



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/23466/2016

THE IMMIGRATION ACTS

Heard at Field House
On 16 August 2018

Decision & Reasons Promulgated
On 18 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUHAMMAD IRFAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms K Pal, Home Office Presenting Officer

For the Respondent: Mr A Maqsood, Counsel, instructed by Julia & Rana Solicitors

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of Pakistan born on 17 April 1988. He appealed against the decision by the Secretary of State refusing him leave to remain dated 26 January 2016. The basis of that decision was that the Claimant did not meet the suitability requirements set out S-LTR2.2(a) of Appendix FM of the Immigration Rules on the basis that the Claimant had used a proxy when undertaking an English language test under the ETS TOEIC programme. The Claimant appealed against this decision and his appeal came before Judge of the First-tier Tribunal Wright for hearing on 8 February 2018. In the decision and reasons

promulgated on 28 February 2018, the Judge allowed the appeal, finding that the suitability requirements were met by the Claimant and that his removal would be disproportionate in light of his established family and private life in the UK.

2. The Secretary of State sought permission to appeal to the Upper Tribunal in time on 5 March 2018, on the basis that the Judge had failed to give adequate reasons for findings on a material matter, in that having accepted the evidential burden fell upon the Claimant to offer an innocent explanation, the Judge failed to adequately address what this explanation was and relied on the Claimant's English language ability and other qualifications. However, the test is not whether the Claimant speaks English but whether on the balance of probabilities he employed deception in light of the judgment in *MA (Nigeria)* [2016] UKUT 450 at [57]. It was submitted that the Judge materially erred by failing to give adequate reasons for finding that a person who clearly speaks English would therefore have no reason to secure a test certificate by deception.
3. Following refusal of permission to appeal by the First-tier Tribunal, a renewed application was made which asserted that the Judge had made a mistake as to a material fact in that there was sufficiently adequate evidence to satisfy the initial burden on the Secretary of State. The fact that the witness statement of Chandrika Mindelsohn was incomplete was immaterial in light of the fact that there was a supplementary bundle containing three other witness statements and the annex A & B spreadsheets showing the Appellant's score had been invalidated. The second ground of appeal asserted that there was a lack of adequate reasons for findings on a material fact ie. why the Claimant and his wife could not enjoy family life together in Pakistan.
4. Permission to appeal was granted by Upper Tribunal Kekic in a decision dated 19 May 2018, on the basis that arguably the Judge erred in his assessment of the documentary evidence that the Respondent had used to show that the Appellant had used deception to obtain an English language certificate as more than the evidence identified at [43] to [44] had been put forward. It was also arguable that inadequate reasons were provided by the judge for his conclusions on Article 8 at [47].

Hearing

5. At the hearing before the Upper Tribunal I heard submissions from Ms Pal on behalf of the Secretary of State and Mr Maqsood on behalf of the claimant. Ms Pal sought to rely on the grounds of appeal as drafted. She submitted in relation to the family life, despite the Judge's findings at [47] that the Claimant's wife had already relocated to the UK and had no interest in relocating to Pakistan given that she does not speak the language and the culture is totally alien for her, the Judge failed to take account of the fact that the Claimant's wife would be relocating with him and he would be able to assist her in adapting to life in the UK. Ms Pal submitted that the Appellant's status has always been precarious given that he was in the UK pursuant to a Tier 4 Student visa and the Judge had materially failed to take this factor into account when considering the public interest.

6. In his submissions, Mr Maqsood asserted that the Judge was well aware of the circumstances as is clear from [14] and [15] of his decision and that the grounds of appeal made erroneous assertions, in that there was no finding by the First-tier Tribunal that a person who speaks English would have no reason to secure a test certificate by deception. The Judge was clearly aware of the witness statement of Chandrika Mindelsohn: see [43] and [15]. At [46] of the decision the Judge clearly recognised that the evidential burden had shifted from the Secretary of State to the Claimant. At [45] there was an unchallenged finding of fact by the Judge that deception had not been used. So, it is neither material nor correct to assert in the grounds of appeal that the First-tier Tribunal did not find that the burden had shifted from the Respondent to the Claimant. Mr Maqsood submitted that on a close reading of the Judge's findings, there is no error in relation to the English language aspect and it was clear that the Judge had read all the generic evidence. Mr Maqsood submitted that once the suitability point under the Rules was decided in the Claimant's favour, then the requirements of the Rules were met and it was not necessary to attach further weight to the public interest when assessing the proportionality of the decision. He accepted that at [47] there was no clear reference to the fact the Appellant's leave is precarious but this was not material because the requirements of the Rules were met.
7. Ms Pal in reply submitted in relation to the ETS aspect of the case that it was clear from [41] and [45] that the judge does make reference to the Appellant's English language ability and refers to other test scores. However, the tests were taken six years before. Ms Pal submitted that it is clear from *MA (Nigeria)* that there could be many reasons why somebody would engage with a TOEIC fraud. At [43] and [44] the Judge started off on the wrong foot and he ought to have been aware of the Court of Appeal decisions and ought to have found that it was good evidence. If it was accepted the evidential burden had shifted, then the Judge needed to make a finding one way or another as to whether the Secretary of State's evidence is good evidence, however, this was not addressed by the Judge. Consequently, the Judge found that there was an innocent explanation without addressing the evidence of the Secretary of State. The Judge also found no other rational explanation and it was simply not clear and that all of this impacts on the correct approach to proportionality. Ms Pal submitted that if the ETS finding was flawed then this materially impacts on the Article 8 considerations.

Findings

8. I find no material errors of law by First-tier Tribunal Judge Wright in relation to the ETS aspect of the case. Contrary to the grounds of appeal, the Judge did take account of the generic evidence in the supplementary bundle before him at [43] and Annexes A and B at [44] where he correctly directed himself as to the correct test and was entitled to conclude at [46] that that evidence was sufficient for the burden of proof to shift from the Secretary of State to the Claimant on the basis that he was satisfied on the balance of probabilities deception was not used.
9. The Judge considered and was entitled to place weight on the evidence of the Claimant as to taking the tests at other schools and that he had previously passed the TOFEL test, which was evidence which was unchallenged and that he had attempted to retake

the TOIEC test but had been unable to do so because his passport was being held by the Secretary of State [45].

10. I find it was open for the Judge to allow the appeal in light of the evidence before him, not only that relied upon by the Secretary of State, but also having had the opportunity to see the Claimant give oral evidence in English and to assess his credibility in light of the evidence as a whole. It follows that the Judge found that the requirements of the Immigration Rules were met, the Appellant having made an application for leave to remain on a five year route to settlement on the basis of his relationship with his partner.
11. The judge went on to take into account the public interest considerations set out in section 117B of the NIAA 2002 and to consider the appeal on the basis that the Claimant has an established private and family life in the UK with his wife and stepchild. The findings of the Judge at [47] that removal would be disproportionate and an interference with the Claimant's family life with his wife were open to the judge on the evidence before him and are sustainable. Whilst his reasoning at [47] was brief, it was in the circumstances of the case adequate, the requirements of the Rules having been met.
12. I dismiss the appeal by the Secretary of State, with the effect that the decision and reasons of First tier Tribunal Judge Wright to allow the appeal is upheld.

Signed *Rebecca Chapman*

Date 14.9.18

Deputy Upper Tribunal Judge Chapman