



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/28630/2015

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)
On 4 July 2017

Decision & Reasons Promulgated
On 7 July 2017

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

SAJID ALI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Ms L Dickinson, Fursdon Knapper, Solicitors

DECISION AND REASONS

1. The respondent (whom I shall hereafter refer to as the "claimant") is a citizen of Pakistan who was born on 30 April 1981.
2. He entered the United Kingdom on 25 May 2011 as a student with leave valid until 11 July 2012. He was subsequently granted leave to remain from 15 February 2013

until 15 February 2015 as the civil partner of a British Citizen, Mr Thomas Glyn Williams. They married on 17 May 2012.

3. On 30 March 2015, the claimant made an application for further leave as a partner under Appendix FM of the Rules (HC 395 as amended).
4. On 5 August 2015, the Secretary of State refused the appellant's application on the basis that he fell within para 322(1A) of the Rules having submitted a falsely obtained TOEIC certificate from ETS. The decision states that the claimant had used a proxy test taker for the speaking part of the test and ETS has declared his test to be "invalid" and his result had been cancelled.
5. The claimant appealed to the First-tier Tribunal. The appeal was heard by Judge Holder who allowed the claimant's appeal.
6. First, the judge noted that the Secretary of State had not submitted the usual evidence (as he described it the "generic evidence") to support the Secretary of State's contention that the language certificate had been obtained by fraud. In fact, as Mr Mills accepted before me, in addition to the absence of the "generic evidence" the Secretary of State had not put in evidence the print out from the "Lookup Tool" demonstrating that ETS had cancelled the claimant's test on the basis that it was "invalid". In the absence of that evidence, Judge Holder concluded that the Secretary of State had not discharged the evidential burden upon her of proving that the English language certificate had been obtained through fraud and so para 322(1A) did not apply.
7. Secondly, in any event, having heard the claimant give evidence in relation to where he took the test and what happened when he arrived at the test premises, the judge found that the appellant was a credible and truthful witness and so had established that he had taken the test.
8. Thirdly, Judge Holder allowed the appeal under Appendix FM on the basis that, apart from the general refusal ground in para 322(1A), the Secretary of State had not taken any issue with the remaining requirements under the Rules.
9. The Secretary of State sought permission to appeal on the ground that the judge had erred in law by failing to adjourn the hearing in order to allow the Secretary of State to provide the evidence to establish that the claimant's test was obtained by deception, namely the evidence normally presented in cases of this nature.
10. On 28 March 2017, the First-tier Tribunal (Judge E M Simpson) granted the Secretary of State permission to appeal. In addition to granting permission on the Secretary of State's single ground of appeal, the judge also considered it arguable that the judge had been wrong to allow the appeal under Appendix FM on the basis that no issue was raised in relation to the substantive requirements of the Rules.
11. At the hearing before me, Mr Mills, who represented the Secretary of State, acknowledged that the Secretary of State had been legally represented by Counsel at the hearing and no application to adjourn the hearing had been made to Judge

Holder. He candidly acknowledged that it was difficult, in these circumstances, to press the case that the judge had erred in law by not adjourning the hearing in order that the Secretary of State could seek further evidence. Further, Mr Mills accepted that, if para 322(1A) of the Rules did not apply, the judge had not erred in law in allowing the appeal on the basis that the claimant met the substantive requirement of the partner rule. He accepted that the Secretary of State had not put in issue any of the substantive requirements of the Rules in the decision.

12. Having heard Mr Mills' submissions, I did not call on Ms Dickinson in response.
13. The burden of proof on the issue of deception or fraud lay on the Secretary of State (see SSHD v Shehzad and Chowdhury [2016] EWCA Civ 615). As part of that burden, the Secretary of State had an evidential burden which would have been discharged by providing the screenshot of the "Lookup Tool" together with the generic evidence in the form of the witness statements from Rebecca Collings and Peter Millington (see Shehzad and Chowdhury at [30]). In the absence of that evidence, there was nothing before the judge in evidence to discharge the evidential burden upon the Secretary of State. On the evidence before the judge, he was correct, therefore, to find that the Secretary of State had not established that para 322(1A) applied.
14. In my judgment, Judge Holder was entitled to determine the appeal on the evidence before him.
15. It was incumbent upon the Secretary of State, as with any litigant, to put before the Tribunal the evidence to be relied upon. The Secretary of State was represented by Counsel who could have, but did not, make an application for an adjournment in order to obtain further evidence. Such an application would not, of course, necessarily have been successful. However, the point is that it was for the Secretary of State through her legal representative to make any such application. It was not for the judge, of his own volition, to adjourn the hearing in order that the Secretary of State could have the opportunity, not sought by the Secretary of State, to obtain further evidence. There was nothing unfair, irrational or otherwise unlawful in the judge determining the appeal on the evidence presented to him, and relied upon by, the parties.
16. Consequently, I am satisfied that the judge did not err in law in reaching his finding that the respondent had failed to establish that para 322(1A) of the Rules applied to the claimant.
17. As I have already indicated, Mr Mills did not seek to pursue the point raised by the First-tier Tribunal Judge when granting permission and not made in the Secretary of State's grounds themselves. In my judgment, he was entirely correct to do so. The Secretary of State had not raised any issue in relation to the substantive requirements of a partner rule in Appendix FM apart from the suitability requirement. Consequently, the judge did not err in law in finding that the claimant met the requirements of Appendix FM and to allow the appeal under the Immigration Rules.
18. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

19. The First-tier Tribunal's decision to allow the claimant's appeal under the Immigration Rules stands.

Signed

A Grubb
Judge of the Upper Tribunal

Date 6 July 2017

TO THE RESPONDENT
FEE AWARD

Judge Holder, in allowing the appeal, made a fee award in the sum of £140. I see no basis to depart from that and I make the same order.

Signed

A Grubb
Judge of the Upper Tribunal

Date 6 July 2017