



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/27710/2016

THE IMMIGRATION ACTS

Heard at UT(IAC)
On 13 September 2018

Decision & Reasons Promulgated
On 18 September 2018

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JUBAYER ALAM JEHAD CHOWDHURY

Respondent

Representation:

For the Appellant: Mrs H Aboni, Senior Home Office Presenting Officer

For the Respondent: In Person

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Chowdhury's appeal against the respondent's decision to refuse his human rights claim.
2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Chowdhury as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Bangladesh born on 26 April 1993. He arrived in the UK on 9 January 2010 with leave to enter as a Tier 4 (General) Student Migrant valid until 20 April 2014. On 8 July 2013 he applied for leave to remain as a spouse and was granted leave to 2 March 2016. On 24 February 2016 he applied on form FLR(M) for leave to remain as a spouse.

4. The respondent refused the appellant's application under the suitability provisions in S-LTR.1.6 of Appendix FM on the basis that his presence in the UK was not conducive to the public good because he had fraudulently obtained a TOEIC certificate. The appellant was therefore unable to meet the requirements in Appendix FM and paragraph 276ADE(1). The respondent considered further, and in any event, that the appellant could not meet the eligibility requirements as the partner of a British national as there were no insurmountable obstacles to family life continuing in Bangladesh for the purposes of EX.1(b) and EX.2 of Appendix FM, there were no significant obstacles to integration in Bangladesh for the purposes of paragraph 276ADE(1)(vi) and there were no exceptional circumstances justifying a grant of leave outside the immigration rules.

5. The appellant appealed against that decision. His appeal was heard on 18 September 2017 by First-tier Tribunal Judge Ferguson. The judge heard oral evidence from the appellant. He noted from the record of the appellant's interview, which followed a finding by ETS that the appellant's test results were "questionable", that the appellant had been found to be credible. The judge considered in the circumstances that the respondent had not met the burden of proving that there was reason to believe that the appellant had used deception. Noting that the refusal letter accepted that the appellant met the eligibility requirements in Appendix FM, the judge allowed the appeal.

6. The respondent sought permission to appeal to the Upper Tribunal, asserting that the judge had erred by failing to appreciate that the respondent had met the evidential burden of proof and that the burden therefore fell upon the appellant to provide an innocent explanation and that the judge had failed to make findings on human rights grounds which was the only ground of appeal open to the appellant.

7. Permission was granted on both grounds, but particularly on the basis that the judge had arguably erred in his assessment of whether the initial burden of proof had been met.

8. At the hearing Mrs Aboni submitted that the judge had made a material error of law in finding that the respondent had not discharged the evidential burden of proof, given that it had been found in SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 that the generic evidence together with a look-up tool referring to the specific person was sufficient to meet that burden. There was no innocent explanation and the judge had therefore erred. The appellant, who appeared in person without a legal representative, responded by saying that he had genuinely taken the test and had passed. He had a wife and child here and could not live separately to them. His wife could not apply for entry clearance to the UK.

Discussion

9. It was Mrs Aboni's submission that the judge had accepted that the appellant had been found to be credible in his interview yet had also accepted that he had not talked about the relevant test in the interview and that his findings were therefore flawed. I have to agree. It is relevant to note from the refusal decision that the appellant was talking about a later test at his interview and that the assessment of credibility was based upon his evidence in that regard, whereas the only evidence he gave of the relevant test in 2013 was in his handwritten response to questions dated 17 November 2016, from which there was no finding of credibility. It is also relevant to note that the respondent's appeal bundle before the judge contained only part of the interview record and the appellant's handwritten response, as the bundle contains only every other page, and it seems that that was overlooked by the judge. Accordingly there was clearly some confusion, as is apparent from the fact that the judge appears to have conflated the evidence of the two different tests and failed to consider the full extent of the evidence and the respondent's observations in the refusal decision.

10. Accordingly I am in agreement with the assertion in the grounds that the judge failed properly to consider the evidence and that his finding that the respondent had not met the evidential burden of proof was therefore flawed.

11. For all of these reasons the judge's decision cannot be sustained and must be set aside and re-made afresh. The most appropriate course would be for the case to be remitted to the First-tier Tribunal for a fresh hearing.

DECISION

12. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The Secretary of State's appeal is allowed and the decision is set aside.

13. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be heard afresh before any judge aside from Judge Ferguson.

Directions

The respondent is to provide the full and complete respondent's appeal bundle containing all annexes in full and including the complete interview record and appellant's handwritten response of 17 November 2016.

Signed:



Upper Tribunal Judge Kebede

Dated: 13 September 2018