



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16077/2016

THE IMMIGRATION ACTS

Heard at Field House
On 20 November 2018

Decision & Reasons Promulgated
On 20 December 2018

Before

THE HONOURABLE MRS JUSTICE ANDREWS DBE
UPPER TRIBUNAL JUDGE PITT

Between

UMER AFAQ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Skinner, Counsel instructed by ATM Law Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Parkes dated 1 June 2017 whereby he dismissed an appeal against the respondent's decision of 27 June 2016 refusing the appellant's application for leave to remain on Human Rights (Article 8) grounds. One of the key findings made by the respondent ("the Secretary of State") in deciding that the appellant did not qualify for leave to remain under the Immigration Rules was that he had allegedly used deception in an English language test. That finding was based on evidence supplied by the Secretary of State's

contractor, Educational Testing Services (ETS). The finding of deception had a materially adverse effect upon the balancing exercise carried out under Article 8.

2. The background can be very briefly stated. The appellant is a national of Pakistan. He married a lady who is a British citizen, and they have children who are also British citizens. Both the appellant and his wife gave evidence at the hearing, and the First-tier Tribunal judge also had the benefit of detailed submissions. Among the submissions that were made on that occasion by Mr Skinner (who represents the appellant here and represented him before the First-tier Tribunal), was a submission that in terms of the allegation of deception the Secretary of State did not even get over the first hurdle of showing a *prima facie* case. Mr Skinner referred to a number of the ETS test cases, from which it emerged that there was a three-staged approach to the burden of proof. Initially it was for the Secretary of State to show a *prima facie* case of deception, and then the evidential burden would shift to the individual applicant (or appellant) to come up with a legitimate or, on the face of it, innocent explanation for what happened which was capable of casting doubt on the test result. It would then be for the Secretary of State as a matter of law to prove on the balance of probabilities that, notwithstanding that explanation, deception had been used in the testing.
3. This Tribunal has held on a number of occasions, starting with the decision in **SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC)**, a decision promulgated on 21 April 2016, that certain expert evidence of a generic nature used by the Secretary of State in relation to ETS tests, coupled with specific evidence peculiar to the individuals concerned, sufficed to discharge the evidential burden of proof, by establishing the *prima facie* case of deception. In those specific cases, the individuals concerned were unable to rebut the *prima facie* case by providing an innocent explanation. However, in those cases and in most of the cases that have been considered by the Tribunal since, the findings of ETS as a result of listening to the tapes of the tests were that the individuals concerned did not take those tests, and therefore they fell within a category of case where the test was termed "invalid". A finding by ETS that the test was invalid obviously indicated that somebody else had taken the test. In some of those cases, the individual concerned then adduced expert evidence indicating that there may be reasons to question the finding of invalidity.
4. This case falls into a very different category, because it fell within a different categorisation by ETS, namely that the test was "questionable". One of the witnesses for the Secretary of State, Miss Collings, explained that for tests falling within the "questionable" category there was no conclusive finding that a substitute had been used in the test itself, but rather that there was a question mark over the test centre as a whole. The question mark could arise for a variety of reasons. For example, the test could have been taken at a test centre where a very high number of candidates were held to have had invalid tests, which might raise a very significant question mark about the others. Nevertheless, questionable results were not something which in practice tended to be regarded by the Secretary of State as justification without more for coming to a conclusion that there had been dishonesty (at least in the later stages of his investigations). There was a suggestion, which was described in **Qadir** as "a

vague suggestion without any supporting evidence”, that some students in the “questionable” category were offered the opportunity to undergo the test a second time.

5. So far as the researches of Mr Skinner have discovered, there is no other case in which somebody falling within the “questionable” category has been found to have used deception without more. The submission that Mr Skinner made to the First-tier Tribunal judge and has made to us today, is that that simply is not good enough, because it does not tell one anything about whether this individual used deception or not. That is a powerful argument, with which this Tribunal is inclined to agree, but it is unnecessary to make any clear findings about it, because in this particular case the Secretary of State did not specifically rely merely on the questionability of the test result. The Secretary of State also looked at the results of an interview which the applicant was asked to undergo once it was found that the results of the test were questionable.
6. Unfortunately, the evidence before this Tribunal does not indicate what, if any, information was given to the applicant about the reasons why this interview was going to take place. We should say straightaway that we can well understand why the Home Office would not necessarily want to tip somebody off in advance that they were going to be asked questions about a language test which was questionable, because forewarning them might give them the opportunity to come up with a false explanation of a false test. On the other hand, we can also see the force of the point made by Mr Skinner that one cannot expect somebody, especially if they took the test some two or three years earlier, to remember all the details of the test. Therefore, if someone is unprepared, the extent to which the answers to the questions can be held against them will be diminished if they have not had a proper opportunity to consider the matter in advance of the interview. This being a case where we simply do not know what the background is, the implication from the answers to the interview is that the appellant really did not have much forewarning. In reply to the questions that he was asked, he said that he took the test about three years earlier, that he chose to do the test in a place in central London, though he did not remember the building; there were quite a lot of other people there when he took the test; and that he picked the test centre because the date he wished to take the test was available there and his cousin lived nearby, so he did the test and then went to see his family. He could not remember how much the fee was, and he told the interviewer that he paid it at the counter at the reception. It subsequently turned out that his cousin had paid the fee.
7. At the hearing before the First-tier Tribunal the appellant and his wife both gave evidence that they attended the test centre on that day, and indeed they had supporting train tickets to establish that they did make that journey. Of course, personal attendance at the test centre may, or may not, be consistent with someone actually taking the test. It is possible that somebody who cheated would attend the test centre simply to be able to give evidence that they attended it, and then put in a substitute. However, the cousin also gave some evidence about paying the money. The First-tier Tribunal Judge found that there were inconsistencies in that regard, but those inconsistencies about who paid the money and where do not really shed any

further light on whether it was the appellant or someone else who underwent the test.

8. For the purposes of this decision we do not need to make any final decision as to whether or not the *prima facie* case was made out, because in our judgment the First-tier Tribunal Judge undoubtedly fell into error in his approach. This was due to an assumption on his part that the decision in Qadir, to which reference has already been made, established that the generic evidence that was relied upon by the Home Office was sufficient to establish a *prima facie* case of dishonesty even in a questionable case. Mr Avery on behalf of the Secretary of State today very properly conceded that that was an error. He submitted that it was not a material error, but in our judgment that submission really does not hold water, because the impact of that assumption must have infected the whole approach to the question of whether, at the end of the day, on all of the evidence, the Secretary of State had discharged the legal burden of proof of dishonesty. For that reason alone, we must allow this appeal.
9. In those circumstances it is, strictly speaking, unnecessary for us to go on to decide the independent ground pursued by Mr Skinner which is that, even if deception were made out, the First-tier Tribunal Judge fell into error in relation to his approach to the Article 8 claim. However, in deference to counsel's arguments we have gone on to consider the points made. Mr Skinner prayed in aid the guidance of the Supreme Court (which of course was given since the hearing in the First-tier Tribunal) in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 [2018] 1 WLR 5273 which stressed that in any assessment of a case where an individual is not liable to deportation but is refused leave to remain, it is important to look at the test in Section 117B(6) of the Nationality, Immigration and Asylum Act 2002, and that under that test it is important to look at where the parents are expected to be located.
10. Lord Carnwath delivered a judgment with which the rest of the Justices of the Supreme Court agreed. At paragraph 19 of that judgment, he referred to the observations made by Lewison LJ (when considering the best interests of children in the context of Section 55 of the Borders, Citizenship and Immigration Act 2009) in the case of EV Philippines v Secretary of State for the Home Department [2014] EWCA Civ 874 at paragraph 58:-

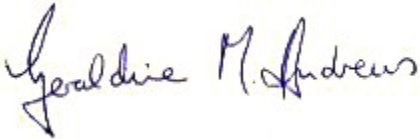
“In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?”

Lord Carnwath observed that, to the extent that Elias LJ may have suggested otherwise in MA (Pakistan) [2016] 1 WLR 5093, at paragraph 40, he would respectfully disagree. There is nothing in the section to suggest that

“reasonableness” is to be considered otherwise than in the real world in which the children find themselves.

11. The Supreme Court’s approval of the approach adopted by Lewison LJ in EV Philippines and its adoption in the context of Section 117B(6) means that it is important, when assessing whether it is reasonable for the children to leave, to consider the fact-specific position of the parents: whether both the parents would be leaving if the parent with no right to remain must return to another country, or whether, as in some cases, the other parent would stay here and if so, whether they would stay here with the children. That is clearly a finding that will depend on the facts of the individual case.
12. The position in the present case is that one simply does not know what would happen. The First-tier Tribunal Judge never really addressed the test under Section 117B(6). There is no reference to that test, and indeed insofar as he addressed the position of the children at all, he seemed to be falling into the error of looking at the case on a factual, Zambrano-type basis rather than addressing the correct question of whether it would be reasonable to expect the child to leave with the parent who would not have leave to remain. For that reason, there is a further material error of law in the Article 8 assessment. The Appeal must succeed on both the grounds advanced by Mr Skinner.
13. The question for this Tribunal, following from the success of the appeal, is whether we should re-make the decision ourselves or remit it to the First-tier Tribunal, and if we do re-make the decision, whether we should do it on this occasion. We would observe that this family has had to wait for a decision for quite some long period of time and it would not be in their best interests if the matter was to be prolonged.
14. It is acknowledged by Mr Avery on behalf of the Secretary of State that there are difficulties in re-making the Article 8 assessment because very little information was placed before the First-tier Tribunal about the position of the children. However, it does seem to us that it is possible for us to re-make the decision in relation to the question of deception, and if that decision were to be found in favour of the appellant, then we would not need to go on to consider the position of the appellant’s children, because the appellant would have shown that he met the the Immigration Rules in any event, there would be no public interest weighing against him and the appeal would fall to be allowed under Article 8 ECHR.
15. We have scrutinised the evidence with some care and have concluded that the finding of the First-tier Tribunal Judge that there had been deception by the appellant was wrong. We consider that there is insufficient foundation for such a finding, irrespective of whether the Secretary of State gets over the *prima facie* evidential burden. If one takes the evidence in the round there really is nothing, other than a lack of recollection as to who paid the fee at the counter, to impugn the appellant’s credibility or his evidence of taking the test, and that falls a long way short of a justification for finding that somebody else took the test and that the appellant did not. Given that he was present, his wife says that he was present, there was corroborative evidence in the form of the train tickets, and the test is merely

“questionable” for the reasons that we have explained, it seems to us that the Secretary of State cannot prove, on the balance of probabilities, that he used deception. For that reason, we re-make the decision and allow under Article 8 ECHR the Appellant’s appeal against the Secretary of State’s refusal to grant him leave to remain under the Immigration Rules.

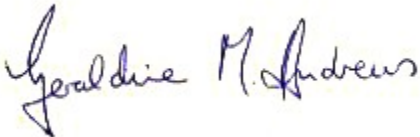


Signed
Mrs Justice Andrews

Date 12 December 2018

TO THE RESPONDENT
FEE AWARD

As we have allowed the appeal we have decided to make a fee award of £140 because it has been established that the Appellant complied with the Immigration Rules at all material times and the allegation that he had used deception was based on the flimsiest of grounds.



Signed

Date 12 December 2018

Mrs Justice Andrews