



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/12174/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 24th April 2018**

**Determination Promulgated
On 3rd May 2018**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**MD FORHAD HALIM TAPADER
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Z Khan of Londinium Solicitors

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Bangladesh born on 10th January 1981. He arrived in the UK on 7th April 2010 as a Tier 4 general student migrant. He then married in the UK, and was eventually (after an appeal) granted leave to remain on the basis of his marriage valid from 14th March 2012 to 17th June 2015. On 15th June 2015 the claimant applied for indefinite leave to remain on the basis of his marriage. This application was refused under the general grounds of refusal on the basis of his presence not being conducive to the public good due to his having fraudulently obtained a TOIEC certificate on 9th December 2011 and presented it with his spouse application in March 2012. His appeal

against the decision was allowed by First-tier Tribunal Judge Telford in a determination promulgated on the 23rd February 2017.

2. Permission to appeal was granted to the Secretary of State by First-tier Tribunal Judge Lambert on 25th September 2017 on the basis that it was arguable that the First-tier judge had erred in law in particular because it was arguable there was a lack of adequacy in the reasoning that the claimant had not used deception and that the Secretary of State's evidence had been misunderstood.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

4. The Secretary of State argues, in both written grounds of appeal and oral submission from Mr Kotas, that it was an error of law to have allowed the appeal under the Immigration Rules when this was not permissible under the current version of s.82 of the Nationality, Immigration and Asylum Act 2002. It was necessary to allow or dismiss the matter only on human rights grounds.
5. Secondly it is argued that the burden of proof in assessing whether the claimant had used dishonesty to obtain his TOEIC certificate was not properly understood and applied by the First-tier Tribunal. It had been found that the generic evidence of the Secretary of State did show that the evidential burden was met, see SM & Qadir (ETS – Evidence -Burden of Proof) [2016] UKUT. The question is then whether the legal burden is met by looking at whether the evidence from the claimant outweighs that of the Secretary of State, and whether the appellant has raised an innocent explanation which the Secretary of State cannot counter. The evidence of the spreadsheet showed that the test was questionable and the interview conducted with the claimant added to this evidence satisfying the evidential burden.
6. The evidence of an innocent explanation in this case was simply the bare assertion of the claimant that he attended the test centre without any detail of the test taking; plus the fact that he was able to speak English well before the First-tier Tribunal years later; and a passed English test taken four years later. As set out in MA (ETS – TOEIC testing) Nigeria [2016]UKUT 450 there are many reasons why a claimant might cheat including lack of confidence, fear of failure, lack of time and commitment and contempt of the immigration system and not simply because his English was not good enough.
7. Mr Khan submitted that allowing the appeal under the Immigration Rules was not a material error as what was clearly meant was there was no public interest in interfering with the appellant's family life as he met the Immigration Rules it he had not cheated and so the refusal was a disproportionate interference with Article 8 ECHR.

8. Mr Khan submitted that the First-tier Tribunal had dealt with all aspects of the case adequately particularly if what was said at paragraph 30 of Secretary of State for the Home Department v Shehzad and Chowdhury [2016] EWCA Civ 615 was considered. In that case it was stated that in “questionable cases” there may not have been deception and so even the initial burden on the Secretary of State may not have been met.
9. After the error of law submissions I informed the parties that I found that the First-tier Tribunal had erred materially in law, and that the decision was set aside and would have to be remade. I set out my reasoning for the finding that the First-tier Tribunal had erred in law below. We adjourned for half an hour prior to remaking the decision to enable the representatives to formulate their submissions. At the end of the remaking hearing I reserved my decision.

Conclusions - Error of Law

10. It was an error of law by the First-tier Tribunal to have allowed the appeal on the basis that the applicant met the Immigration Rules. As Judge Lambert noted, when granting permission to appeal, this is not necessarily a material error however as if the claimant meets the Immigration Rules then there is no public interest in his removal and so the interference with his family and private life ties which removal represents will not be proportionate and will therefore be a breach of Article 8 ECHR, and thus an appeal will necessarily be allowed on this basis. The key question is therefore whether the decision that the claimant did not use deception was lawfully made and so whether the claimant did in fact meet the Immigration Rules or not.
11. The respondent says that the First-tier Tribunal has not explicitly taken account of the guidance decisions made by the Upper Tribunal and Court of Appeal on this issue that the generic evidence generally meets the evidential burden. This is a correct submission: there is a failure to place the examination of this issue in the context of the relevant caselaw and to therefore take the correct legal steps in determining whether the claimant was correctly refused under the general grounds of refusal.
12. There was also an error of law by failing to take relevant information into account including the interview notes; the evidence regarding the college where the claimant took his test and his own test results; the claimant’s statement; and the evidence that the claimant gave evidence in English before a First-tier Tribunal in March 2013. It was rational for the First-tier Tribunal to note that the claimant’s certificate was not annulled by ETS due to being invalid but simply on the basis it was questionable in the context of the test administration irregularities; and to consider the subsequent English test taken in May 2015 and his English language performance before the First-tier Tribunal, but this was not a complete consideration of all material evidence.

Evidence & Submissions - Remaking

13. The claimant provided a witness statement and gave oral evidence in support of his appeal. In short summary he says that he came to the UK to study travel and tourism in April 2010. Before starting his main course he had to do an English course which lasted between April and December 2010. He started his travel and tourism course but then he met and married his wife in October 2011. At this point he decided that he should cease these studies, and intends to start studies in computing when he has indefinite leave to remain as these will be of more use to him if his future lies in the UK. He therefore has no certificates for any studies in the UK other than for English language.
14. He took the TOEIC test, which the Secretary of State contends was fraudulent obtained in November 2011, for submission with his marriage application which was made in March 2012. He maintains that he did not cheat when he took this test. He had no need to do so as it was only at A1 level in listening and speaking and he was at that time studying at NQF course level 4 which required a higher B1 level of language. He draws attention to his detailed description of how he took the tests in his statement which included that he had done some study sessions first. He did not see anything that looked like cheating by others whilst he was there either, but he was busy. He points out that he only got 55% in both tests which indicates the he took the tests himself, although he was disappointed with the results, and not through a highly proficient proxy test taker. He was also able to give evidence at two hearings before the First-tier Tribunal in 2013 without an interpreter with no difficulty. He took a further English test with Trinity College in May 2015 which showed he obtained a distinction at B1 level, making it highly plausible that he had obtained the lower level TOEIC test as he claimed in 2011.
15. The claimant says that he could not remember many details about his TOEIC tests when interviewed almost four years after the event by the Secretary of State in September 2015 because he panicked and his mind went blank. He had been confused when he told the interviewer that he did a written test too, and about the duration of the speaking aspect being 1 hour and not 20 minutes.
16. He was able to provide a full statement about the TOEIC tests to his solicitor in February 2017 because he had had time to think about them and recover related documents like receipts.
17. In addition to providing a statement to his solicitor the claimant said he had tried to return to Opal College where he took the tests to find out what had happened with the allegation of cheating but the college was no longer there. He checked another suggested location but it was not there either, and he believed it no longer existed as he had also done some on-line checks He had not personally tried to contact ETS.
18. Mr Kotas submitted that he relied upon the reasons for refusal letter, the interview record and the supplementary bundle submitted by the Secretary of State. He submitted that the evidential burden was met in

this case as there was not simply an ETS document stating the claimant's result was cancelled due to being questionable but also the interview record from September 2015 during which the claimant had been unable to answer simple open questions, and during which he gave evidence about a written test he did not take and misremembered the time the speaking test had taken significantly. The detailed statement should not be seen as credible as it was given 6 years after the events. Further it was relevant to put the questionable result in the context of the other results from Opal College which from the look up tool showed that 73% was invalid for the day the claimant took his exams and the remainder (including the claimant's ones) were found to be questionable due to administrative irregularities. The claimant's English ability should not be seen as of much significance as there are many reasons why he might have cheated even if he were proficient in the English language, and the claimant had not pursued ETS for the voice recording to try to clear his name.

19. Mr Kotas therefore submitted that I should find that the Secretary of State had met the legal burden of showing the claimant had cheated and dismiss the appeal. He accepted that if I found the claimant had not cheated then I would have to allow the appeal on human rights grounds as this was the only matter put in issue under the Immigration Rules.
20. Mr Khan provided an email from the Londinium Solicitors file which showed that they had written on behalf of the claimant to ETS in the USA asking for further information and reasons about the cancellation of his test scores. He submitted that if the claimant had used a proxy test-taker on the evidence from the Secretary of state it would be expected that he would have got a score of something like 85%, where as in fact both of his speaking and listening tests were scored at 55%. His results had only been found to be questionable, which meant that when his voice was compared there was no evidence of cheating by use of a proxy test taker. In these circumstances not even the evidential burden should be seen as having been met in accordance with the Court of Appeal decision in Shehzad and Chowdhury.
21. The claimant did not perform well at his interview in 2015 but he has explained he could not remember anything as his mind went blank, and it is notable he could not give details of his other English language test taken later either. He was able to give a few details which were correct and consistent with his later statement such as the location and about the fees. He has shown he had an appropriate level of English to have achieved the result he was awarded by TOEIC through his oral evidence in 2013 before the First-tier Tribunal, his later 2015 test from Trinity College where he achieved a B1 level, and his evidence before the Upper Tribunal.
22. Mr Khan therefore submitted that the claimant had provided an innocent explanation for the evidence of the Secretary of State, and the appeal should be allowed on human rights grounds as he could meet the

Immigration Rules for his indefinite leave to remain application, and clearly refusal interfered with his family and private life in the UK.

Conclusions - Remaking

23. The first question for me is whether the generic evidence and the particular evidence relating to the claimant satisfies the evidential burden on the Secretary of State that he procured his TOEIC certificate by dishonesty, see SM & Qadir v SSHD (ETS- Evidence-Burden of Proof) [2016 UKUT 229. In making this consideration I need to consider what was said in the later case of Shehzad & Chowdhury with respect to test results which have been cancelled due to being questionable rather than invalid. What is said at paragraphs 25 and 30 is that a questionable designation means that there may not have been deception because unlike in a case where there was an invalid designation there was not a matched voice with a person who took a test using a different name. The Court of Appeal concludes that the Secretary of State faces difficulties in respect of the evidential burden if there is no individual evidence which shows the test results to be invalid. This position is consistent with the generic evidence of Rebecca Collings, at paragraph 29 of her statement, which states that where tests results were cancelled as questionable this was because of test administration irregularities including the fact where numerous other results had been invalidated due to a match with a proxy test-taker.
24. Of course, in this case there was also the interview which the Secretary of State conducted in 2015 with the claimant in which he was questioned about his TOEIC test. I find that the claimant was not able to provide a lot of detail of what he did during the test at that interview, and inaccurately said he took a writing test at that time (although his full statement does say that he was aware that a writing test took place afterwards which he did not need to take) and in retrospect he says that he got the time the speaking test took wrong – it was about 20 minutes not one hour. This interview was nearly four years after the event, and he was not on notice about the focus of his interview, and if innocent of any fraud would have had no reason to think he was going to be questioned about his TOEIC English test or had reason to think about it after taking it. He had by this time also taken another English language test at another college in 2015, and it is notable that he struggles to remember the details of that one as well. In all of the circumstances I am not satisfied that the Secretary of State has met the evidential burden on her to show the claimant submitted a fraudulently obtained English language certificate.
25. However, in case I am wrong I go on to balance the totality of the evidence and assess whether the legal burden is met. I note that the claimant has, with time to consider the matter, provided a very detailed statement about taking his TOEIC tests, and that the Secretary of State has not identified any detail as being inconsistent with the known facts about the tests taken at Opal College.

26. I find it is an indicator that the claimant's statement and oral evidence should be seen as credible that there was no positive invalidation of his scores as fraudulent by ETS and given that he scores very significantly below the average marks that were achieved on that day at Opal College where 73% of persons were found to have used a proxy test-taker. The claimant achieved 110 marks and was at level 5 whereas the average score was 172 and at level 7: the claimant only got 55% whereas on average candidates were getting 86%, on the Secretary of State's evidence, through this cheating process. His speaking score was also equivalent to his listening score for which there is no contention of cheating.
27. I accept Mr Kotas's argument that there are many reasons why the claimant might have cheated other than he had insufficient English to take the test himself, as has been said by the Upper Tribunal the following might be the case: lack of confidence, fear of failure, lack of time and commitment and contempt of the immigration system. However, it is still of some relevance that the level of English achieved at that time in the claimant's English tests was probably consistent with his actual ability as is born out in his evidence in English to the First-tier Tribunal in 2013 and his passing a test at the higher B1 level in 2015.
28. It is not in the claimant's favour that he could not give a full account of his tests in 2015 when called to interview, and even got some elements wrong, but I do not find this weigh heavily against him. I accept his evidence that his mind went blank about what was a fairly minor matter which happened almost four years earlier and that he was able to recall more when he sat down to consider the matter with his documents later one. It is of course of relevance that in relation to almost three quarters of the candidates at Opal College on the day he attended there is ETS evidence of cheating, and that this evidence is highly likely to be accurate on the basis of the generic evidence. However, it remains the case that the claimant is not part of his cohort, and that for a quarter of candidates there is no such evidence. I do not find it significant that the claimant did not write to ETS himself given his questionable designation as it would appear that there was no evidence of his specifically cheating to probe.
29. As a result, having weighed all of this material, I conclude that the claimant has provided an innocent explanation for the ETS and interview evidence provided by the Secretary of State which is not countered by the totality of the Secretary of State's evidence. The claimant was refused under paragraph 287 of the Immigration Rules solely because he failed to meet the requirement that he not fall to be refused under the general grounds of refusal, which in turn were said to be met due to the submission of a false TOEIC certificate. I find that the Secretary of State has not shown on the balance of probabilities that this was the case. The claimant therefore meets the requirements of the Immigration Rules for indefinite leave to remain as a spouse of a person present and settled in the United Kingdom.

30. The claimant has family and private life ties with UK, having been resident in the UK for eight years and being genuinely married to a British citizen in a relationship which is subsisting. The consequence of the refusal of leave to remain is that bar success on appeal he is required to leave, and this requirement will interfere with his private and family life ties with the UK. As the claimant has shown that he can meet the requirements of the Immigration Rules at paragraph 287 of the Immigration Rules (which include showing financial and English language requirements were met) I find that there is no public interest in refusing him that leave to remain to maintain immigration control, and as such find that any proposed removal would be a disproportionate interference with his Article 8 ECHR rights.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal.
3. I re-make the decision in the appeal by allowing it on human rights grounds.

Signed: Fiona Lindsley
Upper Tribunal Judge Lindsley

Date: 24th April 2018