Neutral Citation Number: [2022] EWHC 1850 (Admin)

Case No: CO/942/2022

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

Friday 15th July 2022

Before :

MR JUSTICE FORDHAM

- -

Between:

THE QUEEN on the application of ZUBAIR AHMAD	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Howsoun Janneh (instructed by Burnley Legal) for the **Claimant**
Matthew Howarth (instructed by GLD) for the **Defendant**

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Hearing date: 15.7.22
Judgment as delivered in open court at the hearing

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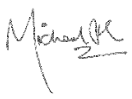
Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM:

1. I am granting permission for judicial review in this case because I am satisfied that there is an arguable case with a realistic prospect of success and no "clean knockout blow". The challenge is to the decision on 20 May 2021 – maintained by a decision dated 18 December 2021 – refusing citizenship on bad character grounds. The basis relied on is that the Claimant had used deception in obtaining on 31 January 2013 leave to remain as a student, for a further 15 months, because the evidence supports the conclusion that an English language test dated 19 September 2012 was not undertaken by the Claimant but by dishonest proxy. The background is well known from what has been called the TOEIC litigation: see eg. R (Mahmud) v UT [2021] EWCA Civ 1004 and DK v SSHD [2022] UT (25.3.22).

2. The Claimant says that his application on 3 November 2012 was only ever supported by certified TOEIC tests dated 26 August 2011 and 20 September 2011. He denies ever taking a test on 19 September 2012. He denies ever relying on such a test in support of that application. The Defendant points to a "Record" that that application had been based on tests dated 26 August 2011 and 19 September 2012, and that those tests satisfied the "B2" standard. The Defendant also says the test of 20 September 2011 would not have met the "B2" standard. The Defendant says that the claim must fail for the same reason given in DK at §§99-101 and 134-135. There, a test was found to have been provided by someone in conjunction with an application. Reliance on it was implausibly denied by the applicant. On that basis, says the Defendant, the decision was plainly rational and any onus of proof on the defendant has been discharged. The Defendant points out that it is open to the Claimant to reapply and/or to obtain the voice recording of the test on 19 September 2012 and show that it was him taking it. Those points persuaded the Judge on the papers that this judicial review claim is unarguable.

3. The key dispute as I see it is as to whether the Claimant did indeed put forward a test dated 19 September 2012, in support of the application on 3 November 2012. It is right that the Defendant's Record refers to the tests he relied on as being dated 26 August 2011 and 19 September 2012. The question is whether that is an error. The Court does not have a copy of the application which the Claimant made on 3 November 2012. Nor of any certified test score of 19 September 2012, in the claimant's name and with his date of birth. Mr Janneh says that the Defendant faces an initial stage evidential burden and points to the absence of a "look-up tool". I have seen the documented certified test scores from 26 August 2011 and 20 September 2011. The Defendant says that there has been no failure of disclosure. As I have explained, she says the Claimant has the ability to obtain the test recording from 19 September 2012. But the immediate issue is not whether there is a recording of someone else taking a test on 19 September 2012. The issue is whether such a test was relied on as being the Claimant's test, in his application of 3 November 2012.

4. Within the Acknowledgement of Service ("AOS") filed by the Defendant in these judicial review proceedings, and accompanied by a statement of truth, is a chronology. That chronology has an entry for 3 November 2012. It states:

> ***Claimant applied for LTR as a student. In support of this application the Claimant provided TOEIC Certificate from Innovative Learning Centre for Listening and Reading taken on 26/08/11 (total score 925) and Speaking (score 150) and Writing (score 130) taken on 20/09/11.***

That is what the Claimant says happened. The Defendant's chronology makes no reference to the Claimant having put forward a test dated 19 September 2012 either on 3 November 2012 or at some stage in between that date and the date when the application was granted on 31 January 2013. Mr Howarth candidly tells me today that he does not have instructions in relation to that part of the acknowledgement of service and that it may be a mistake. For obvious reasons, it is a concern to the Court that the Defendant's position as to what happened is undermined by a statement within her own AOS.

5. Mr Howarth says that the contemporaneous Record in and of itself discharges any burden of proof. He has invited my attention today to DK §129, referring to "the story shown on the documents". I have concerns about the picture as it currently stands. That is particularly so given that I see no reason why the Defendant – albeit that she tells me, and I accept, she is not "able" to access recordings – would not be able to access the other relevant materials: the application itself that was made by the Claimant on 3 November 2012; and any certificate dated 19 September 2012 in the Home Office records bearing the Claimant's name and date of birth. There is, as I have explained, the additional difficulty which requires investigation and explanation regarding the Defendant's own chronology.

6. There is another point. The Claimant's judicial review grounds, in arguing that the decision impugned is "unlawful", cite authority for the proposition that it is the function of the Court to decide the issue of fact, referring to R (Abbas) v SSHD [2017] EWHC 78 (Admin) [2017] 4 WLR 34. In DK (an appeal where the impugned decision related to leave to remain) the Tribunal evaluated the facts, and reference was made to the precedent fact approach in the passage quoted at §39. In Abbas – a judicial review case which included a citizenship refusal – the passage which records the "precedent fact" approach, as well as the staged approach to the burden of proof on the Home Secretary, is at §6 of the judgment. A discussion of whether judicial review claims arise in contexts where the function of the Court would be to decide the "precedent fact" can also be found in Ahsan v SSHD [2017] EWCA Civ 2009 [2018] HRLR 5 at §§117-118, 31, 37 and 43. Ahsan is a case relied on by the Defendant in the AOS, where the position maintained by the Defendant is that it is not open to the Claimant to "disagree" with the Defendant's conclusions, and the question for the judicial review Court is whether a "reasonable, rational conclusion" has been reached. I think it is arguable that this is a precedent fact case. It is arguable, in any event, that the Court needs disclosure from the Defendant of the application (3 November 2012) or any certificate or other document relating to the 19 September 2012 test which is said to have been in the Claimant's name and relied on by him. I observe that, if this is indeed a precedent fact case, the Court would in principle be able to consider, on fresh evidence from the parties, how the objective question of deception is to be answered, by reference to the relevant burden and standard of proof.

7. There are other points in the case about fairness of the process and reasonableness of the decision. I am not going to limit permission for judicial review. I have identified essential points on which the claim is arguable, and it is not necessary or appropriate in those circumstances to consider whether other short and closely-linked points are capable of adding to the analysis. With industry and cooperation on both sides it should be possible to grasp the nettle in the present case at a short substantive hearing, with all the evidence. Subject to abuse to the contrary from Counsel I intend to direct the case

have a half a day time estimate and can be listed before any Judge of the Administrative Court in Manchester.

Later:

8. Having secured permission for judicial review Mr Janneh for the Claimant seeks an order for the costs of this permission stage. He emphasises that the Claimant has succeeded in getting permission; that permission was assisted by the Defendant unsuccessfully. He emphasises the practical realities of his client's position in this case, and that the Defendant could have been and should have been putting forward material by way of disclosure which is not yet been produced in this case. I can see that there could be circumstances where a contested permission hearing could lead to the Court to depart from the usual order, namely costs in the case, and could reflect the justice of the case in all the circumstances by making a costs order against a Defendant who has resisted permission and caused an unnecessary hearing with the costs of that hearing. But I am satisfied that the circumstances of the present case do not justify a costs order in favour of the Claimant. Who wins and loses the end of the day in this case will be able to secure their costs, including the costs of this permission stage and the costs of this hearing. But I am not prepared to make a costs order. It would mean that the Claimant would recover the costs of the permission stage in this case even if it transpired subsequently that the Defendant is able to find documents which demonstrate that the 12 September 2012 test result was indeed relied on by the Claimant in the application of November 2012. The appropriate order in all the circumstances is "costs in the case".

15.7.22