



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/26263/2016

THE IMMIGRATION ACTS

Heard at Field House
On 25 February 2019

Decision & Reasons Promulgated
On 15 March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MUHAMMAD SHUAIB KHIZAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Gill, QC, of Counsel, instructed by Lee Valley Solicitors
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Chana (the judge), promulgated on 26 March 2018, by which she dismissed his appeal against the Respondent's decision of 16 November 2016, which in turn had refused his human rights claim (made by way of an application for indefinite leave to remain on 8 January 2015).

2. That application had been for indefinite leave to remain on the basis of ten years' continuous lawful residence in the United Kingdom.
3. The refusal was predicated upon an allegation that the Appellant had been dishonest in respect of an English language test taken on 29 August 2012. As a result of the alleged dishonesty paragraphs 322(1A) and 322(2) of the general grounds of refusal under the Rules were relied on. This had the effect of precluding the Appellant from being able to satisfy all of the requirements of 276B, specifically sub-paragraph (ii)(c).
4. What was rather unusual about the Appellant's case is that the English language issue (hereafter the ETS issue) had not been raised by the Respondent when refusing a previous application made by the Appellant in 2015.

The judge's decision

5. At [15] the judge concluded that the only live issue in the appeal was whether or not the Appellant had been dishonest in respect of the ETS issue. She rightly emphasised the fact-specific nature of cases such as the present. The judge concluded that the Respondent had proved that the Appellant had indeed been dishonest in respect of the ETS issue and that as a result paragraph 322(1A) of the Rules applied. Therefore the Appellant was unable to satisfy all the provisions of 276B and that his Article 8 claim would fail.
6. The basis for this conclusion was essentially that the judge did not find aspects of the Appellant's evidence to be credible. In particular, she did not accept the evidence that the Appellant had been unable to submit evidence about the speaking component of a City & Guilds English language test that he had undertaken, and that the Appellant had failed to show that he had in fact attended a prestigious English language school in Pakistan. A further reason was her rejection of the Appellant's claim to have taken an English language test when it had been unnecessary and that it was implausible that the Appellant would have remained in this country for a significant period of time and studied for as long as he did.

The grounds of appeal and grant of permission

7. The grounds of appeal are lengthy and make a number of attacks on the judge's approach to the ETS issue. Of significance in this case is the list of issues which were said to have been raised before the judge by the Appellant's Counsel (not Mr Gill). I will deal with the substance of the most significant of the grounds, below.
8. Permission to appeal was initially refused by the First-tier Tribunal but was then granted by Deputy Upper Tribunal Judge Taylor on 1 November 2018.

The hearing before me

9. Given the date of the claim/application, I did ask the representatives to clarify whether or not the Appellant's appeal fell to be considered under the old statutory appeal regime in force before the amendments brought about by the 2014 Immigration Act or whether the current provisions applied. It is fair to say that the situation appeared to be somewhat unclear. However, it was agreed for the purposes of the appeal the particular framework did not matter.
10. Mr Gill relied on the grounds of appeal. I indicated those challenges which appeared to have more merit than some of the others, in particular the points raised about paragraph 322(1A) and an interview conducted with the Appellant by the Respondent in 2015, together with the Appellant's reliance on an IELTS certificate indicating that he had a very good level of English at the time of the ETS test.
11. Mr Duffy, with his customary candour, checked the Respondent's database and confirmed that there had indeed been an interview with the Appellant conducted on 7 September 2015. This interview had related to the ETS issue. The note on the database confirmed that the interviewing officer had found the Appellant's evidence to be "credible". No record of that interview has ever been produced. Mr Duffy also accepted that the judge was wrong to have concluded that paragraph 322(1A) applied in the Appellant's case. That is because this particular provision relates only to "the application" which led to the refusal currently under appeal: it did not relate to previous applications.
12. In light of the above, Mr Duffy quite rightly accepted that the judge's decision as a whole was unsafe.

Decision on error of law

13. I conclude that there are material errors of law in the judge's decision. These are threefold.
14. First, I am satisfied that the judge was made aware of the ETS interview and that the Respondent had not challenged the fact of its occurrence and that no negative issues had arisen as a consequence thereof. I am satisfied that the Appellant had asserted that the Respondent had indeed found him to have been telling the truth as a result of that interview. The judge has simply failed to engage with this evidence at all. There is no specific finding that the interview took place, or what its effect was in respect of the allegation of dishonesty. This aspect of the evidence was particularly important given that the Respondent had not raised the ETS issue in the past.
15. Second, the judge was wrong to have concluded that paragraph 322(1A) applied to the Appellant's case. It is, in my view, well-settled that the phrase in that provision,

“the application” relates to the application leading to the refusal currently under appeal to the Tribunal. It does not relate to previous applications. Although paragraph 322(2), which does relate to previous applications, was raised in the reasons for refusal letter, the judge quite clearly relies on the inapplicable general ground for refusal in her decision. Given that paragraph 322(2) is a discretionary ground of refusal (unlike 322(1A), which is mandatory) the judge’s error had potential consequences as to make it material.

16. Third, I am satisfied that the Appellant did produce an IELTS certificate indicating that he had a score of 8 at the hearing (see [24]). The judge fails to have factored this into her overall assessment. This evidence was significant because it showed a strong command of the English language at the material time that the Appellant had taken the ETS language test.
17. In light of these material errors of law I set the judge’s decision aside.

Remaking the decision

18. Both representatives were agreed that I could and should remake the decision on the basis of the evidence now before me. This I now do.
19. It has been accepted throughout that the Appellant has accrued ten years’ continuous lawful residence in the United Kingdom and I find this to be the case.
20. I turn to the ETS issue. For present purposes I will accept that the generic evidence provided by the Respondent discharges the relatively low evidential threshold. This is consistent with case law on the subject including Shehzad [2016] EWCA Civ 615.
21. I move on to consider whether the Appellant has provided an innocent explanation to the allegations made against him. First and foremost there is what I consider to be the extremely significant evidence relating to the interview conducted in September 2015. I find that this interview in fact took place, that it in fact related specifically to concerns over the relevant English language test in 2012, and that the interviewing officer found the Appellant’s evidence to be “credible”, as confirmed by Mr Duffy at the hearing and in the printout of the database which he has helpfully provided to me post-hearing (now on file).
22. In effect, this evidence shows that an officer of the Respondent acting within his/her powers specifically addressed their mind to the issue now in dispute and concluded that the Appellant had not been dishonest. There is no evidence whatsoever postdating this interview to significantly undermine the conclusion reached after the interview in 2015.
23. In addition, there are several other factors pointing in the Appellant’s favour. I am satisfied that he did indeed achieve a score of 8 in the IELTS test and that this indicates a very good level of English at the time at which the Respondent alleges he

was having to use a proxy test taker in respect of the ETS issue. In saying this, I do appreciate that people may have a variety of reasons for cheating, but I am of course assessing the Appellant's case on the evidence before me and not on generalisations.

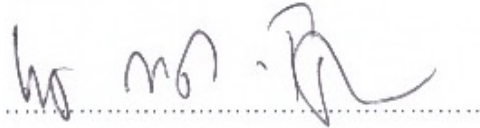
24. I also look back to the history of the appellate proceedings in this country. I note that in an appeal to the First-tier Tribunal heard in December 2011 (IA/32481/2011), the judge, whilst acknowledging that the Appellant had not produced a certificate for a City & Guilds English test, clearly found the Appellant to have a good level of English ([12] of that decision). The decision was overturned on appeal to the Upper Tribunal. At that stage the Respondent conceded that the Appellant had then been able to provide all relevant information and that he did satisfy all the requirements of the Rules in respect of Tier 4. This of course included the English language ability. The relevance of this is that it provides contemporaneous evidence as to the Appellant's English language ability with reference to the ETS test.
25. Even leaving aside entirely the issue of the Appellant's schooling in Pakistan, he has provided what in my view is a very strong rebuttal to the allegations against him.
26. The Respondent has not been able to produce any cogent evidence to materially undermine the Appellant's explanation.
27. Ultimately, I find that the Respondent has failed to discharge the burden of proof in respect of paragraph 322(2) of the Rules. Therefore, none of the general grounds of refusal applies to the Appellant's case.
28. No other public interest concerns have been raised by the Respondent.
29. Therefore, I conclude that the Appellant has met all of the requirements of paragraph 276B of the Rules.
30. What is the consequence of this? Although there is a lack of certainty as to which appellate regime applies to this appeal, it really matters not. For the sake of argument and in light of TZ (Pakistan) [2018] EWCA Civ 1109 and OA and Others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 00065 (IAC), I conclude that the Appellant's satisfaction of paragraph 276B has the effect of rendering the Respondent's decision a disproportionate interference with his private life, that refusal thereby being unlawful under section 6 of the Human Rights Act 1998.
31. Although it is not for me to direct the type of leave to be granted by the Respondent as a result of my decision, the Appellant would have a very strong case in arguing that indefinite leave to remain should follow.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside.

I remake the decision by allowing the Appellant's appeal on the basis that the Respondent's refusal of his human rights claim is unlawful under section 6 of the Human Rights Act 1998.

No anonymity direction is made.



Signed

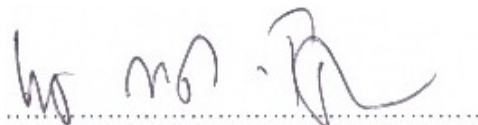
Date: 12 March 2019

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of £140.00. In light of the very late disclosure of the outcome of the 2015 interview, the very least the Appellant can expect is the repayment of his fee.



Signed

Date: 12 March 2019

Deputy Upper Tribunal Judge Norton-Taylor