



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19608/2016

THE IMMIGRATION ACTS

Heard at Field House
On 14 June 2018

Decision & Reasons Promulgated
On 25 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HABEEB RAGUMAN FAZRUL RAHUMAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Home Office Presenting Officer

For the Respondent: Mr N Butt, of West Ham, solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing an appeal by the appellant against the decision of 3 August 2016 refusing him further leave to remain as the partner of his wife, the sponsor, a person settled in the UK. In this decision I will refer to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Secretary of State as the respondent.

Background.

2. The appellant is a citizen of India born on 3 August 1980. He arrived in the UK on 13 September 2010 with entry clearance as a Tier 4 (General) student with leave to enter until 18 March 2011. His leave was further extended as a student until 29 November 2013. On 27 November 2013 he applied for a variation of his leave following his marriage to the sponsor on 14 November 2013. He was granted limited leave until 13 June 2016. He then made an application for further leave on 3 June 2016 but this was refused on 3 August 2016 on the basis that on 16 March 2012 in connection with an earlier application for leave to remain as a student he had submitted a TOEIC English Language Certificate issued by Educational Testing Service ("ELS") which the respondent believed was obtained by deception. For this reason, it was not accepted that he met the suitability requirement at para S-LTR.4.2 and so in turn did not meet para R-LTRP.1.1(c)(i) of Appendix FM. Further, the respondent did not accept that the appellant had a claim to remain under para 276ADE(1) of the Rules or that the facts of this case merited a grant of leave on article 8 grounds outside the Rules.

The hearing before the First-tier Tribunal.

3. At the hearing before the judge, the appellant gave oral evidence adopting his witness statement f at A21-24 of his appeal bundle. His wife also attended adopting her witness statement at A25-27. The judge noted that there was no cross examination of either witness by the Home Office presenting officer.
4. The judge considered firstly whether the appellant had engaged in deception by using a proxy test-taker on 21 February 2012 to obtain the English language qualification he later submitted to the respondent. He noted that the respondent in the decision letter simply stated that, on the basis of information provided by ETS, she was satisfied that the appellant's certificate was fraudulently obtained and that he had used deception in his application of 16 March 2012. In the subsequent appeal bundle the respondent produced generic evidence in witness statements from Rebecca Collins and Peter Millington and an expert report from Professor French. There was also a document headed ETS SELT Source Data with the results of an ETS TOEIC Test Centre Lookup Tool from the relevant test centre on 21 February 2012 [15].
5. The judge said that it appeared likely that the test centre which the appellant said he had attended to sit the exam was engaged in some irregular or fraudulent practices. The lookup tool for that test centre indicated that out of the 51 individuals (actually or potentially) tested on that date, 38 results had been subsequently categorised as "invalid" and the remaining 13 as "questionable". The judge said that, nevertheless, he had not been supplied with a Project Façade report on the test centre and had not been supplied with any information as to why the appellant's test was designated as "invalid". There had been no audio evidence provided indicating that a voice other than the appellants was responding to the questions asked. He commented that there was little or no evidence from ETS as to why the appellant's test was held to be invalid [18].

6. The judge said that the appellant adamantly denied he had ever engaged in the deception alleged. He noted that, prior to arriving in the UK, he had already been awarded a Bachelor's degree from India taught in English and that between 2010 to 2013 he undertook further studies in the UK. In more recent years, post-February 2012, he had been employed in a managerial post and had submitted a level A2 (with merit) CEFR English language qualification in connection with the application under appeal. The judge commented that during the hearing, the appellant had no hesitation understanding the admittedly few questions put to him and was able to respond in good English without hesitation or difficulty. There had been no cross-examination and no direct challenge to his credibility. The judge noted the comments in paragraph 57 of the Upper Tribunal decision in MA (ETS-TOEIC testing) [2016] UKUT 450 that there might be a range of reasons why persons proficient in English might nevertheless have engaged in fraud.
7. The judge then summarised his conclusions in [20] as follows:

"There are a number of decisions relating to 'TOEIC cases' that discuss matters such as the 'shifting evidential burden' and other issues (see most recently Ahsan and others v SSHD [2017] EWCA Civ 2009) but ultimately the legal rule is that he asserts has the legal burden and must prove. Looking at this case in the round, I find that the respondent has failed to prove to the appropriate civil standard that the appellant made 'false representations' in a previous application to the Home Office UKVI. He therefore meets the 'suitability' requirement in para S-LTR.4.2 appendix FM and so meets the requirements of para R-LTRP.1.1 (a)-(c) of Appendix FM."
8. In the alternative, the judge went on to consider the discretionary element of para S-LTR.4.2 and said that, even if he had found that the respondent had proved that the appellant had made false representations in early 2012, he would nevertheless have found that this incident by itself would be insufficient to deny him the right to remain in the UK with his settled wife and British child. He said that, bearing in mind that the appellant had lived in the UK for over seven years, was married to a woman settled in the UK and had a UK born British citizen child, he would have found that the removal had consequences of such gravity as to engage article 8 and that the public interest question would focus on the suitability requirement that he had failed to meet together with other relevant considerations set out at s.117B of the Nationality, Immigration and Asylum Act 2002.
9. When considering proportionality, the judge took into account the duty under s.55 of the Borders, Citizenship and Immigration Act 2009 to safeguard and promote the welfare of a child and to take his best interests as an integral and a primary consideration in the proportionality assessment. He also referred to the respondent's policy guidance in the Immigration Directorate Instruction-Family Migration-(August 2015) at section 11.2.3. Taking these factors into account, even if the appellant had engaged in deception in early 2012 sufficient to justify the refusal of his 2016 application for leave to remain, the consequence would be unduly harsh on his minor

British citizen child [22]. He would therefore have allowed the appeal on the basis that the decision to refuse leave would have been disproportionate [26].

The Grounds of Appeal and Submissions.

10. The grounds of appeal argue in ground 1 that whether the appellant had engaged in deception or not, the judge would still have found that refusal was unduly harsh on the child but the ETS findings were material to the outcome of article 8 proportionality and the judge had erred by failing to take that factor into account and by using nationality as a trump card. There was no explanation why it would not be reasonable for the appellant's young child to leave the UK. The judge had failed properly to consider the deception issue, his precarious immigration status and the family ties to India.
11. Ground 2 argues that the judge failed to provide adequate reasons why the legal burden of proving that the appellant had acted dishonestly had not been discharged. The respondent had provided a number of documents including witness statements from Peter Millington and Rebecca Collins, the report by Professor French and the source data. In the light of that evidence the respondent had reasonably concluded that the appellant had used deception and the judge had provided inadequate reasons for finding that the appellant was credible.
12. Ground 3 argues that the judge applied an impermissibly high standard of proof in determining the deception issue. His findings made it clear that he had applied a far more onerous standard than the balance of probabilities.
13. Mr Clarke adopted his grounds. He submitted that the generic evidence provided was sufficient to discharge the evidential burden. The judge's approach effectively inferred that that data was unreliable. He had made no finding that the burden had shifted from the respondent on to the appellant in the light of that evidence. In summary, he submitted that the issue of deception had not been adequately considered by the judge. He acknowledged that the fact that the appellant had not been cross-examined was a relevant factor to be taken into account in assessing whether the judge's decision had been open to him but he argued that, if deception was established, that had not been properly taken into account in the assessment of proportionality.
14. Mr Butt adopted his skeleton argument submitting, in substance, that the judge had reached a decision properly open to him on the issue of deception and that the respondent was seeking to re-open an issue of fact.

Assessment of the Issues.

15. The first issue in this appeal is whether the judge erred in law in his finding that the respondent had failed to prove deception. The assertion is that the test taken on 21 February 2012 was by a proxy test-taker and not by the appellant. The judge properly

directed himself in [16] on the approach to the evidence, referring to the decisions in SM and Quadir (ETS-Evidence-Burden) [2016] UKUT 229 and MA. When considering the generic evidence, the judge commented that he had not been supplied with a Project Façade report or any information as to why the appellant's test was designated as invalid. He also took into account that there was little or no evidence from ETS as to why his test had been held to be invalid.

16. The appellant had adamantly denied that he had ever engaged in deception and had given evidence to this effect. As the judge noted, he was not cross-examined and there was no direct challenge to his credibility. When this factor is taken with the evidence before the judge about the appellant's English language ability, including the fact that prior to arriving in the UK he had been awarded a Bachelor's degree taught in English and had subsequently undertaken further studies in English, I am satisfied that it was open to the judge to find that the respondent had failed to discharge the onus of showing that the appellant had been guilty of deception.
17. It is further argued that the judge failed to consider whether the evidential burden had been discharged but I am not satisfied that this is the case. The judge referred at [20] to decisions that discussed matters such as the 'shifting evidential burden' but he was right to comment that ultimately the legal rule was that he who asserted had the legal burden and must prove. There was no dispute that the generic evidence produced by the respondent was sufficient to discharge the evidential burden, putting an onus on the appellant to provide an explanation. But he did provide that explanation in his witness statement and oral evidence and it was for the judge to assess, looking at the evidence as a whole including the background evidence relating to the appellant's competence in English, whether he had used a proxy test-taker rather than taken the test himself. The judge found that this had not been shown.
18. I am not satisfied that the judge erred in law in his approach to the assessment of this issue of fact. There was no need for a long disquisition on the various cases about shifting the evidential burden. The judge properly directed himself that the respondent had to meet the civil standard and he found that he had not done so. I am, therefore, satisfied that his finding was open to him for the reasons he gave and there is no substance in the argument that the judge applied an impermissibly high standard of proof.
19. In the circumstances, I need not deal at any great length with the alternative finding where the judge said that he would have found, in any event, in the particular circumstances of this appeal that the refusal of further leave would be disproportionate to a legitimate aim. He explained why, even if there was deception, he was satisfied in the light of the length of the appellant's residence in the UK and the impact that his removal would have on both his wife and young child that his removal following the refusal of leave would be unduly harsh for his child and, accordingly, disproportionate. Suffice to say that whilst another judge might have made a different decision, I am satisfied that this judge reached a decision properly open to him, which cannot be categorised as irrational or perverse.

Decision.

20. The grounds do not satisfy me that the judge erred in law. It follows that the First-tier Tribunal decision stands.

Signed: H J E Latter

Dated: 21 June 2018

Deputy Upper Tribunal Judge Latter