



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/11706/2018

THE IMMIGRATION ACTS

Heard at Field House

On 7 March 2019

**Decision & Reasons
Promulgated**

On 20 March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE FROMM

Between

**SHAUKAT HAYAT KHAN
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Smith, Counsel

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Fox, sitting in Birmingham, dismissing his appeal against a decision of the respondent, dated 15 May 2018, refusing his application for leave to remain on the grounds of private and family life. The appellant came to the UK in 2011 as a Tier 4 (General) Student Migrant but was

subsequently granted leave to remain as a spouse. His application for further leave was refused for the following reasons:

- He had submitted as part of a previous application a TOEIC certificate issued by ETS which he had obtained fraudulently by use of a proxy test-taker (paragraphs R-LTRP.1.1.(c)(i), R-LTRP.1.1.(d)(i) and S-LTR of Appendix FM of the Immigration Rules).
 - Whilst he met the Eligibility requirements of Appendix FM in respect of Relationship, Immigration Status, Financial and English Language (paragraphs R-LTRP.1.1(c)(ii), R-LTRP.1.1.(d)(ii), E-LTRP.1.1. to 1.12, E-LTRP.2.1 to 2.2, E-LTRP.3.1 to 3.4 and E-LTRP.4.1. to 4.2), he did not meet the requirements of paragraph EX.1 because there were not insurmountable obstacles to family life continuing in Pakistan (paragraphs EX.1(b) and EX.2).
2. It might be observed at this point that there is a degree of obscurity and confusion in the refusal letter. I say obscurity because the respondent has not explained which of the Suitability requirements the appellant has not met. Was it, for example, the mandatory paragraph S-LTR.1.6. or the discretionary paragraph S-LTR.2.2.? I also say confusion because, if the appellant met all the Eligibility requirements so as to meet paragraph R-LTRP.1.1.(c)(ii), as appears to be conceded, then he does not also have to show he meets the requirements of paragraph EX.1. In other words, if the appellant meets the Suitability requirements, he has met all the requirements of the rules.
 3. The appellant appealed to the First-tier Tribunal. In his grounds of appeal he pointed out that, in order to obtain his previous grant of leave as a spouse, he had complied with a request to sit another English test. His application for further leave under the 5-year route had been refused and then reconsidered following a threat of judicial review. He denied using deception and reiterated that his leave had been granted on the basis of a second test and he had not relied on the first test. Furthermore, he had been interviewed at port after returning from a holiday and the immigration officer had been satisfied so as to readmit him as a spouse. The appellant has excellent English skills.
 4. The appeal bundle contained, among other things, Home Office records obtained through a SAR showing that the appellant was admitted to the UK on 2 May 2015 after interview because it was established that his leave had been granted on the basis of a new English language test sat at Trinity College, not on the test in question, and the Home Office was aware when granting leave of the submission of the earlier TOEIC test. Additionally, a record dated 5 February 2016 stated that deception had not been confirmed and an interview was required to test the appellant's credibility. That had not happened.
 5. There was other evidence of the appellant's English language skills, such as his first degree and his MBA, which had been taught in English.

The appellant had obtained a CEFR level B2 certificate on 20 April 2011 and ABE qualifications in 2013. He scored 99% in his DVLA multiple choice test in April 2014. There was evidence of the appellant ordering TOEIC study materials from Foyles in February 2013.

6. Judge Fox noted the respondent had conceded the appellant met all the requirements of the rules, with the sole exception of Suitability, in paragraph 3 of his decision and again in paragraph 12. He then tackled the ETS point, finding the respondent had satisfied the burden on him to show dishonesty on the part of the appellant such that the burden shifted to him to provide an innocent explanation. After considering his evidence, the judge decided the appellant had not provided an innocent explanation. He concluded in paragraph 46 that the respondent had been entitled to apply paragraph 322(5) of the rules. He next considered article 8 outside the rules and concluded there would be no breach. Although she had not been called to give evidence, he found the appellant's wife's entitlement to DLA inconsistent with her employment. There was no reliable evidence of insurmountable obstacles to family life continuing in Pakistan. The appeal was dismissed.
7. Extremely lengthy grounds were submitted by the appellant, appended to which was a statement prepared by counsel who had attended on behalf of the appellant at the hearing.
8. Permission to appeal was granted by the First-tier Tribunal on all rounds.
9. A short rule 24 response has been filed by the respondent which opposes the appeal on the basis the judge directed himself correctly in law.
10. Parts of the grounds allege procedural impropriety on the part of the judge through his abrupt behaviour and giving the impression, at least to the appellant, that he "worked for the Home Office". These are serious allegations and, as I pointed out, I was in no position to consider them without first giving Judge Fox an opportunity to respond. Ms Smith did not urge me to take that step but preferred to proceed on the remaining issues. As they are not pursued, I shall say nothing further about those particular allegations.
11. Ms Smith made her submissions after which Mr Tarlow said, with characteristic frankness, that he could not defend "the indefensible". He confirmed, in particular, that there was no answer to the first ground, which was that Judge Fox had erred by simply assuming that the respondent had relied on paragraph 322(5) of the rules.
12. I agree with the representatives that this error is sufficient to require the decision to be set aside. I have already mentioned the absence of

any indication from the respondent which of the Suitability grounds was relied on. What can be said with certainty is that the respondent did not rely on paragraph 322(5). That is because there is a general reference to Section S-LTR. Paragraph 322(5) is not found in that section.

13. It is apparent that the judge did not require the respondent to clarify his case and, without knowing what the allegation against him was, it was unfair to expect the appellant to deal with it. The refusal letter stated that the TOEIC test taken by the appellant on 21 August 2013 at the Universal Training Centre had been cancelled by ETS and, on the basis of the information provided by ETS, the respondent was satisfied the certificate was fraudulently obtained and the appellant used deception in his application of 7 January 2014.
14. The judge then erred, in my judgement, in his analysis of that evidence. Whilst it is correct that the generic evidence relied on in such cases and which the judge appears to have had before him is usually sufficient to cause the burden to shift to the appellant (see *SM and Qadir (ETS - Evidence - Burden of Proof)* [2016] UKUT 229 (IAC)), the judge appears to have lost sight of the fact the allegation was that the appellant had relied on the TOEIC test in his application. As seen, that was denied by the appellant and there was a great deal of evidence before the judge to establish the point. In particular, the respondent's own records disclosed that he was granted leave on the basis of the Trinity College test, not the TOEIC test. The documents show that the respondent wrote to the appellant on 10 February 2014 stating that his application was on hold because of the "discrepancies" in the TOEIC certificate. The letter invited him to take another test from an alternative source, provided it was not ETS. That is precisely what he did.
15. Judge Fox makes no mention of this evidence. In paragraphs 35 to 37 of his decision, he only refers to the evidence of the TOEIC test. If the respondent had been relying on character grounds under the Suitability heading, then counsel addressed him as to the respondent's own guidance which stated that this ground could only be relied on if the information had not been known before. The judge did not consider this at all. Judge Fox was aware of the Trinity College certificate because he mentioned it in paragraph 41.
16. There is another reason the decision is erroneous in law such that it has to be set aside. As mentioned, the judge accepted at the beginning of the hearing that the only issue was Suitability. It appears that, on that basis, he advised counsel that the appellant's wife did not need to give evidence. Notwithstanding that indication, he went on to make adverse findings on the issue of insurmountable obstacles and to make an adverse credibility finding against the appellant's wife on the basis she was working and in receipt of DLA. The point had simply not been put to her to give her an opportunity to answer it and it is certainly not

outside the realms of possibility that Tesco's would retain a longstanding employee who had developed a disability. It is not a condition of receipt of DLA that a person is unemployed. That is a straightforward error of procedural fairness.

17. In the penultimate paragraph of his decision, Judge Fox said that it was reasonable to conclude that the appellant (not his wife) had made misrepresentations to the DWP, which damaged *his* credibility further. There was no legal basis for making that inference.
18. Having indicated I would set aside the decision of Judge Fox, there was discussion of how to proceed. Having had that discussion it was agreed that the appropriate course would be for me to re-make the decision rather than remit it to the First-tier Tribunal.
19. I shall not repeat the frailties in the reasons for refusal letter set out above. In my view, they place the respondent in difficulties in resisting the appellant's appeal which, as I have also explained, turns solely on the issue of Suitability.
20. It is clear enough that the respondent relies on deception and there are available requirements in the rules which concern an applicant who has previously made false representations, such as S-LTR.4.2. However, without knowing which rule is relied on, I do not consider there is any case to answer on the part of the appellant. The burden cannot shift to him without him being told what allegation he has to deal with.
21. However, even if I were wrong about that and it is enough for the respondent to say that the appellant engaged in deceptive conduct by submitting the TOEIC certificate, that allegation has not been made out unless the appellant is shown to have relied on the deception. As seen, the appellant was offered the opportunity to submit a fresh test certificate, which he duly did. The respondent was satisfied by that and proceeded to grant leave on the basis of the Trinity College certificate. If there were any force in the allegation of deception, it is difficult to understand why leave would have been granted. Of course, it is clear from the respondent's records that deception had not been confirmed and that was the reason the appellant was admitted after being held up by immigration officers at Heathrow Airport. I repeat that no interview was ever arranged to test the appellant's credibility, as referred to in the respondent's notes.
22. Under such circumstances, it could not seriously be argued that the appellant's presence was not conducive to the public good.
23. Even supposing the burden did shift to the appellant to provide an innocent explanation, I note that in *Secretary of State for the Home Department v Shehzad & Anor* [2016] EWCA Civ 615 the Court of

Appeal noted what the Upper Tribunal had said on the matter at paragraph 69 of *SM and Qadir*:

“We turn thus to address the legal burden. We accept Mr Dunlop’s submission that in considering an allegation of dishonesty in this context the relevant factors to be weighed include (inexhaustively, we would add) what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated. Mr Dunlop also highlighted the importance of three further considerations, namely how the Appellants performed under cross examination, whether the Tribunal’s assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic achievements are such that it was unnecessary or illogical for them to have cheated.”

24. It is not necessary to hear oral evidence from the appellant to find that he more than exceeded the slight burden of showing with minimal plausibility that he had no reason at all to submit a false certificate due to his existing language skills. He was already highly educated and had studied in English. There are no other adverse matters raised regarding his character and he had nothing to gain by obtaining the TOEIC certificate at the time he obtained it. It is clear beyond any doubt that the respondent cannot discharge the legal burden of proving deception in this case.
25. This is a human rights appeal. However, having disposed of the Suitability issue, there is no other matter in terms of the public interest to weigh against the appellant who meets all the requirements of the rules for a grant of leave.
26. The appeal is therefore allowed.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error of law and his decision dismissing the appeal is set aside. The following decision is substituted:

The appellant’s appeal is allowed on human rights grounds (article 8).

No anonymity direction is made.

Signed

Date 7 March 2019

A handwritten signature in black ink, appearing to be 'N. [unclear]', written in a cursive style.

Deputy Upper Tribunal Judge Froom