



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/27184/2016

THE IMMIGRATION ACTS

Heard at Field House
On 14th December 2017

Decision & Reasons Promulgated
On 16 January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD SUHEB KHAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer

For the Respondent: Mr S Uddin of Taj Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Obhi made following a hearing at Birmingham on 11th September 2017.

Background

2. The claimant is a citizen of Bangladesh born on 22nd August 1985. He came to the UK on 24th February 2011 as a Tier 4 (General) Student until 27th June 2012. He then applied to extend that leave on 28th February 2012 and again on 9th November 2012

resulting in his leave being extended to 10th July 2013. On 1st July 2013 he applied for permission to remain as the spouse of a settled person which was granted until 1st January 2016.

3. On 4th December 2015 he applied for further leave to remain as the spouse of a settled person but was refused and the refusal was certified under Section 94 of the Nationality, Immigration and Asylum Act 2002 denying him a right of appeal. The appellant challenged that decision by a judicial review resulting in a further refusal letter being issued on 30th November 2016. It was this decision which was the subject of the appeal before the Immigration Judge.
4. The Secretary of State refused the application on the basis that it was believed that the appellant had fraudulently obtained a TOEIC certificate which he had submitted with his application in November 2012. The Secretary of State relied on the information provided from the Educational Testing Service which was able to detect when a single person was undertaking multiple tests. It was believed that the appellant's certificate was fraudulently obtained by the use of a proxy test taker. The Secretary of State relied on the generic evidence provided in a number of these appeals, from a Mr Millington and Miss Collings and Professor Andrew French.
5. The judge considered the evidence and concluded as follows

“However, I cannot rule out the possibility that the appellant is telling me the truth and that the tickets he has provided are genuinely the tickets which he used to attend the centre. Very much on balance, after weighing up the fact that whilst not probable, it is possible that the equipment used by ETS may have thrown up a false positive in the case of this appellant, and noting that he has produced the tickets that he has, I find that the balance has shifted in his favour and that it is possible that he attended and sat the test. I am conscious of the fact that if the appellant had used fraud in his TOEIC then he could well go to greater lengths to disguise that fact, even by accessing these tickets. However that is not currently supported by the evidence before me. Accordingly based purely on the evidence and my critical evaluation of it, I find that the appellant has proved his case.”

The Grounds of Application

6. The Secretary of State sought permission to appeal on the grounds that the judge had failed to make a finding on whether the Secretary of State had met the initial evidential burden of proof in line with the case of SM and Qadir (ETS - Evidence - Burden of Proof) UT (IAC) (21 April 2016).
7. It was also submitted that the judge had failed to give adequate reasons as to why the SSHD had not met the legal burden or that there was an adequate innocent explanation. Had the judge properly considered the evidence of deception she would have reached a different conclusion.
8. Permission to appeal was granted by Judge Boyes for the reasons stated in the grounds on 18th October 2017.

Submissions

9. Mr Duffy did not rely on the first point made in the grounds in relation to whether the judge had taken the proper approach to the evidence, namely firstly to decide whether the SSHD had discharged the initial evidential burden of proof in respect of deception and then to consider whether, the burden having shifted to the claimant, there was an innocent explanation. He accepted that the judge had taken the correct approach to the issue of the evidential burdens.
10. He did however submit that reasoning was not adequate and sought to enlarge the grounds by making the point that the judge had applied the wrong standard of proof when she had said that "she could not rule out the possibility".
11. Mr Uddin submitted that this was a careful determination, and the judge had reached a decision properly open to her. He submitted that the reference to the possibility that the claimant was telling the truth was immaterial in the light of the evidence which was before the judge.

Findings and Conclusions

12. I am satisfied that the judge did not materially err in law and that her decision should stand.
13. First, Mr Duffy properly did not pursue the first Ground of Appeal. The judge was plainly aware of the relevant case law which she applied. She did in fact state in terms at paragraph 31

"If the evidence provided shows that the test taken by this particular appellant was under the invalid characterisation as opposed to the questionable category that will shift the burden onto the appellant."

She then set out the Secretary of State's evidence.

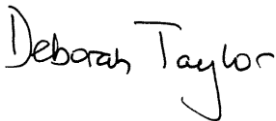
14. The second ground as drafted is in effect a reasons challenge. In a detailed determination the judge set out all of the oral evidence which she had considered together with the documentary evidence and the submissions made both by the Presenting Officer and the appellant's representative. The judge recorded that the claimant had been able to provide train tickets, which he had found in an old wallet, showing that he had travelled to the test centre. She acknowledged that it did not necessarily prove that he had taken the test. She set out her concerns that there was no evidence relating to his enrolment for the test and that there was limited information as to why he had chosen this particular college. Whilst she did not say so in terms, it is clear from her conclusions that she found the oral evidence to be credible and on that basis she allowed the appeal. It was open to her to do so. The claimant had been able to provide some documentary evidence going at least in part to show that he attended the test centre and the judge was entitled to rely on that evidence.

15. So far as the late amendment to the grounds is concerned, Mr Duffy is quite right to highlight the clear error at paragraph 34 when the judge refers to the possibility of the claimant telling the truth.
16. I am conscious that this is an experienced Immigration Judge who had properly set out the correct standard of proof at the beginning of her determination. I am not persuaded that the poor use of language in this paragraph is sufficient to negate the reasoned findings which she made, after a proper consideration of all of the evidence.

Notice of Decision

17. The Secretary of State's challenge fails. The original determination stands.

No anonymity direction is made.



Signed

Date 13 January 2018

Deputy Upper Tribunal Judge Taylor