



Upper Tribunal
(Immigration And Asylum
Chamber)

Appeal Number: HU/10658/2015

THE IMMIGRATION ACTS

Heard at: Field House
On 24 July 2017

Decision and Reasons Promulgated
On 8 August 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MOHAMMAD ABDUL NADEEM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer

For the Respondent: Mr S Karim, counsel (instructed by E1 Solicitors)

DECISION AND REASONS

1. I shall refer to the appellant as “the secretary of state” and to the respondent as “the claimant.”
2. The secretary of state appeals with permission against the decision of First-tier Tribunal Judge Parker, allowing the claimant's appeal against her decision refusing his application for indefinite leave to remain on the basis of ten years' lawful residence.
3. The claimant entered the UK as a student on 15 September 2005 and was subsequently granted further periods of leave to remain in that capacity until 19 March 2016. On 20 August 2015 he submitted an application for indefinite leave to remain on the basis of ten years' lawful residence.
4. The secretary of state considered his application under paragraph 276B of the Rules and refused it on one of the general grounds of refusal available under paragraph

322 of the Immigration Rules which sets out the grounds on which leave to remain and variation of leave to remain in the UK should normally be refused.

5. One of the general grounds of refusal is paragraph 322(5), namely the undesirability of permitting the person concerned to remain in the UK in light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security.
6. The secretary of state noted that as part of his application to extend his leave to remain as a Tier 4 student on 27 January 2012, the claimant had relied upon a TOEIC certificate from ETS. It was contended that there was significant evidence to conclude that the certificate was fraudulently obtained by the use of a proxy test taker and further noted that his scores from the test, taken on 18 October 2011, at Portsmouth International College, had been cancelled by ETS. The secretary of state was accordingly satisfied that the certificate had been fraudulently obtained and that the appellant used deception in his Tier 4 application.
7. Although the claimant did not rely on that certificate in his current application for indefinite leave to remain, his complicity in the fraud contributed to an extremely serious attack on the maintenance of effective immigration control. As a result, the secretary of state found that his presence in the UK was not conducive to the public good as his conduct made it undesirable to allow him to remain in the UK. His application was thus refused under paragraph 322(5) with reference to paragraph 276B(iii) and paragraph 276D of the Immigration Rules [3].
8. The secretary of state also concluded that there was no basis for permitting him to remain under Appendix FM of the Rules. Nor did he meet the requirements of paragraph 276ADE(1). There were no exceptional circumstances warranting a grant of leave to remain under Article 8 outside of the Immigration Rules.

The claimant's evidence before the First-tier Tribunal

9. The claimant gave evidence at his appeal hearing on 25 May 2017. He denied that he had obtained his test results fraudulently.
10. The Judge set out his evidence in full from paragraphs [9-19]. In 2011 he found out that his college's sponsorship licence had been suspended. He then looked for an approved TOEIC centre, Opal College, which was close to his home. He elected to sit an exam for which he paid a fee.
11. He attended Opal College on 18 October 2011. He described how he took the test that day. He again attended on 21 October 2011 and sat the remaining two components - [12].
12. He was then granted further leave to remain as a student and applied for indefinite leave in August 2015, having completed ten years' lawful residence.
13. In support of that application he submitted a further English test certificate, a Grade 5 Examination in spoken English, ESOL (entry 3), CEFR Level B1.1 with distinction. He also completed English tests from City & Guilds in which he obtained a distinction - [13].

14. He was surprised to learn of the secretary of state's allegations that he had taken a test on 18 October 2011 at Portsmouth International College by way of a proxy test taker.
15. He had heard from friends that the Home Office was refusing applications on account of fraudulently obtained TOEIC results but was not worried as he had sat his own TOEIC test. After receiving the refusal letter he tried to contact Opal College to verify that he sat the exam with them but at that stage the college was no longer there.
16. He claimed in evidence that he had never used any deception. He had never breached any immigration condition and never had recourse to public funds. He had established "a decent public life". It would be harsh and wrong for him to be removed [16].
17. The Judge noted that in his oral evidence, he expanded his account of having taken the English language test at Opal College. The college's receptionist called him to say that he had passed the test and that he should come in and get the result. He went to Opal College and informed the receptionist that he was aware that there were problems with the Home Office. The receptionist gave him a copy of the College's list of exam participants and results which was hanging in the reception area. She made him a copy which he included in his bundle. At the same time she gave him his test results which were in his bundle.
18. The claimant also stated that he had taken an IELTS test in India in 2004 which he had passed with an overall band score of 5. He took the TOEIC test in 2011.
19. When he applied for indefinite leave he had to take another test which he sat in July 2015 at Trinity College. He obtained a distinction at CEFR Level B1.1 - [18].
20. In cross-examination it was put to him that there was a list of candidates who took the TOEIC test at Portsmouth International College on 18 October 2011 identified by the certificate number as well as a print out identifying him as the holder of the relevant certificate number, stating that the certificate was invalid. It was put to him that the certificate number was the same as that which appeared in his bundle at page 27 which was a TOEIC certificate which claimed to be genuine. He could not explain this but stated that he had never been to Portsmouth International College and had taken the test at Opal College without using a proxy test taker.
21. He claimed that he first found out about the ETS issue when his friends were "victims". He was sure that there would be no problem for him as he had genuinely taken the test himself. After receiving the refusal notice he tried to contact Opal College but they were no longer open. He had not made any inquiries with ETS themselves.
22. Judge Parker considered the evidence before her. She had regard to the decision in Qadir [2016] EWCA Civ 1167. She set out the relevant factors to be taken into account in considering the allegation of dishonesty as referred to at [69] of SM and Qadir v SSHD [2016] UKUT 00229 (IAC).

23. She found that the evidence relied on by the secretary of state was sufficient to meet the evidential burden. She also had regard to the evidence of the claimant who had acquitted himself 'extremely well' in cross examination [21].
24. He gave a consistent account throughout. He relied upon his test result certificate and was able to provide an account of the circumstances in which he sat the test. He gave evidence fluently in English at the hearing, albeit that some six years had elapsed since 2011 and accordingly little weight was given to that factor. Nevertheless, she had regard to his educational qualifications, noting that he has taken English language qualifications in respect of which no allegation of fraud has been made either before or after the TOEIC test taken in 2011. His qualifications and English language qualifications all support his case that he had no need to cheat - [21].
25. She noted that much was made of his failure to contact ETS directly to attempt to verify his test score. The appellant's representative asserted that ETS had moved all their operations to the United States and no longer had a presence in the UK and it was not reasonable to expect him to contact them directly. He had tried to contact the college where he took the test but it was no longer in existence. She was therefore satisfied that the appellant did what he could to verify his test result [22].
26. Moreover, the secretary of state would have been aware of the discrepancy between the information they held and that presented by the claimant concerning the test centre. He submitted evidence that he took the test on 18 October 2011 at a college in London, whereas the secretary of state's case was that the test was taken at a college in Portsmouth.
27. There was no evidence that the secretary of state took steps to clarify the obvious discrepancy. The secretary of state was in contact with ETS, owing to ongoing litigation and was best placed to conduct such a verification check. Further, the claimant submitted a copy of the list of candidates and results photocopied by the receptionist at the Opal College at the time he collected his test results. It was a poor photocopy but bore the name of the college. His evidence had the ring of truth - [22].
28. In the circumstances Judge Parker was not satisfied in the round that the respondent had discharged the legal burden of establishing fraud in this case.
29. She also found that there was no evidence that discretion was exercised by the secretary of state having found that the claimant had engaged in the conduct alleged. However, there was no need for this to be considered having regard to the finding that the secretary of state had not satisfied the legal burden.
30. In the circumstances she was satisfied that the claimant met the requirements for a grant of leave to remain indefinitely on the basis of ten years' lawful residence under the Immigration Rules.
31. She noted that the appeal is on human rights grounds only but the findings made concerning his long residence application and his ability to meet the requirements of the Rules were relevant when considering proportionality under Article 8(2).

32. The claimant relied on a claim to a private life in the UK. He has now resided here for almost 12 years, significantly in excess of the ten year period required under the Rules for the grant of indefinite leave to remain. At the date of the secretary of state's decision he had completed ten years of lawful residence. There was no evidence that he had ever breached the terms of his leave, nor committed any offence. He is a man of good character.
33. The Judge had regard to the public interest factors under s.117B. She was satisfied that he is able to speak English. He has qualifications and has worked part time while studying. There was no evidence that he had ever had recourse to public funds. There was no evidence that he had been here unlawfully at any stage. Although his leave should properly be described as precarious, as he has always been here on a temporary basis, after being granted leave to remain in February 2013 until March 2016 he would have been aware that he would have completed ten years' lawful residence on 15 September 2015 and was entitled to apply for indefinite leave to remain - [27].
34. In the circumstances, she found that the refusal constituted a disproportionate interference with his rights under Article 8 and the appeal was allowed on human rights grounds.
35. On 29 June 2016, First-tier Tribunal Judge J M Holmes granted the secretary of state permission to appeal. He found that it is arguable that the Judge failed to follow the guidance of SM and Qadir or Shehad and MA upon the correct approach to the burden of proof. Arguably the decision demonstrated a reversal of the burden of proof.
36. It was also arguable that the Judge erred by allowing the Article 8 appeal without making any findings to identify the nature and scope and strength of the private life that would mean the decision engaged Article 8.

The appeal

37. Mr Clarke relied on the grounds. He submitted that the Judge failed to give adequate reasoning as to why the secretary of state has not met the legal burden, nor for the finding that there is any innocent explanation.
38. It did not follow from the fact that the claimant was able to record details of the circumstances in which he took the test, that he personally took the test. The Judge did not refer to the BBC Panorama documentary provided to every hearing centre and may therefore not have been aware of the methods used which would not preclude the candidates from having travelled to the test centre and having knowledge of the procedures and contents of the test itself even though he may not have taken it personally.
39. Further, there may have been reasons why a person who is able to speak English to the required level would nonetheless cause or permit a proxy candidate to undertake an ETS test on his behalf or cheat. He referred to MA (Nigeria) [2016] UKUT 450 at [57].
40. The Judge had accordingly erred by failing to give adequate reasons for holding that the appellant clearly speaks English and would therefore have no reason to

secure a test certificate by deception. Further, the Judge had regard to a “poor photocopy” which bore the name Opal College which the Judge took into account. The secretary of state had not had the opportunity to verify the document and given its poor quality the Judge erred in relying on it.

41. Mr Clarke submitted that the claimant did not do all he could have done, for example by going to Portsmouth College itself or by approaching ETS directly. He submitted that the Judge “erred badly” at [22] regarding the secretary of state's failure to clarify the alleged discrepancy between the claimant's evidence and the secretary of state's concerning the location of the test centre. That in effect amounted to a reversal of the burden of proof.
42. With regard to the second ground, Mr Clarke accepts that this is “not the strongest of grounds”. He acknowledged that the secretary of state's policy guidance on rights of appeal regarded paragraph 276B as sufficient in itself to be construed as a human rights claim. However, it is missing an engagement with the nature and extent of the private life.
43. On behalf of the claimant, Mr Karim referred to the first headnote in MA, supra. The question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact sensitive.
44. He also referred and relied on paragraph 57 of SM and Qadir. The Tribunal set out the applicable principles and jurisprudence regarding allegations of dishonesty. The evidential pendulum swings in three different directions. The secretary of state is required to produce sufficient evidence to raise an issue as to the existence or non existence of a fact in issue. The spotlight then switches to the applicant. If he discharges the evidential burden of raising an innocent explanation, a further transfer of the burden of proof occurs. Where that is satisfied, the burden rests on the secretary of state to establish on the balance of probabilities that his prima facie innocent explanation is to be rejected.
45. He submitted that the three stage approach was adopted in the appeal. In this case, the claimant gave evidence at length. The supplementary bundle was handed in at the hearing itself.
46. He referred to page 25 of the claimant's bundle which contains an Opal College print out of TOEIC results, where the claimant's details are set out. In addition, official score reports have been provided. The name as well as the date of birth of the claimant is given in the score reports. Moreover, there are two separate reports relating to two separate days when the tests were taken, on 18 October 2011 and 21 October 2011. The same registration number on the score report at page 27 of the claimant's bundle is recorded in Annex A with regard to a test taken at Portsmouth International College on 18 October 2011. There is no reference in the summary sheet produced by the secretary of state at Annex B with regard to the test taken on 21 October 2011.
47. Mr Karim submitted that it was not perverse to find that the test was taken at the same centre. It was open to the Judge to find that he took it at the same centre, as revealed in the TOEIC document produced by Opal College at page 25 of the claimant's bundle.

48. He submitted that it was accepted at paragraph 7 of the secretary of state's grounds of appeal that the ETS verification system is not infallible, although it is adequately robust and rigorous. The Judge was satisfied that the claimant did what he could in the circumstances. Nor was there a reversal of the burden of proof when the Judge found that the secretary of state took no steps herself to clarify the obvious discrepancy. She noted that the secretary of state was in contact with ETS having regard to ongoing litigation and was best placed to conduct such a verification.
49. With regard to Article 8, paragraph 279 of the Rules were found to have been satisfied. By its very nature it is accepted that a period of ten years' lawful residence under the Rules constitutes a human rights claim. The Judge addressed the issue and found that the refusal constituted a disproportionate interference with the claimant's rights under Article 8.

Assessment

50. Judge C A Parker has given a careful and detailed decision setting out the relevant legal and factual issues. She has appropriately identified the applicable case law.
51. She was satisfied that the respondent discharged the evidential burden relating to the allegation of deceit. She also had regard to the evidence of the claimant, which was set out in full from paragraphs [9-19]. I have already set out this evidence, and in particular the claimant's assertion that he took the test at Opal College on two separate days without using a proxy test taker.
52. She also had regard to the copy of the print out made of a list of candidates and results of Opal college's list of exam participants and results, which included the claimant. His evidence in that respect had "the ring of truth"- [22].
53. As submitted by Mr Clarke, it is correct that she took into account the fact that the secretary of state had not taken any steps to clarify the discrepancy between the claimant's and her assertions regarding the location of the test centre. However, she had been informed by his representative that ETS had moved their operations to the United States and no longer had a presence in the UK; accordingly, it was not reasonable to expect the claimant to try to contact them directly. He had tried to contact the college where he took the test, but that was no longer in existence.
54. She found that the secretary of state would have been aware of the discrepancy. This was not simply the case of a claimant having provided evidence that he had undertaken a test in which the secretary of state maintained a proxy test taker was used. The evidence was that he took a test at a college in London and not at Portsmouth as contended by the secretary of state. It was in that context that the Judge noted that there was no evidence that the secretary of state took steps to clarify the discrepancy, as she was best placed to conduct a verification check owing to ongoing litigation with ETS.
55. I do not regard her comments to this effect at [22] amount to a reverse burden of proof. Nor was any such assertion made in the grounds of appeal seeking permission.

56. I find that the Judge has in the circumstances properly directed herself. She has also given adequate reasons for finding that the secretary of state had not discharged the legal burden of proof.
57. In the circumstances she found that there was no merit in the general ground of refusal and was satisfied that the claimant met the requirements for a grant of leave to remain indefinitely on the basis of ten years' lawful residence under the Rules.
58. She then directed herself on the basis that the appeal was on human rights grounds only. The claimant's ability to meet the requirements under the Rules was relevant when assessing the proportionality under Article 8(2). She noted that he relied on a claim of private life here. She took into account the fact that he has now resided in the UK for almost 12 years, significantly in excess of the ten year period required under the Rules.
59. She took into account the public interest factors under s.117B. She found that although his leave could properly be described as precarious, as he has always been here on a temporary basis, having been granted leave to remain in February 2013 until March 2016, he would have been aware that once he completed the ten years' lawful residence, which he had in September 2015, he was entitled to apply for indefinite leave to remain.
60. The Home Office's guidance in relation to the current rights of appeal dated 8 May 2017 accepts that an application made under paragraph 276B is a human rights application and the starting position is that there is a right of appeal against a refusal.
61. The claimant had contended that that during the 12 years that he has remained in the UK, he has established "a decent private life".
62. I find having regard to the evidence as a whole that the Judge has made sustainable findings and conclusions which are neither irrational nor perverse.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall accordingly stand.

No anonymity direction is made

Signed

Deputy Upper Tribunal Judge C R Mailer

Date 4 August 2017