



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/21239/2016

THE IMMIGRATION ACTS

Heard at Field House
On 21 June 2018

Decision & Reasons Promulgated
On 08 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS MOSAMMAT NAIMA ATIKA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer

For the Respondent: Mr M A Hossain, Legal Representative of Liberty Legal Solicitors

DECISION AND REASONS

1. The Claimant, a national of Bangladesh, date of birth 12 September 1984, appealed against a decision of the Secretary of State to refuse leave to remain on 22 August 2016 in response to an FLR(N) application. The matter came on appeal before First-tier Tribunal Judge M R Oliver (the Judge) who on 19 December 2017 allowed the appeal on human rights grounds.

2. The Respondent's decision was partly based on the conclusion that the Claimant had used a proxy test taker to carry out the speaking test through the ETS and that the outcome was concluded to be unreliable. As a result of that outcome the Claimant had been interviewed and the conclusion formed by the Secretary of State's representatives that she was not credible. In the event the Reasons for Refusal Letter set out a number of reasons why the conclusion was reached that the Claimant was not a credible witness. In brief I summarise them as follows.
3. First, the Claimant was not able to recall the test centre in which she had taken the test. Secondly, she could not recall where the test was taken in London. Thirdly, she was unsure of the name of the test centre. Fourthly, the conclusions reached that there was, in the light of those details, even though there was some four years since the date of the test, reason to doubt the Appellant's credibility.
4. At the hearing of the appeal the Claimant sought to address the issues of recollection and the taking of the TOEIC test. In paragraph 4 of her statement I conclude looking at the Record of Proceedings, she said that she took the test at Elizabeth College, the name of which she had not previously been able to recall, and that she took the test to check the efficiency of her English with a view to using this qualification for future leave applications provided she had presumably achieved that qualification. The statement, nor as far as I can see as the Judge records the oral evidence, did particularly address the circumstances of the test, the elements of the speaking test that she was required to do or proffer any explanation for the possible outcome. She said, 'I took the test and I passed, I received my certificate and I am entitled to rely upon that.'
5. The position therefore was that the Judge had on the face of it also sufficient evidence I think from the Claimant's husband. A stark contrast to the view the Secretary of State formed that the outcome of the test was of questionable validity. The Secretary of State in the circumstances, as she was committed to do, carried out an interview. The result of that interview was the conclusion that the Claimant was not credible.

6. The Judge said, with reference to the case of Shehzad v SSHD [2016] EWCA Civ 615:

“It was held that whereas an ‘invalid’ test result might satisfy this burden a questionable result did not”, that is the burden of proof of showing that a proxy test taker was in all likelihood to have been used. Instead the Respondent has relied on the Appellant’s answers in interview four years later. She recalled that the test was in London and the name of the test centre was something like Queen Mary College. In fact, it was Elizabeth College. In my judgment it was grossly unfair of the Respondent to draw this unsustainable conclusion without considerably more evidence. In the same interview it was noted she answered questions in a fluent manner.”

(My emphasis)
7. It seemed to me that the Judge has done the very thing that needed to be avoided. He made an assessment of the credibility of the ETS evidence and using the explanation given at the hearing by the Claimant and her husband, rather than the generic evidence relied upon to assess if the Respondent has discharged the burden of showing the likelihood of a false result. So the Judge has inverted the exercise and simply raised the requirements or misunderstood what the Secretary of State has actually done to show the real risk that a proxy test taker was used.
8. In the circumstances I find the Judge’s reasoning was not adequate or proper to correctly analyse the issue that is being raised and dealt with, SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 229 (IAC), Majumder [2016] EWCA Civ 1167 and Qadir and in MA [2016] UKUT 00450 (IAC).
9. I conclude that the Original Tribunal made an error of law in that assessment in either failing to provide adequate reasons or failing to provide a proper reason and the issue of ‘gross unfairness’ is perhaps to misunderstand the limited nature in which these proxy test-taking cases have to be assessed.

10. The issue on which the permission was given was by reference to Article 8 ECHR. The Judge correctly referred to the case of Agyarko [2017] UKSC 11 and Razgar [2004] Imm AR147 and somewhat curiously refers to the cases of Sanade [2012] UKUT 00048 and Zambrano which really has almost no relevance to the issue of the proportionality of the removal of the Claimant. The relevance of the case law is touching a different point. It simply was inexplicable how in one short paragraph the Judge could conclude, because of his finding, that the Claimant had undertaken the test, the issue of proportionality could be simply swept away and fail to give any adequate explanation and reasons.
11. It is trite law the need to provide reasons applies to both parties to an appeal so they should know why they have won and lost. In the circumstances I conclude that the Judge's errors of law in dealing with the Article 8 claim is significant. The importance of the allegation of having used a proxy test taker in terms of long-term possibilities of return to the UK cannot be understated. I find the Original Tribunal decision cannot stand. The only course is for this matter to be returned to the First-tier Tribunal and remade.

DIRECTIONS

- (1) The case is to be dealt with at Taylor House, not Judge of the First-tier Tribunal M Oliver.
- (2) Time estimate – two hours.
- (3) Two witnesses.
- (4) Any further evidence relied upon to be served 10 clear working days before a further hearing unless otherwise directed by First-tier Tribunal at a PTR or CMRH.

NOTICE OF DECISION

The appeal is allowed to the extent that it is to be remade in the First-tier Tribunal (IAC).

No anonymity direction is made.

Signed

Date 24 July 2018

Deputy Upper Tribunal Judge Davey