



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13480/2016

THE IMMIGRATION ACTS

Heard at FIELD HOUSE
On 27th June 2018

Decision and Reasons Promulgated
On 06th July 2018

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL
G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MOHAMMAD SULTAN
(anonymity order not made)

Claimant

Representation:

For the Appellant: Ms Z. Ahmad (Home Office Presenting Officer)

For the Respondent: Mr R Singer (Counsel)

ERROR OF LAW DECISION AND REASONS

1. This is an error of law hearing. The appellant in this matter is the Secretary of State for the Home Department (“SSHD”). The “Claimant” is Mr Ahmad. The SSHD appeals against the decision of the First-tier Tribunal (Judge Nicholls) (“FtT”) promulgated on 8.12.2017 in which the Claimant’s application for leave to remain on human rights grounds was dismissed.

Background

2. The Claimant is a citizen of Bangladesh. His application on the basis of 10 years residence was refused on Suitability grounds and the SSHD relied on an allegation that the Claimant had used a proxy test taker in an English language test (ELTS) in 2012 (which the Claimant had not in fact used in support of any application).

FtT decision

3. The FtT found that the Claimant had not used the test certificate dated 21.3.2012 [15]. The test result was below the competence level that was needed for the tier 1 application [15]. He produced a certificate dated Jun 2012 which he used in his tier 1 application made in September 2012, which was granted and there was no suggestion made that deception was used in that test. The FtT further found that following a data subject access request the notes accompanying an interview in 2015 with the Claimant were recorded as “credible” – “no further action required” [16]. There was no explanation given by the SSHD as to why it was subsequently decided to take action.
4. The FtT was nevertheless satisfied that the SSHD had met the evidential burden of proof to show that the March 2012 certificate was obtained with the use of a proxy taker [17]. The FtT found that the burden was then on the Claimant to produce an innocent explanation [17]. The FtT found that the Claimant was not dishonest having regard to the fact that the certificate was not used, on two occasions he took tests which had not been impugned and which were consistent linguistically. The FtT accepted that the Claimant’s language ability at the hearing was not a reliable factor on its own [18]. His immigration history was otherwise exemplary. The FtT concluded that the evidence showed that the test was false but that the appellant had not been dishonest.

Grounds of appeal

5. In grounds of appeal the SSHD argued that the FtT erred by failing to give adequate reasons for finding that the Claimant adduced evidence of an innocent explanation. It was unclear why the evidence relied on would preclude the use of a proxy taker, namely on the basis that the appellant spoke English.

Permission to appeal

6. Permission to appeal to the Upper Tribunal (UT) was granted by FTJ Holmes. In granting permission the FTJ stated that the FtT found that the SSHD had discharged the evidential burden of proof to show that the Claimant had used a proxy taker to obtain

a test certificate and the burden then passed to the Claimant to show an innocent explanation. The FtT then concluded that the Claimant had not acted dishonestly. This approach was arguably flawed because it was not consistent with guidance in **MA** (Nigeria) [2016] UKUT 450. It was unclear how the FtT could conclude that there was dishonesty yet somehow excuse the Claimant from any involvement. The FtT was not then able to correctly conclude that the Suitability provisions were not met.

Submissions

5. At the hearing before me Ms Ahmad argued that the evidence from the SSHD had included the look up tool which was reliable evidence of deception, and that the FtT had found the evidential burden of proof to have been met. The FtT did not make any assessment of what in fact amounted to an innocent explanation and such an approach was not lawful. The burden thereafter falls back on to the SSHD as to dishonesty and which the FtT failed to consider.
6. In response Mr Singer conceded that there was some contradiction in [17] and [19] as to the issue of dishonesty given that it was found that the Claimant had taken the test. The FtT was confused in its approach having found the evidential burden to have been met and then considered if there was an innocent explanation in [19]. Mr Singer submitted that there was no error of law rather infelicity in drafting by the FtT in terms of having referred to the burden of proof when it meant the evidential threshold. The findings at [19] were sustainable when considered in that context.

Discussion and conclusion

7. I have decided that there is material error of law disclosed in the decision which shall be set aside. It is conceded that there was some confusion by the FtT in its approach to the issue of deception. On the one hand in finding that the evidential burden was made out [17] and on the other hand in concluding that the appellant had not used deception [19]. The FtT found that the evidence demonstrates on the balance of probabilities that the test “was not the outcome of a genuine speaking test taken by this appellant” [17]. The FtT referred to evidence in [19] which it is assumed was taken to amount to the innocent explanation but there is thereafter no further consideration of the burden reverting to the SSHD as to deception. It is unclear how the FtT could have reached the conclusion that the Claimant was not dishonest having found that he must have been a party to the deception by use of a proxy test taker.
8. I have taken the view that it would be appropriate for the matter to be remitted to the FTT to be heard afresh before a different Tribunal so that the evidence relied on by the Claimant can be considered and assessed following the correct approach as discussed in **Muhandirange** (section S-LTR 1.7) [2015] UKUT 675 (IAC) and **SM & Qadir v SSHD** (ETS – evidence – burden of proof) [2016] UKUT 299 (IAC) and **MA** (Nigeria) [2016] UKUT 450. The findings are important and material to the ultimate decision in terms of Suitability which will have to be assessed.

Decision

9. The decision is set aside and the matter remitted for hearing do novo at Taylor House (excluding FTJ Nicholls). No findings of fact are preserved in respect of the test certificate dated 21.3.2012 save that it was agreed that the Claimant had not used that test for any purpose, and he had relied on a test certificate dated June 2012 which supported his Tier 1 application.

Signed

Date 4.7.2018

GA Black

Deputy Judge of the Upper Tribunal

NO ANONYMITY ORDER

NO FEE AWARD

Signed

Date 4.7.2018

GA Black

Deputy Judge of the Upper Tribunal