



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10520/2016

THE IMMIGRATION ACTS

Heard at Field House
On 13th June 2018

Decision & Reasons Promulgated
On 26th June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUHAMMAD SALMAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr P Turner, Counsel

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, for the sake of convenience, I shall refer to the Secretary of State as “the Respondent” and to Mr Muhammad Salman as “the Appellant”, reflecting their respective positions in the First-tier Tribunal.
2. The Appellant is a citizen of Pakistan born 5th March 1989. He appealed against the decision of the Respondent dated 15th April 2016 refusing his application for indefinite leave to remain in the United Kingdom under the Immigration Rules as the spouse of

a British national. The Secretary of State was not satisfied that he met the suitability requirements under Appendix FM and paragraph 276ADE of the Immigration Rules. The Respondent's decision refusing the application was based on the fact that in November and December 2011, the Appellant fraudulently obtained a TOEIC certificate from Elizabeth College. It was noted that Elizabeth College was an institution that raised particular concerns because of the unusually large number of fraudulently issued test certificates emanating from that establishment.

3. The Secretary of State concluded therefore that the Appellant's presence in the UK was not conducive to the public good, although it was accepted that all the other suitability requirements of the Immigration Rules were met.
4. First-tier Tribunal Judge Robinson allowed the Appellant's appeal in a decision promulgated on 19th March 2018. The Respondent appealed against that decision and a Judge of the First-tier Tribunal granted permission to appeal in the following terms:

"The grounds argue that the Judge did not properly consider the issue of the burden and standard of proof and **SM and Qadir**. The Judge had erred with regard to the Appellant's status at all times being precarious and the assessment of proportionality.

If the Judge is right on the Appellant's use of deception then it is difficult to see that the proportionality assessment would be flawed. However I have concerns about the assessment regarding the evidence on the Appellant's test and the application of the shifting burdens that apply. Elizabeth College was one that raised particular concerns and that appears to have been ignored by the Judge."

5. Thus the appeal came before me on an error of law hearing.

The First-tier Tribunal Hearing

6. The First-tier Tribunal considered the documentary evidence placed before it and heard oral evidence from the Appellant and his wife. A note was made of the legal framework in cases of this kind, and the judge recognised that the Appellant's appeal before him was based on an Article 8 ECHR private/family life claim.
7. The FtTJ further recognised that the main issue before him concerned the Appellant's TOEIC test and the Respondent's assertion that a fraudulent ETS certificate had been obtained. The judge acknowledged that the certificate was now cancelled [4] and [20].
8. He further noted that the Appellant, who has always maintained that he did not engage in deception in obtaining his test certificate, was interviewed by the Respondent on 7th April 2016. The judge noted that the Appellant replied fluently in English to the questions asked. He noted that the Respondent considered the substance of the answers given showed vagueness and therefore placed the appellant's credibility in doubt.
9. Having considered the evidence the FtTJ said this [25-26]:

“I have assessed all the evidence concerning the appellant’s case and note that it is not in dispute that he was issued with a test certificate which was withdrawn on the basis that there was evidence to suggest that it may have been obtained by deception. Some of the evidence before this Tribunal is generic. The appellant was interviewed and his answers were deemed to be incredible. A close look at the interviewer’s comments show that the reasons for doubting him were that his answers about the tests were *rather vague* and his answers about the timing of the tests were not satisfactory as his estimate of the timing of the tests was *rather short*. These are not serious criticisms. Importantly he was assessed as a fluent English speak (sic) and this is a point in his favour.

It is apparent that the respondent took the view that the appellant’s explanations and the generic evidence as a whole lead to a conclusion that there had been deception. I have quoted the appellant’s statement above. I have heard and assessed his oral evidence which included his description of the venue in cross examination and his recall of the events during the test. I am satisfied that his explanation satisfies the minimum standard of plausibility required for this tribunal to make a finding in his favour.”

10. The FtTJ after considering the Appellant’s appeal under Appendix FM and paragraph 276ADE allowed it.

Onward Appeal

11. The Respondent’s Grounds of Appeal take issue with the FtTJ’s findings at [25] and [26].
12. The grounds assert that the FtTJ (i) failed to assess the correct burden of proof in cases of this kind, (ii) failed to give adequate reasons why the Respondent had not met the legal burden and (iii) failed to set out adequately the reasons for finding there was an innocent explanation. It was further asserted in light of the decision in **MA (Nigeria) [2016] UKUT 450** that the FtTJ materially erred in failing to give adequate reasons for holding that a person who clearly speaks English would therefore have no reason to secure a test certificate by deception.

Error of Law Hearing

13. Mr Duffy’s submissions relied upon the grounds seeking permission. He said that the FtTJ had not adopted the correct approach as to whether the Secretary of State had discharged the burden upon her. The likelihood of false positives on the speaker comparison test was less than 2%. He emphasised, as the grant of permission indicated, that Elizabeth College was one that raised particular concerns. The FtTJ had failed to properly consider these concerns.
14. Mr Turner submitted that the FtTJ had looked carefully at all the evidence before him. He had set out the Respondent’s case and had properly set out the legal framework in addition to considering the Appellant’s oral evidence. It was clear that although the FtTJ appeared to give a limited summary of the application and burden and standard

of proof in cases of this kind, nevertheless he properly concluded that the Appellant had not committed any fraud. The judge's findings were sufficient to show why he accepted the Appellant's evidence that he was at the test centre and thereby conclude that the Appellant had provided sufficient evidence to satisfy the judge that the burden shifted back to the Respondent.

15. Mr Turner added that there was no submission made that the judge's findings amounted to perversity. Therefore they were ones which were open to him. The weight to be attached to a piece of evidence was a matter for the judge and, having directed himself on the case law of **MA (ETS - TOEIC testing) [2016] UKUT 450**, he found that the Appellant had provided an explanation which satisfied the minimum standard of plausibility required for the Tribunal to make a finding in his favour [26]. The Respondent's case amounted to no more than a disagreement with the findings made by the First-tier Tribunal.

Consideration of Error of Law

16. The proper approach involving an allegation of fraud in relation to the ETS English test was set out in the case of **SM and Qadir (ETS - evidence - burden of proof); [2016]**. This case was considered by the Court of Appeal in **Shehzad and Another**. It is clear from those cases that the legal burden of proving that the Claimant used deception lies on the Secretary of State and that there is a three stage process.
- (i) The Secretary of State must first adduce sufficient evidence to raise the issue of fraud.
 - (ii) The Appellant then has the burden of raising an innocent explanation which satisfies the minimum level of plausibility.
 - (iii) If that burden is discharged, the Secretary of State must establish on a balance of probability that this innocent explanation is to be rejected.
17. Despite the seriousness of the allegation of fraud and its consequences, the standard of proof throughout the whole process is the civil standard of the balance of probabilities.
18. In the instant case the judge referred to and set out all the evidence produced by the Respondent [4]. He acknowledged that the Appellant's test was one of those taken at Elizabeth College [20]. I find that whilst the judge did not make a specific finding acknowledging the high degree of fraud perpetrated at that establishment nevertheless there is nothing to show that he has ignored the evidence. A reading of [21] mentions the nature and scale of the deception by reference to the statement of Rebecca Collings, the Civil Servant tasked with overseeing the application of the ETS system.
19. Likewise again whilst not specifically setting out the three stage process outlined in **SM and Qadir** above, I am satisfied from a reading of the decision that the judge has

kept in mind that the Respondent discharged the initial burden to raise the prospect of the Appellant having used deception in his English language test.

20. The judge then set out fully the Appellant's evidence. He took oral evidence from the Appellant. He also noted the interview undertaken by the Respondent on 7th April 2016. He noted that the Appellant's answers to the questions raised by the Respondent were given in a fluent manner without the use of an interpreter.
21. In assessing that evidence, the judge discounted the Respondent's assessment of the Appellant's credibility. He set out his reasons why he did so. He considered that the criticisms made by the interviewing officer were not in his judgment serious criticisms. They were outweighed by the fact of the Appellant's fluency in English and the content of the answers given [25].
22. The FtTJ relied upon the Appellant's explanation and description of events during the test. He was cross-examined on these matters. The Appellant recollected that he had taken the test in Whitechapel and made a payment of £150 [7] and [22].
23. After seeing and having heard from the Appellant, and after assessing the impact of the Respondent's cross-examination, the judge was led to the conclusion that the Appellant was a credible witness. The assessment of credibility is a matter for the judge. He found that this evidence was sufficient to counter the Secretary of State's evidence and raise an innocent explanation as to the Appellant's participation in the relevant test.
24. Although I acknowledge that another Tribunal may have found differently, I cannot see that the judge's approach can be criticised as one which led him into material error.
25. The main criticism made of the FtTJ is that he failed to assess correctly the burden of proof in line with **SM and Qadir**. Whilst I am satisfied that the judge failed to set out the legal test in an appropriate format, nevertheless I am satisfied that the judge considered the evidence before him in an appropriate manner and that there is no material error in his consideration of the evidence of alleged fraud in the Appellant obtaining his TOEIC certificate.
26. I find that the judge's assessment of the evidence, concerning the innocent explanation, is adequate. I keep in mind that the FtTJ is the one who saw and heard from the Appellant and therefore the assessment of credibility is a matter solely for him.
27. At the hearing Mr Duffy properly accepted that if there is no error concerning the suitability requirements of the Rule, then the grounds raised in connection with the proportionality assessment fall away.
28. Accordingly for the foregoing reasons I find there is no material error in the FtTJ's decision promulgated on 19th March 2018. The Secretary of State's appeal is therefore dismissed.

Notice of Decision

The appeal of the Secretary of State is dismissed. The decision of the First-tier Tribunal stands.

No anonymity direction is made.

The First-tier Tribunal made no fee award and I find that nothing has been shown to interfere with that decision. The decision of no fee award stands.

Signed C E Roberts Date 23 June 2018

Deputy Upper Tribunal Judge Roberts