



Upper Tribunal
(Immigration and Asylum
Chamber)

Appeal Number: IA/00026/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 2 October 2017

Decision and Reasons Promulgated
On: 18 October 2017

Before

Deputy Upper Tribunal Judge Mailer

Between

MR MUBASHAR HASSAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr A Otchie, counsel, instructed by Malik Law Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Pakistan, born on 16 March 1992. He appeals with permission against the decision of First-tier Tribunal Judge Lingam promulgated on 16 January 2017, dismissing his appeal against the decision of the respondent dated 11 December 2015, to refuse to vary his leave to remain under the Tier 4 (General) Student Migrant Rules, with reference to paragraph 322(1A) for using an invalid TOEIC pursuant to paragraph 245ZX(a), and to remove him under s.47 of the 2006 Act. The appellant did not appear at the hearing of his appeal on 3 January 2017.
2. Judge Lingam noted at [13-14] that his application fell to be refused under the general provision of paragraph 322(1A) of the Rules. ETS had declared the appellant's TOEIC as invalid on the evidence that in 2012 he had used a proxy to pass the oral part of the English test paper that was used to further his leave to remain for his studies in the UK. That test took place on 21 February 2012.

3. She set out the relevant authorities including Qadir v SSHD [2016] UKUT 00229 (IAC). She had regard to the evidence relied on by both parties filed at the hearing. She properly directed herself as to the burden of proof at [26].
4. She noted that the appellant had requested an oral hearing but failed to attend that hearing. She was satisfied that his unexplained absence was highly unhelpful because "...it could reasonably infer his lack of interest in his appeal and more importantly, the appellant has forfeited an opportunity to avail himself to be cross examined by the respondent's representative". Even so, she had regard to his grounds of appeal when assessing the allegation of fraud - [29].
5. It was contended in his grounds that the respondent failed to discharge the legal burden of proof that his TOEIC was obtained fraudulently. However, he neither provided any counter evidence to the allegation nor that he actually sat for his own English spoken test. She was satisfied that his silence on this serious allegation is indicative of his own inability to counter the respondent's allegation made under paragraph 322(1A) of the Rules – [29].
6. She was thus satisfied 'on a balance' that the appellant had failed to demonstrate that he has the English language skill to complete the spoken part of his test taken in 2012. The evidence adduced by the respondent was therefore sufficient to show that he had previously gained leave with a fraudulently obtained English language test certificate - [30].
7. With regard to his CAS, she was satisfied that even if the document were valid at application, his appeal fell to be refused under the first appeal ground of the general refusal, paragraph 322(1A). He thus failed to make out his ground that he should be granted 60 days to find a replacement sponsor [31].
8. She had regard to the appellant's grounds advancing Article 8. She took account of his failure to comply with the consent order sealed on 11 December 2014 to provide a recent statement of his personal circumstances of private and family life in the UK. The respondent noted in the reasons for refusal that he had failed to provide such information for consideration [32].
9. It was not disputed that his Article 8 ground related only to his private life [33].
10. She found that the appellant had failed to offer a satisfactory explanation that the mandatory requirement under S-LTR.1.1 of Appendix FM did not relate to him. His Article 8 ground "falls here" [34].
11. She noted that the respondent took account that the appellant relied on a fraudulent document and decided not to exercise her discretion. She 'rejected him leave' under paragraph S-LTR.2.2. Based on that, it was concluded that the appellant failed to meet paragraph 276ADE(1) of the Rules. She was satisfied that he had failed to provide any grounds regarding the refusal [37].
12. She noted that the respondent nevertheless considered his circumstances under the remaining sub-paragraphs of 276ADE [38]. His nationality and period of five years' presence in the UK was accepted. However there was no evidence of any very significant obstacle under paragraph 276ADE(vi), regarding his re-integration into life in Pakistan – [38].

13. The appellant also failed to offer good reasons for not providing proper evidence regarding his life in the UK since 2012 either to the respondent or at the hearing itself. She concluded that it is reasonable that he may no longer have an interest in his current appeal or that he lacked sound evidence to make out his private life on Article 8 grounds [39]. She was satisfied that he would therefore not suffer very significant obstacles if required to resume life in Pakistan after six years in the UK [39].
14. The Judge stated at [44] that having considered the appellant's overall circumstances, the respondent was satisfied that there were no exceptional circumstances. She was also satisfied that no such exceptional circumstances were identified in the grounds. There were accordingly no good grounds warranting consideration of his Article 8 grounds outside the rules.
15. On 27 July 2017, First-tier Tribunal Judge McGinty granted the appellant permission to appeal. He stated that the grounds of appeal asserted that the Judge failed properly to consider his appeal under Article 8 and to apply the five stage test set out in Razgar. He noted that the decision was dated 11 December 2015. Accordingly, the only relevant ground of appeal was that the decision was unlawful and contrary to s.6 of the Human Rights Act 1998. Accordingly although the Judge had considered the Article 8 claim through the lens of the Immigration Rules, she should still have applied the five stage test. It was not open for her to find that the Immigration Rules were a complete code for assessing the Article 8 claim.
16. Mr Otchie referred to the appellant's grounds of appeal in the permission application. He submitted on his behalf that the Judge failed to make any finding in relation to paragraph 276ADE(vi) – incorrectly referred to at paragraph 8 of the grounds as sub paragraph (iv).
17. He submitted that the Judge failed to make a clear finding regarding private life. The relevant step by step analysis had not been undertaken.
18. On behalf of the respondent, Ms Isherwood noted that there had been no challenge to the ETS finding. Moreover the appellant failed to attend the hearing. She referred to the letters sent to the First-tier Tribunal from Morgan Mark Solicitors, who represented the appellant at the time. In a letter dated 3 January 2017 the solicitors enclosed the appellant's appeal bundle noting that by a letter dated 20 December 2016, the appellant had requested that his appeal be decided on the papers.
19. The appellant's witness statement was produced. With regard to the TOEIC/ETS English test, he contended at paragraph 12 that his case is similar to SM and Qadir.
20. Ms Isherwood referred to the decision of the Judge from [32] onwards. The Judge did consider paragraph 276ADE(1)(vi), finding that there was no evidence of any significant obstacles affecting his re-integration into life in Pakistan after five years. She referred to his witness statement in which he complained that he had not been given an opportunity of 60 days to provide a fresh CAS letter from a new Tier 4 sponsor after his Tier 4 sponsor had its licence revoked during the currency of his application. Moreover he also asserted that the decision of the Home Office was unfair and unreasonable and constituted an arbitrary exercise of discretion.

21. She submitted that at paragraph 12 of his statement he simply relied on the judgment of SM and Qadir, contending that his case is similar. No evidence however was produced in relation to the allegations made by the respondent. He contended at paragraph 13 of his statement that even though the applicant cannot qualify under the Rules, there is always a power to make a favourable decision outside the rules when justified. Given that he has not completed his studies and that his parents have spent substantial amounts on his studies in the UK he was not granted a visa to complete them. He will face an irreparable loss. He requested the Judge to consider his appeal on human rights grounds so that he can complete his ongoing studies “outside the immigration rules to enable my return home country with an advanced qualification from the UK.”
22. Ms Isherwood submitted that the appeal should be dismissed.
23. In reply, Otchie referred to paragraph [44] of the decision where the Judge was satisfied that no exceptional circumstances were identified in the grounds and that the rules are a complete code for assessing his Article 8 claim.
24. The appellant had referred to matters constituting the circumstances that fell outside the rules. The Judge required “further consideration and perhaps a further paragraph”. He submitted that the question comes down to whether or not there has been a material error.

Assessment

25. The appellant did not appear at his appeal before the Tribunal, having requested that his appeal be considered on the papers. On the day of the scheduled hearing the solicitors enclosed an appeal bundle. The Judge noted that there was no show by the appellant and his legal representatives. The Judge also stated in the record of proceeding that no reason was given for their absence.
26. However, as noted, Ms Isherwood has very properly referred me to letters faxed to the Tribunal on 20 December 2016 and again on 3 January 2017 noting that the appellant had requested that his appeal be decided on the papers. That information had apparently not been relayed to the Judge.
27. In the grounds seeking permission there is no reference to those letters. The grounds relied on Article 8, contending that his removal would breach the private life component of Article 8. Similarly the Judge failed to make any finding with regard to paragraph 276ADE(vi). It was contended that the Judge did not undertake a step by step analysis referred to in Razgar.
28. However, as submitted by Ms Isherwood it is only where there are exceptional or compelling circumstances not dealt with in the Immigration Rules that it is appropriate for the Tribunal to consider Article 8 outside the Rules.
29. He appealed against the decision to refuse his application to remain as a student and submitted a notice of appeal. The Judge noted at [4], that in the grounds of appeal before the First-tier Tribunal he contended that the respondent failed to discharge the burden of proof relating to the TOEIC being a forgery. He also relied on common law fairness, contending that the respondent has not acted fairly. Further, he asserted that he had a legitimate expectation to complete his studies in

the UK and his proposed removal was against legitimate aims of the immigration control and was unjustified.

30. It was not contended in the grounds seeking permission to appeal that there was any procedural irregularity in proceeding with the appeal on 3 January 2017. Nor has it been contended that there was an error relating to the Judge's finding that his TOEIC English test was invalid. As noted, she found that the silence on this allegation is indicative of his inability to counter the respondent's allegation.
31. Accordingly her findings at [29-30] that he had previously gained leave with a fraudulently obtained English language certificate, has not been disputed. In his witness statement dated 30 December 2016 the appellant did not challenge the respondent's assertion that his English speaking certificate was fraudulently obtained. He simply stated that he relies on the recent judgment of the Court of Appeal refusing the respondent's appeal against the Upper Tribunal's decision in SM and Qadir, contending that his case is similar to that decision.
32. Apart from that assertion however, he has provided no evidence in his witness statement in support of his assertion.
33. In his witness statement he also submitted that the respondent failed to consider the issue of proportionality. Even if an applicant cannot qualify under the Rules there is the power to make a favourable decision outside the rules. Given that he had not completed his studies and that his parents had spent substantial amounts on them, he would be at an irreparable loss if not granted a visa to complete his studies.
34. It is on that basis that he asked the Judge to consider his appeal on human rights grounds. He submitted that the appeal should be allowed and that the respondent be directed to grant him a visa to complete his ongoing studies so that he could return home with advanced qualifications from the UK.
35. I have had regard to the appellant's detailed grounds of appeal before the First-tier Tribunal. There it was asserted that the respondent had not discharged the burden of proof relating to the allegations of deceit. Further, the respondent has not acted fairly. There is reliance on various Tribunal decisions including Thakur; Patel (revocation of sponsor licence – fairness) and Naveed (Student – Fairness).
36. As noted, he also contended that he had a legitimate expectation to complete his course, and has paid his tuition fees, built up a relevant connection with the course, the institution and the educational sequence for the ultimate professional qualification sought. He also referred to having established social ties during the period of studies. Cumulatively this may amount to private life deserving of respect.
37. The appellant has however provided no evidence substantiating these latter assertions.
38. He has contended that applying the above legal principles to the facts of his case, his compassionate circumstances provide sufficient weight which outweighs the legitimate interests of the immigration authorities in enforcing immigration control. On those facts, his case is compelling and compassionate enough to attract the attention of the Tribunal to consider his case on a human rights basis.

39. In his witness statement dated 30 December 2016, the appellant has relied on the same matters.
40. In Patel and Others [2012] EWCA Civ 960 at [57] the Court of Appeal stated that it is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the secretary of state's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right.
41. Judge Lingam found that the appellant had not demonstrated any compelling circumstances warranting allowing the appeal, notwithstanding that the Rules were not satisfied.
42. That claim had to be assessed in the context of her finding that a false document had been produced by the appellant at an earlier application. She had proper regard to the appellant's circumstances and his submissions. She was satisfied that no such exceptional circumstances were identified in the grounds.
43. Even though the Judge did not conduct the Razgar five step test, given the paucity of evidence before her, the Judge would inevitably have come to the same conclusion, namely that the decision was proportionate in the circumstances. Any error made by the Judge was therefore not material.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall accordingly stand.

Anonymity direction not made.

Signed

Date 16 October 2017

Deputy Upper Tribunal Judge C R Mailer