



Upper Tribunal
(Immigration And Asylum Chamber)

Appeal Number: HU/24054/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 21 February 2018

Decision and Reasons Promulgated
On: 3 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR BABAR SHAHZAD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation

For the Respondent: Mr D Coleman, counsel (instructed by Pasha Law Chambers)
For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I shall refer to the appellant as the secretary of state and to the respondent as the claimant.
2. The secretary of state appeals with permission against the decision of First-tier Tribunal Judge Herlihy who, in a decision promulgated on 13 November 2017, allowed the appellant's appeal against the decision of the respondent to refuse to grant him indefinite leave to remain under the Immigration Rules on the basis of ten years' long residence.
3. She found that the appellant satisfied the requirements of the rules and had established a strong family and private life in the UK. She accordingly found that the

decision was not proportionate under Article 8 of the Human Rights Convention (6.14).

4. On 5 December 2017, First-tier Tribunal Judge Parkes granted the secretary of state permission to appeal to the Upper Tribunal. He referred to the grounds which argued that the Judge did not give adequate reasons for finding that the secretary of state did not discharge the legal burden in showing that the appellant had used deception under ETF.
5. It was arguable that the Judge failed in the approach to the evidence. The fact that the claimant had attended the test centre would not be evidence that he took the test as observed from the BBC documentary.
6. On behalf of the secretary of state, Mr Jarvis acknowledged that paragraph 3 of the secretary of state's grounds of appeal was not accurate. The assertion made was that there was no finding that the claimant is able to recall details of the examination process such as to demonstrate that he attended the examination in person. However, Mr Jarvis acknowledged that there was evidence at [5.3] of the decision.
7. He submitted that the real point is that the overall evidence of Professor French supports the secretary of state. The fact that the claimant had attended the test centre was not sufficient.
8. He referred to the decision in MA (Nigeria) [2016] UKUT 450. There may well be a reason why a person who is able to speak English to the required level would nonetheless cause or permit a proxy candidate to undertake an ETS test on their behalf or otherwise to cheat. The Judge erred in failing to give proper reasons for holding that the claimant who speaks English, would therefore have no reason to secure a certificate by deception.
9. Nor did the Judge identify any compelling circumstances to justify consideration of whether there would be a breach under Article 8. The proportionality assessment has been coloured by this error with regard to her findings relating to the claimant's use of deception.
10. Mr Coleman, who had also represented the claimant at the hearing before the First-tier Tribunal, noted that it is clear from the secretary of state's evidence that not everyone who took the English test cheated. It was thus not shown on the balance of probabilities that everyone cheated. The allegation of cheating required 'good evidence'.
11. He submitted that the real difficulty is that the claimant attended a Home Office interview on 10 July 2015. He had been particularly invited to attend to assess his English language and to see whether his TOEIC was genuine. He did attend that interview and subsequently was informed by the interviewing officer that he was satisfied as to the appellant's proficiency in the English language. No curtailment action was pursued against the claimant. Further, the claimant had travelled on several occasions after that and had never been stopped a border control on suspicion of deception concerning the TOEIC.

12. He also referred to the claimant's witness statement at paragraph 17, page 14. He had obtained qualifications prior to taking the English test. He had been a student for five years before this.
13. The First-tier Judge had full regard to this at [6.9]. She referred to the fact that he gave his evidence in English noting that it was not possible to assess his level of English in December 2011, some six years earlier. He would no doubt have improved significantly over that period. This showed a balanced approach to the evidence before her.
14. Mr Coleman referred to the Upper Tribunal decision in SM and Qadir v SSHD (ETS – evidence – burden of proof) [2016] UKUT 229 which had been identified by the Judge at [6.8] and [73]. She adopted the approach set out by the President in that decision.
15. She has made clear and appropriate findings based on the evidence before her. The secretary of state's grounds amount to no more than a disagreement with a sound and well-reasoned decision. This includes the decision under Article 8 which gave effect to her finding that the claimant did not cheat, had not used deception and was married to a British citizen.
16. In reply Mr Jarvis submitted that the 2015 interview constitutes a red herring. That occurred at a time prior to the evidence presented by Professor French. A very small proportion are thought to have produced a false positive.

Assessment

17. The Judge has properly directed herself in accordance with the applicable rules and the evidence. She has set out the evidence of the secretary of state in some detail in [6]. This included reliance upon the expert report from Professor French dated 20 April 2016 relating to the likelihood of the ETS testing methodology as well as the report from DI Andrew Carter, investigating this college.
18. She properly directed herself in accordance with SM and Qadir, supra. She had regard to the claimant's evidence where he expressly denied the charge of deception. She considered the submissions that he had previously undertaken an IELTS test, that he had studied and received an MBA degree in English.
19. He gave evidence before her in English, although, as already noted, that did not constitute evidence relating to his level of English in December 2011, some six years prior to the test under dispute [6.9].
20. She found that the evidence before her was that the claimant was likely to have reached the required level of ability prior to taking the TOIEC test at Elizabeth College in December 2011.
21. She had full regard to the claimant's oral evidence relating to the taking of the test at Elizabeth College. He gave details relating to its location as well as the number of people in a large hall where the test was taken, and that it took place in the morning and afternoon. Everyone had a separate table with individual computers. He set out the details concerning the listening and reading tests on the same day as well as details relating to the writing and speaking part undertaken the following day.

22. She found that the claimant was a credible witness who had given credible explanations of the issues canvassed with him. That included his oral descriptions of the test and his familiarity with the area where the test centre is located [6.12].
23. She accordingly found that there was no evidence to conclude that the claimant had engaged in deception. Following that she was satisfied that the requirements of the rules had been met. He had clearly established strong family and private life in the UK and was married to a British citizen, had completed a Masters degree and had no history of overstaying. In the circumstances, she found that the decision of the respondent was disproportionate [6.14].
24. The assessment of credibility was central to the outcome of the appeal. As noted by Mr Coleman, there has been no perversity challenge by the secretary of state.
25. Having regard to the evidence as a whole, the Judge has given satisfactory reasons substantiating her findings.

Notice of decision

The decision of the First-tier Tribunal did not involve the making of any material error on a point of law. It shall stand.

Anonymity direction not made.

Signed

Dated: 9 March 2018

Deputy Upper Tribunal Judge Mailer