



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/23767/2016

THE IMMIGRATION ACTS

Heard at Field House
On 16 May 2018

Decision & Reasons Promulgated
On 5 June 2018

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD RUMAL AHMED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr D Balroop instructed by Universal Solicitors

DECISION AND REASONS

1. I shall refer to the appellant hereafter as the respondent as he was before the judge, and to the respondent before me as the appellant as he was before the judge.
2. The appellant appealed to the First-tier Tribunal against the decision of the First-tier Tribunal Judge of 3 October 2016 refusing further leave to remain in the United Kingdom, materially on the basis that he had submitted an English language test as part of his application for entry clearance, dated 19 June 2013 and this had been withdrawn by ETS and declared as questionable on the grounds that widespread test

fraud was known to have occurred at the test centre. The appellant had therefore been asked to attend for an interview and the respondent judged his responses to the questions to be unsatisfactory to the extent that he was satisfied that the English language certificate submitted with the entry clearance application was fraudulently obtained. Accordingly the appellant did not meet the suitability requirements of the Rules and no matters outside the Rules arose such as to justify a grant and therefore the application was refused.

3. At the hearing before the judge the appellant in response to questions said that the test centre was near a station but he could not remember which station and could not be certain of the dates, he said it was 2012. He was not able to answer what he was doing in the United Kingdom after the expiry of his visa. In answer to questions from the Tribunal he denied having difficulty understanding the questions but said he was having difficulty remembering what happened in 2012 and also said he was not intellectually sharp and his first language was Bengali but he tried to keep up his English. He remembered being interviewed in 2016 and that he had been nervous at the interview. He asserted that he had done the test himself and did not use a proxy. He could not remember his score as it was five years ago.
4. The judge noted that the appeal was a little unusual as the disputed language test was not marked as invalid by ETS but as questionable. In the absence of a record that the test was invalid there was no direct evidence from ETS that the appellant committed fraud. The test was questionable on the basis that there was widespread fraud at the test centre where he sat his test. It was clear from a statement provided and the schedule attached to it that a number of tests taken on the same day as that on which the appellant took his test were invalid. No evidence had been found that his test was fraudulent but it was questionable given the high incidents of fraudulent results. The judge noted that it was common in these circumstances for an applicant to be given the opportunity of taking another test, but the respondent chose not to do so in this case and interviewed him instead.
5. With regard to the interview it was carried out by the interviewing officer and the judge noted there was no suggestion that the interviewing officer was a language expert or would have known the details of the CEFR system to be able to assess if the appellant was able to communicate at A1 level, which the appellant had earlier said he considered to be a basic level of English and not the level required to face an interviewer for half an hour when being nervous. It was accepted in evidence by both the appellant and the sponsor that his English was not of a high standard but he was able to understand sufficient English in the view of the judge as to be able to identify himself and understand the reason for the interview, to answer which test he took and at what level. If he had forgotten a matter he was able to say so to the interviewer and he answered how much the test had cost and where he did the course and who booked it. The judge considered that A1 was the lowest level of language use and that he demonstrated an ability to interact in a simple way, answering simple questions about himself. The appellant had difficulty in replying to a number of the questions at the interview and also at the hearing, when a number of matters were responded to clearly if not at the first time.

6. The judge considered that the appellant was able to make himself understood at a basic level and on his answers at the hearing as the judge put it, he could not be satisfied that the appellant could not communicate at level A1. He was of a similar view with regard to his reading of the interview notes. The judge also noted the appellant had passed the test at CEFR level 1 in February 2016 some months before the interview, and that test result had not been disputed. The judge said that he could not be satisfied that the appellant was unable to communicate at level A1 CEFR at the time of the 2016 interview and there was no conclusive evidence that he was fraudulent at the time of the disputed 2013 test. The judge went on to say that if the appellant was able to communicate at level A1 in 2016 he was not satisfied that his inability to remember the details of questions such as who booked his test and the length of the test almost four years later was conclusive that he did not take the test. He went on to say as this was an allegation of fraud the burden of proof was on the respondent to prove the allegation at more than the balance of probabilities which he did not consider had been reached in this appeal. He also noted the appellant's own evidence that he was not intellectually the sharpest of individuals which might explain his poor memory for detail.
7. The judge therefore concluded that he was not satisfied that the appellant had submitted a fraudulent test certificate. He went on to consider elements of the appellant's family and private life, concluded that he had met the requirements of the Rules and that his removal would not be proportionate to the need for immigration control.
8. In his grounds of appeal the Secretary of State argued that the judge had employed the wrong standard of proof in requiring the allegation made by the respondent to be proved on more than the balance of probabilities, and that the proportionality assessment had been coloured by the error in respect of the finding on the appellant's use of deception. Permission to appeal was granted on all grounds by a Judge of the First-tier Tribunal.
9. In her submissions Ms Isherwood accepted that this was a questionable rather than an invalid case, and recalled what had been said with regard to the process in ETS cases at paragraph 21 of Shehzad [2016] EWCA Civ 615. Ms Isherwood argued that the judge had not engaged with the evidence that could be seen from the interview that it was a question of the test that happened in 2013 rather than the situation in 2016. The judge had failed to refer to the appellant's inability to answer questions properly with regard to the questionable decision. He had difficulty even at the hearing. The judge had not related matters back to the test taken. Also the judge had also erred with regard to the standard of proof and that was material. He had not said why the appeal was to be allowed.
10. In his submissions Mr Balroop argued that the Secretary of State usually placed reliance on Ms Collings' and Mr Millington's statements with regard to the discharge of the burden of proof. There had been no finding of invalidity and that had to be significant. It was necessary to note what had been said at Shehzad at paragraph 19

and 20 with regard to the process to be adopted. He argued that if there was evidence of invalidity and there had not been cancellation then the evidential burden on the Secretary of State was not discharged. It was true that the judge had not specifically addressed the issue of the burden on the Secretary of State but that could be seen in the way in which the findings were framed. It was argued on the appellant's behalf that the burden on the Secretary of State had not been discharged and that could be gleaned from the judge's decision and the way in which the evidence was taken. It might be different if the decision had been one of invalidity rather than questionability but that was not the case. The issue was whether another person took the test in 2013 and that was not confirmed by the ETS evidence. It had not been put to the appellant at the interview that he had not taken the test and there was no evidence of use of a proxy put in.

11. With regards to the standard of proof point, it was argued that was not material to the assessment of whether or not a proxy had taken the test. There was nothing in the 2016 interview put to the appellant that he had used a proxy in 2013. He had achieved the A1 level earlier in 2016.
12. By way of reply Ms Isherwood referred to paragraph 3 in Shehzad which made it clear that the civil standard of proof was the balance of probabilities as the relevant standard in such cases. It was right to note the points set out towards the end of paragraph 30 in Shehzad with regard to the difficulties for the Secretary of State in respect of the evidence burden in cases of invalidity. The judge had not engaged with the evidence.
13. I reserved my determination.
14. It is clear that in a case such as this where the test result is regarded as questionable rather than invalid, that, as was noted by the Court of Appeal in Shehzad at paragraph 30, there is a difficulty for the Secretary of State in respect of the evidential burden at the initial stage. This is not however a matter that appears to have been addressed in terms by the judge. He set out in detail the history including the difficulties the appellant had at the interview in September 2016 and also with regard to his performance before the judge. It is not suggested that the respondent was required to give the appellant the opportunity of taking another test, and the alternative of interviewing the appellant was fully open to him. It can be seen from the interview that the appellant's answers were deficient in a number of respects, although it is relevant to bear in mind that level A1 is not a level of high performance. The difficulty that I have with the judge's decision in this case is that it is not structured so as to make it clear whether or not he realised there was an evidential burden on the Secretary of State and if he was so aware, whether he considered that burden had been discharged. Nowhere does one see set out the proper framework as described for example at paragraph 3 in Shehzad of the initial burden of furnishing proof of deception on the Secretary of State, an evidential burden, which thereafter involved a shifting onto the appellant to provide a plausible innocent explanation and the burden then shifting back to the Secretary of State. What the judge appears to have done is to conclude that he could not be satisfied that the appellant could not be said to be unable to communicate at level A1 rather than putting this in the context of a burden on the

Secretary of State, other than the erroneous description of the burden on the respondent towards the end of paragraph 14.

15. This is the other matter of particular difficulty in this case. It is clear as I have noted above that the Secretary of State is in greater difficulties in a case where the issue is one of questionability, and here the Secretary of State decided to interview the appellant and came to conclusions as to the likelihood of a fraud on the basis of that interview and the questionable status as allocated to the case because the fraud at the test centre by other people had been identified. I do not consider that the judge has made a clear finding as to whether or not the burden was discharged by the Secretary of State, but even if he can be said to have done so in paragraph 14 and at the beginning of paragraph 15, the judge clearly erred in saying that the burden of proof is on the respondent to prove the allegation at more than the balance of probabilities. That betrays a misunderstanding of the correct standard of proof as is clearly set out at paragraph 3 of Shehzad. Inevitably that approach to the evidence as well as the concerns I have about whether or not the judge appreciated the need to consider whether the Secretary of State had discharged the evidential burden entails that I consider that the decision has been shown to be flawed by material errors of law. There will therefore have to be a full rehearing in this case by a different judge at Taylor House.

Notice of Decision

No anonymity direction is made.



Signed

Date: 22 May 2018

Upper Tribunal Judge Allen