



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06676/2017

THE IMMIGRATION ACTS

Heard at Newport
On 20th November 2018

Decision & Reasons Promulgated
On 27th December 2018

Before

UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MONJUR AHMED

Claimant/Respondent

Representation:

For the Appellant:

Mr C Howells, Home Office Presenting Officer

For the Claimant/Respondent:

Mr O Manley of Counsel, instructed by AWS Solicitors
Ltd

DECISION AND REASONS

1. The claimant is a citizen of Bangladesh. He first entered the United Kingdom as a student in March 2011.

2. The claimant seeks to appeal against the decision of the Secretary of State for the Home Department dated 18th May 2017 refusing the application for leave to remain on the basis of human rights and under Article 8 of the ECHR.
3. The basis of refusal was that the claimant had exercised deception in the obtaining of the TOEIC language certificate and that there were no insurmountable obstacles to the family returning to Bangladesh.
4. The claimant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Suffield-Thompson hearing on 24th July 2017. In a determination promulgated on 1st August 2017 the appeal was allowed both on the basis that the Judge was satisfied that no deception had been exercised by the claimant and that there would be insurmountable obstacles to family life being commenced in Bangladesh.
5. The Secretary of State for the Home Department sought to appeal against that decision and leave to appeal to the Upper Tribunal was granted. Thus the matter comes before me to determine the issues as between the parties.
6. In terms of the deception aspect of the TOEIC, Mr Manley submitted that the Judge had found the claimant to be credible and that that was a finding which was unassailable in the circumstances of the case. Also, given the health of the appellant's spouse, it was entirely open to the Judge to conclude that she would not be able safely to travel to Bangladesh and that that amounted to insurmountable obstacles to reintegration and/or exceptional or compassionate circumstances.
7. The difficulty, it seems to me with the approach taken by the Judge to the matter of deception, is that there is no acknowledgement whatsoever in the determination as to the context in which the evidence of the appellant should be considered. Although the determination sets out certain legal principles in terms of family or private life, there is no recognition as to the jurisprudence relating to the TOEIC certificates. Particularly there was no recognition for example that **SM and Qadir (ETS - evidence - burden of proof) UTIAC** made it clear that the Secretary of State's generic evidence was such as to discharge the evidential burden upon the Secretary of State, such that the burden then fell upon the claimant. The course did not discharge the overall burden invested upon the Secretary of State.
8. It seems to me to be fundamental to any consideration of the evidence to be clear as to the contextual nature of that consideration.
9. It was of course open to the Judge to be unimpressed with the quality of the evidence as adduced, provided that the full nature of the evidence is considered. In Annex A the nature of the evidence produced on behalf of the Secretary of State it was that the claimant had taken part in the test at Colwell College on 15th January 2013 and the test at Eden College International on 19th March 2013.

10. It was the evidence of the claimant that he had never attended Colwell College and that was accepted by the Judge. In those circumstances the Judge felt that little weight could be given to the ETS self source data. Linked with that was the ETS TOEIC test centre look-up tool for Eden College International on 19th March 2013, the day accepted by the claimant that he was there, to show that there were two questionable results and 60 invalid results out of a total of 62 tests that were taken.
11. The Judge noted that fact. The Judge noted also the witness statement of Professor French that there was a 2% error rate of false positives. The Judge took that to mean that a valid test could be found to be false.
12. It was the evidence of the claimant that he did indeed attend on 19th March and that people were cheating at that college but that he was not.
13. Mr Manley submits that, on the basis of the 2% error rate, it was properly open to the Judge to conclude, having heard the claimant, that he was one of the very few at the college that had taken the test properly.
14. However the Judge did not, as I so find, properly consider all the evidence that was presented by the Secretary of State for the Home Department in respect of that particular college. There was also in the same bundle of documents a Project Façade - criminal enquiry into abuse of the TOEIC specifically referring to Eden College International London. It indicated that between 20th March 2012 and 5th February 2014 there had been 2,439 TOEIC speaking and writing tests of which 1,878 was found to be invalid and 561 questionable. It was said that that demonstrated clearly the organised and widespread abuse of the TOEIC that took place at the centre. It was said also that the BBC Panorama programme highlighted abuse at the college, invigilators were shown to read out answers to listening and reading candidates and pilots (imposters) were shown taking the TOEIC exam on behalf of the entire classrooms of students while the students stood next to them.
15. That is of significance in this case as part of the credibility. A factor found in favour of the claimant was that he was able to describe the college and who was taking part at the time of the test. Clearly if the claimant was one of those classroom students, who were cheating as described by the BBC, then he would be fully aware of the layout.
16. The nature of the evidence of the Project Façade is essentially to indicate that Eden College was a bogus college in terms of examinations.
17. It seems to me only proper that that full context should have been appreciated by the Judge in the assessment of credibility that was made.
18. The assessment of credibility essentially was that the appellant was a good English speaker and had no need therefore to cheat. As was made clear by the court in **MA (Nigeria) [2016] UKUT 450**. And in paragraph 57 in particular, the ability to speak

English was not of itself a defence to the accusation of deception; there may be a range of reasons why a person is proficient in English and yet engage in the TOEIC fraud. Such may include lack of confidence, the fear of failure, lack of time and commitment and contempt for the immigration system.

19. In common sense it would seem to be extraordinary that, given the entirely bogus nature of the college, exceptionally it was the claimant who was genuine in his taking of the test. Clearly it is open to a Judge, having heard the claimant, to make that assessment but, as I have indicated, it should be a finding made in the proper context of the evidence as produced and I find that that in this case was not done. I find therefore that there was a material error of law in that approach.
20. In terms of Article 8 generally I do not uphold the Secretary of State's challenge. The respondent made clear that the claimant's partner had very serious health issues which would prevent any prolonged flying. The Judge recognised that a ten hour flight to Bangladesh would be injurious to her health. What is suggested by the Secretary of State in the grounds of challenge is that she could travel to Bangladesh by train which would take sixteen days. It seems to me that that is a ridiculous suggestion to make given the nature of her health. The Judge properly considered that she will be unable to relocate to Bangladesh, that that would either amount to an insurmountable obstacle to her reintegration, alternatively compassionate circumstances to be borne in mind under Article 8. The Judge then considered whether the claimant's removal in the circumstances would be proportionate and concluded that it would not. That of course was on the basis that the claimant had not committed deception. Whether that factor if established, will be such as to render his removal proportionate, particularly in the public interest is of course not a factor that was considered in the mix. Clearly a finding as to deception or not is a relevant factor to determine properly the aspect of Article 8 of the ECHR in particular, given the public interest considerations which would arise.
21. Having found a material error of law in the approach taken by the Judge I set the decision aside to be remade.
22. Given that the issue of the TOEIC involves considerations of credibility it is appropriate that this appeal be remitted to the First-tier Tribunal to determine the issues.
23. I do not seek to preserve any findings as that would perhaps unreasonably tie the hands of any Judge who considers the matter. No doubt were the Judge to conclude, having heard the evidence within its proper context that the allegation of deception falls away, then it may well be that he or she would be entitled to adopt the reasoning of Judge Suffield-Thompson when it comes to the approach taken to Article 8. Of course it will be a matter for the Judge but it might perhaps correspond with common sense and fairness.

Notice of Decision

The appeal of the Secretary of State before the Upper Tribunal is allowed. The First tier tribunal decision is set aside to be remade in the First Tier Tribunal.

No anonymity direction is made.

Signed 

Date 13 December 2018

Upper Tribunal Judge King TD