



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10211/2016

THE IMMIGRATION ACTS

Heard at FIELD HOUSE
On 20th June 2018

Decision and Reasons Promulgated
On 3rd July 2018

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL
G A BLACK

Between

MR IKRAM MUSSADAQ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Sharma (Counsel)

For the Respondent: Ms A Everett (Home Office Presenting Officer)

ERROR OF LAW DECISION AND REASONS

1. This is an error of law hearing. The appellant appeals against the decision of the First-tier Tribunal (Judge Shanahan)("FtT") promulgated on 20th March 2017 in which the appellant's application for further leave to remain on human rights grounds was dismissed.

Background

2. The appellant is a citizen of Pakistan and came to the UK as a tier 4 student. His application was refused on the grounds that he had used a proxy taker for an English language test on 20.3.2012 and therefore did not meet the Eligibility and Suitability requirements of the Immigration Rules Appendix FM, EX1 and paragraph 276ADE.

FtT decision

3. The FtT set out the various burdens of proof applicable in ETS cases at [15] and in found that the evidential burden had been made out [19]. The FtT considered the appellant's innocent explanation at [20-23]. The FtT found that the appellant had made only one attempt to re-sit the test and could have pursued the same by obtaining his passport from the Respondent, for which he had given inadequate reasons [22]. The FtT found it improbable that the appellant's language ability would have deteriorated to the level shown by the test results, in between 2011 and 2012.

Renewed Grounds of appeal

4. In grounds of appeal it is argued that the FtT wrongly held it against the appellant that he had not been able to re sit a test which was not a requirement and he could not do so. He had attempted to obtain his passport for taking a test but the respondent had retained the original document.
5. The FtT failed to apply **Shen** (paper appeals; proving dishonesty) [2104] UKUT 236 (IAC) which held that the appellant's innocent explanation needed only to meet the basic level of plausibility and to which the UT had regard in **SM & Qadir** (ETS - Evidence-burden of proof) [2016]. Nothing the appellant said was implausible and at its highest the FtT found that further evidence could have been provided. The findings made in [20] amounted to an innocent explanation that the FtT failed to appreciate.
6. The FtT's approach was flawed in considering that the burden was on the appellant to prove innocence rather than on the respondent to show dishonesty.
7. The FtT erred by requiring the appellant to explain why there was a record of him taking a test on 21.3.2012 when he stated that he had not done so.
8. The FtT failed to have proper regard to the medical condition (Vitiligo) that the appellant's wife suffered from which restricted her ability to tolerate sunlight and heat and which was a factor in considering insurmountable obstacles and it was perverse for the FtT to find that it could be managed in Pakistan (ground 2). It was further argued that the level of "offending" behaviour did not reach the level in the Criminal guidance.

Permission to appeal

9. Permission to appeal to the Upper Tribunal (UT) was granted by FTJ Adio on the second ground only. The application was renewed before to UT and permission was granted on the first ground by UTJ Frances who found the FtT's approach to

deception and whether it the application was properly refused on Suitability grounds were arguable errors of law.

Submissions

10. At the hearing before me Mr Sharma expanded on the grounds of appeal and argued that the respondent provided evidence of a look up tool for a test dated 21st March 2012 which did not tally with the respondent's case. The FtT relied on the same which was a factual error. The appellant had only to show an innocent explanation that met the basic level of plausibility (**Shen**) which the FtT had as set out at [20]. To re sit the test was not a requirement and in any event the appellant could not do so as the respondent had his passport.
11. The FtT failed to have any regard for the fact that the appellant sat a reading and listening test on 18.1.2012 with an exceptionally high score. On 17.1.12 he scored 150 in the writing and 100 in the speaking test which was a pass. His earlier tests taken in 2011 were in line with those marks. The FtT failed to consider the test results in the round which showed that the appellant had consistently scored higher levels in reading than speaking. The appellant argued that the FtT erred by failing to take into account the information given by the appellant as to having taken the test on 20.3.2012.
13. Ms Everett responded that the FtT had provided an explanation of her assessment of the evidence in [20] and the FtT was entitled to look at other evidence in considering the issue of innocent explanation. The appellant's efforts to re take a test were minimal. There was no error in the findings made as the FtT was entitled to find the appellant lacking in credibility.

Discussion and conclusion

14. I am satisfied that both grounds have been made out by the appellant and that there were errors in law such that the decision shall be set aside. The FtT placed weight on the failure of the appellant in his attempts to re sit the test when this was not a requirement [22] and its approach was thus flawed. The FtT appeared not to have considered that the actual scores obtained in January and March 2012 for speaking which were both low 100 and 140 respectively. The FtT failed to have regard to the fact that the score for 20.3.2012 for speaking was 140 which arguably was not in line with the scores obtained by the proxy takers which were much higher and which would go to the issue of motive. The FtT failed to revert the burden of proof to the respondent as to dishonesty having found no innocent explanation. I am satisfied that overall the FtT was in error having regard to the issue of deception [31].
15. Further the FtT failed to properly deal with the evidence of the appellant's wife's medical condition in concluding that she had not been provided with sufficient evidence as to how the condition could be managed in Pakistan, which was contrary to the evidence from the GP at page 51 and the appellant's oral evidence that she required medical treatment after a short visit to Pakistan. The conclusion are

