



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/31665 /2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 4 September 2017**

**Decision & Reasons
Promulgated
On 11 September 2017**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

**MANSOOR AHMED BALOCHI
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Saini, of Counsel, instructed by House of Immigration Solicitors

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

- 1.** The appellant challenges the determination of First-tier Tribunal Judge Price dismissing his appeal against the respondent's refusal on 8 September 2015 to grant him leave to remain on the basis of ten years of residence. The determination was promulgated on 9 January 2016 following a hearing at Newport on 28 November 2016.

2. The appellant is a Pakistani national born on 13 April 1975. His application was refused under paragraph 322(5) because the respondent considered that he had relied on a false document from ETS in a previous application and under 276ADE (1) (i), (iii), (iv), (v) and (vi) because the requirements of those provisions were not met.
3. The grounds are lengthy; at 14 pages, they are five pages longer than the determination. They take issue with the issue of the respondent's discretion, the legal and evidential burden of proof upon the respondent, the failure to give the appellant an opportunity to address the judge's concerns, the failure to assess the evidence of the appellant's language skills, the unlawful consideration by the respondent of paragraph 322(5) and the judge's failure to properly consider article 8.
4. Permission to appeal was granted by First-tier Tribunal Judge Adio on 18 July 2017.
5. At the hearing on 4 September 2017, I heard submissions from the parties.
6. Mr Saini expanded on his grounds. Details are set out in my record of proceedings and the following is a brief summary of what was argued before me.
7. On ground 1, Mr Saini submitted that the respondent's exercise of discretion had not been lawfully assessed by the judge. With respect to ground 2, he submitted that whilst the judge was entitled to rely on the respondent's generic evidence to find that she had discharged the evidential burden, the judge erred in relying on the same evidence to conclude that the legal burden had been met. He submitted that there were many ways in which tests could be invalidated particularly in the test centre in question where many tests would have been invalidated as a matter of course due to the high level of fraud and the lack of trust in the centre; this should have been considered by the Tribunal. With respect to ground 3, the judge did not put matters of concern to the appellant at the hearing and very few questions had been asked of him. Mr Saini submitted that ground 4 was troubling in that the judge had disregarded the historic evidence of language ability before him. There should have been an assessment of the historic evidence which, if it had been undertaken, may have led to a different outcome. On ground 5 he submitted that there had been no assessment of the appellant's undesirability for the application of paragraph 322(5). Finally, on ground 6, the appellant's lawful stay had not been factored into the article 8 assessment. The matter needed to be re-heard by the First-tier Tribunal.

- 8.** Mr Wilding submitted in response that the judge had properly considered the evidence and a paragraphs 42, 44, 46 and 47 reached a conclusion that was open to him and was not susceptible to a perversity challenge. The judge's findings on deception were sound. He submitted that a consideration of the previous test certificate in the bundle would not have assisted the appellant as there are many reasons why a person would use a proxy. With regard to the appellant's conduct, the respondent relied on 322(5) as well as the character requirements under 275ADE. She did consider exercising discretion however as the appellant has used deception to obtain leave, it was difficult to see why he should benefit from the exercise of discretion and in any event no positive factors had been identified. The guidance identified the main categories of cases to which paragraph 322(5) applied; that did not mean it did not apply to other cases. Whilst the judge had not considered s.117B, this was not a material error as no positive factors had been put forward. Consideration of the appellant's leave would not assist as part of it was obtained by deception.
- 9.** Mr Saini replied. The French report relied on by the respondent was generic evidence and did not relate specifically to the appellant. The finding that the appellant could have taken the test at a centre closer to his home was not based on any specific evidence and was speculative. This was a matter that the judge should have put to the appellant. Moreover, the contents of his witness statement addressed the issue of why he needed to re-take the test quickly and was not considered by the judge. Finally, it could be seen from the decision letter, which had not been before Mr Saini when he prepared the grounds, and which had just come to his attention, that the respondent refused the application under paragraph 322(2) and not 322(5). This meant that the judge had proceeded to determine the case on a false premise.
- 10.** Mr Wilding responded briefly to the last point. He acknowledged that the judge had mistakenly referred to 322(5) but submitted that it made no difference to the outcome of the appeal given the findings on deception.
- 11.** Mr Saini submitted that an appeal had to be determined under the correct rule. The decision was not defensible.
- 12.** At the conclusion of the hearing I reserved my determination which I now give.

Discussion and Conclusions

- 13.** The most glaring problem with this determination, as pointed out by Mr Saini when he saw the decision letter, was that the judge determined the appeal under the wrong provisions of the rules. The respondent refused the application under paragraph 322(2) and *not* 322(5) as the judge maintains throughout his determination. I have considered the record of proceedings and there is no erroneous reference to 322(5) anywhere in the submissions recorded and I have to assume, therefore, that this error emanated from the judge. Not only does this show a lack of care on the part of the judge in the preparation of his determination but it also shows that the documentary evidence was not properly considered; had it been, the judge would not have made such a glaring mistake.
- 14.** Whilst the judge accepted that the appellant had attended the test centre on the date of the test, he appears to have relied heavily on the appellant's failure to explain why he had been in such a hurry to take the test that he chose to travel to a centre so far from where he lived (at 46). However, as Mr Saini pointed out in his submissions, there was a good reason provided in the appellant's witness statement which the judge does not appear to have considered at all. Additionally, had this been a matter which concerned the judge, it should, in fairness, been put to the appellant at the hearing so that he had an opportunity to explain his actions. Whilst I do not suggest that each and every matter of concern can be put to an appellant at a hearing, this was a concern which clearly factored heavily in the dismissal of the appeal and should, therefore, have been canvassed in court.
- 15.** The judge also accepted that the evidence in respect of the appellant's language ability did raise questions as to why he would need to use a proxy test taker. However, he relied entirely upon MA (ETS-TOEIC testing) [2016] UKUT 00450 (IAC) to conclude that the appellant did employ deception without providing any reasons why he preferred that over the appellant's evidence.
- 16.** The judge also failed to consider s.117B when assessing article 8. He was obliged to do so. As there has been no assessment of all the matters raised by the appellant in his witness statement and other evidence, I cannot speculate on whether this would have made any difference to the outcome of the appeal. It may possibly have had little if any impact but the difficulty is that there are so many matters on which the judge erred, that they cannot all be swept aside on the basis that they were not material. When taken cumulatively, I cannot speculate on whether a different outcome would have been possible.
- 17.** These matters are enough to render the decision unsustainable. In the circumstances, I do not consider it necessary to address the numerous other complaints made on behalf of the appellant.

- 18.** The decision is set aside in its entirety except as a record of proceedings and the matter is remitted to another judge of the First-tier Tribunal for a fresh decision to be made on all issues.

Decision

- 19.** The First-tier Tribunal made material errors of law and the decision to dismiss the appeal is set aside. The matter shall be re-heard by the First-tier Tribunal at a hearing to be arranged.

Anonymity

- 20.** I was not asked to make an anonymity order and see no reason to do so.

Signed

A handwritten signature in black ink, appearing to read "R. Keir". The signature is written in a cursive style with a small dot at the end.

Upper Tribunal Judge

Date: 7 September 2017