



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/25691/2016

THE IMMIGRATION ACTS

Heard at Newport
On 19 October 2018

Decision & Reasons Promulgated
On 22 November 2018

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DINUK LAKMAL KAMBURUGAMUWE LOKU ARACHCHILAGE

Respondent

Representation:

For the Appellant: Mr C Howells, Senior Home Office Presenting Officer

For the Respondent: Mr R Sharma, instructed by Liyon Legal Limited

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Background

2. The appellant is a citizen of Sri Lanka who was born on 27 May 1976. He entered the United Kingdom on 4 October 2009 with leave as a Tier 4 (General) student valid until 20 January 2012.

3. On 12 January 2012, the appellant applied for further leave to remain as a Tier 4 (General) student which was subsequently granted, valid until 30 November 2013.
4. On 12 December 2013, the appellant married a British citizen, Diane Patricia Pfeiffer.
5. On 29 November 2013, the appellant applied for further leave to remain as the spouse of a British citizen and was granted leave to remain on that basis from 14 January 2014 to 14 July 2016.
6. On 14 July 2016, the appellant applied for further leave to remain as the partner of a British citizen under para R-LTRP of Appendix FM of the Immigration Rules (HC 395 as amended).
7. On 4 November 2016, the Secretary of State refused that application for leave to remain. It was accepted that the appellant met the 'eligibility' requirements of para E-LTRP. However, the appellant's application was refused under the 'suitability' requirement in para R-LTRP.1.1.(c)(i) read with para S-LTR.1.6, namely that his presence was not "conducive to the public good because [his] conduct (including convictions which do not fall within paras E-LTR.1.3 to 1.5.), character, association, or other reasons, make it undesirable to allow [him] to remain in the UK". The Secretary of State was satisfied that the appellant had previously obtained, and had used in making his Tier 4 application on 12 January 2012, a fraudulently obtained TOEIC certificate which had been cancelled by ETS on the basis that he had used a 'proxy test taker' when taking the 'speaking and writing' part of an English language test at Opal College on 13 December 2011.

The Appeal to the First-tier Tribunal

8. The appellant appealed to the First-tier Tribunal. His right of appeal was limited to human rights grounds, namely Article 8 of the ECHR. Judge Davidge allowed the appellant's appeal under Article 8. First, she was not satisfied that the respondent had established that the appellant had fraudulently obtained and used the English language certificate. Secondly, as it was accepted before her that the appellant met all other requirements of the 'partner' route in Appendix FM, she concluded that the appellant's removal would be a disproportionate interference with his family life and so a breach of Article 8.

The Appeal to the Upper Tribunal

9. The Secretary of State sought permission to appeal to the Upper Tribunal. Permission was initially refused by the First-tier Tribunal (Judge Frankish) on 28 March 2018 but on 16 April 2018 the Upper Tribunal (UTJ Perkins) granted the Secretary of State permission to appeal.
10. On 11 October 2018, the appellant filed a Rule 24 notice seeking to uphold Judge Davidge's decision.

The Grounds of Appeal

11. The Secretary of State's grounds of appeal, upon which permission to appeal was granted, contains two challenges to the judge's decision. First, the judge erred in law by failing to conclude that the respondent had discharged the 'evidential burden' upon him to demonstrate that the appellant had practised deception on the basis of the 'Look-Up Tool' invalidating the appellant's test result, read together with the generic evidence concerning ETS cases. Secondly, in any event, even if the deception was not established, the judge had been wrong to allow the appeal under Article 8 as there was nothing to prevent the appellant returning to Sri Lanka in order to apply for entry clearance.

The Hearing

12. At the hearing, the Secretary of State was represented by Mr Howells and the appellant was represented by Mr Sharma.
13. Mr Howells, in his submissions, maintained the first ground of appeal. He submitted that the judge had erred in law by failing to find that the Secretary of State had satisfied the 'evidential burden' upon him on the basis of the invalidation of the appellant's test result read with the well-known generic evidence concerning ETS cases. Mr Howells did not, however, press the second ground of appeal in relation to Article 8. He accepted that, if the judge was entitled to find that it had not been established that the appellant had practised deception in his previous application, as he met all the other requirements of the 'partner' route in Appendix FM then the judge had been entitled to find that his removal would breach Article 8.
14. In relation to the first ground, I drew Mr Howells' attention to the judge's factual finding in para 10 of her determination. There, she accepted that the appellant had put forward a "plausible innocent explanation" that he had attended the test centre and taken the test himself. Indeed, she noted that the (then) Presenting Officer "did not pursue a challenge to credibility based on the appellant's account of attending the centre and taking the test, having fully explored it in cross-examination". Mr Howells acknowledged that he was in some difficulties on ground 1 given this unchallenged finding that the appellant had established an innocent explanation even if the 'evidential burden' had passed to the appellant.
15. In response, Mr Sharma in the light of Mr Howells' submissions and stance, was content to rely upon the Rule 24 notice seeking to maintain the judge's decision.

Discussion

16. The background to the so-called ETS cases is well-known and the correct judicial approach is settled (see, e.g. SSHD v Shehzad and Chowdhury [2016] EWCA Civ 615 and Majumder and Qadir v SSHD [2016] EWCA Civ 1167). The approach was not in dispute before me and can be summarised as follows.

17. The legal burden of establishing on a balance of probabilities the “deception” (namely that the appellant dishonestly used a proxy test taker) is upon the Secretary of State. However, the combined effect of the ‘Look-Up Tool’ evidence (that the test had been cancelled as “invalid” by ETS following interrogation by the voice recognition software) together with the generic evidence as to that process, is sufficient to discharge the evidential burden upon the Secretary of State, shifting to the appellant an evidential burden to demonstrate an ‘innocent explanation’. In the absence of the latter, it would be open to a judge to find that the Secretary of State had discharged the legal burden of establishing deception on a balance of probabilities.
18. That framework, however, is dependent upon the reliability of the ‘Look-Up Tool’ evidence. That evidence would be worthless, as regards any particular individual, unless it is established that it relates to that individual. In this case, Judge Davidge was not satisfied that the ‘Look-Up Tool’ evidence was reliable, namely that it was established that it related to the appellant. The basis for this is set out, in some detail, at paras 9–14 of her determination. At the core of her reasoning is that fact that, inexplicably, the ‘Look-Up Tool’ evidence referred to two ‘writing and speaking’ tests taken by the appellant on 16 November 2011 and 13 December 2011. It was the appellant’s case throughout that he had taken the ‘speaking and writing’ test on 13 December 2011 and that the result in respect of 16 November 2011 did not relate to him. Having set out the evidence and the parties’ respective submissions in relation to this, the judge reached the following conclusion at paras 13–14 of her determination:
 - “13. The respondent relies on the test taken on 13 December 2011 in the reasons for refusal. The evidence of the 16 November test is not dealt with at all. I repeatedly took Mr Baker to the ETS evidence showing that the 16 November and the 13 December were both for speaking asking for an explanation as to why there were two tests for speaking, both apparently resulting in high marks, and both allegedly with a proxy. He was simply unable to help me with the evidence and did not offer any coherent explanation for two speaking tests in the Look-Up Tool results. Instead in submissions Mr Baker restricted his discussion to that of 13 December 2011.
 14. The problem with Mr Baker’s submission is that the evidence relied on is not clear. ETS have the appellant taking the speaking test twice once on 16 November 2011 and again on 13 December 2011. The appellant says that he only took the test once, on 13 December 2011. There was no cross-examination on that point. The only certificate is the one produced by the appellant, and that has the 13 December as the test date. The notes at “J” of the respondent’s bundle only refer to the speaking test of the 13 December. If the test is not the appellant’s whose is it and why is it in the Look-Up Tool for this appellant. The evidence raises real issues of identity. In short, the 16 November test results in the ETS Look-Up Tool are entirely unexplained, a complete mystery. There are obvious questions including why only one test is relied on in the reasons for refusal letter, why would someone who has passed a speaking test with a proxy take another one only weeks later, could they in any event obtain such test dates in close succession. These and other questions serve to illustrate the uncertainty of

the evidence. The Look-Up Tool shows both tests have been concluded to be invalid i.e. ETS are clearly satisfied that they were taken by a proxy. The unexplained position of the 16 November undermines the respondent's evidence. The confusion about the 16 November position infects the 13 December position. It is not a sufficient answer to simply say that the respondent only relies on the December position."

19. Whilst the judge does not spell it out in explicit terms, it is clear that she concluded that the 'evidential burden' was not discharged by a combination of the 'Look-Up Tool' evidence and generic evidence. That was because the former was simply "unreliable" given the "entirely unexplained" and "complete mystery" of the respondent's evidence being that the appellant took a test on 16 November 2011 - which was not part of his case - and which the judge clearly accepted he had not taken. That called into question the reliability of the "identity" of the person to whom the test result on 13 December 2011 related.
20. The integrity of the judge's reasoning which led her to this conclusion is not challenged in the grounds of appeal. Indeed, the grounds of appeal simply do not engage with her reasoning but simply assert - as if this were the usual kind of ETS case - that the 'Look-Up Tool' evidence taken with the generic evidence suffices to discharge the evidential burden. It was, in fact, not a 'usual' case. For the reasons I have given, the judge was fully entitled to find, in my judgment, that that evidence was not sufficient to discharge the evidential burden upon the Secretary of State.
21. In any event, the judge accepted the appellant's "innocent explanation" and that, in fact, he had attended and taken the relevant test in person on 13 December 2011. It would appear from para 10 of her determination, and Mr Howells did not draw anything to my attention to counter this, that the Presenting Officer had not challenged the credibility of the appellant's account. In accepting the appellant's 'innocent explanation', the judge was properly entitled, in accordance with the accepted legal position, to find that even if the 'evidential burden' had been discharged that in the face of an accepted 'innocent explanation' the respondent had failed to discharge the legal burden of establishing deception on a balance of probabilities. That was the judge's finding in para 15 (read with para 10).
22. The respondent has failed, in my judgment, to establish that the judge was wrong to find that he had not established on a balance of probabilities that the appellant used deception by submitting a fraudulently obtained TOEIC certificate.
23. As I have already indicated, Mr Howells placed no reliance upon the second ground of appeal. He accepted that the judge was entitled to find, if her finding in respect of deception stood, that the appellant's removal would be a disproportionate interference with his family life in the UK. Indeed, it is clear from para 16 of the judge's determination that the Presenting Officer did not seek to argue to the contrary. The appellant met all the requirements under the 'partner' route, including the genuineness of his relationship and the financial eligibility requirements. Absent deception, it was properly open to the judge rationally to conclude that to require the

appellant to leave the UK to seek entry clearance was pointless and disproportionate (see, e.g. Tikka v SSHD [2018] EWCA Civ 642 at [22]).

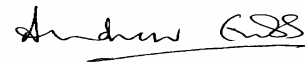
24. For these reasons, I reject the Secretary of State's grounds of appeal.

Decision

25. Accordingly, the decision of the First-tier Tribunal to allow the appellant's appeal under Article 8 did not involve the making of an error of law. That decision stands.

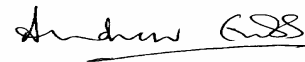
26. The Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed



A Grubb
Judge of the Upper Tribunal
6 November 2018

Respondent's name corrected pursuant to rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).

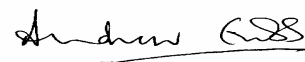


A Grubb
Judge of the Upper Tribunal
20, November 2018

TO THE RESPONDENT
FEE AWARD

Judge Davidge made a fee award in respect of any fee which has been paid or may be payable. That decision also stands.

Signed



A Grubb
Judge of the Upper Tribunal
6 November 2018