



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09499/2016

THE IMMIGRATION ACTS

Heard at Liverpool
On 25 June 2018

Decision & Reasons Promulgated
On 18 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

v

MR QIN CHEN
Respondent

Representation:

For the Appellant: Mr. C. Bates, Presenting Officer

For the Respondent: Mr. Kumar Uddin, AGI solicitors

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of China, born on 24.11.82. He arrived in the United Kingdom on 15 March 2007 and claimed asylum at the port of entry. He applied for leave to remain on 13 August 2015 on the basis of his private and family life. This application was refused in a decision dated 22 March 2016, on the basis that he did not meet

the suitability and eligibility requirements of the Rules and EX1 does not apply.

2. The Claimant appealed against this decision and his appeal came before First tier Tribunal Judge Bannerman for hearing on 21 August 2017. In a decision and reasons promulgated on 13 September 2017, he allowed the appeal.

3. The Secretary of State sought permission to appeal against this decision, in time, on the basis that the Judge had erred in failing to give adequate reasons for finding that the Claimant could offer an innocent explanation in respect of the assertion that he had obtained an English language certificate by deception.

4. Permission to appeal was granted by First tier Tribunal Judge Grant in a decision dated 6 March 2018 on the basis that it was arguable that the judge had erred in law by providing wholly adequate reasons for his findings.

Hearing

5. At the hearing before me, Mr Bates sought to rely on the grounds of appeal. He submitted that the Judge was not disputing that the Secretary of State had discharged the initial evidential burden and he made findings based on the Claimant offering a limited explanation. The Claimant's evidence is that he was duped into taking the test and the Judge was entirely satisfied he was not part of the scheme. The problem is that the Claimant chose a course of 2 hours a day for 6 days to learn parrot fashion the questions he would be asked. When he turned up for the examination it only took about a minute. The Secretary of State would argue the Claimant gave personal details for 1 minute and then the proxy took over as it was recorded examination.

6. Mr Bates submitted that the Judge erred in failing to give adequate reasons as to why the Claimant would believe it was a normal examination or test of English language. There was no evidence he was completely unfamiliar with taking exams and it is highly unusual to be told what the answers would be and to learn them in parrot fashion and to give name and details. When the Judge is considering the innocent explanation being put forward by the Claimant, he needed an interpreter for him to give evidence easily. The Claimant had clearly been the beneficiary and there was no reason why those who organized the deception would have done this without his knowledge. If the Claimant is saying he was deceived and had to take a test that was not needed then why has he not reported the deceit to the Secretary of State. Even if he is an innocent party, Mr Bates submitted that he should still have reported what took place or complained about it.

7. Mr Bates submitted that in the context of his own evidence it was clearly a dubious test whether it was conducted with or without the Claimant's knowledge, because it was not carried out normally and thus the Judge needed to say more at [54], particularly given that the Secretary of State had discharged the evidential burden and that this was a material error. Mr Bates submitted that it follows from that the consideration of suitability is contaminated and the Secretary of State's position is entirely justified and this is a public interest factor in the Article 8 consideration.

8. Mr Bates further submitted with reference to the decision in SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC) albeit there had been a Home Office change in policy in February 2018, the Secretary of State would be arguing that where someone has actively undertaken a proxy test even without repeat offences they would meet the definition of very poor immigration history and the policy does not apply. Consequently, there would just be a proportionality assessment but with very strong public interest arguments. Consequently, the Judge's assessment of proportionality pursuant to Article 8 would require reconsideration.

10. In his submissions, Mr Kamar Uddin took me to the findings of the Judge at [53] onwards, where he carefully considered all of the written and oral evidence before him. At [54] having heard the evidence of the Claimant he found his evidence to be genuine and accepted it. He submitted that the Judge was entirely satisfied that the Claimant was not part of the fraudulent scheme and paid genuine money for a certificate he believed to be genuine. The Judge's indirect finding is that the Claimant was the victim and cannot simply be guilty by association. He did go to London from Liverpool but would not do so unless he was preparing for a test.

11. He submitted that at the Claimant followed a genuine course of action. At [37] onwards the Judge records the Presenting Officer's detailed submissions. Mr Kamar Uddin submitted that, in respect of the Claimant's evidence that the oral test only took a minute, that he was a customer and if he was participating in the fraud he would have said it took longer. He genuinely believed that this is what the test is and it is for the Secretary of State to say it is not. The Judge having heard first hand evidence from the Claimant found the evidence he gave to be credible. If the Judge found it was a fraudulent test he did not need to say anymore but having found the Claimant was not part of the fraud the blame lies on the company and not at the Claimant's door. None of the representatives of the company were giving evidence and so the Judge could only deal with what was before him. The Judge at [26] recorded the Claimant's evidence that he was angry and felt cheated when he found out that the test centre had been some form of fraud.

12. Mr Kamar Uddin submitted that the Claimant is the father or three British Citizen children and that the Home Office now accept the relationship is

genuine and subsisting. The Claimant did not need to be involved in a fraud as the father of three British Citizen children. The Presenting Officer directed the Judge's mind through submissions and the specifics of the refusal letter. He submitted that the fact is that the Judge has addressed the material points and that while the judgment made may be condensed, looked at overall everything was in the Judge's mind.

13. In reply, Mr Bates pointed out that in terms of the evidence before the Judge, there was a letter dated 21 August 2017 from a senior caseworker, Leslie Singh and a Professor French report, in addition to the evidence in the Respondent's bundle. He reiterated his submission that [54] amounts to findings with inadequate or a complete lack of reasons. The question is whether [54] is sufficient to provide answers to the detailed submissions made by the Presenting Officer. He submitted that why would a 1 minute test not have lead the Claimant to question what had taken place? At [22] it would have been useful if the Claimant felt his English was good enough and if he was prepared to take a TOEIC test he should have investigated what was involved. He needed an interpreter then and probably still does.

Findings

14. I find material errors of law in the decision of the First tier Tribunal Judge, on the basis that he failed to provide adequate reasons for concluding at [54]-[56] that:

"54. Having heard the evidence of the Appellant in particular I found his evidence to be genuine and on the balance of probabilities was able to accept it. I felt that he gave his evidence honestly about being duped into undertaking a test that subsequently turned out to be a fraudulent scheme. I am however entirely satisfied that he was not part of the fraudulent scheme and that he paid genuine money for a certificate that he believed to be genuine.

55. I therefore, having regard to the EX1 paragraph of the immigration rules, find that he did not fall foul of R-LTRP 1.1. in respect of his good character.

56. Standing the evidence that I have heard I am satisfied that it is not undesirable to allow him to remain in the United Kingdom. I am satisfied that he would otherwise meet the eligibility criteria requirements and that it would be proportionate in this particular circumstances narrated in the evidence, for him to meet the suitability tests."

15. I accept the submissions made by Mr Bates, in line with the grounds of appeal by the Secretary of State, that there is an absence of reasons as to why the Judge reached his findings, in particular as to being "entirely satisfied" that the Claimant was not part of the fraudulent scheme, given that it would have been apparent that neither the college nor the test were genuine. I further find that rationally no genuine college could have a 100% pass rate,

which was the Claimant's evidence. Even if, as the Judge found, the Claimant was "duped," he would have known that something was amiss, if not during the course where he told to learn the questions he would be asked then at the test itself which only lasted for one minute, on his evidence. I have set out the extent of the Judge's findings above and it is also clear from [56] that there is an absence of reasoning to support the finding that it would be proportionate for him to meet the suitability tests, which is in any event not a matter of proportionality but rather whether they are met or not met.

16. It follows that the Judge's findings as to the proportionality of removal cannot stand either, as they are entirely predicated on his finding that the Claimant meets the requirements of the Rules.

Decision

17. I find material errors of law in the decision of First tier Tribunal Judge Bannerman. I set that decision aside and remit the appeal for a hearing *de novo* before a different Judge of the First tier Tribunal.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

16 July 2018