



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/41059/2014

THE IMMIGRATION ACTS

Heard at Field House
On 28 April 2017

Decision & Reasons Promulgated
On 25 May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IJAZ AHMAD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Turner, Counsel, instructed on a Direct Access basis
For the Respondent: Mr S Staunton, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I shall refer to the parties as they were before the First-tier Tribunal, thus the Secretary of State is the Respondent and Mr Ahmad is once more the Appellant.
2. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge Khawar (the judge), promulgated on 14 March 2016, in which he allowed the Appellant's appeal under the Immigration Rules. This appeal has a somewhat protracted procedural history. In summary, the Respondent's original decision in

respect of the Appellant's application for further leave to remain was made on 26 September 2014. The Appellant's initial appeal came before First-tier Tribunal Judge Cooper, and by a decision promulgated on 28 April 2015 he dismissed the appeal. That decision was then successfully challenged in the Upper Tribunal, Deputy Upper Tribunal Judge Archer finding there to be material errors of law and then remitting the matter back to the First-tier Tribunal for a complete re-hearing. In this way the appeal eventually came before the judge on 20 January 2016.

3. The Appellant's case involved the now very well-known ETS issues. In particular the Respondent has asserted throughout that the Appellant obtained his English language certificate through deception and that a proxy test taker was involved in the obtaining of the certificate back in 2012.

The judge's decision

4. The judge begins his findings and conclusions at paragraph 15. He sets out the assertions made in the refusal letter and refers to what he describes as the "generic evidence" relied upon by the Respondent, namely witness statements from Miss Rebecca Collings and Mr Peter Millington. The judge goes on to note the absence of other specific evidence from the Respondent, and at paragraph 23 the judge states as follows:-

"... on the totality of the aforesaid evidence before me, I am not satisfied that the Respondent has discharged the burden of proof upon her to establish that the Appellant has used deception ...".

5. At paragraph 24 the judge refers to what he finds to be credible evidence from the Appellant contained in two witness statements, a number of documents, and oral evidence. On the basis of these findings the appeal was duly allowed.

The grounds of appeal and grant of permission

6. The Respondent's grounds of appeal are in essence twofold. First, that the judge had failed to set out what evidence from the Appellant the judge had deemed to be credible, with particular reference to paragraph 24. Second, that the judge had applied a standard of proof higher than that of the balance of probabilities.
7. In granting permission to appeal, Upper Tribunal Judge Jackson, by a decision dated 17 March 2017, found the first ground to be arguable, but the second to lack in any merit at all.

The hearing before me

8. At the outset of the hearing I indicated to the parties that I had read what I regarded to be the relevant case law pertaining to the ETS issues, the Record of Proceedings from the hearing before the judge, and the two witness statements referred to in

paragraph 24 of his decision. I also indicated that if the judge had approached the relevant issues correctly and that if the Appellant's evidence had been sufficient to support a conclusion that he had provided a plausible rebuttal to the Respondent's allegations, then the judge was also probably entitled to conclude that the Respondent's generic evidence was insufficient to discharge the legal burden resting upon (with regard to the case of Qadir in both the Upper Tribunal and Court of Appeal).

9. Mr Staunton relied on the first ground of appeal, did not seek to re-open the second ground of appeal and had nothing further to add. Mr Turner submitted that there are no material errors of law in the judge's decision.

Decision on error of law

10. As I announced to the parties at the hearing I conclude that there are no material errors of law in the judge's decision.
11. It is right that the decision could have been structured in a clearer manner, but that is really by-the-by: substance is always more important than form. Having read the judge's decision holistically and in a sensible manner, I conclude that his reference in paragraph 23 to a failure by the Respondent to discharge the burden of proof relates to the ultimate legal burden and *not* the initial evidential burden. I would conclude that by way of implication the judge has in effect accepted that the generic evidence was sufficient to overcome that initial evidential burden, albeit he has not said so in express terms. I read paragraph 23 in that way because at paragraph 24 the judge goes on to refer to the Appellant's evidence in rebuttal and deems this to be credible. Thus the judge was, in my view, proceeding in effect, if not entirely by design, in an appropriate manner. As I have mentioned previously, once the judge (assuming he was entitled to) concluded that the Appellant's rebuttal was credible, he was then entitled to conclude that the generic evidence relied upon by the Respondent was insufficient to discharge the legal burden of proof (see SM and Qadir in the Upper Tribunal and paragraph 23 of the Court of Appeal's judgment in Qadir).
12. The question arises as to whether the judge was entitled to conclude that the Appellant's evidence was credible. It is right that he does not set out this evidence when making his findings in paragraph 24. That is somewhat unfortunate as where particular factual issues are of essential importance to an appeal, the recitation of the relevant evidence will always be helpful to those reading the decision at a later date. Having said that, reference to the Appellant's evidence and the essence of its contents is made in paragraph 13 of the decision. I have looked at the two witness statements referred to in paragraph 24 and in relation to the first witness statement dated 10 March 2015 it is right that a degree of detail as to the circumstances surrounding the relevant English test has been provided by the Appellant. I have also looked at the Record of Proceedings produced by the judge at the hearing. There is clear reference to a number of questions being put in cross-examination about the circumstances surrounding the relevant test. As far as I can see, the oral evidence was consistent with the written evidence and taking an overall view of the

evidence the judge was, in my view, entitled to conclude that the Appellant had indeed provided a credible rebuttal to the Respondent's allegations.

13. In light of the above, and whilst the Appellant may appear to be somewhat fortunate, the judge's findings and conclusions were open to him and therefore the decision stands.

Notice of Decision

The decision of the First-tier Tribunal does not contain any material errors of law.

The appeal of the Secretary of State to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed

Date: 24 May 2017

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

A fee was paid and in agreement with the award made by the First-tier Tribunal, I make a whole fee award of £140.00.

Signed

Date: 24 May 2017

Deputy Upper Tribunal Judge Norton-Taylor