



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06237/2017

THE IMMIGRATION ACTS

Heard at Field House
On 12 June 2018

Decision & Reasons Promulgated
On 27 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MANPREET SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr. T. Melvin, Home Office Presenting Officer
For the Respondent: Miss. F. Shaw, Counsel instructed by Charles Simmons Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Anthony, promulgated on 24 November 2017 in which she allowed Mr. Singh's appeal against the Secretary of State's decision to refuse to grant further leave to remain.
2. For the purposes of this decision I refer to the Secretary of State as the Respondent and to Mr. Singh as the Appellant, reflecting their positions as they were before the First-tier Tribunal.
3. Permission to appeal was granted as follows:

“It is arguable that, contrary to the Judge’s finding, the respondent’s evidential burden was met with regard to the TOEIC certificate which was cancelled on the basis of test administration irregularity as set out in the statement of Peter Millington at [47]. Further, although the appellant’s grounds of appeal were restricted to human rights only, it is arguable that no proper assessment was undertaken under Article 8 of the Human Rights Convention.”

4. The Appellant attended the appeal. I heard submissions from both representatives following which I reserved my decision.

Error of Law

5. Ground 1 submits that the Judge erred in finding that the Respondent had failed to discharge the evidential burden. At [20] the Judge states:

“I find the respondent has failed to discharge the initial burden of proof in demonstrating that the appellant is a dishonest appellant, particularly in light of the fact that his test schools were not declared invalid and there was no evidence of a proxy test taker in the appellant’s speaking test.”

6. It was submitted by Mr. Melvin that the evidence provided by the Respondent was sufficient to meet the evidential burden, and that therefore the burden of proof shifted to the Appellant who was then required to provide evidence to rebut the Respondent’s allegation of deception. He submitted that ETS had cancelled the test. The recent case law showed that there was no difference between an invalid and a questionable result, and that both of these were “cancelled” by ETS. It was therefore not of any relevance whether a case had been held to be invalid or questionable.
7. I was referred to the cases of Ahsan [2017] EWCA Civ 2009, Gaogalalwe [2017] EWHC 1709 (Admin), Nawaz (ETS: review standard/evidential basis) [2017] UKUT 00288 (IAC), KS (India) [2018] EWCA Civ 836. Miss. Shaw referred me to the case of Shehzad and Chowdhury [2016] EWCA Civ 615. It is this latter case on which the Judge relied when at [12] she stated that it had held that “it was acknowledged that in “questionable” cases, there may not have been deception” [25].
8. I have carefully considered the caselaw provided, in particular the case of Ahsan which set out a summary of the TOEIC litigation to date at [22] to [33]. Taking all of caselaw into account, I find that the evidence provided by the Respondent was sufficient to discharge the evidential burden upon her.
9. While I do not intend to repeat it all, it is useful to set out some of the summary of the caselaw set out in Ahsan. In relation to the Respondent’s evidential burden it states at [23]:

“The evidence supplied by the Secretary of State in the substantive TOEIC cases has developed over the course of the litigation. In the earlier cases she sought to rely essentially on (a) generic evidence, given by two Home Office officials, Rebecca

Collings and Peter Millington, about the reports received from ETS identifying results as “invalid” or “questionable”, and the methodology underlying those reports; and (b) the use of an “ETS Look Up Tool” to marry up those reports with the case of the individual appellant. These cases were not always well-prepared, and in some the look-up tool evidence was not provided at all, or was provided so late that it was not admitted. In more recent cases, however, the Secretary of State has supplemented that evidence by a report from another Home Office official, Adam Sewell, who has analysed the test results from a number of test centres in London. On the basis of his evidence the Home Office case now is that certain centres were “fraud factories” and that all test results from those centres, generally or on certain dates, are bogus. The centres in question include Elizabeth College, which has also been the result of a criminal investigation, under the name Project Façade.”

10. At [26] Ahsan states, with reference to the case of SM and Qadir [2016] UKUT 229 (IAC):

“The evidence of Ms Collings and Mr Middleton was criticised by the UT as displaying “multiple frailties”, which left open the possibility that false positive results might have arisen. Nevertheless it was held to be (just) sufficient to transfer the evidential burden to the appellants to show that they had not cheated.”

11. At [27] with reference to the case of Shehzad and Chowdhury it states:

“The appeal in Mr Chowdhury’s case (brought from out of country) was allowed because the FTT had wrongly held that the Secretary of State’s evidence did not establish a *prima facie* case, and the appeal was remitted for a hearing to consider Mr Chowdhury’s evidence in answer.”

12. I find that Ahsan confirms what the earlier caselaw had established, that the “generic evidence” submitted by the Respondent is sufficient to discharge the initial evidential burden of proof.
13. The Judge pointed out the discrepancies between the evidence provided by the Respondent and the allegation in the Reasons for Refusal Letter [9]. However, irrespective of any discrepancy, the Respondent had provided evidence that the Appellant’s test had been cancelled by ETS as the result was questionable. The evidence provided by the Respondent consisted of the statement of Jagdev Singh, the “look up tool”, evidence that all of the results from the test centres where the Appellant carried out the test were either questionable or invalid, the witness statements of Peter Millington and Rebecca Collings, the report of Professor French, and the record of an interview carried out with the Appellant.
14. I find that the Respondent had provided both the “generic evidence” as well as the witness statement of Mr. Jagdev Singh. The Respondent did not provide any voice recordings but, as is made clear in the case of Ahsan, now that those are available, it is for the Appellant to request his. At [25] of Ahsan it states:

“One other development that I should mention is that it in due course became known that ETS has retained copies of the individual voice recordings which it has identified as showing the use of a proxy, and that a copy can be obtained (without charge) on application. This will allow the person concerned to listen for themselves to check if the recorded voice is their own. If they believe it is, they can seek confirmation from an independent expert: the Secretary of State’s practice is to agree in such a case to the instruction of a joint expert. However, even where the voice appears to be someone else’s that is not necessarily accepted by applicants/appellants as conclusive. There have been challenges to the accuracy of the system for storing and retrieving the relevant file; and it has been argued that even if a test centre submitted a batch of recordings made by a proxy that was done in its own interests and without the knowledge of the person taking the test.”

15. Later it states at [33]:

“Where the impugned test was taken at an established fraud factory such as Elizabeth College, and also where the voice-file does not record the applicant’s voice (or no attempt has been made to obtain it), the case that he or she cheated will be hard to resist”.

16. The Appellant has not attempted to obtain the voice recording of his test. At the college where he took the test, 75% of the tests were declared invalid and 25% questionable, thus indicating that none of the tests from that college were sustained by ETS as being safe and reliable.

17. I find that the Judge has erred in finding that the evidence provided by the Respondent was not sufficient to meet the evidential burden. Had she found that the evidential burden had been met, it was then open to her to proceed to consider the rebuttal evidence and the extent to which it addressed the Respondent’s concerns.

18. It was argued by Miss. Shaw that the Judge had considered the rebuttal evidence, and in fact her submissions began by referring me to that evidence. However she confirmed that she was not accepting that the Respondent had discharged the evidential burden. A Judge must first consider the evidence provided by the Respondent to discharge the evidential burden, as that is on whom the initial burden lies. It is not the case, as submitted by Miss. Shaw, that a Judge needs to consider all of the evidence at the outset. It is not necessary for there to be any consideration of the evidence provided by the Appellant in ascertaining whether the Respondent has met her initial evidential burden.

19. I find that, given that the Judge found that the Respondent had failed to discharge the initial burden of proof at [20], her consideration of any rebuttal evidence was not in the correct context, i.e. of rebutting the presumption that deception had been used. Essentially she considered the Appellant’s evidence when considering whether or not the Respondent’s evidence was sufficient to discharge the initial burden of proof, but the Appellant’s evidence was not of any relevance at that stage.

20. Ahsan states at [24] in relation to rebuttal:

“The evidence adduced by individual appellants in rebuttal will obviously vary from case to case. At a minimum they can be expected to give evidence that they did indeed attend the centre on the day recorded and took the spoken English test in person. But that may be supplemented by supporting evidence of various kinds: a frequent theme is that it is said to be demonstrable from other evidence that their spoken English was very good and that they thus had no motive to cheat.”

21. In relation to ground 2, had the Judge been entitled to find that the Appellant had not practised deception and therefore that the Appellant met the requirements of Appendix FM, I find that whether or not the Judge had considered Article 8 fully outside the immigration rules would not be material given the weight to be attached to the fact that an appellant meets the requirements of the immigration rules. However, I have found that the Judge was wrong to find that the evidential burden had not been met by the Respondent. The rebuttal evidence provided by the Appellant has not been considered in the context of a decision where the evidential burden has been met. Therefore, given that it has not been established that the Appellant did not use deception, and therefore whether he met the requirements of Appendix FM, I find that the failure to give full consideration to Article 8 is a material error.
22. It was submitted that, in the event that I were to find a material error, the case should be remitted because the Appellant would need to request the tape of his voice recording and instruct experts accordingly, and because there had been no proper consideration of Article 8. I have taken account of the Practice Statement dated 10 February 2010, paragraph 7.2. This contemplates that an appeal may be remitted to the First-tier Tribunal where the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for the party's case to be put to and considered by the First-tier Tribunal. Given the nature and extent of the fact-finding necessary to enable this appeal to be remade, having regard to the overriding objective, I find that it is appropriate to remit this case to the First-tier Tribunal.

Notice of Decision

23. The decision of the First-tier Tribunal involves the making of a material error of law, and I set the decision aside.
24. The appeal is remitted to the First-tier Tribunal to be reheard.
25. The appeal is not to be listed before Judge Anthony.
26. No anonymity direction is made.

Signed

Date 26 June 2018

Deputy Upper Tribunal Judge Chamberlain