



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03191/2018

THE IMMIGRATION ACTS

Heard at Manchester
On 25th July 2018

Decision & Reasons Promulgated
On 9th August 2018

Before

UPPER TRIBUNAL JUDGE CHALKLEY

Between

MR USMAN ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Holmes of Counsel, instructed by Equity Law Chambers
Solicitors (Oldham)
For the Respondent: Mrs Pettersen, a Senior Home Office Presenting Officer

REASONS FOR FINDING AN ERROR OF LAW

1. The appellant is a citizen of Pakistan who was born on 31st October 1988. He made application to the Home Office for leave to remain as the spouse of Aminah Iqbal, a British citizen born on 18th March 1990 (“the sponsor”). This application was refused by the respondent on 19th January 2018. The appellant appealed the respondent’s decision and his appeal was heard in Manchester on 16th March 2018 by First-tier Tribunal Judge Herwald.
2. The respondent refused the application for various reasons. The first and the one which causes me to set aside the determination, was an allegation that the appellant had made false representations or failed to disclose a material fact in a previous application. The appellant claimed to have taken an English language test on one and

only one occasion, on 15th January 2014, but the respondent said that ETS had a record of him taking a TOEIC speaking test on 13th December 2013. Using voice verification software it was found that there was significant evidence to conclude that the certificate was fraudulently obtained. The appellant denied ever taking an English Language test on 11th December 2013.

3. Pausing there, there are several errors in that refusal, which I will come back to later.
4. Secondly, in terms of eligibility, the appellant had been cohabiting with his partner since September 2016 and although there was a marriage recognised under Islamic law they had not undergone a civil ceremony recognised under UK law. Thirdly, it was asserted that the appellant was in breach of immigration laws in that he had been issued with form RED.001, an overstayer form, on 4th May, 2016 and could not therefore meet the requirements of E-LTRP.2.2(b). Fourthly, it was not accepted that the appellant was in a genuine and subsisting marriage, even though he and his wife had a British child, born on 4th October 2017 and lastly it was claimed that the appellant could not meet the requirements of paragraph 276ADE (1) and could not meet the suitability requirements for the reasons given above.
5. The judge, was supplied with evidence in piecemeal form and I believe that this is what may have caused him some difficulties. The documents referred to as being "Appendix A" and "Appendix B" are actually in the correspondence section of the Tribunal's file. Why they are there I have no idea, but that is where I found them today. The Secretary of State's supplemental bundle, which purports to contain "Appendix A" and "Appendix B", does not in fact contain either. It is said to contain a witness statement of Sarah Marsh. In fact, it contains only the first two pages of her witness statement. Why I do not know.
6. I deal with the documentary evidence before the judge, because it is relevant in that in paragraph 21 of his determination the judge makes various findings and the first finding that is challenged is that at paragraph 21(c) of his determination. There, he says:
 - “(c) It is further complicated by the fact that the results put before me from ETS clearly show that the appellant took different elements of the test, on two separate days at a place called Apex. The first element was taken on 11th December 2013. Annex A to the respondent's bundle clearly shows the appellant sitting that test on that day, and the second element was taken on 15th January 2014. Both tests are revealed to have 'invalid' results. Thus, this is not a case where the results are 'questionable'. Instead, they are clearly invalid. Of the tests taken by sixteen persons on 11th December that year, 19% were shown to be questionable, and 81% invalid. Similarly, on 15th January 2014, 83% were shown to be invalid. That is a huge percentage of dishonest test takers. Those persons' certificates were cancelled or withdrawn.”
7. The difficulty with what the judge has said is that at Appendix A, the test date of 11th December, 2013 shows an invalid test, but there is no score for speaking and no score for writing, because this is the date the appellant said he did not attend. He insists that he only attended on 15th January 2014. Indeed, on that occasion he was awarded 170 points for speaking and 190 for writing, but the test was said to be invalid.

8. The judge goes on at paragraph 21(d) to suggest that since the appellant insists he only attended on one date and not on both, this cannot be reconciled with clear evidence put before him by the respondent. The judge is therefore suggesting that the evidence of the appellant might not be relied upon.

9. He went on in paragraph 21(f) to say this:

“(f) Furthermore, in respect of the 2014 test, the appellant asserted that he was able to remember precisely that there were eighteen persons all sitting the test, whereas in fact from the documentary evidence before me, it appears that there were in fact not eighteen persons in the room. While not determinative, this, taken in with the other information from the appellant in the round, serves to further damage his credibility.”

That adverse credibility is based on a misunderstanding by the judge of the evidence put before him. It would be unfair to blame that misunderstanding entirely on the judge. He does not appear to have been helped by the parties in submitting evidence piecemeal.

10. The judge went on in the determination to consider Article 8 and at paragraph 29 he said this:

“29. The respondent said that there was no genuine and subsisting relationship between the appellant and the sponsor. During their evidence, it became apparent that they were contradicting each other, in respect of whether or not it would be possible to relocate to Pakistan. But on balance, I am satisfied from the evidence put before me that the couple are in a relationship, and the respondent did not seek to deny that the couple have a child together, and that child is a British child. That must therefore be the central issue in terms of Article 8 here. I accept that the couple have a genuine relationship and that there is a British child involved.”

11. That finding at paragraph 29 will stand. The rest of the determination, I am afraid, cannot stand because of the misunderstanding of the evidence placed before the judge. The result is that the appellant has been denied a fair hearing and as a result I am minded to remit this appeal to the First-tier Tribunal for hearing afresh before a judge other than Judge Herwald. Paragraph 29 will stand. Two hours should be allowed for the hearing of the appeal. No interpreter required.

Richard Chalkley

Upper Tribunal Judge Chalkley