



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/33496/2015

THE IMMIGRATION ACTS

Heard at Field House
On 7th June 2017

Decision & Reasons Promulgated
On 15th June 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SIMRANJIT SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Ms M Malhotra instructed by Tennyson Monroe Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State I refer to the parties as they were in the First-tier Tribunal.
2. The Appellant, a national of India, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 14th October 2015 to refuse his application for leave to remain in the UK on the basis of his private and family life. First-tier Tribunal Judge S J Clarke allowed the appeal and the Secretary of State now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Parkes on 2nd May 2017.

3. The background to this appeal is that the Appellant entered the UK on 23rd January 2010 with leave to remain as a student valid until 30th August 2013 when he submitted an application for leave to remain as a Tier 4 Student. That application was refused on 6th November 2013. The Appellant appealed against the decision but the refusal was upheld and appeal rights were exhausted on 3rd June 2014. On 1st July 2014 he submitted a further application for leave to remain in the UK as a Tier 4 Student, the application was initially refused in November 2013 but was reconsidered and the decision to refuse was upheld on 23rd February 2015. The Appellant then applied for leave to remain on the basis of his relationship with his partner who he met in June 2012. The Appellant's partner has a child from a previous relationship who was born on 4th September 2009.
4. In the reasons for refusal the Secretary of State decided that the Appellant could not meet the suitability requirements of the Immigration Rules because he had provided a TOEIC certificate from Educational Testing Services (ETS) along with the application submitted on 30th April 2013 for leave to remain as a Tier 4 Student. The Secretary of State says that the certificate had been cancelled by ETS on the basis that it was fraudulently obtained and that the Appellant therefore used deception in his applications in August 2013 and July 2014. As the Appellant was found not to be able to meet the suitability requirements his application under the partner route of Appendix FM was refused as was his application under the parent route of Appendix FM. In terms of paragraph 276ADE the Secretary of State did not accept there would be very significant obstacles to the Appellant's integration in India. It was considered that there were no exceptional circumstances and the application was refused.
5. In her decision the First-tier Tribunal Judge firstly considered the suitability requirements in the context of the evidence about the ETS test. The judge examined the documentation provided in relation to the English language test and the CAS. The judge concluded that the evidence relied on by the Secretary of State to show that this Appellant used deception to obtain his TOEIC certificates issued by ETS is unreliable [13]. The judge noted that there were inconsistencies between the documents submitted by the Secretary of State which show that there were entries for two candidates bearing the same name as the Appellant, there were two different dates of birth on the certificates submitted and two different dates on which the tests were said to be held. There were also differences in the passport numbers set out in different documents.
6. The judge went on to say at paragraph 13;

“SM and Qadir is authority that the generic evidence relied upon by the Respondent in that case is sufficient to discharge the evidential burden. I conclude that the inconsistencies in this specific evidence is such that either this evidential burden is no longer discharged, or if I am wrong, based upon **SM and Qadir**, the Respondent has not discharged the legal burden because the discrepancies within the evidence”.

The judge concluded at paragraph 14;

“Drawing the strands together, I do not find the evidence which contains different dates of birth of the Appellant to be reliable. The Appellant presented his passport for the test and his application form shows it is []. The Respondent has access to the evidence to make the case, and has elected to produce evidence which is not reliable because of the reasons I have set out”.

7. In the Grounds of Appeal the Secretary of State contends that the judge cannot make a finding that the evidential burden has been discharged but then for the same reasons find that the legal one has not. It is contended that the evidential burden has been discharged in this case. The Secretary of State relied on the decision in **Secretary of State for the Home Department v Shehzad and Another** [2016] EWCA Civ and in particular paragraph 22 where Lord Justice Beatson said

“I have stated, the question in these appeals only concerns the initial stage and whether, with the evidence of Mr Millington and Ms Collings, the evidential burden on the Secretary of State is satisfied. If it is, it is then incumbent on the individual whose leave has been curtailed to provide evidence in response raising an innocent explanation”.

8. Whilst accepting that there are errors in the ETS spreadsheet in this case, the Secretary of State contends that it does give the Appellant’s details as being the holder of an invalid test. It is submitted that, properly read, the witness statement and the spreadsheet extract showed that the Appellant’s English language test had been invalidated because of evidence of fraud in the test taken by the Appellant. It is submitted that the Secretary of State’s evidential burden was met and that the individual burden fell upon the Appellant to offer an innocent explanation. It is contended that it is not clear how the deception allegation has been rebutted by the Appellant and it is unclear therefore how the legal burden has shifted back to the Secretary of State to disprove. It is contended that the judge materially erred in law in failing to follow the Court of Appeal guidance in **Shehzad**.
9. In granting permission to appeal First-tier Tribunal Judge Parkes concludes that the grounds are arguable as the judge appears to have overlooked or misapplied the findings of the Court of Appeal. The judge also expresses concerns about the findings in relation to the Appellant’s stepchild as if he can remain in the UK with a parent then there is no question of his being expected to leave the UK and it is stated that **Sanade and others (British children - Zambrano - Dereci)** [2012] UKUT 00048(IAC) and **Dereci C-256/11** are clear on that.
10. At the hearing before me Mr Tarlow relied on the grounds of appeal and in particular on paragraph 22 of the decision of **Shehzad**. He submitted that the burden shifts to the Appellant and the judge made an error in failing to recognise that.
11. Ms Malhotra relied on paragraphs 13 of the judge’s decision submitting that the judge made two alternative findings in that she finds either that the evidential burden had not been discharged on the basis that the tool kit was flawed or

alternatively, if she was wrong in relation to that, based on **SM and Qadir v SSHD (ETS-Evidence-Burden of proof) 2016 UKUT 00229**, the legal burden had not been discharged due to discrepancies in the evidence. Ms Malhotra submitted that, if the burden had shifted, there had been an innocent explanation put forward by the Appellant in his witness statement and in his oral evidence which gave the Appellant's reasons for disagreeing with the Secretary of State's assertions. Therefore, in her submission, if the burden had shifted the Appellant has put forward an innocent explanation. In these circumstances she submitted that there was no material error.

Error of Law

12. I have considered the judge's findings in the context of the guidance given in the case of **Shehzad**. As well as paragraph 22 I also note the contents of paragraph 30 were Lord Justice Beatson said;

"... The Tribunal might be open to criticism in its treatment of the Millington/Collings evidence at the initial stage. But, in circumstances where the generic evidence is not accompanied by evidence showing that the individual under consideration's test was categorised as "invalid", I consider that the Secretary of State faces a difficulty in respect of the evidential burden at the initial stage."

In my view this supports Ms Malhotra's submission that the Court of Appeal did not say in the case of **Shehzad** that the burden always shifts on the basis of the generic evidence. The evidence referred to by the Court of Appeal in relation to the appeal of Mr Chowdhury included specific evidence on top of the generic evidence and relating to that particular Appellant. The Court of Appeal noted that the evidence in Mr Shehzad's appeal differed from that in Mr Chowdhury's in that the Secretary of State did not identify Mr Shehzad's test as invalid. The Court of Appeal went on to reach the conclusion set out above to say that the Secretary of State faced a difficulty in terms of the evidential burden at the initial stage where the generic evidence was not accompanied by evidence showing that the individual's test was characterised as invalid.

13. In her analysis of the evidence in this appeal the judge concluded that the inconsistencies in the specific evidence submitted in relation to this Appellant was such that the evidence submitted by the Secretary of State was not sufficient to discharge the initial burden. The Secretary of State's Grounds imply that the judge misunderstood the documents. However Mr Tarlow made no specific submissions to that effect. On the basis of the evidence before me I cannot conclude that the judge in any way misread the documents before her. The judge examined all of the documents and concluded that there were inconsistencies in the evidence such as to render them unreliable. In these circumstances it was open to the judge to conclude that the evidential burden had not been discharged.
14. In any event the judge made an alternative finding that the Secretary of State had not discharged the legal burden upon her to prove dishonesty on the Appellant part. Ms Malhotra submitted that this was a sufficient alternative finding. I agree with that

submission given the findings by the judge at paragraph 13 and 14 in relation to the unreliable evidence. I am therefore satisfied that, even if the judge was wrong to conclude that the evidential burden had not been met, the alternative finding is sufficient to deal with all of the evidence put forward by the Secretary of State and the Appellant. In these circumstances I accept it was open to the judge in the alternative to find that the legal burden had not been discharged.

15. Although mentioned in the permission to appeal the Secretary of State did not specifically challenge the findings in relation to Appendix FM. Having found that the Appellant met the suitability requirements the judge went on at paragraph 15 to conclude that there are insurmountable obstacles to family life with the Appellant's partner in India. The Secretary of State does not specifically challenge this finding. At paragraph 16 the judge considered the Appellant's relationship with his partner's child and concluded that the Appellant could not have a genuine and subsisting relationship with the child because the child had such a relationship with his biological father but went on to conclude that it was not reasonable to expect the Appellant's partner and child to leave the UK. It is clear from reading paragraphs 15 to 18 that, rather than finding that the Appellant met the parent route, the judge has found that there are insurmountable obstacles to family life continuing outside the UK because of his partner's relationship with the child and the fact that it is not reasonable or in the best interests of the child to leave the UK because of the contact he enjoys with his biological father. There is no challenge to these findings.
16. In these circumstances for the reasons set out above I conclude that there is no material error in the decision of the First-tier Tribunal.

Notice of Decision

There is no material error in the decision of the First-tier Tribunal.

The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed

Date: 15 June 2017

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

I maintain the fee award made by the First-tier Tribunal.

Signed

Date: 15 June 2017

Deputy Upper Tribunal Judge Grimes