



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/23651/2016
HU/23656/2016

THE IMMIGRATION ACTS

Heard at Field House
On 18 June 2018

Decision & Reasons Promulgated
On 4 July 2018

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHAKABA [S]
(AND DEPENDENT CHILD)

Respondents

Representation:

For the Appellant: Ms Z. Ahmad, Senior Home Office Presenting Officer

For the Respondents: Ms L. Dickinson of Fursdon Knapper Solicitors

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State against a decision of First-tier Tribunal Judge B. Lloyd (“the judge”), which was promulgated on 16 November 2017. Although this is an appeal by the Secretary of State, for the sake of convenience, I will refer to the parties as they were before the First-tier Tribunal.

2. The First-tier Tribunal Judge set out the background to the case and the reasons for refusal. The appellant is a citizen of Afghanistan who appealed with her child against a decision dated 27 September 2016 to refuse to vary and extend leave to remain to that of indefinite leave to remain. The appellant had been living in the UK since February 2014 having been granted entry clearance as the spouse of a person who is settled in the UK.
3. The respondent refused the application on the ground that the appellant's presence in the UK was not conducive to the public good because her conduct made it undesirable to allow her to remain in the UK with reference to paragraph 322(2) of the immigration rules. The respondent noted a TOEIC test certificate dated 20 March 2012 was submitted with the application. Notably, the decision was not based on information from ETS, but on an interview undertaken by the respondent on 26 August 2016. The interview record is a little unclear, but it seems that the question was specifically asked about a test taken at Thames Education Centre on 20 March 2012. The appellant is recorded to have answered: "no haven't done this". Based on her answer the respondent was not satisfied that she was telling the truth because the test certificate related to a test taken at Thames Education Centre on 20 March 2012, two years prior to her entry to the UK. This indicated that she did not attend the test in person, but a proxy attended on her behalf. Based on that information the respondent concluded that the test certificate was obtained by fraud.
4. In his decision the judge set out the background to the appellant's applications for entry clearance and indefinite leave to remain. He summarised the reasons for refusal letter. He went on to summarise the evidence given by the appellant at the hearing. In her evidence the appellant stated that she did not take the test at Thames Education Centre. She had taken the test in Islamabad on 20 March 2012. The judge went on to consider the relevant legal framework from [29] onwards. At [37-41] of the decision he summarised the arguments relating to the TOEIC/ETS certificate put forward by both parties. During that process he made no findings one way or the other whether (i) the respondent's evidence discharged the initial evidential burden of proof; and (ii) even if it did, whether the appellant had provided an innocent explanation in response. The judge made his findings from [51] onwards.
5. It seems clear from those findings that the judge did not, as the respondent asserts in his first ground of appeal, make any clear findings as to whether he accepted the evidence relating to the TOEIC/ETS certificate or not. The only reference in those findings is found at [52] where the judge states:

"The Secretary of State considered that in the light of the first appellant's presumed deception in submitting a fraudulently obtained ETS TOEIC certificate it was not considered unreasonable to expect the children to leave the UK and continue their family and private life abroad."
6. This statement is a summary of the Secretary of State's position and could not be said to be a finding made by the judge. Certainly it does not disclose any analysis of the evidence or the arguments put forward by the appellant in response to the allegation.

7. The judge went on to consider the best interests of the children. The grounds do not make any specific challenge to those findings save for the second ground, which simply states that there was no real analysis to balance the best interests of the children against the public interest considerations. Insofar as that seems to be the case, I accept that the judge did not make any clear findings relating to the ETS issue and did not balance the public interest considerations raised by the Secretary of State against his findings relating to the best interests of the children. However, the Tribunal will only set aside the First-tier Tribunal if the error of law is material.
8. In assessing this issue, I have considered whether the Secretary of State's case could have been accepted. The evidence is extremely thin. The only evidence before the judge was a copy of the TOEIC certificate dated 20 March 2012, a record of the interview that took place on 26 August 2016 and what are usually termed the 'generic statements' of Peter Millington and Rebecca Collings which contain general information relating to the widespread fraud regarding ETS English language certificates.
9. Central to the respondent's allegation was the TOEIC/ETS certificate dated 2012 which, if it had been issued by the Thames Education Centre, would cast doubt on the appellant's credibility given that she was living in Pakistan at the time. On the face of the certificate contained in the respondent's bundle it does not indicate one way or the other whether it was issued by the Thames Education Centre or, as the appellant alleged, by a provider in Pakistan. The appellant's claim that she had not done a test at the Thames Education Centre, but had done it in Islamabad, was not inconsistent with the TOEIC certificate included with the application for leave to remain.
10. The generic statements of Peter Millington and Rebecca Collings were criticised by the Upper Tribunal in *SM & Qadir (ETS – Evidence – BOP)* [2016] UKUT 229. Despite the weaknesses in that evidence, a combination of the generic statements and the ETS look-up tool printout were found to just be sufficient to meet the initial evidential burden on the Secretary of State to shift the burden to the appellant. But it is apparent from my outline of the evidence that the minimum level of evidence was simply not available to the judge in this case. There was no evidence to link the TOEIC certificate produced by the appellant to Thames Education Centre, there was no look-up tool from ETS to link the test certificate to a test allegedly taken at Thames Education Centre, nor was there any evidence to show, even if that test had been taken at Thames Education Centre, that it had been deemed invalid or questionable by ETS.
11. On the face of such limited evidence, which amounted to not more than a bare allegation by the respondent, any judge would have been bound to conclude that the Secretary of State had failed to discharge the initial evidential burden of proof. It is for this reason that the judge's failure to make specific findings would have made no material difference to the outcome of the decision because there was insufficient evidence before the Tribunal to support the Secretary of State's allegation of fraud

and no evidence that could possibly give weight to the public interest considerations raised.

12. The second ground makes an additional point about the judge's failure to consider whether the appellant could make a fresh application for entry clearance. However, I find that there is no merit to this ground because if the appellant met the requirements of paragraph EX.1 of Appendix FM it would not have been necessary for the judge to go on to consider the case outside the rules. The judge had already given sustainable reasons for finding that the best interests of the children were to remain in the UK and that it would not be reasonable to expect the British child to leave. In such circumstances it was not necessary for the judge to go on to consider any issues that might be relevant to the '*Chikwamba*' point.
13. For the reasons given above I conclude that the First-tier Tribunal decision did not involve the making of a material error on a point of law. The decision shall stand.

DECISION

The First-tier Tribunal decision did not involve the making of a material error of law

Signed 

Date 04 July 2018

Upper Tribunal Judge Canavan