETS who had later confirmed that the test result had been obtained by deception.
3. On that basis the respondent concluded that the claimant had sought leave to remain by deception, and thus the application was to be refused pursuant to paragraph S-LTR 2.1 with reference to paragraph S-LTR 2.2 a). The application was also refused pursuant to S-LTR 1.6
4. The claimant could not therefore meet the requirements for leave to remain as a partner or under paragraphs 276ADE.

The appeal to the First-tier Tribunal

5. The judge heard submissions but no oral evidence. The judge found that:-
 - (i) there was not sufficient evidence so show that the claimant had sued deception [25];
 - (ii) the Secretary of State had erred in not considered a more recent English language test certificate obtained on 9 August 2014 when assessing the suitability requirements [27]; and, accordingly the decision was not in accordance with the law [27].
6. The judge then allowed the appeal on that limited basis and “remitted” it for a lawful decision to be made.
7. The Secretary sought permission to appeal on the grounds that the judge had erred in law:-
 - (i) in failing to give adequate reasons for finding that the evidence adduced by the Secretary of State outlining the investigations undertaken by ETS and the process of identifying those tests found to be invalid, the judge having failed properly to engage with this evidence; and, in failing to give adequate reasons for rejecting the evidence;
 - (ii) in remitting the appeal to the respondent to reconsider the more recent English Language test certificate of 9 August 2014 as she had already taken it into account.
8. On 10 August 2015, Upper Tribunal Judge Storey granted permission on all grounds.

The hearing before the Upper Tribunal

9. I heard submissions from both representatives. It was accepted by Mr Iqbal that the judge had erred in allowing the appeal on the basis that the decision was not in accordance with the law, and in “remitting” it to the respondent.
10. I am satisfied also that judge did not properly consider the witness statements adduce by the respondent, in that there is no indication that he engaged with evidence in the statements as to the mechanisms and procedures applied by ETS to the investigation of test results, or that as the statement of Michael Sartorius indicates, ETS had identified to the Secretary of State that as a result of the application of these methods, the claimant had been identified as a person who had. The judge appears to have considered only the fact that the witness statements pre-date the date of decision and are not specific to him. I consider that there was thus a failure to engage with all the evidence adduced and to give proper and adequate reasons for rejecting the evidence as there is no indication that the judge considered the evidence that there was in place a mechanism for identifying deception, and that it had been applied to the claimant; and, thus, his name had been placed on the spreadsheet of those believed to have used a proxy test-taker.
11. While it is evident from the evidence of Rebecca Collings and Peter Millington that there may be room for errors in that there may be false positive results and that evaluation by human analysts may lead to error, there is no indication this was considered by the judge. Equally, there is no indication that he engaged with the evidence adduced by the claimant in the form of a witness statement.
12. I indicated that, although there had been no cross-appeal, it was evident from the decision that no proper findings had been made with regard to the Immigration Rules.

Re-making the decision

13. Although I heard submissions from both representatives, on reflection I consider that given the extent of the new fact-finding exercise to be undertaken, including an evaluation of the claimant’s evidence on which neither party made submissions, that it would in all the circumstances of this case be appropriate to remit ti to the Frist-tier Tribunal for a fresh determination on all issues.

Summary of Decisions:

1. The determination of the First-tier Tribunal involved making an error of law and I set it aside.
2. I remit the appeal to the First-tier Tribunal for a fresh decision on all issues.
3. No anonymity direction is made.

Signed

Date: 11 November 2015

Upper Tribunal Judge Rintoul