



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15398/2016

THE IMMIGRATION ACTS

Heard at Field House
On 11 June 2018

Decision & Reason Promulgated
On 21 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IFTAKHARUL ISLAM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer

For the Respondent: Mr Z Nasim (counsel) Instructed by Zahra & Co, solicitors

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Wright, promulgated on 27 November 2017, which allowed the Appellant's appeal on article 8 ECHR grounds.

Background

3. The Appellant was born on 5 January 1982 and is a national of Bangladesh. On 14 June 2016 the Secretary of State refused the Appellant's application for leave to remain in the UK. The respondent believes that the appellant used a fraudulently obtained English language certificate to support an earlier application.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Wright ("the Judge") allowed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 18 April 2018 Judge Cruthers gave permission to appeal stating

1. This appeal stands allowed by a decision of First-tier Tribunal Judge Wright. It was the Judge's assessment that the appeal fell to be allowed because he found, in effect, that the appellant has offered "*a plausible innocent*" explanation for the respondent's [prima facie] evidence that the appellant had fraudulently obtained a TOEIC certificate from ETS (paragraph 37 of the decision under consideration) (and see Qadir et al).

2. If I have understood the situation correctly, the disputed certificate emanated from the Westlink College test centre (the Judge's paragraphs 4(iii) and 37). And the appellant's "innocent explanation" was that he had taken a test in a different test centre (Opal College) as a wager/to prove a point to some friends (paragraph 37 again)

3. Without restricting this grant, it seems to me that paragraph 9 of the grounds on which the respondent seeks permission to appeal may be the strongest argument. That is, I consider it arguable that the Judge may have erred in law by accepting the "innocent explanation" which he refers to in his paragraph 37 seemingly without any evidence (from, for example, the friends involved in the wager) to back up the "innocent explanation" advanced by the appellant. Additionally, it is not clear to me why the explanation referred to was accepted by the Judge when the appellant's case seems to have been that he took the test in a different test centre to the one specified on the TOEIC certificate in issue.

4. Overall, there is sufficient in the grounds to make a grant of permission appropriate.

The Hearing.

5. For the respondent, Mr Tarlow moved the grounds of appeal. He took me to [37] of the decision and told me that the Judge's findings there are inadequate. There, the Judge considers whether or not the appellant gives an innocent explanation. Mr

Tarlow told me that the Judge's conclusion is not adequately reasoned. He told me that the lack of reasoning undermines the decision. He asked me to set the decision aside and remit this case to the First-tier Tribunal.

6. (a) For the appellant, Mr Nasim told me that the decision does not contain errors of law. He reminded me that this decision relied on paragraph 322(2) of the immigration rules. He told me that the respondent has consistently failed to identify which application is said to have been supported by a fraudulently obtained English language certificate. The appellant's position has always been that he has not produced an English language certificate to support any of his applications for leave to remain in the UK.

(b) Mr Nasim took me through the appellant's immigration history. He told me that the Judge took correct guidance in law before reaching conclusions which were well within the range of reasonable conclusions available to the Judge. He described the Judge's decision as "well-reasoned and well structured". He asked me to dismiss the appeal and allow the decision to stand.

Analysis

7. In SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC) it was held that (i) The Secretary of State's generic evidence, combined with her evidence particular to these two appellants, sufficed to discharge the evidential burden of proving that their TOEIC certificates had been procured by dishonesty; (ii) However, given the multiple frailties from which this generic evidence was considered to suffer and, in the light of the actual evidence adduced by the appellants, the Secretary of State failed (in this case) to discharge the legal burden of proving dishonesty on their part. During the course of the determination Tribunal added that "every case belonging to the ETS/TOEIC stable will invariably be fact sensitive. To this we add that every appeal will be determined on the basis of the evidence adduced by the parties".

8. In Shehzad and Chowdhury [2016] EWCA Civ 615 it was held that the Upper Tribunal was wrong to find that the burden of proof for deception had not shifted to an applicant for leave to remain where the voice on an audio recording of his English test matched that of someone who had taken another test using a different name.

9. Between [17] and [20] of the decision the Judge takes correct guidance in law. At [31] and [32] the Judge sets out the appellant's position - which distinguishes this case from many similar cases. It has always been the appellant's position that none of his applications for leave to remain have been supported by an English language test certificate. Before the burden of proof could shift, the respondent would have to establish not just evidence directed at the validity of an English language test certificate, but also that an English language test certificate has been produced to support an earlier application.

10. At [2] of the decision the Judge sets out the appellant's immigration history. There is no dispute that the appellant has made a sequence of applications for leave to remain throughout his years in the UK. It is the respondent's position that one of those applications was supported by an English language test certificate. Nowhere in any of the evidence produced does the respondent specify which application was supported by an English language test certificate. Nowhere does the respondent produce the English language test certificate.

11. Before even approaching the question of whether or not fraud, or a proxy test taker, had been employed, the respondent fails to discharge the burden of proving that the appellant has relied on an English language test certificate to support an application for leave to remain in the UK.

12. The grounds of appeal dwell on the burden of proof and the approach which should be taken to a plausible innocent explanation, but the respondent has missed the determinative issue in this case - that is that the respondent simply failed to prove that the appellant has ever relied on an English language test certificate.

13. The Judge, however, identified that that was the determinative issue in this case and addresses it between [31] and [36] of the decision.

14. At [37] of the decision the Judge goes on to make alternative findings, and (despite employing a double negative) finds that the appellant offers a plausible innocent explanation so that the burden of proof reverts to the respondent. That finding is not necessary because the findings from [31] to [36] are sustainable, but the Judge clearly made his finding at [37] simply for the avoidance of doubt.

15. The Judge's findings at [38], [39] & [40] are that the appellant meets the requirements of paragraph 276B of the rules. Those findings are supported by adequate reasoning from [21] to [38] of the decision. The respondent's own guidance identifies an application under paragraph 276B as a human rights application. The conclusion that the Judge reaches is therefore correct in law.

16. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

17. There is nothing wrong with the Judge's fact-finding exercise. In reality the appellant's appeal amounts to little more than a disagreement with the way the Judge has applied the facts as he found them to be. The respondent might not like the

conclusion that the Judge has come to, but that conclusion is the result of the correctly applied legal equation. The correct test in law has been applied. The decision does not contain a material error of law.

18. The Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed.

19. No errors of law have been established. The Judge's decision stands.

DECISION

The appeal is dismissed. The decision of the First-tier Tribunal, promulgated on 27 November 2017, stands.

Signed *Paul Doyle*

Date 18 June 2018

Deputy Upper Tribunal Judge Doyle