Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03743/2016

THE IMMIGRATION ACTS

Heard at North Shields
On 10th November 2017

Decision & Reasons Promulgated
On 6th December 2017

Before

DEPUTY JUDGE FARRELLY OF THE UPPER TRIBUNAL

Between

MR.AZAM MUHAMMAD
(NO ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr.O'ODusanya of Gracefields Solicitors.
For the Respondent: Home Office Presenting Officer.

DETERMINATION AND REASONS

Introduction

1. Although both parties are appealing I will continue to refer to them as they were in the first Tier Tribunal.

2. The appellant is a national of Pakistan born on 11 August 1987. He came to the United Kingdom as a student in 2010.He then obtained further leave until March 2016. He had also applied for leave to remain as the spouse of Ms Nabi, a settled person, following their marriage on 16

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September 2013. This was granted from November 2013 until May 2016.

3. In an application the appellant had submitted an English language certificate relating to a test taken on 3 April 2013 at Eden College. This college was the subject of investigation and, using voice recognition software, ETS concluded the appellant’s certificate had been obtained by fraud: using a proxy test taker.

4. The appellant was interviewed on the 30 July 2015 and said that he had travelled to London to take the test. He was unable to name the test centre or say how long the test took. He could not state how much it cost to take the test nor what the subject matter was. Following this his leave to remain was cancelled on the basis of the English language certificates submitted was invalid. He unsuccessfully pursued a judicial review.

5. On 23 December 2015 he made an application for leave on the basis of his family and private life. This was refused on 22 January 2016. The application was considered under the immigration rules and refused on the basis of suitability, namely, that his presence was not conducive to the public good because of his conduct and the English language certificate submitted. The respondent so no other basis either within the rules or without whereby he should be allowed to remain.

The First tier Tribunal

6. His appeal was heard by First-tier Judge Fox on 14 March 2017. The appellant was represented by Mr O’Odusanya, as he is now. Judge Fox allowed the appeal, making a full fee award in favour of the appellant. The judge indicated that the respondent had not discharged the evidential burden in respect of the certificate and concluded that the appellant was entitled to leave to remain as he met the immigration rules. However, the judge went on to say that there was no evidence that the appellant could not continue his family and private life from Pakistan and found the respondent's refusal decision was proportionate.

7. The respondent sought permission to appeal on 23 March 2017. It was contended that the judge had not applied the burden of proof correctly and had misunderstood the evidence of deception. Permission to appeal was granted on 18 September 2017.

8. Inexplicably, the appellant also sought permission to appeal even though the appeal was successful. The grounds take issue with the judge's conclusion of family and private life continuing in Pakistan. Permission to cross appeal was granted.

The Upper Tribunal

9. At hearing I asked Mr. O'Odusanya why he was appealing when the appeal had been successful. He referred me to his skeleton argument. Whilst I can understand disagreement with the judge's conclusion that family life could be enjoyed in Pakistan I still could not see why the positive outcome was being appealed.

10. The appellant has a limited right of appeal: it is confined to human rights issues (Section 84(1) (c) of the Nationality, Immigration and Asylum Act 2002. If a protected human right is engaged then when considering the final stage of the Razgar approach the judge is looking at matters through the prism of any relevant immigration rule (see Mostafa (article 8 in entry clearance) [2015] UKUT 112.). There is also a requirement to have regard to the provisions of section 117 B. In an in-country appeal, assessment of the facts relating to private and family life within the meaning of Article 8(1) of the ECHR has to be made at the date of hearing, not the date of decision.

11. At paragraph 8 Judge Fox correctly sets out the basic burden and standard of proof. Paragraph 11 indicates the judge correctly understood the shifting burden of proof: where the respondent has led evidence to call into question the English language certificate. At paragraph 18 onwards the judge makes findings in relation to the appellant's explanation about not recalling details of the test. The judge accepted some of the explanations and rejected others. At paragraph 22 the judge refers to the generic evidence used in such cases and the test results and did not find a link to the claimant proxy testing. The judge also commented on the absence of a report of the interview of 30th July 2015. Having considered the evidence the judge concluded the respondent had not made an evidential link to establish deception.

12. The application was a human rights application initially considered under appendix FM. The stumbling block for the appellant was the suitability requirement on the basis is English test was taken by proxy. It was accepted he was in a genuine and subsisting relationship with a British citizen. It was accepted he met the eligibility requirements. Judge Fox concluded the test was not a bar. This however was not the end of the matter.

13. In considering EX 1 the respondent concluded there were no insurmountable obstacles to family life continuing with his wife in Pakistan. From paragraph 26 on Judge Fox agreed with this. From this and the conclusion that the decision was proportionate a dismissal of the appeal could have been anticipated.

14. The judge does not deal with the considerations in section 117 B beyond the reference to English. The judge did not find private life affected.

Conclusions

15. The decision of First-tier Judge Fox is confusing and contradictory. I find the judge materially errs in law in the approach to the article 8 question. The decision lacks a structured approach. The issue must first be approached through the prism of the rules. In this case this primarily is appendix FM and the question was the appellant's suitability. If this was overcome the other aspects of the rules have to be considered.

16. The respondent’s grounds for permission set out the case law in relation to the evidence used in cases of alleged proxy testing. The Court of Appeal decision in SSHD –v- Shezad and Chowdhury [2016] EWCA Civ 615 focused upon whether the evidence of Mr Millington and Ms Collings satisfied the evidential burden on the respondent. In the instant case there was also the spreadsheet as evidence. The court repeated that the Secretary of State bears the initial burden of furnishing proof of deception and that this is an evidential burden. If the Secretary of State provides prima facie evidence of deception the burden shifts onto the individual to provide a plausible innocent explanation. If the individual does, then the burden shifts back to the respondent. The decisions of MA (Pakistan and others) [2016] EWCA 705 and the judicial reviews, R (on the application of Nawaz) [2017] UKUT 00288 and Abas [2017] EWHC 78 (Admin) have contributed further to the issue.

17. First Tier Judge Fox at paragraph 13 questioned the claim on behalf of the appellant that information from ETS had been sought on his behalf. The judge then found some features in favour of the appellant and some features against him. However, at paragraph 22 the judge says that the respondent has not provided information that directly links this appellant with proxy test taking. This appears to ignore the screen print of the results showing of 67 tests taken on the day 62 were deemed invalid. The respondent’s investigation into the college found of 2439 tests taken between March 2012 and February 2014, 1878 or 77% were deemed invalid. There was also the expert evidence of Prof French of a 1% error margin in the voice checks for proxy tests. Finally, there is a screen print referred to as annex A showing the appellant scored 190 in speaking and reading with the result declared invalid. The judge’s comment of no link would suggest he did not appreciate this aspect of the evidence. There is also married with the criticism of the judge for placing weight on the fact the appellant could recall some details of the examination process. The practice was for candidates to attend at the centre and then the proxy test taker took over. The appellant's ability to speak English at hearing is also open to objection as a test mechanism. In SM and Qadir it was pointed out that apparent fluency by an appellant before the tribunal had to be treated with caution given the passage of time and the fact judges are not linguistic experts.

18. The judge does not appear to have looked at matters through the complete prism of the rules. The central issue has been the test taking and his suitability. However, the other aspects of the rules have to be taken into account. The statement that the appeal succeeds and yet the decision is proportionate is incompatible.

19. For the above reasons the decision allowing the appeal materially areas in law and cannot stand. The matter is remitted for de novo hearing before the First tier Tribunal.

Decision

20. A material error of law has been established. The decision of First-tier Tribunal Judge Fox allowing the appellant's appeal cannot stand. The matter is remitted for a hearing de novo in the First tier Tribunal.

Deputy Judge Farrelly of the Upper Tribunal
10th November 2017