



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/22057/2015
IA/22242/2015

THE IMMIGRATION ACTS

Heard at Field House
On 11 January 2018

Decision & Reasons Promulgated
On 26 January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD DABIR AHMED CHOUDHURY
JAHANGIR ALAM CHOUDHURY
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr. P. Duffy, Home Office Presenting Officer

For the Respondents: Mr. M. Hasan, Counsel, instructed by Kalam Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Easterman, promulgated on 5 July 2017, in which he allowed the appeals of Mr. Md. Choudhury and Mr. J. Choudhury against the Secretary of State's decision to refuse leave to remain in the United Kingdom as Tier 1 entrepreneurs.

2. For the purposes of this decision I refer to Mr. Md. Choudhury and Mr. J. Choudhury as the Appellants, and to the Secretary of State as the Respondent, reflecting their positions as they were before the First-tier Tribunal.

3. Permission to appeal was granted as follows:

“In my assessment it is arguable, as per paragraphs 2 to 14 of the grounds on which the respondent seeks permission to appeal, that the judge may have adopted an erroneous approach when assessing whether or not the respondent had made out her allegation that the appellant had obtained their TOEIC (English language) certificates by dishonesty. [...]

It may also be arguable, as per paragraphs 15 and 16 of the respondent’s grounds, that the judge did not adequately assess the financial aspects of the case, or sufficiently factor in the evidence said to establish the respondent’s case in respect of crucial bank documentation.”

4. The Appellants attended the hearing. I heard submissions from both representatives following which I reserved my decision.

Submissions

5. At the outset of the hearing, I referred to paragraph [40] of the decision, which appeared to show that the Judge was aware of the correct approach in ETS cases regarding the discharge of the burden of proof by the Respondent, and the shift of the burden to the Appellants, the substance of Ground 1. Mr. Duffy agreed and accepted that it was difficult for him to maintain the challenge to the decision set out in Ground 1. He also accepted that there was no merit in Ground 3 given that even if updated evidence had been provided, it would have been inadmissible under the evidential rules which relate to points-based system appeals.

6. He therefore relied only on Ground 2. He submitted that there had been a failure of the Judge to give adequate reasons in [40]. The Judge had essentially said that he was aware of what the caselaw said regarding the burden of proof in ETS cases, and on balance he accepted the Appellants’ accounts. This was insufficient reasoning for preferring the Appellants’ accounts.

7. In response Mr. Hasan submitted that the evidence had been set out from [14] to [18]. The judge had referred to the evidence put forward by the Appellants both in their witness statements, in examination in chief, and in cross-examination. He had recorded the evidence at [18], and it was this evidence which had persuaded him to come to the conclusion at [40]. The evidence had led him to find that the Appellants’ evidence crossed the threshold.

8. I was referred to the Rule 24 response, where paragraph 57 of SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC) was set out. The judge had the evidence before him to show that the burden of proof had been discharged. He had

mentioned all material facts and had given reasons. The same conclusion would have been reached even if the Judge had written more.

Error of law

9. As stated above, no reliance was placed on Grounds 1 or 3 by Mr. Duffy. Ground 2 is the alleged failure of the Judge to give sufficient reasons for his finding that the Appellants had discharged the burden of proof in relation to the ETS issue.

10. As set out above, I find that the judge correctly set out the law in relation to the burden of proof in ETS cases [40]. Having set this out, the Judge then gave his reasons for finding that the Appellants had discharged the burden of proof. He states as follows:

“Both of these appellants have explained why they chose the test centre they chose. They have given answers largely in line, given the length of time it is since the tests were taken, with the handbook provided by the respondent, and on balance, notwithstanding the evidence of the respondent, I cannot say that I am satisfied that these tests were taken fraudulently. I find that the appellants, with their apparent knowledge of what went on in the tests, cross the threshold and make it more likely than not that they took the tests.”

11. The judge set out the evidence at [14] to [18]. At [16] to [19] he recorded the oral evidence. Paragraph [16] states:

“In evidence the first appellant, having adopted his statement, was asked why he went to Elizabeth College and he said his nephew (the second appellant) did the test first and he recommended that centre. He was asked what the procedure was and he said he went to the college, gave a photo identity, they gave him an exam date and he paid his money for the fee. He said it was quite far away from his home, it was two or three trains, nearly an hour’s worth of journey. He lived in Tower Hamlets. He could not recall the area of the test centre but he recalled it was in Stewart Road. The second appellant told him how to get there. He thought the fee was something of the order of £135.”

12. Paragraph [18] states:

“The appellant was asked questions about the testing and he said he had done the reading and listening and after a few days, perhaps a couple of weeks, he had taken the speaking and writing test. He was asked how many questions he was asked in the speaking test and he said he thought ten or eleven. He was asked how long he was given to complete the test and he said he could not recall exactly but it was between 20 and 25 minutes. He was asked more questions. He said that there were about fifteen to twenty other people taking the test. He said there were explanations and/or instructions, they were computer based. There were instructions on how to use the computer and then the appellant said in answer to me, by way of further clarification that someone had shown him to a seat, and given him a code to put into the computer, and when the exam started there were instructions coming from the computer.”

13. At [37] the Judge states that he has given careful consideration to the documents and the oral evidence. At [49] he states:

“Thus on the totality of the evidence before me, in each of the appellant’s cases I find in favour of the appellants on both the E.T.S. issue and the false bank statement issues, meaning that the respondent has not justified the refusal of these applications”.

14. I find that it is clear from [37] and [49] that the Judge has taken into account all of the evidence before him, which includes that set out at [14] to [18], when coming to his decision in relation to the ETS issue.

15. At [40] the judge gives reasons for finding that the Appellants have answered the Respondent’s case. He finds that they have both given reasons for why they chose the test centre that they chose. He finds that the answers given by them were “largely in line” with the handbook provided by the Respondent. He refers to the Appellants’ knowledge of what went on in the tests, as set out in the evidence. Finally he finds that it is more likely than not that they took the tests.

16. Considering [14] to [18], together with [40] where the judge sets out his conclusions, I find that the Judge has given sufficient reasons for his finding that the Appellants have discharged the burden upon them. It is clear from [40] that he has accepted the explanations given by the Appellants as set out in their witness statements, and in the oral evidence, which he has set out in his decision. It is clear that he accepts that they have offered innocent explanations, and he has set out those innocent explanations in the decision itself.

17. Taking the decision as a whole, I find that the judge has given sufficient reasons for finding that the Appellants met the burden placed upon them in relation to the ETS issue. There is no error of law.

Decision

18. The decision of the First-tier Tribunal does not involve the making of a material error of law. I do not set the decision aside.

19. The decision of the First-tier Tribunal stands.

20. No anonymity direction is made.

Signed

Date 24 January 2018

Deputy Upper Tribunal Judge Chamberlain