



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02582/2016

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 17th May 2018

Decision & Reasons Promulgated
On 12th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR WAQAR AJMAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Brown (Counsel)
For the Respondent: Mr A McVeety (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Holt, promulgated on 13th July 2017, following a hearing at Manchester on 1st June 2017. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, and was born on 9th August 1990. He appealed against the decision of the Respondent Secretary of State dated 27th January

2016, refusing his application for leave to remain on the basis of his family and private life rights.

The Appellant's Claim

3. The essence of the Appellant's claim is that, having arrived in the UK on a multiple visitor's visa valid from 27th May 2005 until 27th October 2005, he eventually married a Miss Eleanor Bennett, a school teacher, who is a British citizen and permanently resident in the UK, and that the parties had been cohabiting, and are in a genuine and subsisting relationship, a fact which is not contested by the Respondent Secretary of State. What the Respondent, Secretary of State, does, however, say is that the Appellant has been dishonest because he has firstly, previously submitted a false/forged bank document, and secondly, obtained a language (TOEIC) English language test result by employing dishonest means. Accordingly, the Appellant does not satisfy the "suitability" requirements of the Immigration Rules. That being so, there are no insurmountable obstacles, in his way, which would prevent him from returning back to Pakistan from where he can apply for a foreign national spouse's visa to re-enter the country to join Miss Eleanor Bennett.

The Judge's Findings

4. The judge found both witnesses to be credible. In relation to Miss Eleanor Bennett, the Appellant's wife, the judge observed that "a quite unusual feature of this case" was that, although the Appellant was from the Muslim background, his wife was a practicing Christian, and the judge found her to be a straightforward, honest and articulate individual, which was to be expected of a professional teacher and that, "I have absolutely no doubt that the parties are married as claimed" (paragraph 13).
5. The judge found that Miss Bennett's "faith is of great significance to her, and not least because she obviously spends several hours every week in church related activities" (paragraph 14). Miss Bennett also had "worrying health problems recently" (paragraph 15) and she was worried that "she has an elevated risk of cardiac emergency developing which might require urgent treatment" (paragraph 15).
6. Miss Bennett had additionally also "recently bought a house with the help of a mortgage" and, in these circumstances had, "ties to her job, income and property in the United Kingdom" (paragraph 16). At the same time she did not speak Urdu or Punjabi, and did not want to "change her personal presentation and image" (paragraph 16) and was not interested in going to Pakistan.
7. These facts were all relevant because there was, as the judge observed, in Pakistan, "worsening levels of persecution with churches and individuals being targeted. I am easily satisfied that Miss Bennett would be at real risk living as a Christian in Pakistan" (paragraph 17).
8. In relation to the Appellant himself, the judge also found him to be a "reliable witness who gave evidence in a calm and straightforward manner". The evidence of the Appellant before the judge was that "he generally took the English language test and denied that he had done anything to invalidate the test and said that, after his tests

had been declared invalid, he had tried to make contact with the test centre, but that the centre had failed to respond". For good measure then, the Appellant went on to provide "a Trinity College London grade 2 spoken English entry level certificate in ESOL international dated 23rd December 2016" which showed that the Appellant had "passed with distinction" (paragraph 18).

9. Judge Holt, in the meticulous and carefully crafted determination in this case, also referred to the fact that the refusal letter had drawn attention to an October 2011 letter, but that "neither me nor the Appellant were referred to either the letter or a document verification report" (paragraph 19).
10. What has been challenged in Judge Holt's determination, however, is her substantive findings in relation to the ETS declaring the Appellant's test to be fraudulent. Judge Holt had regard to the case of **Kadir [2016] EWCA Civ 1167**, and properly noted that each case is fact-sensitive, and involved scrutiny of an alleged fraudulent ETS application, requiring there to be a careful analysis on its own facts, determined by the evidence adduced by the parties.
11. That being so, the judge concluded that,

"To that end, the Respondent only provided the standard documentation (in the form of a supplementary bundle) that they rely on in all ETS cases, including a witness statement of Rebecca Collings dated 24th June 2014 and a report from Professor French dated 20th April 2016, as well as a statement from Mr Alain Tan (senior caseworker dated 8th May 2017). I was not provided with any specific evidence to this Appellant and his test" (paragraph 22).
12. Against this background, the judge went on to say that the Respondent Secretary of State's case was not proven that the Appellant had engaged in fraudulent conduct in taking his English language test. Judge Holt gave at least five good reasons for this. First, that the Appellant spoke good English. Second, he provided the Trinity College certificate. Third, he coped easily with giving evidence at the hearing. Fourth, he gave a credible account of his recollection of what happened when he attended the testing centre and took the tests. Fifth, he would have no need to even consider getting an English language test certificate by fraudulent means as his English is good. (See paragraph 22).
13. Given these observations, the judge concluded that, "therefore, I find that the Respondent has not met the evidential standard in relation to the allegation that the Appellant cheated or attempted to provide a 'non-genuine' test result" (paragraph 22).
14. The appeal was allowed.

Grounds of Application

15. The grounds of application state that the judge gave inadequate reasons for finding an innocent explanation for the invalidation of the test and wrongly gave the impression (at paragraph 22) that the case did not even get that far when she referred to "the

standard documentation ... I was not provided with any evidence specific to this Appellant and his test" because there had been spread-sheet evidence before the judge.

16. On 14th December 2017 permission to appeal was granted.

Submissions

17. At the hearing before me on 17th May 2018, Mr McVeety, appearing as Senior Home Office Presenting Officer on behalf of the Secretary of State, stated that the judge was wrong, as a matter of law, in two fundamental respects. First, she referred to the fact that "the Respondent only provided the standard documentation that they rely on in all of the ETS cases", when the supplementary bundle, referred to by the judge, did contain a specific reference also to the Appellant himself.
18. Second, that given that specific reference was included, the judge was wrong to have then concluded that "the Respondent has not met the evidential standard", such that it did not require thereafter for the Appellant to provide any "innocent explanation" in answer to that prima facie case presented by the Respondent.
19. For his part, Mr Brown submitted that the judge was not oblivious to the specific evidence in the general bundle because in that very same paragraph (at paragraph 22) the judge has also stated, that there was standard documentation "as well as a statement of Mr Alain Tan (senior caseworker dated 8th May 2017)" and this showed that all the evidence had been taken into account. Moreover, the Appellant in his witness statement had given a credible account (at paragraph 22) and the Appellant had also undertaken a test at Trinity College London which the judge had referred to (paragraph 18).

Error of Law

20. I am satisfied that the making of the decision by the judge did involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. This is notwithstanding Judge Holt's otherwise sensitive and comprehensive determination. My reasons are as follows.
21. First, although it is right that the judge does say, in relation to the "standard documentation" that there was also "a statement of Mr Alain Tan" (at paragraph 22), this is nevertheless immediately followed by the sentence that, "I was not provided with any evidence specific to this Appellant and his test". There was evidence in the supplementary bundle that was specific to the Appellant, citing his name, and asserting that his test was invalid.
22. Second, and as a result of the aforesaid, it was not correct to say that "the Respondent has not met the evidential standard in relation to the allegation that the Appellant cheated ..." (paragraph 22) because the specific evidence in the statement of Mr Alain Tan was such as to satisfy the evidential standard on the part of the Respondent Secretary of State, given that it specifically referred to the name of the Appellant.

Remaking the Decision

23. I have remade the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal for the following reasons.
24. First, this is a case where the Respondent's supplementary bundle contains a reference to a statement of Mr Alain Tan, who is a senior caseworker, and this statement is dated 8th May 2017, and makes express reference to the Appellant. In **Kadir** it was held that the Secretary of State has to first discharge an evidential burden of proving that the Appellant was guilty of dishonesty (paragraph 67) and that this was a "comparatively modest threshold" (paragraph 68), such that I am satisfied that the Secretary of State does discharge this evidential burden, in the circumstances.
25. In **Shehzad [2016] EWCA Civ 615** Beatson LJ confirmed that
- "Where the generic evidence is not accompanied by evidence showing that the individual under consideration's test was categorised as 'invalid', I consider the Secretary of State faces a difficulty in respect of the evidential burden at the initial stage" (paragraph 30).
26. This is exactly such a case where the generic evidence is accompanied by evidence showing that the individual's test was categorised as 'invalid'.
27. Second, however, it is the Appellant then who has the evidential burden of "raising an innocent explanation" (paragraph 68 of **Kadir**) and I am satisfied that this too has been done here. This is because Judge Holt found, not only that the Appellant spoke good English and had provided a Trinity College certificate, as well as having coped easily with the evidence at the hearing, but he also gave "a credible account of his recollection of what happened when he attended the testing centre and took the test" which Judge Holt found to have been acceptable.
28. Third, however, there is then a "legal burden" (paragraph 69) on the Secretary of State. This includes an analysis of such matters as "what the person accused of 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" (paragraph 69 of **Kadir**). Moreover, other factors such as, "the Tribunal's assessment of their 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" (paragraph 69) can also be taken into account.
29. I find that these two matters are fundamentally in favour of the Appellant. First, the Appellant has nothing to gain from being dishonest given how well he speaks English and how well he has done in his Trinity College London tests which he passed with distinction. Second, the evidence that the Appellant gave before the Tribunal of Judge Holt shows that it was illogical and unnecessary for him to have cheated. He gave an account of how he went to the Darwin Test Centre and "of what happened when he attended the testing centre and took the test" (paragraph 22). When the test was challenged and categorised as being invalid he "denied that he had done anything to

invalidate the test results and said that, after his test had been declared invalid, he had tried to make contact with the test centre, but that the centre had failed to respond” (paragraph 18).

30. The judge did not find any of these explanations to be lacking in credibility.
31. As against this, the statement of Alain Tan, although consisting of eleven paragraphs, only contains a single paragraph, namely, paragraph 6, which states that, “the test result had been cancelled by ETS on the basis its own analysis indicated that the test result had been obtained via the use of a proxy tester”.
32. The other paragraphs are indeed generic. There is a reference (at paragraph 10) to the “ETS TOEIC test centre lookup data”, and this refers to data, which is attached to the document. This evidence has to be balanced against the preponderance of evidence that the Appellant adduced and was found credible on by Judge Holt, and which I also find to be credible, for the reasons that I have set out above. Accordingly, on the balance of probabilities test, the Appellant has discharged the burden of proof that is upon him and this appeal falls to be allowed in his favour.

Notice of Decision

33. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.
34. No anonymity direction is made.

Signed

Dated

Deputy Upper Tribunal Judge Juss

8th September 2018