IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/03741/2019
HU/03743/2019
HU/03746/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 March 2020	**On 27 April 2020**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

HALIMA [A]
ASHIQUER [R]
[AR]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr R. Wilcox, Counsel instructed by JS Solicitors
For the Respondent: Mr Z Malik, Counsel instructed by the GLD on behalf of the Secretary of State for the Home Department.

DECISION AND REASONS

1. The Appellants are citizens of Bangladesh. Mrs Halima [A] was born on 9 December 1982. She came to the UK on 10 October 2010 having been granted a Tier 4 (General) Student visa which was valid from 22

September 2010 to 30 June 2013. On 2 December 2010 she was joined by her spouse, the second named Appellant, who was granted entry clearance as a dependant to join her here. Their daughter, the third named Appellant, was born in the UK on 27 April 2016. The Appellant was granted further leave as a Tier 4 (General) Student which expired on 29 December 2014. Her leave was curtailed by the Respondent on 24 July 2014. The Appellant submitted a TOEIC certificate from ETS with a student application she submitted on 12 June 2013. According to the Educational Testing Service (ETS) a speaking test was taken by a proxy test taker on 12 December 2012. Thus, the Respondent concluded that the certificate was obtained by deception.

2. The Appellant made an application for leave to remain under Article 8 on 20 July 2016. The application was refused in a decision of 29 January 2016. The Appellant appealed against the decision of the Respondent. Her appeal was dismissed by the First-tier Tribunal. The matter came before me on 20 January 2020, the Appellant having been granted permission to appeal against the decision of the First-tier Tribunal. I set aside the decision of the judge to dismiss the appeal. My error of law decision reads as follows:-

> "17. The APPG report is capable of undermining the strength of the Respondent's case against the Appellant or at least assists the Appellant to raise an innocent explanation. The judge did not properly engage with the report and did not adequately reason why the opinions and recommendations expressed in it were of "little evidential weight." The report post-dates the decision in SM and Qadir v SSHD (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 and MA (ETS – TOEIC testing) [2016] UKUT 00450. The evidence of Dr French before the APPG was that his estimation of the rate of false positives was less than 1%, but this was qualified because it depended on the results from ETS to the Home Office being correct. The APPG concluded that there was significant doubt on the usefulness of the statistic so heavily relied on by the Home Office. The experts before the APPG all agreed that there had been a worrying lack of scrutiny of the evidence supplied by ETS.
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> 18. The error is so significant that I set aside the decision of the judge to dismiss the appeal. Whilst, the report has not been subject to judicial scrutiny, its evidential weight, in my view is significant. The Respondent relies on the evidence of Professor French (item 6 of the supplementary bundle) to support his case. However, that evidence is wholly undermined by what the same witness said to the APPG (see the APPG report under the heading "Misuse of advice") namely that his estimate of false positives relied on by the Respondent was qualified and only valid "if the results that ETS had given the Home Officer were correct". The APPG concluded that;
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> > "But, as we have seen, the reliability of those "results" (the evidence provided by ETS) was questioned by every expert to give evidence, including the three technical experts,

> making the reliability of the voice recognition software almost irrelevant and casting significant doubt on the usefulness of that statistic so heavily relied upon by the Home Office."
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> 19. In the light of the evidence the only conclusion that can be drawn is that the Respondent has not discharged the evidential burden of proving that the TOEIC certificate was procured by dishonesty. Mr Aziz, representing the Appellant at the hearing before the FtT was correct to say that in the light of the APPG report the Respondent's evidence was not sufficient to discharge the evidential burden. It follows that there was no need for the judge to consider whether the Appellant had raised an innocent explanation. None of the findings made in this respect are sustainable. I set aside the decision of the judge to dismiss the appeal on Article 8 grounds."

3. I summarised the position at paragraph 24 as follows:-

> "24. To summarise, the decision of the FtT to dismiss the appeal is set aside. I find that the Respondent has not satisfied the evidential burden. I find that the Appellant has not exercised deception. Thus, the decision to curtail her leave, in 2014, was wrong. The issue is whether in the light of this, the decision of 29 January 2019 breaches the Appellant's rights under Article 8. There will be a resumed hearing so that the parties can address the issue of proportionality. Neither party served further evidence following directions from the UT. The decision will be re-made following submissions only."

Submissions

4. The hearing was resumed on 18 March 2020. Mr Malik attended on behalf of the GLD who was instructed on behalf of the Secretary of State. He relied on a written application to set aside my decision pursuant to Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008. He submitted that Court of Appeal authority was not brought to my attention, namely, Secretary of State for the Home Department v Shehzad [2016] EWCA Civ 615 and Majunder v Secretary of State for the Home Department [2016] EWCA Civ 1167. These cases held that the generic evidence relied on by the Secretary of State is sufficient to discharge the initial evidential burden of proof. The authority is binding on the UT, irrespective of the APPG report. As the Court of Appeal said in Nirula v First-tier Tribunal [2012] EWCA Civ 1436 at [29] that "judges at first instance should accept a considered judgement of [the Court of Appeal] that binds them, "even if they consider the judgement to be wrong.

5. The Court of Appeal is hearing the appeal in DK (India) - C5/2019/2221 on 16 June and 17 June 2020 on the issue of the relevance of the APPG report in TOEIC appeals. Mr Malik said that the UT should set aside the error of law decision and adjourn pending the outcome of the case of DK (India).

There is procedural irregularity in the error of law decision. The UT did not take into account that the APPG had not received evidence from the Secretary of State or ETS. The APPG report is not akin to judicial scrutiny of evidence. The evidence was not tested by way of cross-examination. Furthermore, there are potential questions as to the admissibility of the APPG report by virtue of Article 9 of the Bill of Rights 1689.

6. Mr Wilcox submitted that the application by the Secretary of State was without merit. The decision of the UT was a final decision. The application to set aside is out of time, in any event. The decision of the UT was on the evidence. The UT engaged with Mr Kotas' submissions about the shortcomings in the evidence.

Conclusions

7. The Secretary of State's application under Rule 43 is out of time. The Rules require such an application to be received no later than 12 days after the notice of the UT's decision being sent. The notice was sent on 3 February 2020. The written application is dated 16 March 2020. It is not clear to me when it was received by the UT; however, it is at least a calendar month out of time. The application is misconceived. Should the UT have departed from binding precedent, this would be an error of law that is not properly characterised as a procedural irregularity. Should the Secretary of State believe that there is an error of law in my decision, a remedy is available to her by way of an application for permission to appeal to the Court of Appeal.

8. In any event, the problem with the Secretary of State's application is that the UT did not depart from binding precedent. The UT directed itself on the law with reference to SM and Qadir v SSHD (ETS – Evidence – Burden of Proof) [2016] UKUT 00229. In that case the UT found that the generic evidence of the Secretary of State was sufficient to discharge the initial evidence the burden of proof. The Secretary of State appealed that decision in Majumder v SSHD [2016] EWCA Civ 1167; however, the appeal was conceded by the Secretary of State. The Court of Appeal in Shehzed [2016] EWCA Civ 615 held that the generic evidence relied on by the by the Secretary of State sufficed to discharge the initial evidence the burden of proof. The approach taken by the UT in following the guidance in SM is unarguably correct and entirely consistent with Court of Appeal authority.

9. There was no departure from a decision of the Court of Appeal. The evidence of the APPG report was not before the UT or the Court of Appeal. It unarguably undermines the Respondent's generic evidence which was found to narrowly discharge the initial evidential burden. In any event, in the light of the evidence, the Secretary of State's case generally is significantly weakened. She would not be able to discharge the legal burden. The UT was aware of those weaknesses in the APPG report which

were drawn to its attention by Mr Kotas and considered the weight to attach to it accordingly. If the Respondent is of the view that the UT has made an error of law, it is a matter for her to apply for permission to appeal to the Court of Appeal.

10. Mr Malik conceded that should the application under Rule 43 be refused, in the light of the consent order issued by the Court of Appeal of 21 November 2018 and the case of Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 209 referred to in my error of law decision, the appeal should be allowed under Article 8.

The appeal is allowed on Article 8 grounds.

No anonymity direction is made.

Signed Joanna McWilliam Date 26 March 2020

Upper Tribunal Judge McWilliam