



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14566/2016

THE IMMIGRATION ACTS

Heard at Field House
On 11th September 2018

Decision & Reasons Promulgated
On 20th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS MUMENA AKTHAR
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Ms G Jones, Counsel, instructed by City Legal Partnership

DECISION AND REASONS

1. For convenience I shall apply the appellations “Appellant” and “Respondent” as at first instance. The Appellant is a national of Bangladesh whose appeal was allowed by First-tier Tribunal Judge Birk in a decision dated 7th November 2017.

2. The Secretary of State lodged grounds of application. The grounds note that the Appellant was refused further leave to remain in the UK because the SSHD was satisfied that his TOEIC certificate had been invalidated by ETS. The first ground is that the judge had found that the Respondent had met the initial evidential burden of proof and the test was found to have been “questionable” as opposed to “invalid”. Specifically, it was submitted that the judge had failed to adequately consider the fact that the Appellant found it necessary to rely on an interpreter at the hearing and during interview. This cast serious doubt on the Appellant’s ability in English language. The judge had failed to consider the fact that a person who had claimed English capability would have no difficulty in following the hearing in the English language and would have been keen to demonstrate that ability, having had their application refused on that basis. The Secretary of State, while accepting an ETS verification system is not infallible, maintained her view that it is adequately robust and rigorous. The second Ground of Appeal was that there was an error of law in respect of allowing the appeal on human rights grounds. For the avoidance of doubt, the Respondent maintains that there were no compelling circumstances to justify the consideration of the Appellant’s case outside the Rules. There was nothing to prevent the Appellant returning to Bangladesh in order to apply for entry clearance.
3. Permission to appeal was granted, it being said that the reasoning of the judge in paragraphs 21 to 23 was arguably inadequate to justify the conclusion that the evidential burden on the Appellant was met. So far as Ground 2 was concerned the judge granted permission and said that there was “no arguable error in the judge having allowed the appeal on human rights grounds.”
4. Thus, the matter came before me on the above date. For the Secretary of State Ms Everett agreed that the granting of permission by the judge was slightly confusing but in any event, she relied on her grounds. If the Secretary of State was correct in his approach to Ground 1 then this would have an impact on the human rights decision.
5. For the Appellant Ms Jones said that it appeared that the judge granting permission had erred in the grant by saying that there was an arguable error in the first ground put forward by the Secretary of State. In any event, the judge had given clear reasons in paragraph 21 of the decision. The judge had taken into account that she had an interpreter throughout the appeal hearing. Her response was that she envisaged some questions being too difficult to understand and answer in English and the judge found that this was a plausible explanation. That explanation was not challenged and perversity in the decision-making process had not been shown. The Secretary of State had not overcome the high threshold. I was asked to conclude that there was no error in law.

Conclusions

6. The judge noted (paragraph 21) that the Appellant had provided an account that she denied that anyone else sat the test on her behalf by way of a proxy. The Respondent had placed reliance on the interview based on the Appellant being unable to provide any details about the examination and the fact that she had an interpreter from the

beginning of the interview. As mentioned above, the judge took into account that she had an interpreter throughout the appeal hearing and she had given plausible a explanation for that. The judge further found that the interviewer on 30th November 2015 had not shown what skills or qualifications that they held to assess the level of English that the Appellant could speak at the time of the test and further that there was no opportunity to do so since the Appellant had used an interpreter for such an assessment of the standard of her English.

7. The judge went on to find (paragraph 23) that she did not find that on the totality of the evidence the Respondent had discharged the legal burden of establishing that the Appellant's test was taken by a proxy test taker on her behalf. The judge was satisfied on the basis of those findings that she did meet the suitability criteria in Appendix FM.
8. The judge went on to consider the best interests of the children, noting that their best interests were to continue to remain in the care of both their parents, who have been their primary carers since birth and met all their emotional and physical needs (paragraph 28). The judge went on to note that the removal of the children with the Appellant would have very serious consequences for them as they were British children (paragraph 30). The judge noted that the meeting of the Immigration Rules by the Appellant was an extremely weighty matter in her favour (paragraph 32). She took into account paragraph 117B(6), noting that the children were of British nationality.
9. The judge's reasoning is clear and cogent throughout. There is no error of law in the reasoning process. Far less can it be said that the reasoning is perverse or irrational. As such the decision must stand.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

No anonymity order is made.

Signed *JG Macdonald*

Date 18th September 2018

Deputy Upper Tribunal Judge J G Macdonald