IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/45716/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 20th November 2015	**On 15th December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

BURHAN UDDIN AHMED
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Biggs instructed by Universal Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge K Lester, promulgated on 28th May 2015, dismissing his appeal against refusal to extend his leave and to remove him to Bangladesh. Briefly the background is that the Appellant had been in this country as a student since October 2009 and had leave until 30th January 2015. He had married his wife, who is a British citizen, on 10th July 2014 and had applied on 30th July 2014 for further leave to remain on the basis of his family and private life. At very nearly the same time as that

application was made the Respondent made a decision to remove him on the basis that he had allegedly used deception in obtaining a TOEIC (Test of English for International Communication) certificate through Eden College in Mile End, London in late 2012. Following judicial review proceedings the Respondent accepted that the Appellant had an in-country right of appeal. The application as a spouse was supported by an English language certificate issued by Trinity College, London on 1st July 2014 in which the Appellant obtained a distinction. The validity of that later certificate is not impugned.

2. At the hearing the judge had before her evidence on behalf of the Secretary of State consisting of copies of witness statements from employees of the Respondent, namely Peter Millington, Rebecca Collings and Matthew Harold and she heard oral evidence from the Appellant. Her findings are set out at paragraphs 27 to 47 of her decision. She found that the Respondent had established that deception had been used in connection with a TOEIC certificate and that refusal under paragraph S-LTR.2.1. of Appendix FM to the Immigration Rules was appropriate, as was contended by the Respondent. She concluded (at paragraph 39 of her decision) that the Secretary of State had established that "false information, representations or documents have been submitted in relation to the application", which would normally lead to refusal on grounds of suitability under S-LTR2.2.(a). The judge went on to consider Article 8 ECHR having regard to paragraphs EX.1 and EX.2 of Appendix FM and under paragraph 276ADE of the Rules. In doing so she said that she bore in mind the best interests of the Appellant's son, who had been born on 6th March 2015, which were to be with his parents, particularly his mother.

3. In the grounds of application it was contended that the judge had not applied the correct burden of proof, which was on the Respondent to show that the Appellant had cheated, that she had failed to make rational, adequate or adequately reasoned findings and that the findings she made were not open to her on the evidence produced. It was also said that there was a material mistake of fact as the Appellant was now aware of a detailed expert report by Professor Philip Harrison produced on behalf of the National Union of Students which stated that it was almost certain that the set of verified match results would contain false positive errors. With regard to the application under Appendix FM it was contended that the Respondent had relied upon paragraph S-LTR.2.2.(a) which referred to false documents being submitted in connection with "the application" but the Appellant had relied on other evidence of his English proficiency, as the judge accepted. That, it was said, was material as it had led the judge to consider the application under EX.1 and 2 when it should have been considered under the substantive paragraphs of Appendix FM. Finally it was said that the judge had erred in her analysis of Article 8. In particular it was said that she had failed to consider the importance of the wife's British citizenship and apply the elements set out at Section 117B of the Nationality, Immigration and Asylum Act 2002 as amended. The wife

could not be expected to leave the UK as she was a British and an EU citizen.

4. At the hearing Mr Biggs for the Appellant relied upon the grounds upon which he briefly expanded. He said with regard to the burden of proof the Secretary of State had accepted that the burden was upon her but the judge had not set that out explicitly. The allegation made was serious and was of great importance to the Appellant. He had given evidence in rebuttal. It was just such a case where the application of the burden was highly relevant.

5. He continued that there had been no adequate reasons given to reject the Appellant's evidence as the judge appeared to have done at paragraphs 38 and 39 of her decision. There had been no engagement with that evidence or assessment of his credibility. She had given no reasoned basis as to why she had rejected it. On that basis he said it was not open to the judge to find that the burden of proof was discharged. The evidence on behalf of the Secretary of State had been generic and even with the additional statement from Matthew Harold it could not be regarded as dispositive. There was reference in the Upper Tribunal decision in **R (on the application of Gazi) v SSHD (ETS – judicial review) IJR [2015] UKUT 327 (IAC)** as to the inevitable incidence of false positive results. The judge was required to come to the conclusion that the Appellant's evidence was false but she did not reach that point. She had before her his evidence and also the test results showing that he had passed with distinction. He accepted that the report by Philip Harrison had not been before the judge but that too referred to the incidence of false positives.

6. Mr Biggs then briefly addressed paragraph S-LTR.2.2.(a) of Appendix FM and the fact that the alleged deceit had to apply to the application, which was not the case in the Appellant's circumstances. He had met the other requirements of the Rules and the judge should have considered the matter under the substantive provisions. Finally he relied on the submissions in the Grounds of Appeal with regard to Article 8.

7. In response Mr Mills submitted that it was difficult to sustain the argument that the burden of proof was wrongly applied. The judge had frequently referred to the Secretary of State establishing the facts relied upon and had done so at paragraphs 20 and 24 of the decision. In her findings at paragraph 33 she referred to the conclusion being "highly likely" and subsequently to the Secretary of State having produced the evidence necessary.

8. With regard to the evidence itself it was a very high hurdle to say that it was not open to the judge to find that the burden was discharged. He said that all the Appellant had put forward was oral evidence and the results of the test taken two years later than the TOEIC test. He accepted that the judge did not make express findings on the Appellant's evidence but said that she had inherently found that the Appellant's explanation was not

satisfactory. As to adequacy of reasons the judge had set out in some detail her reasoning. At paragraph 33 of her decision she stated how the conclusions were reached. With regard to Professor Harrison's report, which did state that false positives could occur, he reminded me that the Secretary of State was not required to prove to the criminal standard but rather on the balance of probabilities. It was open to the judge to find on the evidence to find that the burden was discharged. The printout, which was exhibited to the statement of Mr Harold, he said, was important as the spreadsheet related to the Appellant himself. The judge accepted that there was sufficient generic evidence and the spreadsheet did relate specifically to the Appellant. Her conclusion at paragraph 38, he said, was perfectly appropriate.

9. He accepted that there was some merit in the point with regard to S-LTR.2.2.(a) which specifically referred to the application under consideration. However he reminded me that sub-paragraph (b) of that section referred to non-disclosure of material facts which would, he said, have led to the same conclusion. It was also likely that the application would have been refused under S-LTR.1.6. namely that the Appellant's presence was not conducive to the public good.

10. As to Article 8 he said that the challenge was really just a disagreement. Although Section 117B of the 2002 Act had not been referred to what mattered was substance rather than form. The fact that the Appellant spoke English and would not be a financial burden did not reduce the public interest element, as was made clear in **Forman (ss117A-C considerations) [2015] UKUT 00412 (IAC)**.

11. Finally in response Mr Biggs said that although perversity was an extreme position there had to be adequate reasons for a conclusion and that oral evidence and a new certificate was the only evidence available to the Appellant and it was inappropriate to infer that his evidence was not found credible. More evidence was required from the Secretary of State to displace the Appellant's oral evidence. The burden of proof could not be implied. With regard to paragraph S-LTR.2. of Appendix FM he said Mr Mills made an interesting point concerning the possible application of sub-paragraph (b) but that had not been referred to in the refusal letter nor even in the Rule 24 response which had been filed.

12. Having heard those submissions I reserved my decision which I now give. As to the burden of proof it would have removed doubt had the judge stated explicitly that the burden was upon the Secretary of State but reading the decision as a whole I think it is apparent that that is the burden which she applied. There was a sufficiency of references to such matters as the "Secretary of State establishing" or that "the Secretary of State has produced" to show that was the burden which she had in fact utilised. I do not find a material error in that regard.

13. However there were other challenges which I found had more merit. The judge set out the Appellant's response to the charge of deceit at paragraph 37 of her decision. She went on to state as follows:

> "38. My own view is while the Respondent's evidence is 'generic' there would be little alternative in a situation of such widespread cheating. The evidence does describe a detailed and rigorous procedure in respect of each test taken, involving not only mechanical checking but checking by two separate OTI employees on two different occasions. The Respondent's test was declared invalid and not questionable. He was thus not offered a free re-test.
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> 39. I conclude therefore that the Secretary of State has established that 'false information representations or documents have been submitted in relation to the application' this would lead to the Appellant's application 'normally' being refused on grounds of suitability."

14. It will be seen that the judge did not give reasons as to why she rejected the Appellant's evidence and in my view those reasons cannot be inferred. It was made clear in the reported decision of **MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC)** that:

> "If a Tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons."

The importance of that assessment is also made clear in **Gazi**, in which it was found that a hearing before the Tribunal was the appropriate forum for resolution of such matters, rather than judicial review. The President stated, at paragraph 36, of his judgment:

> "I consider it appropriate to highlight what this judicial review hearing lacked: there was no examination-in-chief or cross-examination of the applicant or any witness on his behalf; nor was there any live evidence from any witness on behalf of the Secretary of State; and there was no examination-in-chief or cross-examination of Dr Harrison or any other expert witness. All of these missing factors arise in a litigation context in which the *bona fides* and character of the applicant are important issues. However there was no opportunity to evaluate the applicant's demeanour or to assess his performance under cross-examination."

15. The judge's failure to make explicit findings upon the oral evidence of the Appellant in my view amounts to a material error of law sufficient to require the decision to be set aside. I agree that to reach a finding of perversity is to cross a high hurdle which would not be appropriate here; there was evidence from the Secretary of State on which the judge might rely but it is the lack of findings on the Appellant's own answer to the allegations which undermines the decision reached. As to the alleged material mistake of fact it is the case that the evidence of Professor Harrison was not available at the hearing and the judge could not be expected to have judicial notice of it.

16. I also found there was force in the challenge with regard to the finding under paragraph S-LTR.2.2 of Appendix FM. Sub-paragraph (a) refers explicitly to the submission of false information, representations or documents in support of the application. That was the element relied upon by the Secretary of State. However it was the case that the Appellant had submitted with his application his new test certificate, which he had passed with distinction and he had not therefore relied upon any earlier test certificate. The judge accepted (at paragraph 42) that "Had the Appellant's application not been refused under the suitability requirement, I have little doubt that he would otherwise meet the requirements of Appendix FM." The Secretary of State had failed to show that the Appellant did not meet the requirements of S-LTR.2.2(a). Mr Mills submitted that in any event the Appellant would have failed under sub-paragraph (b) but that is speculative. He also referred to paragraph 1.6 but the Secretary of State had not sought to rely upon that. It is the case that if the Appellant had succeeded under the suitability requirements there would have been no need to go on to consider paragraph EX.1. The judge erred in this regard also.

17. Finally it was said that there was a material error in the assessment under Article 8 ECHR, bearing in mind that the Appellant's wife and child were British. The judge did refer to Section 55 of the Borders, Citizenship and Immigration Act 2009 (at paragraph 46) but she did not refer to Section 117B of the 2002 Act. Sub-Section 117B(6) was potentially relevant as the Appellant's child was British and that issue was not addressed.

18. I accordingly find that there were material errors of law in the decision of the First-tier Tribunal and that decision is set aside. I had enquired of the representatives as to the appropriate course if I reached that conclusion. Mr Biggs submitted that as there have been no findings upon the Appellant's evidence a fresh hearing before the First-tier Tribunal was the appropriate course. Mr Mills did not demur from that view. As fresh hearings need to be made upon oral evidence and bearing in mind the further rights of appeal which may be relevant I have decided to remit the appeal to the First-tier Tribunal under the provisions of Practice Statement 7.2(b) and Section 12(2)(b)(i) of the Tribunal's Courts and Enforcement Act 2007, in accordance with the directions which follow.

Decision

I set aside the decision of the First-tier Tribunal.

I remit the case to the First-tier Tribunal with directions for its reconsideration.

There was no application for an anonymity order and none is made.

Signed Date 03 December 2015

Deputy Upper Tribunal Judge French

DIRECTIONS (SECTIONS 12(3)(a) AND 12(3)(b) OF THE TRIBUNAL'S COURTS AND ENFORCEMENT ACT 2007

1. The decision of the First-tier Tribunal is set aside with no findings preserved and the appeal is to be heard afresh.
2. The members of the First-tier Tribunal who are chosen to reconsider the case should not include First-tier Tribunal Judge Lester.
3. The appropriate hearing centre is Taylor House. The time estimate is two hours. If an interpreter is required a request to that effect must be made at least fourteen days before the hearing.
4. Any witness statements or other documents upon which either party intends to rely must be served upon the Tribunal and upon the other party at least seven days before the hearing.

Signed Date 03 December 2015

Deputy Upper Tribunal Judge French