



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

Appeal Number: HU/00034/2017

THE IMMIGRATION ACTS

Heard at Field House

On 17th April 2018

**Decision & Reasons
Promulgated
On 10 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR RAJA IMRAN AZAM
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

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

For the Respondent: Mr G O'Ceallaigh, Counsel instructed by M & K Solicitors

DECISION AND REASONS

1. Although the Secretary of State is the Appellant in these proceedings, I refer to the parties as they were before the First-tier Tribunal.
2. The Appellant, a citizen of Pakistan, appealed to the First-tier Tribunal against a decision of the Secretary of State of 19th December 2016 to refuse his application for leave to remain in the United Kingdom as the partner of Elaine Mary Yorke, a British citizen who he married on 1st February 2014. First-tier Tribunal Judge Somal allowed the Appellant's

appeal. The Secretary of State now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Boyes on 23rd January 2018.

3. The background to this appeal is that the Appellant entered the UK on 8th May 2011 with entry clearance as a student valid until 15th October 2012. His application for further leave to remain as a student was granted until 15th February 2015. He married Ms Yorke on 1st February 2014 and applied for variation of his leave to remain to that of a spouse on 19th February 2014. His leave to remain as a student was curtailed on 23rd June 2014 and his application for leave to remain as a spouse was refused on 30th June 2014. He lodged an appeal against that decision which was allowed on the basis that the Secretary of State was to reconsider the decision. The application was reconsidered and he was refused leave to remain with no right of appeal but the application was reconsidered again and he was again refused leave to remain and appealed against the refusal of that application and his appeal was dismissed in November 2016.
4. The Appellant made a further application for leave to remain on the basis of his relationship. The refusal of that application is the subject of this appeal. The Secretary of State decided that the Appellant did not meet the suitability requirements of Appendix FM of the Immigration Rules because it was alleged that he submitted a TOEIC certificate from Educational Testing Service (ETS) with his application of 9th October 2012 for further leave to remain as a student. The Secretary of State was satisfied that the certificate was fraudulently obtained and that the Appellant used deception in his application of 9th October 2012. Accordingly, it was concluded that the Appellant did not meet the suitability requirements of the Immigration Rules. It was accepted (page 4 of the decision of 19th December 2016) that the Appellant met the eligibility requirements of paragraph R-LTRP.1.1.(d)(ii), however the Secretary of State did not accept that the Appellant met the requirements of R-LTRP.1.1.(d)(iii). The application was refused on the basis of paragraph D-LTRP.1.3 with reference to R-LTRP.1.1.(d)(i) and (iii) of the Immigration Rules. As the Appellant did not have any dependent children under the age of 18 the Secretary of State decided that he did not meet the requirements of Appendix FM in relation to a parent. Consideration was given to the provisions of paragraph 276ADE of the Immigration Rules and the Secretary of State considered that the Appellant could not meet the provisions of 276ADE(1)(vi).
5. The judge considered the Appellant's appeal at paragraphs 7 to 25 of the decision. At paragraphs 7 to 10 the judge set out the evidence submitted by the Secretary of State. At paragraphs 11 to 17 the judge set out the evidence submitted on behalf of the Appellant. The judge considered the evidence and made findings at paragraphs 18 to 25. The judge concluded that it had been established that the Appellant did not fraudulently submit an ETS certificate and did not use a proxy [19]. The judge concluded that the Appellant met the suitability requirements of the Rules. The judge went on to consider EX.1 of Appendix FM and concluded that there were

insurmountable obstacles to the Appellant's family life with his wife continuing outside the UK. The judge considered proportionality at paragraphs 22 to 24 concluding that Appendix FM sets out the requirements to be met and reflects how, under Article 8 of the ECHR, the balance will be struck between the right to respect for private and family life and the legitimate aims for protecting national security, public safety and the economic wellbeing of the UK. The judge concluded at paragraph 24 that, as the Appellant met the requirements of Appendix FM, the human rights appeal succeeds as the decision to refuse the application is not proportionate to the Secretary of State's legitimate aim.

6. The Secretary of State's grounds contend that the First-tier Tribunal Judge erred in failing to properly apply the burden of proof as set out in relevant case law including **SM and Qadir (ETS - evidence - burden of proof) UTIAC 21st April 2016** and **SSHD v Shehzad and Another [2016] EWCA Civ 615** as confirmed in the case of **R (on the application of Nawaz) v Secretary of State for the Home Department (ETS: review standard/evidential basis) [2017] UKUT 00288 (IAC)**. It is contended that the First-tier Tribunal Judge failed to give adequate reasoning why the Respondent had not met the legal burden and had failed to set out whether there was an innocent explanation. It is further contended that the judge materially erred in failing to give adequate reasons for holding that a person who clearly speaks English would therefore have no reason to secure a test certificate by deception in light of the decision in **MA (Nigeria) [2016] UKUT 450**. It is contended that the judge erred in finding that there would be insurmountable obstacles to the family life continuing abroad as insurmountable obstacles is a high threshold and the judge failed to give adequate reasons why that had been met.

The Submissions

7. At the hearing before me Mr Duffy submitted that the judge had not adopted the correct approach as to whether the Secretary of State had discharged the burden upon her. In his submission if the judge had done so she could have reached a different conclusion. He contended that the judge failed to recognise that there was prima facie evidence of fraud. He submitted that the Article 8 consideration was infected by the same error in that the matter of fraud should have carried some weight in the Article 8 assessment, in so submitting he accepted that the second ground was dependant upon the first.
8. Mr O'Ceallaigh submitted that the judge had looked carefully at all of the evidence. He contended that she set out the Respondent's case in the witness statements before her and, as this was sufficient in his view to require a response, the judge went on to consider the Appellant's own evidence before concluding that the Appellant had not committed any fraud. In his view the judge's approach led either to a conclusion that the Respondent had not made out her case, or alternatively it is implicit in the judge's findings that the Appellant had discharged the burden of proof

upon him. He contended that if the decision as set out by the judge is looked at through the prism of the shifting burden, then what the judge has done is sufficient. In his submission it is unusual to have such a level of documentary evidence as there were in this case including documentary evidence from the Appellant as to his attendance at the test centre on the day he took the test. He also referred to a 'GCID case record sheet' at page 55 of the Appellant's bundle dated 1st December 2005 (and followed an interview with the Appellant) which states "there is no evidence to implicate him in the fraud occurring at the college at present". Mr O'Ceallaigh acknowledged that this had not been referred to by the First-tier Tribunal Judge. He submitted that the judge accepted the Appellant's evidence that he was at the test centre and concluded that the Appellant was credible. In these circumstances, in his submission, it is difficult to say that any other conclusion could have been reached by the judge had she considered the case in the context of the shifting burden. He accepted that the second ground is dependent upon the conclusion in relation to the first ground. In any event, he submitted that there was no error in the judge's consideration of the insurmountable obstacles test set out in Appendix FM. In his submission there is no material error in the judge's decision.

9. In response, Mr Duffy submitted that the evidence produced by the Secretary of State has weight and that it was not properly taken into account.

Error of Law

10. The proper approach to cases involving an allegation of fraud in relation to the ETS English test was set out in the case of **SM and Qadir**, considered by the Court of Appeal in **Shehzad and Another** and confirmed recently in the case of **R (on the application of Nawaz)**. It is clear from these cases that the burden is initially on the Secretary of State to provide evidence sufficient to discharge the evidential burden on the Secretary of State. As pointed out at paragraph 22 of the decision in **Shehzad**, if that evidential burden is satisfied, it is then incumbent on the Appellant to provide evidence in response raising an innocent explanation.
11. In this case the judge set out all of the evidence produced by the Secretary of State at paragraphs 7 to 10 and the evidence produced by the Appellant at paragraphs 11 to 17. Mr Duffy did not point to any evidence that had not been considered by the judge. At paragraph 18 the judge stated that she must consider the credibility "of the whole of the evidence". It is clear therefore that the judge did not, strictly speaking, approach the case following the approach set out in the case law.
12. However, the judge set out all of the evidence produced by the Secretary of State, acknowledging at paragraph 9 that there was a printout of the Appellant's test results with an indication that that result was invalid. The judge also acknowledged the specific evidence in relation to the English language test carried out at Colwell College [10]. The judge set out the

Appellant's evidence in detail after that. I accept Mr O'Ceallaigh submission that it is implicit in the judge's findings that she accepted that the Respondent had discharged the initial legal burden before going on to consider the Appellant's evidence.

13. In my view it is therefore clear that before going on to consider the Appellant's evidence in detail the judge must have accepted that the Respondent discharged the initial burden to raise the prospect of the Appellant having used deception in his English language test. The judge considered the Appellant's evidence including the oral evidence set out at paragraphs 11 to 14 where the Appellant is recorded as giving details of his attendance at the test centres and the documentary evidence (including train tickets and receipt from a bank machine opposite the test centre on the appropriate dates). The judge concluded on the basis of all of his evidence that the Appellant was honest and credible [19]. This evidence was sufficient to counter the Secretary of State's evidence and to raise an innocent explanation as to his participation in the relevant test.
14. Accordingly, whilst the judge failed to set out the test in the appropriate format, I am satisfied that the judge did consider all of the evidence in the appropriate way and that there is no material error in the judge's consideration of the evidence of alleged fraud in obtaining his TOEIC certificate. Accordingly, the judge made no error in her approach to the consideration of the suitability requirements.
15. Mr Duffy at the hearing that if there is no error in relation to the assessment of the suitability requirements, then there is no error in relation to the subsequent consideration of EX.1 of Appendix FM.
16. In light of my findings above I conclude that there is no material error in the First-tier Tribunal Judge's decision.

Notice of Decision

17. The decision of the First-tier Tribunal Judge does not contain a material error of law.

The decision of the First-tier Tribunal Judge shall stand.

No anonymity direction is made.

Signed

Date: 3rd May 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT

FEE AWARD

I maintain the fee award made by the First-tier Tribunal.

Signed

Date: 3rd May 2018

Deputy Upper Tribunal Judge Grimes