



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

Appeal Number: HU/03622/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 5th March 2018**

**Decision & Reasons
Promulgated
On 27th March 2018**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR GUNJANBHAI PRAKASHBHAI PATEL

Claimant/Respondent

Representation:

For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Claimant/Respondent: Mr N Paramjorthy, Counsel instructed by way
of Direct Public Access

DECISION AND REASONS

1. The claimant is a citizen of India seeking to challenge the refusal of entry clearance dated 16th July 2015 as confirmed by a subsequent administrative review.
2. The hearing of the appeal came before First-tier Tribunal Judge Malone on 30th March 2017. The Judge found that the decision was defective in a number of respects. The appeal was allowed for a proper decision to be made. The Secretary of State seeks to challenge that decision on the

basis that the Judge was in error in making the findings of fact and law which were made. Permission to argue the matter was granted. Accordingly the matter comes before me to determine the issues.

3. By way of context the claimant entered the United Kingdom as a student in 2009. A further application to extend leave as a student made in 2010 resulted in leave being granted to 1st March 2014.
4. On 20th February 2014 the claimant applied for further leave to remain as a student. No decision on that matter was made. Indeed, subsequent to making that application the claimant made a second one in June 2014 to remain as a spouse of a British citizen. To that application no decision was made. On 30th July 2014 Immigration Officers attended the claimant's accommodation and informed him that he was to be removed as an overstayer. Seemingly his leave to remain as a student had been curtailed by a decision of 28th July 2012. It was his case that he had never received that particular decision and therefore was unaware of his leave having been curtailed. He made his application for further leave on the understanding that he had existing leave and that that leave was lawfully continuing. Nevertheless, it was considered that he would comply with his removal, thus he was removed to India on 28th May 2015.
5. On 26th May 2015 he had made an application for entry clearance to settle in the United Kingdom as the spouse of a British national and the decision in relation to that matter is the subject matter of this appeal.
6. The first contention in the Entry Clearance Officer's decision is in connection with the use of the TOEIC certificate which is said to have been falsely obtained.
7. It is said in the decision that "you had used a false document the TOEIC certificate mentioned above to obtain leave to remain by deception". Although the claimant agrees that such a certificate was obtained and used in the applications of 20th February 2014 and June 2014, neither had resulted in any grant of leave to remain and thus the statement as made on its face is inaccurate.
8. From start to finish the claimant has insisted that he took that test. Indeed, he submitted with his applications an NARIC qualifying certificate which serves the same purpose.
9. Leave to bring the appeal before the Upper Tribunal was granted on the application of the Secretary of State, that the Judge had failed to consider the jurisprudential nature of the evidence concerning the ETS verification system and in particular decisions in **Shehzad [2016] EWCA Civ 615** and **Qadir [2016] EWCA Civ 1167**. It was said that the Judge had failed adequately to engage the evidence of Professor French and of the statistical analysis of such tests.

10. What is accepted in the course of the hearing before me by Mr Walker is firstly that the issue of the TOEIC certificate was raised for the first time in the Entry Clearance Officer's decision. It had not formed part of any previous decision so as to alert the claimant to that issue. Secondly, that it amounted to a bald assertion in the decision and no other evidence relating to that certificate was presented, or indeed relied upon. Usually in such cases the Secretary of State will cite and rely upon certain generic evidence, including the evidence of Professor French, to show that a particular certificate taken on a particular day at a particular place was not valid. None of that evidence was present in the decision, nor indeed was it ever served upon the claimant in the course of proceedings. The position of the claimant, as I have indicated, was clearly stated in the grounds of appeal that he had actually undertaken the test, that he had no need whatsoever to cheat. Indeed, he had with him also another document which would have entitled him to the same relief as the TOEIC certificate. No challenge was made to that and no evidence was served.
11. The Judge noted at paragraph 28 of the decision:-

"The ECO put forward no evidence in support of his contention that the Appellant had submitted a false document with his application, or with any earlier application, namely a TOEIC certificate. The Appellant's evidence was that it was a genuine certificate. He sat and passed the exam. He actually had no need to take the exam at all because he was NARIC qualified. He was never notified that it had been concluded that he had submitted a false document to the Home Office, before it was raised in the ECO's Notice of Refusal. It was not mentioned by the enforcement officers who visited the Appellant's property on 30 July 2014."
12. Indeed, Mr Paramjorthy, who represents the claimant before me and who represented him at the hearing, said that actually matters had gone slightly further along that path than had been explicitly stated by the Judge. That matter has been raised in the Rule 24 response to the Secretary of State's appeal. It was conceded expressly by Mr Graham, who then acted as the Home Office Presenting Officer, that he had nothing to support the submission that was made, no further evidence to present and nothing further to assist. It is in those circumstances that it is entirely understandable that in the absence of any evidence that establishes falsity or even gives a prima facie case of falsity, that allegation cannot succeed. I find that the Judge was therefore entirely correct to approach the matter in the way that it was approached.
13. The second issue and one again raised in the decision was that the claimant contrived in a significant way to frustrate the intentions of the Immigration Rules by overstaying because of the fact that his leave was curtailed on 28th July 2012 and that he was informed of that matter. Nevertheless he continued to make a series of applications for leave and indeed continued to work as if that leave had continued. The position, so far as the claimant is concerned, was a simple one. He maintained at the time when the Immigration Officers came to his home and since that time

that he had no knowledge that his leave had been curtailed. He had received no papers in relation to it or decision. Once again nothing was presented by the Secretary of State to show that indeed that decision had been served upon the claimant. It was a matter also the subject of challenge in the grounds of appeal and thus the Secretary of State would have been aware of that issue well before the hearing before the First-tier Tribunal. The Judge, having heard the claimant, accepted the truth of what he had to say. It was perfectly open in those circumstances for the Judge to accept the credibility of a witness appearing in front of him and to act accordingly.

14. Thus before ever embarking upon the merits of the application itself the Entry Clearance Officer had produced two obstacles in the way of that decision, namely the deception under the TOEIC certificate and the deception in relation to the immigration conduct, such matters were found by the Judge not to be established. I find no error in the approach taken by the Judge.
15. There is perhaps a slight ambiguity in the decision that is set out in paragraph 40 of the decision and there seems to have been a finding that the Entry Clearance Officer's decision had unlawfully infringed the claimant and his wife's qualifying protective rights to enjoy family life together with their baby daughter in the United Kingdom.
16. Mr Paramjorthy has clarified the matters. It looks within the context of paragraphs 40, 41 and 42 of the determination that the case of **Greenwood No. 2** was what was being considered, namely that the appeal was allowed on the basis of the challenges made to it being successful and that it was for the Secretary of State to make a new decision in the circumstances of the findings that had been made.
17. In practical terms therefore it will be for the claimant to present to the Entry Clearance Officer without delay such matters as are relied upon with an invitation that a fresh decision is made. Hopefully that will not be long delayed given the potential importance of family unity with a daughter.

Notice of Decision

18. I find no error of law in the First-tier Tribunal decision. In those circumstances the appeal by the Secretary of State to the Upper Tribunal is dismissed. The decision stands, namely that a fresh decision is required to be made by the Secretary of State in response to the application which was made by the claimant for entry clearance to bring himself and his daughter to his British citizen wife in the United Kingdom.
19. No anonymity direction is made.

A handwritten signature in black ink, appearing to read "P. Q. King". The signature is written in a cursive style with a large initial "P" and "Q".

Signed

Date 26 March 2018

Upper Tribunal Judge King TD