



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11088/2016

THE IMMIGRATION ACTS

Heard at Field House
On 24th August 2018

Decision & Reasons Promulgated
On 18th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

K M ANISUR RAHMAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms Kiss, Senior Home Office Presenting Officer
For the Respondent: Mr Singer, Counsel instructed by Thamina Solicitors

DECISION AND REASONS

1. Mr Rahman is a citizen of Bangladesh whose date of birth is recorded as 29th June 1978. He entered the United Kingdom on 6th April 2006 as a student. He made application eventually for leave to remain based on ten years' lawful residence having regard to paragraph 276B of the Immigration Rules.
2. On 15th April 2016 the Secretary of State refused the application. The Appellant appealed and the matter came before Judge of the First-tier Tribunal James sitting at Hatton Cross on 16th March 2018. The issue before Judge James was whether the TOEIC certificate evidencing Mr Rahman's English language skills was honestly

obtained. It was the Secretary of State's case that the certificate had been obtained fraudulently. The Secretary of State relied on the generic evidence considered in the case of **SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 00229** and there has been further consideration in the case of **The Secretary of State for the Home Department -v- Shehzad & Anor [2016] EWCA Civ 615**.

3. The hearing before Judge James proceeded on the basis of submissions only. The Appellant in the First-tier Tribunal, Mr Rahman, had provided a witness statement, as had the Secretary of State's witnesses. Neither side adduced live evidence. If of course there were a legal requirement for live evidence to be given, the legal burden of proof being upon the Secretary of State, the case would not even have started. As it was, Judge James, appreciative of the way in which the evidential burden moves first of all from the Secretary of State to the Appellant in the First-tier Tribunal, then back to the Secretary of State with the legal burden, found, on the evidence, that the Secretary of State had not proved, on balance of probabilities, that there had been a fraud.
4. Not content with that decision, by Notice dated 29th March 2018 the Secretary of State made application for permission to appeal to the Upper Tribunal. In the grounds the Secretary of State contends that he was disadvantaged by not being allowed to cross-examine the Appellant. Indeed, it is put forward as an error of law. It is further asserted, as set out in eight sub-paragraphs, that the judge failed to give adequate reasons for her finding.
5. On 19th June 2018 Judge of the First-tier Tribunal Lever granted permission. It is of note that in granting permission Judge Lever found the judge's reasoning to be sound. He appears to grant permission only on the basis that there was a procedural irregularity in not permitting the Secretary of State to cross-examine Mr Rahman. It is worth setting out what Judge Lever had to say, given my own view of this appeal. He said at paragraph 3:

"The judge noted at [6] that the case proceeded by submissions only. Had that been an agreed course of action then there would have been no procedural error. Thereafter the judges (sic) reasoning is sound. He accepted that the Respondents (sic) generic evidence in these highly unsatisfactory ETS cases was enough to discharge the initial burden of proof on the Respondent [9]. Even that evidence was only produced by the Respondent on the day of the hearing. However, the judge gave clear and on the face of it strong reasons why he found that the Appellant could demonstrate he had genuinely taken the test and had not employed deception [10]15]. I have however noted the presenting officer's minute. If accurate it shows that the judge took the decision that there was no need for the Appellant to give evidence even though he was in attendance. In cases of this nature it perhaps is prudent for an Appellant to give evidence and to allow cross examination even where there may be obvious features within the witness statement. The minute would suggest the presenting officer did not agree to that course of action. It is arguable therefore that there was a procedural error such that there was an arguable error of law."

6. This matter comes before me therefore on a procedural point. I have however allowed Ms Kiss to put forward broader arguments in relation to this case and Mr Singer did

not object. I deal however first of all with that procedural point. If there is a requirement in the Tribunals for any evidence which is to be relied upon to be live evidence, then many of the decisions in cases before the First-tier Tribunal would have no validity at all. What is more, in this case, it being accepted that the evidential burden in the first instance was upon the Secretary of State, the Secretary of State's case would not even begin because the Secretary of State did not produce any live witnesses. There is no requirement for a witness to give live evidence. What weight is given to that evidence however is another matter. Where the evidence is not live less weight might be given to the evidence. Of course, in this case the Secretary of State did not bring the witnesses to the Tribunal and so insofar as it is being argued that less weight should be given to what the Appellant in the First-tier Tribunal had to say, then the same of course must apply to the Secretary of State.

7. Mr Singer conceded that the evidential burden which, in the first instance, was upon the Secretary of State was discharged by the presentation of the generic witness statements. It is common ground that the evidential burden then shifted to Mr Rahman. It was upon that point that there was much discussion before me.
8. Ms Kiss sought to persuade me that the witness statement, without Mr Rahman, being obliged to present himself for cross-examination, was insufficient. I do not agree. In the same way as the witness statement from the Secretary of State was sufficient to discharge the evidential burden, so too was the witness statement from Mr Rahman. It was some evidence and was capable of being deemed sufficient evidence by the Judge at first instance. Mr Rahman was obliged, following the authorities starting with the case of **Shen [2014] UKUT 236**, in which I had a passing interest, to provide an innocent explanation, which he did. It is of note that the case of **Shen** was a case decided on the papers. He was not required to assist the Secretary of State to bolster his case by making himself available at a hearing. The same is true for Mr Rahman. How he discharged the burden that was upon him was a matter for him, provided he did so. In fact, having discharged the burden that was upon him one might think that he was well advised to do no more other than to invite the Secretary of State to prove her case on the basis of the available evidence, such as it was. As I have said, the Secretary of State relied on the generic evidence which has been criticised in other cases and on the document naming Mr Rahman with a certificate number and an entry which says invalid.
9. There are aspects of the decision of Judge James which, however, are difficult to follow, in respect of which I ought to make mention. I refer in particular to paragraph 16 in which she says:

"Taking the totality of the evidence before me into account I find that the Appellant's English-speaking skills were fluent and similar to a native speaker prior to even applying to sit the TOEIC exam. The independent documents confirm his English language qualifications, which were undertaken in the UK, in the English language and to post-graduate level. Thus, the Appellant firmly rebuts the allegation of deceit put forward by the Respondent, and I find the allegation is not made out. Therefore, the appeal is allowed".

Ms Kiss pointed out that the Appellant, in his witness statement, had said that he had failed the speaking and writing test on four occasions and the listening and reading test on two occasions before getting the desired scores in the relevant test (see paragraph 14 of his witness statement). Ms Kiss submitted that the findings overall reflected an unbalanced approach on the part of the judge. The best interpretation I can put on that paragraph, is that absent the Respondent proving his case, that is where the Judge felt the evidence left the matter.

10. My task is to decide whether there was a material error of law and, insofar as findings of fact were made, whether those findings were open to the judge. I have already dealt with the initial burdens of proof, that is to say the evidential burdens upon the Secretary of State and Mr Rahman.
11. For the avoidance of doubt, I find no error of law in Mr Rahman not presenting himself for cross-examination. The question then is whether it was open to the judge to find that the Secretary of State had not discharged the legal burden. I find that notwithstanding the concerns that I have already alluded to and those concerns raised by Ms Kiss (with respect to the way the judge expressed herself), on the basis of the evidence it was open to Judge James to find that it was lacking for the reasons set out in the cases to which I have already referred, that is to say **SM & Qadir [2016] UKUT 229 IAC** and **Shehzad [2016] EWCA Civ 16**, the judge was entitled to weigh in the mix the witness statement, notwithstanding the fact that the Appellant had not been cross-examined, and make the findings that were open to her. It follows that I find no material error of law in the decision of Judge James. Much of the matters raised before me by Ms Kiss were, and I mean her no disrespect, attempts to reargue the case, but that only becomes relevant if there is an error of law and I do not find that there was one in this case.

Notice of Decision

12. In those circumstances the appeal to the Upper Tribunal is dismissed. The decision of the First-tier Tribunal is affirmed.
13. No anonymity direction is made.
14. I asked the parties at the end of the hearing if there was any matter that they wished me to deal with but they were content that the relevant matters had been dealt with by me adequately.

Signed

Date: 13 September 2018



Deputy Upper Tribunal Judge Zucker