



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01511/2016

THE IMMIGRATION ACTS

Heard at Field House
On 19 June 2018

Decision & Reasons Promulgated
On 21 June 2018

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

MD FOYSAL AHAMMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Syed Ali, Counsel

For the respondent: Mr Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Pakistan, appealed to the First-tier Tribunal ('FTT') against a decision dated 13 July 2015 refusing him leave as a Tier 4 (General) Student. It is not in dispute that the FTT appeal was an 'old-style appeal' because the decision was made in response to an application of some vintage, dated 18 September 2012. This means that the FTT was not limited to determining whether the decision breached the appellant's human rights. One of the reasons for the delay in the decision under appeal is that a previous decision, dated 30

September 2015, in which the SSHD erroneously referred to evidence unrelated to the appellant, was withdrawn.

FTT decision

2. A key issue in dispute before the FTT was whether or not the appellant exercised deception when he placed reliance upon a TOEIC certificate he obtained following a test taken at South Quay College on 21 August 2012, in his application for further leave to remain as a student dated 18 September 2018.
3. After hearing from the appellant, the FTT concluded at [21] that the SSHD had established that the appellant procured a TOEIC certificate by deceit and 322(1A) of the Immigration Rules was met. The FTT found that the appellant did not meet the requirements of the Immigration Rules and his removal would not constitute a breach of Article 8 of the ECHR.

Grounds of appeal

4. The grounds of appeal have been prepared by solicitors but they are vague, repetitive and difficult to follow. I have reformulated the grounds as best as I can in order to summarise them as follows:
 - (i) The FTT erred in finding that the SSHD discharged the evidential burden of establishing deception;
 - (ii) The FTT made inconsistent findings regarding the appellant's general credibility;
 - (iii) In so far as the FTT found the appellant's evidence incredible, it was wrong to do so and took irrelevant matters into account.
5. In a decision dated 24 April 2018 FTT Judge Davies granted permission to appeal. He considered there was "*clear confusion*" in the FTT's findings because at first it considered the appellant to be a credible witness before going on "*in relation to many aspects of the evidence, to find the appellant incredible*".

Hearing

6. At the hearing before me Mr Syed-Ali relied upon a helpful skeleton argument and re-focussed the grounds. He submitted that the FTT made a positive credibility finding and required the appellant to provide evidence regarding the circumstances of the relevant English test in compatible with the relevant standard of proof. In these circumstances, he argued that the FTT's findings on deception were not open to it.
7. I did not need to hear from Mr Tufan and indicated that the appeal would be dismissed with reasons to follow.

Error of law discussion

8. For completeness I address each of the written grounds of appeal as clarified by Mr Syed-Ali during the course of his oral submissions.

Ground 1

9. I am satisfied that the FTT committed no error of law in its approach to the allegation of deception. For the reasons provided by the FTT at [14], it was entitled to find that the SSHD discharged the evidential burden, such that the appellant was required to provide an innocent explanation. The FTT properly directed itself to the relevant factors to take into account when assessing the explanation provided at [15] and made clear findings of fact open to it in relation to each factor at [16] to [20].

Ground 2

10. At [12], under the sub-heading 'my findings of credibility and fact' the FTT said this:

"I make the following findings. I have found the appellant to be a credible witness. He gave his evidence in a compelling and consistent manner and as a result I am satisfied he is a witness of truth."

11. The FTT provided no examples to support this finding and it is entirely inconsistent with the remainder of the decision. Mr Syed-Ali's submission that the FTT made a clear, positive credibility finding is not supported by a full reading of the decision. I am satisfied that [12] was included in error in the decision but that this error is not material when the remainder of the decision is carefully considered, and the decision is considered as a whole.
12. First, [12] is out of sync with the substantive factual findings. These are to be found at [16] to [20] and after the FTT addresses other matters such as the burden of proof where deception is alleged and its application to the instant case at [13] to [15].
13. Second, not a single example is provided in support of the appellant having provided evidence in a "*consistent and credible manner*". The summary of the evidence at [8] to [11] entirely supports the later adverse credibility findings at [16] to [20].
14. Third, notwithstanding the inclusion of [12] it is clear that the FTT for all practical purposes did not consider the appellant to have provided credible evidence:
 - The FTT found the appellant's "*evidence to be lacking in detail and implausible*" and his failure to make a complaint via his representatives to be illogical and "*undermine the credibility of his account*" at [16].
 - The FTT also found the appellant's inaction in seeking to reconstruct what happened at the relevant time with the support of banks and the college not

credible at [17]. For the avoidance of doubt I reject the submission that this misapplied the relevant standard of proof. The FTT was entitled to draw adverse inferences from the appellant's complete failure to provide or to explain the failure to provide any corroborating evidence from his bank or college in support of his explanation.

- The FTT clearly concluded that the appellant provided confusing evidence lacking in credibility at [18].
- Crucially, having considered all the relevant evidence, the FTT concluded that the appellant did not provide an innocent explanation at [20].

Ground 3

15. This does no more than disagree with the adverse credibility findings and was not pursued by Mr Syed-Ali at the hearing before me.
16. Mr Syed-Ali submitted that the FTT failed to address a relevant factor: the absence of any obvious reason on the part of the appellant to use a proxy. The difficulty with this submission is that the appellant did not provide any clear evidence regarding this in the witness statement available to the FTT. In any event as observed at [57] of MA (ETS – TOEIC testing) [2016] UKUT 00450, there is a range of reasons why persons proficient in English may engage in TOEIC fraud.
17. Finally, although Mr Syed-Ali did not make any reference to this, I note that the FTT said at [21] "*this is a human right appeal*" when it was an 'old-style' appeal. This is not a material error because the FTT clearly considered all relevant grounds of appeal: at [21] the FTT clearly addressed the Immigration Rules and found for reasons open to it that the appellant did not meet its requirements, before considering Article 8.

Decision

18. The decision of the First-tier Tribunal did not involve the making of a material error of law and I decline to set it aside.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
19 June 2018