



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10548/2016

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 15th May 2018

Determination & Reasons Promulgated
On 12th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

JAMAL MUHAMMAD KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Khan (Solicitor), Parkview Solicitors
For the Respondent: Mr A McVeety (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the decision of Judge Jessica Pacey, promulgated on 15th June 2017, following a hearing at Birmingham Sheldon Court on 31st May 2017. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, and was born on 19th November 1975. He appealed against the decision of the Respondent Secretary of State dated 4th April 2016, refusing his application to remain in the United Kingdom as the spouse of Ms Abida Shaheen Hussain, who he had married on 17th November 2015, after having first

arrived in the United Kingdom on 10th March 2011 as a Tier 4 Student. The basis of the Respondent's decision is that the Appellant had obtained a fraudulent TOEIC certificate, thus preventing him from qualifying under the suitability requirements of Appendix FM, and he could not avail himself of the benefit of the provisions of EX.1, or demonstrate that there were very significant obstacles to his return to Pakistan, such as to succeed under paragraph 276ADE.

The Appellant's Claim

3. The Appellant stated that he took the TOEIC test himself. He attended the test centre himself. He was subjected to identification verification. His subsequent IELTS test certificate was not challenged. The Respondent subsequently had not established a prima facie case in relation to the alleged false TOEIC certificate. He had subsequently undertaken a IELTS test, which he was not required to take, and he speaks good English.

The Judge's Findings

4. The judge took account of the fact that there was a computer generated spread-sheet provided by the Home Office, but this had the incorrect basic details, and did not specifically refer to the Appellant. It gave an incorrect date of birth. It also gave an incorrect test centre. The Appellant has so argued the case before Judge Jessica Pacey (paragraph 11).
5. The judge did not accept that the Appellant's date of birth had been incorrectly given, because it had always been stated as 19th November 1975, and this was the date put forward by the Respondent Secretary of State. However, in relation to the Appellant's test number, in the previous solicitor's certificates, there had been no such number. (Paragraph 27).
6. Nevertheless, the judge stated that,

"Clearly the Appellant does speak English, on the evidence not only of the IELTS test certificate but from the fact that he was able to give evidence at the hearing in very good English. I accept that this is five years on from the test, in which time he might very well have improved his English but it is a factor which I take into account ..." (paragraph 28).
7. The judge also reminded herself of the applicable authoritative case of **SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229**. This stated that the evidential burden of proving that the TOEIC certificate had been procured by dishonesty lay on the Respondent Secretary of State, where generic evidence had been presented. Every case was "fact sensitive". In this case, "in the light of the ample evidence adduced by the Appellants, the Secretary of State failed (in this case) to discharge the legal burden of proving dishonesty on their part" (paragraph 30).
8. The judge held that in this case the generic evidence did suffer from "multiple frailties regarding the Appellant's number and the actual test centre" (paragraph 32). Moreover,

“The Appellant has given a plausible explanation of why he chose the college he did, and I accept as credible his argument that he did not attend Premier College. The Respondent has therefore failed to discharge the legal burden of proving dishonesty on the Appellant’s part” (paragraph 32).

9. Judge Jessica Pacey also had regard to the case of **Shehzad [2016] EWCA Civ 615** with respect to the giving of a “innocent explanation” by the Appellant when faced with evidence from the Respondent at the first instance (see paragraph 33 of the determination).
10. The appeal was allowed.

Grounds of Application

11. The grounds of application state that the judge had misapplied the case of **SM and Qadir [2016] UKUT 229** when approaching the disclosure of generic evidence by the Respondent Secretary of State. The judge had also erred in finding that the Respondent had accepted the language test certificate at a time when she would not have been aware of the widespread cheating in such tests. The judge has wrongly assumed that the test certificate was genuine and this had subsequently gone on to colour the way in which the proportionality exercise was carried out by the judge in relation to Article 8 rights between the Appellant and his wife.
12. On 12th December 2017 permission to appeal was granted.

The Hearing

13. At the hearing before me on 15th May 2018, Mr McVeety, representing the Appellant as a Senior Home Office Presenting Officer, relied upon the grounds of application.
14. First, **SM and Qadir [2016] UKUT 229** made it abundantly clear that the Secretary of State’s generic evidence, when combined with evidence particular to an Appellant, did discharge the evidential burden of proof that a TOEIC certificate had been procured by dishonesty, and this was the case here. The judge had wrongly accepted the Appellant’s statement that he took the test at Jinnah College and not at Premier Language Centre, because although it may well be that the spread-sheet had an incorrect test number, nevertheless, the rest of the spread-sheet gave the Appellant’s correct name, parcel number, and date of birth for taking the test at the Premier Language Centre. The judge failed to take proper account of this evidence.
15. Second, the judge had also wrongly stated (at paragraph 32), that the fact that the Appellant had been granted leave to remain as a student in 2013, meant that it was reasonable for the judge to assume that the Respondent did accept the Appellant’s English language skills at the time.
16. Third, it could not be overlooked that the Secretary of State was not notified that there was an issue with some ETS testing until 24th March 2014, which meant that the Appellant’s grant of leave before this date, would have no bearing on what was discovered afterwards.

17. For his part, Mr Khan, relied upon his skeleton argument. First, the Respondent accepted, (and Mr McVeety today accepted), that the spread-sheet had an incorrect test number. If that was the case, it was difficult for the Secretary of State to argue that the burden on her was discharged simply because, “the witness statements and the spread-sheets provide the necessary evidence to demonstrate that he did deploy deception”. In fact, what the judge said was that the Secretary of State had, on the basis of **SM and Qadir [2016]** discharged “the evidential burden of proving that their TOEIC certificates had been procured by dishonesty” simply by the fact that two witness statements had been provided in generic evidence (see paragraph 30).
18. Second, however, in relation to the “legal burden”, it is here that the judge held that “the Appellant has given a plausible explanation of why he chose the college he did” such that “the Respondent has therefore failed to discharge the legal burden of proving dishonesty on the Appellant’s part” (paragraph 32). That finding, submitted Mr Khan, was open to the judge, and there is no error of law in this finding at all.
19. Third, if one looks at paragraph 66 of the Appellant’s bundle, it is clear from this that the Appellant did successfully undertake an English language test certificate in 2012. The judge properly took into account the fact that the Appellant was proficient in the English language, conducted himself in the English language before Judge Jessica Pacey, and would have had no reason to have fabricated evidence.

No Error of Law

20. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.
21. First, the judge does not cite the law incorrectly at paragraph 30 when referring to **SM and Qadir**, and explaining that all that the Secretary of State has to do, is to furnish generic evidence, combined with her evidence particular to the Appellant, which would then discharge the evidential burden (see paragraph 30).
22. Second, the judge did properly conclude, as it was open to her, that the Respondent did not discharge the “legal burden” “in the light of the actual evidence adduced by the Appellants” (see paragraphs 30 and paragraph 32). In relation to the “legal burden” the judge, when considering the generic evidence, did state that it suffered “from multiple frailties regarding the Appellant’s number and the actual test centre”, because the Appellant had given a “plausible explanation” of why he chose Jinnah College, or the Premier Language Centre. The judge was entitled to find that the Appellant took the test in Dudley on 20th June 2012 at Jinnah College. He subsequently took the IELTS test on 12th April 2014 as well. Moreover, the computer-generated spread-sheet had incorrect data including a certificate number that was wrong. All of this is set up at paragraph 11 of the determination.
23. Furthermore, the judge, as the relevant jurisprudence in such cases makes clear, found that the Appellant spoke English (and would have had no reason to cheat) and this is set out at paragraph 28 of the determination. The judge also found that it was highly unlikely that the Appellant would have taken a journey to Essex and this is set out at

paragraph 29. In respect to all these matters, the judge accepted that the Appellant gave a “plausible explanation” as set out at paragraph 32 of the determination.

Notice of Decision

24. There is no material error of law in the original judge’s decision. The determination shall stand.
25. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

7th September 2018