



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05153/2016

THE IMMIGRATION ACTS

Heard at Field House
On 25th June 2018

Decision and Reasons Promulgated
On 27th July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

ISHFAQ AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr B Ali (Counsel, instructed by Aman Solicitor Advocates (Luton))
For the Respondent: Ms A Everett (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant is a citizen of Pakistan who entered the UK in 2005. In November 2015 he applied for further leave to remain under the 10 year route relying on his being married and on his having family life with his wife's daughter and his private life. The application was refused for the reasons given in the Refusal Letter of the 2nd of February 2016, it was considered that the Appellant did not meet the suitability requirements of the Immigration Rules as it was believed that he had used deception in an ETS test.
2. The appeal was heard by First-tier Tribunal Judge Raikes at Stoke on Trent on the 22nd of June 2017. He allowed the appeal for the reasons given in the decision promulgated on the 4th of July 2017. In short he found that the Appellant had not used deception in the ETS test and so did meet the suitability requirements, the Judge also considered Appendix FM and paragraph EX.1

as well as paragraph 276ADE before going on to article 8 and section 55 of the 2009 Act finding that the Appellant's removal would be disproportionate.

3. The grounds argue that the Judge failed to assess properly the burden of proof in line with SM and Qadir. The test was whether on a balance of probabilities the Appellant had used deception and that the decision showed that the Judge applied too high a standard to the Secretary of State. The error rate was less than 2% and the Judge erred in requiring conclusive evidence. It was submitted that the Judge had not given adequate reasoning why the Respondent had not discharged the burden. There was no finding on the Appellant's use of an interpreter at the hearing. It was also submitted that the Judge had not identified compelling circumstances in the article 8 exercise that would justify a grant of leave outside the Immigration Rules. Permission was refused by the First-tier Tribunal but granted by the Upper Tribunal on a renewed application.
4. At the hearing the Home Office relied on the grounds of application and submitted that the Judge had applied the wrong standard referring to paragraphs 14 and 15 and that in turn infected the findings on article 8. The Appellant had used an interpreter and in paragraph 13, the Appellant's inability to recall, that was the basis of the Secretary of State's challenge. The ETS error could not be ring-fenced.
5. For the Appellant Mr Ali submitted that the Judge had correctly approached the case and applied the relevant principles. At paragraph 14 the judicial decision was evaluative, the reference to the standard had not infected the Judge's application of the civil standard, the look-up tool showed 78% against 22%, this was a nuts and bolts engagements and there was a lack of continuity in the evidence. There was no basis to say the Judge had adopted the wrong standard. It was also submitted that the Judge had properly approached paragraph EX.1 and paragraph 276ADE and that it was a model article 8 assessment.
6. Notwithstanding Mr Ali's well directed submissions I indicated at the hearing that I was satisfied that there was an error of law with respect to the ETS side of the decision and that that infected the article 8 side of the decision which could not be sustained.
7. In the decision the Judge repeatedly referred to the wrong standard of proof. In paragraph 12 it was stated that where there was a failing or wrongdoing on the part of an application that "must be shown to a high standard." In paragraph 14 the Judge stated "I am not satisfied that the Respondent has conclusively shown that he did not undertake an English Test himself." At the end of that paragraph having referred to evidence of deception at the test centre on that day "the fact that the Respondent cannot indicate that all tests were indeed taken by proxy on that day means that they have in my view not discharged the burden of proof..." In paragraph 15 the Judge found that he was not satisfied "given the high standard required in such circumstances, that the Appellant has used deception to obtain leave or that the evidence can conclusively establish that the Appellant was deliberately dishonest."
8. In addition to the repeated reference to the wrong standard of proof there are other issues that arise about the Judge's approach. Whilst not a deciding point the Appellant's use of an interpreter was a matter that required consideration given the claimed level of ability in English that the disputed test suggested. The fact that an Appellant could give an account of attending a test centre and logging in did not mean that the Appellant had taken the test as evidence from the BBC had shown that there were cases where Appellant's attended, logged in and then stood to one side. The fact that an Appellant can speak English did not preclude the use of a proxy.

9. The look-up tool evidence was that the Appellant's test was invalid and that the rate of invalid tests for the centre used by the Appellant was 78% with 22% being questionable. The levels quoted are comparable to those in the project façade colleges such as Elizabeth College considered by the Upper Tribunal in Nawaz [2017] UKUT 288 (IAC) and the Court of Appeal in Ahsan [2017] EWCA Civ 2009 where the institutions were described as fraud factories.
10. The failure of the Judge to consider the totality of the evidence and the application of the wrong standard of proof lead me to find that the Judge materially erred in the decision and that the findings made in respect of the deception allegation cannot be maintained. It follows that the Judge's finding that the Appellant met the suitability requirements also cannot be maintained. If the Appellant does not meet the suitability requirements, and that is a decision that has to be made properly then the Appellant would not meet the Immigration Rules and accordingly compelling reasons would be required to justify a grant of leave outside the rules under article 8.
11. I disagree with Mr Ali's submission that the article 8 side of the decision can be maintained. The findings on deception, or absence of it, are directly relevant to the balancing exercise that has to be undertaken and as it stands the decision proceeds on a basis that is fundamentally flawed. In the circumstances the decision is set aside. The decision will be remitted to the First-tier Tribunal at Birmingham or Nottingham for the appeal to be re-heard de novo with no findings preserved.

CONCLUSIONS

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision. The decision is remitted to the First-tier Tribunal for re-hearing, not to be heard by First-tier Tribunal Judge Raikes.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

In remitting this appeal I make no fee award which remains a matter for the First-tier Tribunal dependent on the outcome and reasons for the decision made.

Signed:


First-tier Tribunal Judge Parkes

Dated: 20th July 2018