Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02661/2017

THE IMMIGRATION ACTS

Listed at North Shields
On 19th September 2018

Decision Promulgated
On 12th October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

M A R
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the appellant: Mr Duffy, Home Office Presenting Officer
For the respondent: Mr Mahmood of Nation Wide Law Associates

DECISION AND REASONS

Introduction

1. Although it is a Secretary of State who is appealing in these proceedings for convenience I will hereinafter refer to the parties as in the First tier Tribunal.

2. The appellant is a national of Pakistan, born on 21 July 1983.

3. He came to the United Kingdom on 4 September 2012 with leave as a student, valid until 20 December 2011. On 30 December 2011 he applied for further leave which was granted until 4 May 2013. On 4 May 2013 he again applied for further leave which was granted until 15 May 2015. With both of these applications he submitted a TOEIC certificate from the Educational Testing Service (ETS). The certificate indicated it was granted after the appellant sat a test in English on the 16th November 2011 at Portsmouth International College in London.

4. His leave as a student was curtailed on 7 July 2014, effective from 18 October 2014. That day he applied for leave outside the rules which was refused on 14 January 2015. His appeal was dismissed, permission to appeal to the Upper Tribunal was refused and he became appeal rights exhausted on 21 January 2016.

5. On 24 May 2016 he applied for leave to remain on the basis of family life. The appellant had married Mrs Farhat Batool, a British national on 22 April 2016.

6. This was refused on 1 January 2017. The respondent accepts that the relationship was genuine and subsisting. However, ETS had checked the records held of his speaking test in English using voice recognition software. Following this, his scores were cancelled on the basis the test was taken by proxy. The decision maker concluded he had fraudulently obtained the certificate submitted with his two student visa applications. Such conduct was not conducive to the public good and his application was refused on suitability grounds.

7. His appeal against that decision was heard by Judge of the First tier Tribunal Hindson sitting at North Shields on 13 November 2017. In a decision promulgated on 14 November 2017 the appeal was allowed on human rights grounds. The respondent was not represented at the hearing. The judge heard from the appellant and his wife. The appellant denied any fraud and said he attended a one-day introductory session and took the test at Portsmouth International Colleges London test centre. He had paid a fee of £180. He said that in Pakistan he was a practising lawyer and had been taught through the medium of English and therefore had no need to cheat.

8. The judge referred to the witness statements of Mr Peter Millington and Ms Rebecca Collings and at paragraph 15 said that their generic evidence carries little weight in isolation. The judge stated that the respondent had provided no evidence relating to the appellant individually. The judge found the appellant and his wife to be reliable witnesses and that the appellant gave his evidence in fluent English. The judge found his claim to be educated through English in Pakistan as inherently plausible. The judge stated they were aware that court proceedings in Pakistan are usually conducted in English. The

judge then concluded the appellant speaks good English and this was the position before he came to the United Kingdom and so he had no need to cheat. The judge said the appellant had explained the circumstances of the test, such as where it was taken and the fee paid.

The Upper Tribunal

9. Permission to appeal to the Upper Tribunal was granted on the basis that there was no consideration by the judge as to whether or not the respondent had discharged the evidential and legal burden of proof applicable. Furthermore, there was no clear finding on the deception issue.

10. Mr Duffy argued that the judge failed to assess the evidence correctly and did not identify the notion of a switching burden. Mr Mahmood appeared for the appellant as he did in the First tier Tribunal. He referred to paragraph 6 of the decision whereby the judge indicated it was necessary to be selective when referring to the evidence. He referred me to para 15 where the judge said there was no evidence relating to the appellant individually. He submitted the appellant had no reason to cheat as he was proficient in English, having been taught through that language. He likened the situation to someone being asked to bring oranges from their garden. If they had oranges growing then there would be no need for them to go to the market to buy them. He accepted the judge did not refer to the changing burden of proof but said this was so well settled that it was unnecessary.

Consideration

11. It is unfortunate that there was no presenting officer attending before the judge. I have checked the court file in an attempt to determine what evidence the respondent placed before the judge in the papers. I have located the bundle that would have been before the judge as well as the appellant's bundle. In cases such as these presenting officer's sometimes submit at hearing a report prepared by the Home Office into a specific college giving statistics for instance about the number of tests on a specific day and the numbers cancelled. I do not see any such report in the papers. Typically there can be statements from experts about the calibration of the testing for personation to reduce false positives. I cannot see any such evidence in the bundle before the judge.

12. In the papers is a screen-print identifying the appellant and the test taken on 16 November 2011. The score recorded is 180 out of a possible 200. The test was declared invalid. There is also a print out marked C1 which identifies the appellant by his passport number and confirms that the outcome was used in two tier 4 applications. Consequently, the judge is factually incorrect in stating at paragraph 15 that there has been no evidence produced specific to the appellant.

13. At para 14 the judge stated in human rights appeals the burden of proof is upon the appellant to show an interference with their protected human rights. If it is then it is for the respondent to show the interference is justified and the standard of proof is the balance of probabilities. In itself this is correct but the judge makes no reference to the jurisprudence which has developed in relation to the large number of cases involving English language tests taken by proxy.

14. SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC) found the Secretary of State's generic evidence, combined with her evidence particular to the appellants, sufficed to discharge the evidential burden of proving that the TOEIC certificates had been procured by dishonesty. The respondent produced computerised spreadsheet entries derived from the "Look up Tool" .Para13 explains this further :

> On the face of the documents ETS devised a dichotomy of "invalid" and "questionable" TOEIC test results. The Home Office, in turn, has developed a system whereby upon receipt of the ETS testing analysis outcomes these are matched to the person who has the name, date of birth and nationality of the certificate holder. This is known as the "Lookup Tool".

15. This is repeated in the decision of R (on the application of Nawaz) v Secretary of State for the Home Department (ETS: review standard/evidential basis) [2017] UKUT 00288 (IAC). There, the Upper Tribunal held that evidence obtained by use of the Look-up Tool, and subject to the human verification procedure, is an adequate basis for the Secretary of State's deception finding in these cases, in the light of Flynn & another [2008] EWCA Crim 970 [24 – 27], and the evidence of both Dr Harrison and Professor French.

16. First-tier Tribunal Judge Hindson does not set out the distinction between the evidential and the legal burden in this type of case and makes no reference to the screen-print or the notion of a shifting the burden of proof.

17. The judge does not give adequate reasons for the decision. It is not sufficient to assert at paragraph 16 that they found the appellant and his wife to be reliable witnesses. This conclusion must be explained.

18. The fact the appellant could give his evidence in fluent English is not the point. The appellant was giving his evidence before the judge six years after the event.

19. The appellant told the judge that he had been educated to English in Pakistan. The appellant's bundle does not indicate he provided confirmation of this fact

albeit there is reference in the papers in the student visa application. At hearing, Mr Mahmood invited me to look at the appellant's qualifications from Pakistan to demonstrate his ability in English. However he confirmed this evidence was not before the First-tier Tribunal and I declined lest it prejudice my approach to the error of law issue.

20. Paragraph 18 is the closest the judge comes to explaining the decision. However, it is an assumption to state the appellant would have no need to cheat. As was explained in MA (ETS – TOEIC testing) [2016] UKUT 00450(IAC) a person competent in English may still cheat –para 57 :

> …there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system

21. In the same way, the ability to describe the location of the test centre and the fee paid may be of limited value. There are cases where the person has attended at the test centre and stood beside the proxy test taker. In the circumstance such evidence is of limited probative value though each case will turn on its facts.

22. It is my conclusion that the decision of First-tier Tribunal Judge Hindson materially errs in law in failing to engage with the case law and evidence in relation to the evidential and legal burden. Because of this the findings made in relation to article 8 is tainted.

Decision.

The decision of First-tier Tribunal Judge Hindson materially errs in law and is set aside. The appeal is to be relisted for a de novo hearing in the First-tier Tribunal on the issue of personation. The respondent has accepted that the appellant's marriage is genuine and subsisting and this is preserved unless there is evidence of subsequent change.

Francis J Farrelly

Deputy Upper Tribunal

Directions.

1. Realists for a de novo hearing in North Shields excluding First-tier Tribunal Judge Hindson.

2. The respondent is to prepare a new appeal bundle which should index clearly the evidence specific to the appellant relied. The bundle should include the generic statements already provided plus any expert evidence. Any evidence specific to the college should be provided. If possible the sound recordings should be made available to the appellant's representative for their own analysis if they so wish. The appeal bundle should also contain the relevant case law.

3. The appellant's representative should prepare a fresh appeal bundle including the evidence about the appellant's abilities in English before taking the test and evidence of taking the test.

4. An interpreter is not required unless the appellant's representatives indicate to the contrary

5. The hearing should not take longer than one and a half hours.

Francis J Farrelly

Deputy Upper Tribunal