



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/06051/2016
HU/06055/2016

THE IMMIGRATION ACTS

Heard at Field House

On 5 December 2017

**Decision & Reasons
Promulgated
On 5 January 2018**

Before

**DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR OM BAHADUR UPRETI
MRS AMINA MIYA
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr P Nath, Home Office Presenting Officer

For the Respondent: Mr S Sharma, Counsel, instructed by Paul John & Co
Solicitors

DECISION AND REASONS

1. The decision under challenge in this case is that by Judge Abebrese dated 27 July 2017 allowing on human rights grounds the appeal of the respondent (hereafter the claimant) against the decision of the appellant (hereafter the Secretary of State or SSHD) to refuse his application for leave to remain.

2. The SSHD's grounds of appeal submit first of all that the judge erred in law in concluding that the SSHD had not shown that the claimant had used deception in relying on an ETS/TOEIC English language test. It was contended secondly that this error coloured the judge's proportionality assessment.
3. I find no merit in the SSHD's first ground. The grounds allege that the judge failed to appreciate that the SSHD had met the evidential burden and failed to make adequate findings in respect of an "innocent" explanation: "There is no innocent explanation when anyone who takes the test is required to show identification as ETS have to verify the [claimant] via an official document." The first difficulty with this ground is that the judge does not say or imply anything to the effect that the SSHD had not discharged the evidential burden. Further, the judge's reference in paragraph 22 to the case of **Kadir** ([2016] UKUT 229 (IAC) and to the respondent's generic evidence in that case being "of general application" would, if anything, suggest that the judge was clearly aware of the Upper Tribunal's view that the SSHD's generic evidence discharged the evidential burden of proof. A second difficulty is that the judge clearly treated as central to the case whether, on the facts of this case, the claimant had provided an innocent explanation. At paragraphs 18 - 20 he recorded the claimant's evidence as follows:
 18. He did not sit the TOEIC as he was told that it was necessary for him to take the examinations because he already had a qualification at level 5 Diploma in Business Management and this was acceptable as an equivalent to the English language requirement and the University of West London then provided him with a Confirmation of Acceptance of Studies (CAS).
 19. The appellant was then informed by the University that he would not be able to take his remaining modules because his name was on a list stating that his TOEIC was invalid.
 20. The appellant in cross examination repeated these points and he explained further why it was not necessary for him to take the TOIEC test. He stated that he had never heard of Cauldon College neither had he ever been to that College. The appellant gave evidence that he had had sight of the test certificate and he could not explain how his personal details were on the test certificate. Unfortunately the test certificate was not produced by the respondents at the hearing."
4. At paragraph 21 the judge noted the Presenting Officer's submission that the claimant had not provided a plausible reason to show how his personal details had been used by another person. At paragraph 22 the judge held that he did not accept this as in his assessment he "found the evidence of [the claimant] to be credible [and that] the details that were found in the

test certificate did not necessarily mean that he took the test” At paragraph 23 he concluded:

“23. I find the first appellant to be credible when he states that he did need to take the test because he already had a level 5 Diploma which the University of West London were content to accept in place of any other test. In this instance it is likely that the information of the first appellant was used for fraudulent purposes.”

5. In my judgement, it was open to the judge to accept the claimant’s explanation and to consider that in the claimant’s individual case the claimant’s explanation was plausible. Indeed not only did the claimant have good command of English but at the time he was alleged to have taken the test – on 19 November 2013 – he still had student leave to remain and very shortly after – on 6 July 2014 – he was granted further leave to remain in the same capacity. In such circumstances it is difficult to understand why the claimant needed to take a TOEIC test.
6. The SSHD’s failure to establish an error of law in the judge’s treatment of the deception issue somewhat weakens the second ground of challenge, since it cannot be said any longer that the judge’s proportionality assessment was “coloured” by error regarding the deception issue. It must be said, however, that the judge’s treatment of the proportionality assessment was at the very least incomplete. At paragraph 25 the judge stated:


“25. I find that the decision of respondent will interfere with the private and or family life of both the first and second appellant and that it is likely to have consequences of a grave nature. The decision is not in accordance with the law because inadequate weight was given to explanation provided by the appellant. The decision is also not in the public interest because the appellant has an appropriate qualification in English which was approved by the University of West London. In the circumstances the decision is not proportionate.”

7. On the face of the SSHD’s ground this treatment was inadequate because the judge does not expressly identify any exceptional/compelling circumstances or show he had weighed in the balance the fact that the claimant’s stay in the UK has been precarious and had not shown if the claimant and his wife could not continue their family life in Nepal. Ordinarily such omission would very likely lead me to find a material error of law. However, it is clear that in this case there were unusual circumstances underlying the claimant’s decision to apply for leave to remain on human rights grounds. His correspondence shows clearly that he only wished to remain in the UK to continue his studies but was prevented from doing that because he did not have a CAS. He could not get a CAS because the SSHD had alleged he used deception. His

application and his grounds of appeal are careful to set out limits to his claim that he be granted further leave. Seen in that context, I read Judge Abebrese's cursory treatment of the proportionality assessment as being based on a recognition that, but for the deception, the claimant had a legitimate expectation he would be able to continue to obtain leave as a student. In discussions at the hearing Mr Nath did not dispute the claimant's student credentials. In these unusual circumstances, I conclude that the judge's proportionality assessment was not vitiated by legal error.

8. I would add that if I had found the judge's proportionality assessment legally erroneous, and gone on to re-make the decision, I would have attached very significant weight to the fact that, absent the deception allegation, the claimant had realistic prospects of success in a further student application. However, in very likely going on to allow the appeal I would have borne closely in mind s.8 of the Human Rights Act 1998 and the requirement to afford an "appropriate remedy". Given the claimant's own statement that he only sought further leave as a student, I would have encouraged the SSHD to grant further leave to remain only on a limited basis subject to the claimant being able to show that he could meet all the requirements of the Rules governing students. I would not have considered a free-standing grant of leave appropriate in his case.
9. Since the judge did not turn his mind to the issue of remedy it may be that the observations I have just made remain pertinent to what action the SSHD elects to take in light of my upholding of that decision.

No anonymity direction is made.

Signed: 

Dr H H Storey

Date: 4 January 2018