



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/34198/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 18 January 2018**

**Decision & Reasons
Promulgated
On 22 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

**MOHAMMAD KABUL HUSSAIN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Malik of counsel Mr Malik of counsel

For the Respondent: Mr Tarlow, a Home Office presenting officer

DECISION AND REASONS

Introduction and Background

1. The appellant is a citizen of Bangladesh born on 31 December 1977. The appellant first applied for ten years' long residence in the UK on 9 October 2014 having originally come here in 2004 and had various extensions to his leave to remain. On 3 November 2015 the respondent decided that the appellant fell for exclusion from the UK, because he had exercised fraud in relation to an English language test he had been taken some years earlier relying on paragraph 322 of the Immigration Rules.

2. The appellant appealed that decision. His appeal came before First-tier Tribunal Judge Clarke sitting in the First-tier Tribunal on 16 March 2017. Judge Clarke rejected the respondent's case, saying, incorrectly, that the two civil servants who were relied on by the Secretary of State had been rejected by the Upper Tribunal. He was therefore unable to accept their evidence in support of the claim that the appellant had used deception in support of his application. However, the Immigration Judge went on to consider the merits of the case for the appellant and accepted all the appellant's oral evidence, including his explanation as to the circumstances surrounding the English language test in question.
3. The current appeal to the Upper Tribunal is heard with the permission Upper Tribunal Judge Storey on 21 November 2017. Judge Storey decided it was arguable that Judge Clarke had failed to consider fully the evidence produced by the respondent together with the guidance given by the Court of Appeal in the case of **Secretary of State v Shehzad [2016] EWCA Civ 615**.

Discussion

4. Before me, Mr Malik accepted the first ground of appeal raised by the respondent. This ground pointed out that the Immigration Judge had been wrong simply to reject the respondent's evidence of Mr Millington and Ms Collings without going on to consider whether or not that discharged the evidential burden on the Secretary of State. That evidence, he accepted, at least raised a case which the appellant had to answer. The evidential burden on the Secretary of State required her only to show that there was an issue, as to the existence or non-existence of a fact in issue, which his client had to answer. Mr Malik accepted that that burden had at least potentially been discharged by the witness statements of Ms Collings and Mr Millington. However Mr Malik went on to explain that in his submission based on recent case law including the case of **Shehzad** and **Chowdhury** as well as **Njunda**, there was a three stage process. He said that the second stage, given that the respondent had discharged the initial evidential burden, required the appellant to provide an innocent explanation for his conduct. If he did so the burden then shifted back to the Secretary of State to show that the innocent explanation should be rejected.
5. Mr Tarlow, who appeared for the respondent in the Upper Tribunal, candidly accepted that no questions have been asked of the appellant on behalf of the Secretary of State at the First-tier Tribunal. Accordingly, that Tribunal was only left with the appellant's explanation in his witness statement. As the judge records in paragraph 47 of his decision the appellant was not challenged in respect of the contents of his witness statement and it was not put to the appellant that he was dishonest or that the rest of his evidence was untrue or contained lies.

Conclusion

6. The correct analysis is contained in the case of **Shehzad**. Given that Mr Malik conceded that the respondent had discharged the burden of showing

that there was at least a case to answer, the question is then whether the First-tier Tribunal went on to consider the explanation given by the appellant and whether that explanation was plausible. Did the appellant's apparently innocent explanation discharge the burden of proof to the ordinary standard that the civil standard.

7. I find that the appellant did raise sufficient evidence to support the conclusion that he had an innocent explanation for the alleged. It seems clear from paragraph 39 onwards in Judge Clarke's decision that he looked carefully at the evidence before him. He noted that the relevant English language test had been taken some years previously, in 2011. It was also a relevant factor that the appellant was, apparently, able to speak adequate English at the time of the hearing as this enabled the Tribunal to conclude that he probably spoke English reasonably well at the date he took the test. He had undertaken various forms of English language test in the past in Bangladesh. It is also of note that the appellant was not cross-examined as to his evidence (see paragraph 47 of the decision).
8. In the circumstances there was material evidence to support the appellant's case. I have concluded that the decision was one reasonably open to Judge Clarke based on the evidence he heard. It is unfortunate that the First-tier appeared to give an erroneous summary of the application of the burden and standard of proof. However, having regard to the comprehensive findings made in the paragraphs to which I have referred and the acceptance of the appellant's evidence, I do not consider that the error that the First-tier Tribunal made was material to the outcome.

Notice of Decision

The appeal to the Upper Tribunal is dismissed and the decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed

Date 21 February 2018

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT FEE AWARD

I have decided to make no fee award.

Signed

Date 21 February 2018

Deputy Upper Tribunal Judge Hanbury