



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/00003/2017

THE IMMIGRATION ACTS

Heard at Bradford
On 11 July 2018

Decision & Reasons Promulgated
On 19 September 2018

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALLAH NOOR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Diwnycz, Senior Home Office Presenting Officer

For the Respondent: Miss Hashimi, instructed by Kingswell Watts, Solicitors

DECISION AND REASONS

1. I shall refer to the appellant as the respondent and the respondent as the appellant as they appeared respectively before the First-tier Tribunal. The appellant, Allah Noor, was born on 8 March 1987 and is a male citizen of Pakistan. He appealed to the First-tier Tribunal (Judge Hillis) against the decision of the respondent dated 24 March 2015 to refuse him leave to remain in the United Kingdom and to remove him under Section 10 of the Immigration and Asylum Act 1999. The First-tier Tribunal, under a decision

promulgated on 27 February 2018, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The grounds of appeal are summarised in the grant of permission of Judge Mailer which is dated 21 May 2018 at [3]:

The grounds assert that properly read the witness statements and the spreadsheet extract showed that the appellant's test had been invalidated because of evidence of fraud in the test taken by the appellant. The evidence of Professor French puts the likelihood of a false positive at lower than 2%. The test was not whether the appellant speaks English but whether he employed deception – *MA Nigeria [2016] UKUT 450* at [57]. Nor did the respondent need to produce the voice recordings: the burden of proof had been met. I have considered that permission should be granted because it was arguable the judge had failed properly to consider the burden of proof in line with *SM and Qadir (ETS – Evidence – Burden of Proof) [2016]*.

3. I find that the decision of the judge should be set aside. My reasons for reaching that decision are as follows. First, the judge has not made any effort to consider in proper detail the evidence adduced by the Secretary of State in the appeal. He observed [28] that the witness statements of Mr Addy, Mr Millington and Ms Collings were not “case specific” and he rejected also the expert report of Professor French on the same basis. However, as the grounds (and also the grant of permission) point out Professor French's evidence is particularly persuasive showing that there is a less than two percent chance of a false positive occurring in recordings which had been rejected on the basis that a proxy had been employed. Secondly, the judge has also failed to take account that the particular language centre in which this appellant had taken the test had been subject to a damaging report by the Home Office which indicated that 45% of the tests undertaken at the centre had proved invalid. Whilst I note that the judge appears to have found that the appellant provided an innocent explanation for the disputed test, the two reasons given by the judge for finding in the appellant's favour are not satisfactory. First, the judge notes [29] that the appellant has passed other examinations showing his proficiency in English; as Judge Mailer noted when granting permission, it is not the appellant's proficiency in the English language which is to be considered here, but whether or not he has employed deceit. Secondly, I agree with the Secretary of State that it was not necessary for the voice recordings to be produced in order to establish fraud as the judge appears to have thought; as I understand it, the grounds of appeal are correct to observe that the voice recordings remain the property of the ETS.
4. In view of the insubstantial nature of the arguments accepted by Judge Hillis as establishing the appellant's case in this appeal and considering also the fact that this was an appeal in which there was not only a report from Professor French but also a report in respect of the specific training centre in which the appellant claimed to have taken the test, I find that the burden of proof on the Secretary of State to prove deceit has been discharged. Judge Hillis erred in law failing properly to consider the respondent's evidence as I have detailed above. I set aside his decision. I have proceeded to remake the. In the light of my findings above, the appellant's appeal against the Secretary of State's decision is dismissed.

Notice of Decision

5. The decision of the First-tier Tribunal promulgated on 27 February 2018 is set aside. I have remade the decision. The appellant's appeal against the decision of the Secretary of State dated 24 March 2015 is dismissed.

No anonymity direction is made.

Signed

Date 17 September 2018

Upper Tribunal Judge Lane

TO THE RESPONDENT

I have dismissed the appeal against the Secretary of State's decision and therefore there shall be no fee award.

Signed

Date 17 September 2018

Upper Tribunal Judge Lane