



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12021/2017

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 24th September 2018

Decision & Reasons Promulgated
On 18th October 2018

Before

UPPER TRIBUNAL JUDGE LANE

Between

WAHEED IQBAL CHAUDHARY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Swain, instructed by Eagles Solicitors
For the Respondent: Mr Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Waheed Iqbal Chaudhary, born on 2 January 1981 is a male citizen of Pakistan. On 25 April 2017, the appellant made a human rights application to remain in the United Kingdom under Appendix FM of HC 395 (as amended) on the basis of his family life with Mrs Renita Chaudhary. By a decision dated 2 October 2017, the Secretary of State refused the appellant leave to remain. The appellant appealed on human rights grounds to the First-tier Tribunal (Judge Herwald) which, in a decision promulgated on 29 January 2018, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.
2. The grant of permission by Judge Nightingale dated 22 May 2018 is not entirely clear. It was the subject of a further direction by Upper Tribunal Judge Hanson which is

dated 12 July 2018. Judge Hanson has confirmed that the grant of permission concerns the judge's findings as to the language test purportedly undertaken by the appellant ("the ETS element"). Consideration of whether the appellant and his wife can continue their family life in Pakistan shall not be revisited.

3. The appellant challenges the contents of [20(b)] of the decision. In this lengthy subparagraph, the judge considered whether or not the respondent had discharged the burden of proving that the appellant had used deception in obtaining his TOEI certificate from ETS. In reaching that decision, the judge considered the witness statement of Rebecca Collings. He also had before him a witness statement of Sarah Marsh, the witness statement of Peter Millington and the expert report of Professor French. The judge refers specifically to the statement of Sarah Marsh but does not refer in the decision to the report of Professor French. The judge recorded that "In his evidence before me, [the appellant] was asked questions about why he had chosen that particular college (Elizabeth College) he denied any form of cheating. He said he had not undertaken the two separate modules of the test on the same day and he had not used a proxy. His wife could not have been able to confirm this as she had not been present and "did not know him at the time, it seems." The judge recorded that the "application must fail, as noted above" but went on to consider what had been said in the refusal regarding the ETS issue insofar as it might affect the overall human rights claim (under Article 8 ECHR). Having summarised the evidence of Peter Millington and Sarah Marsh, the judge concluded as follows:

In my view, the respondent has discharged the burden of proof. The specific data in relation to the appellant, concerning his speaking, writing and correspondence tests utilising the look-up tool persuade me that it is more likely than not that the appellant used a proxy at his test on 18 July 2012.

4. Mr Swain, who appeared for the appellant, submitted that the judge had not specifically considered the appellant's explanation regarding what had happened at the test centre. He submitted that, only if the judge had given reasons for rejecting the appellant's "innocent explanation", would the judge be in a position to conclude that the respondent had discharged the burden of proof. Mr Tan, for the Secretary of State, submitted that the judge had not erred as pleaded in the grounds or at all. The judge had before him two accounts of what may have occurred and he had, by application of the standard of proof of the balance of probabilities, preferred the account provided by the Secretary of State.
5. I agree with Mr Tan. The judge has recorded what the appellant said in evidence regarding the examination at Elizabeth College (see above). Mr Swain complains that the judge did not refer to what the appellant had said in his witness statement. The appellant said this in the witness statement:
 16. I chose this college as it was a suitable venue in my location and was the closest college to attend in undertaking the relevant course as it was referred to me by Lincoln College.
 17. I paid £270 for sitting the exam.

18. As it had been some time doing this exam (sic) I recall some questions that were asked in the exam which I answered. I was asked about my daily routine, place of study, hobbies and interests.
 19. In the examination hall there were around other 25 people doing the test. (sic)
6. I find that there was no need for the judge to examine that part of the appellant's statement in detail. I am also satisfied that the judge has read the statement before reaching his decision. I reject the submission that it was vitally important for the judge to consider that explanation and to give reasons for rejecting it. Mr Tan is right, in my opinion, when he submits that there are two accounts of what happened at Elizabeth College and, at the end of the day, the judge was required to prefer one account over another. In a case such as this, that is what the proper application of the standard of proof of the balance of probabilities involves. By analogy, if a judge is hearing a case involving a traffic accident he or she may have two differing accounts of what happened. In such a case, the judge does not need to give specific reasons for rejecting an account *before* giving reasons for preferring one account over the other. There is a burden of proof and the judge has correctly reminded himself that in this appeal that burden falls on the respondent. The appellant has claimed that he undertook the exam and the respondent says that another individual undertook it on the appellant's behalf. The judge has preferred the latter account to the former. The evidence adduced by the respondent was capable of leading to that result so the judge's finding cannot arguably be described as perverse. Certainly, the judge is required to give reasons for preferring one account to another but he has done exactly that in his decision. In the circumstances, I cannot find any error of law in his analysis.

Notice of Decision

7. This appeal is dismissed.
8. No anonymity direction is made.

Signed

Date 1 October 2018

Upper Tribunal Judge Lane

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 1 October 2018

Upper Tribunal Judge Lane