



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18393/2016

THE IMMIGRATION ACTS

Heard at FIELD HOUSE
On 20th June 2018

Decision and Reasons Promulgated
On 02nd July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

MR HASSAN SHAHID
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson (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 Wright) ("FtT") promulgated on 16th December 2017 in which the appellant's appeal against the respondent's refusal of leave to remain on human rights grounds was dismissed.

Background

2. The Appellant is a citizen of Pakistan. He entered the UK as a Tier 4 student with a valid visa from 2011 - 2012. In 2011 he entered into a relationship with his wife who was later granted refugee status on 6.12.2013 and they married on 29.4.2014. He was granted leave under the partner route on 21.2.2015 valid until 21.7.2017. He was served with a notice of removal on 24.3.2015 following receipt of information that he

had used a proxy tester for his language test on 17.7.2012. As a consequence his leave was curtailed. His application for further leave was refused on 20.7.2016 under the Suitability provisions.

FtT findings and reasons

3. The FtT found that the appellant had used a proxy taker for the test and had acted dishonestly. It was conceded by the appellant's representative that the evidential burden on the respondent was met (**Shezad & Chowdhury [2016] EWCA Civ 61**). The FtT considered that the burden had shifted to the appellant to show an innocent explanation. The FtT found that this was not established and thereafter that the respondent had proved that the appellant used dishonesty [31].
4. The FtT's reasons for rejecting the innocent explanation were set out at [30(i)-(v)].

Grounds of appeal

5. In grounds of appeal the appellant argued that the FtT erred by failing to give adequate reasons for rejecting the appellant's account that he had attended and taken the test. The FtT was unacceptably pedantic by reference to the passage of time since the test was taken; the appellant stated 'almost 5 years ago' whereas the FtT found that it was 'more than 5 years ago' and failed to make any connection between the error as to the passage of time and the use of a proxy taker.
6. The FtT erred by finding that the appellant in seeking clarification of questions put to him was a reason to disbelieve him. There was no finding that the appellant could not speak English.
7. The FtT relied on the fact that the appellant passed a test at level B1 with distinction as evidence to show that he had previously cheated in the higher level test B2.
8. The FtT's approach was flawed in finding that the appellant had failed to obtain the voice recording and this was not put to him at the hearing.
9. The FtT failed to properly assess the Article 8 rights of the appellant and his wife who was a refugee, in concluding there were no compelling circumstances and its approach to the proportionality assessment was entirely one sided.

Permission to appeal

10. Permission to appeal to the Upper Tribunal (UT) was granted by FTJ Saffer on 1.5.2018. In granting permission the FTJ found there were arguable grounds that the FtT was unfair to have held against the appellant that he had not obtained the voice recording, the FtT was indeed pedantic as to the passage of time reference and it was unclear what clarification the appellant had required and for what reason. Taken together it was arguable that the errors were material. All grounds were arguable.

Submissions

11. At the hearing before me Mr Richardson expanded on the grounds of appeal and argued that the appellant had given in some detail what amounted to a plausible explanation. The FtT's reference to "no hesitation" was inappropriate. The FtT made

no proper findings as to matters under Article 8 or consideration of section 117B factors.

12. In response Miss Everett contended that the FtT decision was convoluted and accepted that the appellant had raised some valid concerns as to some of the findings made. However, the FtT was entitled to look at the evidence in the round and had made sustainable findings and given adequate reasons. The appellant had a strong Article 8 claim but the deception used in the ETS had a continuous impact and it was sufficient to justify why the appellant's presence was not conducive to public good.

Discussion and conclusion

13. I found that there were material errors in law and that both grounds were made out. The FtT's findings were not based on legal reasoning in particular the pedantic reference to over 5 years simply could not justify any finding made. Further that the appellant had sought to clarify questions put to him was inadequately reasoned to support the conclusion reached. It is standard practice for an appellant to be informed at the start of any tribunal hearing that if s/he requires clarification of any questions that s/he should ask for it. This is not a matter to be held against an appellant and the FtT was unfair to do so. Equally the FtT ought not to have held against the appellant that he had not sought to obtain the voice recordings and in particular when this point had not been put to him at the hearing. The FtT's findings and reasons were inadequate and amount to errors in law. Such errors are material given that the impact on the Suitability issue.
14. As to Article 8 I am satisfied that the FtT failed to properly consider the factors in favour of the appellant into the assessment and its consideration of compelling circumstances.

Decision

15. There is a material error of law in the decision which shall be set aside.
16. The matter is to be remitted to the First-tier Tribunal at Hatton Cross (excluding Judge Wright) **for a hearing de novo**. None of the findings are preserved.

NO ANONYMITY ORDER

NO FEE AWARD

Signed

Date 28.6.2018

GA Black

Deputy Judge of the Upper Tribunal

