



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/34004/2015

THE IMMIGRATION ACTS

Heard at : Field House
On : 12 October 2017

Decision & Reasons Promulgated
On: 13 October 2017

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PROSHANTO BARAI

Respondent

Representation:

For the Appellant: Mr P Nath, Senior Home Office Presenting Officer
For the Respondent: Mr D Kumudusena, of Liyon Legal Ltd

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Barai's appeal against the respondent's decision to refuse his application for indefinite leave to remain on long residence grounds and to refuse his human rights claim.
2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Barai as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.
3. The appellant is a citizen of Bangladesh born on 20 July 1985. He entered the United Kingdom on 9 October 2004 with entry clearance as a student valid until 31 October 2007 and was subsequently granted further periods of leave to remain as a student/ Tier 4

student until 31 May 2012, the latter period following a successful appeal. On 31 May 2012 he applied for further leave to remain as a Tier 4 student and was granted leave until 20 April 2014, but his leave was subsequently curtailed to 27 August 2013. On 23 August 2013 he applied for leave as a Tier 4 student and was granted leave until 24 February 2015.

4. On 4 August 2014 the appellant was served with an IS151A removal decision on the basis of having exercised deception in relation to his use of a fraudulently obtained ETS TOEIC certificate in his application of 31 May 2012. That had the effect of curtailing his leave to remain from the date of service. The appellant lodged an appeal against that decision but his appeal was struck out on 4 September 2014 on the basis that he had no right to appeal from inside the UK.

5. On 23 September 2014 the appellant applied for indefinite leave to remain on the basis of ten years' continuous lawful residence. His application was refused on 27 October 2015. The application was refused under paragraphs 322(2) and 322(5) of the immigration rules on the basis of the use of the fraudulently obtained TOEIC certificate and the exercise of deception. The respondent went on to consider paragraph 276B of the immigration rules with regard to the appellant's length of residence in the UK and concluded that he failed to meet the requirements of paragraph 276B(ii) and (iii) as a result of his use of deception. The respondent then considered Article 8 and concluded that the appellant's application fell for refusal under R-LTRP.1.1(d)(i) of Appendix FM on suitability grounds, with reference to S-LTR.1.6, and that he did not meet the eligibility requirements for the purposes of paragraph R-LTRP.1.1(d)(ii) as his partner was not settled in the UK. It was considered further that paragraph EX.1 did not apply. The respondent considered, in addition, that the appellant could not meet the requirements in Appendix FM as a parent, that he could not meet the criteria in paragraph 276ADE(1) on the basis of private life and that there were no exceptional circumstances justifying a grant of leave outside the immigration rules.

6. The appellant appealed against that decision. His appeal was heard by First-tier Tribunal Judge Keane on 6 December 2016. The appellant gave oral evidence before the judge, responding to the discrepancies relied upon by the respondent in concluding that he had used a proxy test taker to take his English language test. The judge found that, whilst the respondent had discharged the evidential burden of proving deception, the appellant had provided an innocent explanation in response and the respondent had failed to discharge the legal burden of proof. The judge accepted that the appellant sat the English language test as claimed without the use of a proxy and that he had not exercised deception. He found that the respondent was not entitled to exercise discretion as she did under paragraph 322(2) and (3) and that the decision was not in accordance with the immigration rules. He allowed the appeal on human rights grounds.

7. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge's reasons for finding that the appellant had given an innocent explanation were inadequate and that he had placed undue weight on the appellant's ability to speak English. The grounds asserted further that the judge was bound to dismiss the appeal in any event because the basis for the appellant's leave had been removed

following the withdrawal by ETS of the TOEIC certificate. Further, the judge had failed to give any reasons for allowing the appeal on human rights grounds.

8. Permission to appeal was granted on 10 August 2017 on the basis that there was arguably insufficient reasoning on the part of the judge for the conclusion that there was an innocent explanation as it was not clear what that innocent explanation was.

Appeal Hearing

9. Mr Nath, in his submissions, relied upon Secretary of State for the Home Department v Shehzad & Anor [2016] EWCA Civ 615 and SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 229 in submitting that the judge's reasons for finding that the appellant had given an innocent explanation were inadequate and that the judge had failed properly to consider the respondent's evidence.

10. Mr Kumudusena submitted that the judge had properly rejected the discrepancies and other reasons relied upon by the respondent for finding that the appellant had failed to provide an innocent explanation. He had found that there were no contradictions in the appellant's evidence. He had given sufficient reasons for concluding that the appellant had provided an innocent explanation and that the respondent had therefore failed to discharge the legal burden of proving deception. The judge followed the correct approach to the evidential and legal burden of proof. The appellant had completed ten years' continuous lawful residence in 2013 and therefore met the requirements of the immigration rules. The appeal could have been allowed under the rules. There was no error of law in the judge's decision.

11. Mr Nath submitted that once the TOEIC certificate had been withdrawn by ETS the basis of the appellant's leave had been removed and the appellant could not, therefore, show ten years of continuous lawful residence even if the judge had properly found there was no deception. The judge ought to have gone on to consider the effect of his decision on the deception allegation on the ten year period under paragraph 276B and given reasons in that regard and in regard to Article 8.

12. I allowed Mr Kumudusena to reply and he submitted that the judge's failure to deal with the long residence issue had not been part of the grounds and in any event the refusal under paragraph 276B was solely on the basis of the deception.

13. Mr Nath responded by reiterating the points previously made.

Consideration and Findings

14. I do not believe it is disputed that the judge followed the correct approach in considering the shifting burden of proof. That is set out in SM and Qadir at [101] as follows:

"101. We have already held that the evidential burden of proof resting on the Secretary of State has been narrowly discharged. For the reasons which we have given, we are satisfied that both Appellants have discharged their burden of raising an innocent explanation of the

prima facie indications of deception on their part in the Secretary of State's evidence. For the reasons elaborated, we conclude, without hesitation, that the Secretary of State has failed to establish, on the balance of probabilities, that the Appellants' *prima facie* innocent explanations are to be rejected. The legal burden of proof falling on the Secretary of State has not been discharged. The Appellants are clear winners."

and in Shehzad at [22]:

"22. As I have stated, the question in these appeals only concerns the initial stage and whether, with the evidence of Mr Millington and Ms Collings, the evidential burden on the Secretary of State is satisfied. If it is, it is then incumbent on the individual whose leave has been curtailed to provide evidence in response raising an innocent explanation."

15. What is challenged, however, in the first instance, is the judge's finding as to whether or not the appellant has raised an innocent explanation. The appellant's response to the respondent's grounds of challenge in that regard is that the grounds are simply a disagreement with the judge's findings that an innocent explanation was established. The appellant's case is that the judge was entitled to reject the discrepancies and contradictions relied upon by the respondent and was entitled to find that he had given a consistent account of the English language test he had undertaken.

16. It is relevant to note that two matters relied upon by the judge in particular, in finding that the appellant had raised an innocent explanation, were his rejection of an apparent inconsistency in the appellant's evidence at his interview as to whether the test was completed in one day or two and the appellant's excellence in communicating in English. With regard to the latter, the Upper Tribunal made clear in MA (ETS - TOEIC testing) Nigeria [2016] UKUT 450 that "there is a range of reasons why persons proficient in English may engage in TOEIC fraud" and accordingly that was not a matter which the judge ought to have accorded weight. With regard to the former, the judge found at [9] that the appellant's evidence at question 15 was that he sat the test during the course of one day and that that was not inconsistent with the account given at question 2 which the respondent had misinterpreted as being that he sat an examination on two different dates. Yet it seems to me that the evidence at question 2 was unequivocally that the test was taken in two parts on two different dates, and that is supported by the test dates on the certificates at C1 and C2. It seems to me that, if anything, it is the appellant's evidence at question 15 that was open to clarification, but that was not what the judge found. Accordingly it seems to me that there is a lack of clarity in the judge's reasons for rejecting the discrepancy relied upon by the respondent in that regard. Given that these two matters formed a significant part of the judge's conclusion that the appellant had raised an innocent explanation, I find merit in the respondent's grounds of appeal challenging that conclusion.

17. I also find merit in Mr Nath's assertion that there appeared to be no analysis of the evidence produced by the respondent in support of the deception allegation, other than the reference at [8] to the generic evidence which was accepted as discharging the evidential burden of proof. Whilst the judge referred at [3] to the respondent's supplementary bundle and to the statement of H Rackshaw, there appears to have been no consideration of the documents annexed to the statement at pages 6 to 13.

18. In all of these circumstances it seems to me that there are particular flaws in the judge's reasoning in accepting that the appellant had raised an innocent explanation and an inadequate consideration of all the evidence in assessing whether or not the respondent had discharged the burden of proof. Accordingly the judge's findings on the deception allegation and paragraph 322(2) and (5) of the immigration rules cannot stand and the matter has to be considered afresh.

19. I would add further that there appears to be a lacuna in the judge's reasoning in [10] and no proper explanation as to how the decision to allow the appeal on human rights grounds was reached. It is not entirely clear if the judge found that the appellant met the requirements of paragraph 276B of the immigration rules on long residence grounds and, if so, how the conclusion was reached that there had been ten years of continuous lawful residence, particularly considering that the appellant's leave ended on 4 August 2014.

20. For all of these reasons the judge's decision cannot stand and the Secretary of State's appeal is allowed. The judge's decision must be set aside in its entirety. The appropriate course is for the case to be remitted to the First-tier Tribunal to be heard afresh.

DECISION

21. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside.

22. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from First-tier Tribunal Judge Keane.

Signed:



Upper Tribunal Judge Kebede

Dated: 12 October 2017