



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07660/2017

THE IMMIGRATION ACTS

Heard at Field House
On 19 June 2018

Decision & Reasons Promulgated
On 27 June 2018

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MOHAMED INFAZ MOHAMED YAHIYA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms Z Ahmad

For the Respondent: Ms E Harris of Counsel instructed by Nag Law Solicitors

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of Sri Lanka born on 19 April 1981, as the appellant herein. He arrived in this country on 2 October 2004 with a student entry clearance. On 10 October 2014 he applied for indefinite leave to remain on the basis of ten years' long residence under paragraph 276B of the Immigration Rules. After reconsideration the Secretary of State decided on 27 June 2017 to refuse the application. The Secretary of State noted that an application under paragraph 276B was subject to the requirement that the appellant did not fall for refusal under the general grounds for refusal-paragraph 276B. The appellant had taken a TOEIC speaking test with Educational Testing Service (ETS) at Portsmouth International College on 18 April 2012 which had been relied upon in connection with an application made on 26 May 2012. ETS had confirmed to the

Secretary of State that there were significant evidence to conclude that the appellant's certificate was fraudulently obtained by the use of a proxy test taker. The Secretary of State was satisfied that the appellant's presence in the UK was not conducive to the public good.

2. The appellant appealed and his appeal came before the First-tier Tribunal on 26 February 2018. Ms Harris who appears before me represented the appellant but there was no representative for the Secretary of State. The judge reminded herself that the appeal was on human rights grounds and heard from the appellant in the English language. There was an interpreter available when required.
3. The judge summarised the appellant's evidence as follows in paragraph 10 of her determination:

“He said he had studied in English in Sri Lanka and that when he came to the UK he spoke good English. He said he went to the best college in Sri Lanka, Trinity College and they studied in English. He handed into the court other certificates from other English courses he has completed in the UK. He said that his English was good so he had no need to cheat and he was not that type of person. His cousins took him to the exams. He said he knew why it was so important to pass the test as the government need to make sure that you can speak the language here. He said he knew if he failed that he would not be allowed to carry on with his studies but he had no need to cheat and he found the exam was fine. He said he also thought the Home Office would check with the other courses and tests he had done in English.”

4. The judge also heard from the appellant's cousins. The first witness had taken the appellant to the English language test in Canary Wharf and the second witness said he had taken the appellant to the disputed test at Portsmouth and the appellant had said his exam had gone fine. The appellant's English was good as he was studying for a diploma in Sri Lanka and had good English when he came to this country. He and the appellant were now sharing a house although they had not been at the time the exam was taken. Ms Harris referred the judge to **SM and Qadir v Secretary of State (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC)**. The Secretary of State it was submitted had not shown that the appellant had cheated in his exam which it was a matter for the respondent to prove. The Canary Wharf test had been accepted as valid and it made no sense for the appellant to cheat in one part of his exam and not the other. He had very good English and had taken other exams in this country and in Sri Lanka. Having addressed herself on the legal provisions the judge dealt with the appeal under the Immigration Rules as follows:

“24. It is clear that I have no jurisdiction to hear an appeal against the substantive decision. I will address the application of the Immigration Rules as part of any proportionality assessment I may be required to undertake.

25. In this appeal the application was made under the Immigration Rules, specifically paragraph 276ADE(1)(i)-(vi).

26. To make my findings as to whether or not the Appellant meets the Rules I have to deal firstly with the allegation that the Appellant fraudulently and deliberately obtained his English Language certificate by having someone undertake the test on his behalf with the aim of this assisting him in meeting the UK Immigration Rules.
27. The Respondent submitted a bundle of documents which were generic. The Respondent has submitted statements which are from professionals who work within the arena of the ETS system and who are aware of the voice activation software and how attempts are made to cheat the system. I have carefully considered the case of and am aware that the issue of fraud, once raised, places the burden of proof on the Respondent. I accept that the conclusions made in SM about the reliance on these generic statements is of assistance in this particular appeal and that only the statement of Mr Hibbs is directly related to this appeal. I accept that these statements have been highly criticised in the case of SM and but this is not the only evidence that I have in this appeal and so I give it limited weight. The most significant evidence in this case comes from the Appellant himself.
28. I am assisted by the case law in this area in my findings. In the case of Quadir the court sets out how decision makers should consider cases where TOEIC fraud is alleged. The court stated that decision makers should consider:
- ‘.....what the person 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.’
- and it went on to say:
- ‘...how the Appellants performed under cross examination, whether the Tribunal’s assessment of their English 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.’
29. It is clear that what the Appellant or any Appellant has to gain by cheating is Immigration status in the UK and by cheating he could lose that. An important consideration in this type of case is the level of English spoken by the Appellant. He did not ask for the court interpreter and his English was good. He only needed clarification for three of the questions and he clearly understood all that took place at the hearing from his appropriate responses.
30. The Respondent has produced generic statements about how tests are made and checks carried out when tests are suspected of being false. In the

Respondent's bundle I had (Annex AA) some results from Portsmouth College from April 2012. The results state that on the 18 April 2012 95 tests were taken and out of those 16 were questionable and 79 were invalid.

31. The Respondent places great weight on their generic statements from R Collins, Professor French, Calvin Hibbs and P Millington. However, none of these witnesses came to court to be available to be cross-examined as to the content of their statements. More significantly no one came from the college to speak about their tests and the results from April, when the Appellant took his test. Nothing was stated in relation to the questionable results and what that actually means in terms of validity.
32. In the case of **MA (ETS-TOEIC testing) [2016] UKUT 00450 (IAC)** it was stated that the question of whether a certificate was valid will "invariably be intrinsically fact sensitive". In this case expert evidence was given about the way that these colleges store their data and lack of any proper systems in recording their data. The court found, based on the expert evidence:

'(xi) The integrity of the test taking procedures and systems established by ETS in its manuals depends heavily on the reliability and probity of test centre staff. Further, the ETS security precautions concentrate on the elicited conduct of candidates and not test centre employees.'
33. I had no details of how this college protects and stores its data or on the reliability or probity of this particular test centre so I give this report and the statements from the Respondent limited weight.
34. The Appellant gave his evidence in very good English and came across as an honest and open witness who was frank with the court. He produced certificates to show that he has undertaken other English tests here in the UK. He had completed his ESOL Skills for Life which he did in English. He has completed two City and Guilds Entry Level 3 for Speaking and Listening, he has a Diploma in Advanced Diploma in Tourism and Hospitality Management and a Diploma of Business and Management Studies. He also studied in English in Sri Lanka.
35. As well as his oral evidence, which I accepted, I also note that he took the two parts of his TOEIC in different colleges, one in Canary wharf and one in Portsmouth. I find it unusual that the Respondent has queried only one part of his test.
36. As well as the oral evidence of the Appellant I also had the evidence of his cousins who both took the time to come to the Tribunal to give evidence. Again, I found them to be honest and open witnesses who both confirmed that the Appellant had studied English in Sri Lanka and has done other English tests here in the UK. They confirmed that they had taken him to the

test centres and Mr. Ismath said he had driven him to Portsmouth and that when he came out he seemed confident that he had done well. I do accept that evidence of these witnesses and I find that the Respondent has not shown that the Appellant used fraud to obtain his TOEIC certificate."

5. The judge then turned to consider that the position under paragraph 276ADE but found there were no very significant obstacles preventing the appellant returning to Sri Lanka. In relation to the human rights aspects the judge referred to **Razgar [2004] UKHL 27** and found that Article 8 was engaged and concluded her determination as follows:

- "45. The Appellant came to the UK in 2004 and he came with valid leave. He has been given further periods of leave and when his leave was curtailed it was not the fault of the Appellant but the college licence was revoked. He reapplied again and was granted leave again so this is an Appellant who has a positive Immigration history which I find significant and of weight in my assessment.
46. He has taken many courses in the UK to improve his English and his qualifications. He has a close family with whom he spends a significant amount of time and lives with one of his cousins.
47. I had before me a statement from Mr. Fasmi, one of the Appellant's cousins who attended at court (Appellant's bundle, page 4). He is married with a child. They see the Appellant at least once a week and he will babysit for their daughter when they go out. It was clear from their interaction at the Tribunal that they are more like brothers than cousins.
48. I find that I can take account of the Appellant's Private Life as although the leave he has had is dependent on a further grant he has had every application that he has applied for granted and therefore he is not a person who has built up their life in the UK when they were here illegally.
49. I had letters before me from friends that he has made here in the UK (Appellant's bundle, Pages 8-14(a)). He does volunteering for a charity and this was confirmed by Mr Aslam (page 10). He is involved in track sports and cricket and plays for a team (page 14 and 12).
50. Looking at this appeal through the lens of section 117B I find the following. The Appellant speaks very good English, he has no criminal convictions, he has integrated fully into UK society and has made a life where he also contributes to the community. He has always been here legally and has not sought to flout the Immigration laws. He has built up a Private Life at a time when he was here with lawful leave. He is qualified and will be able to work once his leave is established and, in the mean-time, he has been supported by his family so he had not been a drain on the public purse.

51. I accept that his is finely balanced and I do not underestimate the significance of Immigration control but in this case, I find that the balance comes down in favour of the Appellant and his family's Article 8 rights."
6. The Secretary of State applied for permission to appeal on the basis that the judge had failed to apply the correct burden of proof-it was clear that the evidential burden had been discharged. Professor French had put the likelihood of a false positive at lower than 2%. An impermissibly high standard of proof had been applied in paragraphs 31 and 33 of the decision. The judge had relied on the appellant's English ability and other qualifications but the test was not whether the appellant spoke English but whether he had employed deception. Reference was made to **MA Nigeria [2016] UKUT 450** at paragraph 57. The determination was not properly reasoned in this respect. In relation to the human rights aspect the appellant had parents and siblings in Sri Lanka and close family in the UK-an uncle and two cousins. The judge had failed to consider whether there were elements of dependency going beyond normal emotional ties. Too much weight had been placed upon the appellant's private life and his status had always been precarious. There would be no unjustifiably harsh consequences for the appellant if removed and indeed it had been found there were no insurmountable obstacles preventing his return to Sri Lanka.
 7. Permission to appeal was granted by the First-tier Tribunal on 23 April 2018.
 8. At the hearing Ms Ahmad relied on her grounds of appeal. She referred to paragraphs 50 and 51 of **MA** where the Tribunal had been provided with cogent evidence "explaining the 'look up tool'". The Tribunal had found that the "invalid" assessment should be treated as reliable in paragraph 51. In paragraph 57 the Tribunal had considered the suggestion that the appellant had no reason to engage in the deception. The Tribunal referred to a range of reasons why a person proficient in English might engage in deception.
 9. There had been a supplementary bundle before the First-tier Judge containing the ETS documents submitted by Kelvin Hibbs. An expert report by professor French was also included. This was after the case of **SM and Qadir**. Ms Ahmad submitted that the judge had failed to appreciate that the evidential burden had been discharged by the Secretary of State. It was acknowledged that no Presenting Officer had appeared before the First-tier Tribunal. The judge had misdirected herself. At paragraph 31 she had referred to the non-attendance of witnesses and had referred to irrelevant matters in paragraph 33. The appellant's parents and siblings were in Sri Lanka and would continue to support him. The judge had erred in allowing the appeal on private and family life grounds. His leave had always been precarious. Reference was made to Section 117B of the 2002 Act.
 10. Counsel pointed out that there had been no mention of the legal burden which lay on the respondent to prove deception. While the judge had not explicitly said that the evidential burden had been met it was plain that that aspect had been satisfied and so she had simply moved on directly to consider the legal burden. Counsel submitted that it was apparent from paragraph 50 of **MA** that the Tribunal had more material

than in the instant appeal. There was cogent evidence explaining the look up tool and expert reports. The case did not alter the fundamental position on the burden of proof as set out in SM. In MA it was made clear that whether fraud had been used would invariably be intrinsically fact-sensitive. In contrast with the position of the appellant in the instant appeal the Tribunal was dealing with an appellant who had been found to be lacking in credibility as set out in paragraphs 48 to 51. The Secretary of State's evidence was not enough-an adverse credibility finding was also required. The judge in this case had found the appellant to be an honest and open witness who had come to the hearing with his cousins whose evidence had also been accepted. In MA the appellant had failed to provide even the most basic description of the car journey he claimed to have taken to the college. The positive credibility findings had not been the subject of challenge.

11. In relation to Article 8 Counsel submitted that the judge had made an error although this had not been raised. In paragraph 25 she had referred to an application made under the Immigration Rules-276ADE. In fact the application had been made under paragraph 276B. The refusal of the application had been on the basis of the fraud.
12. The judge's treatment of Article 8 was not relevant as the appellant had qualified under the ten years' long residence Rule. This had been met at the time and at the date of decision in June 2017. There had been an earlier decision that had been made in error. The appellant's Section 3C leave continued. This was a private life matter rather than a family life matter. There was no material error in the decision.
13. In reply Ms Ahmad relied on her submissions and argued that the evidential burden had not been dealt with.
14. In respect of Article 8 she accepted that the application had been made for indefinite leave to remain under the ten year Rule. The lawful residence appeal turned on the issue of fraud. The judge had made a mistake in referring to 276ADE. But the key issue was whether there had been deception and if the deception fell away then there was no material error of law in the decision.
15. At the conclusion of the submissions I reserved my decision.
16. I have carefully considered all the material before me and the submissions that have been made. The question is whether the grounds raise a material error of law.
17. An important part of the Secretary of State's case is that the judge had not, it was said, dealt with the evidential burden that rests upon the Secretary of State. However I accept Counsel's submission that the judge in the light of the authorities moved directly to consider the legal burden implicitly accepting that the evidential burden had been discharged.
18. Counsel also in my view correctly distinguishes the appellant's circumstances from those under consideration in MA. In MA the Tribunal had identified significant gaps in the appellant's statements and discrepancies and had failed to give even the most

basic description of his journey to the test centre. His account had not been supported by any documentary evidence or supporting witnesses. The contrast with the facts in the instant case could not be greater. Not only had the appellant been found to be wholly credible but his account had been supported by two witnesses who had driven him to the two colleges.

19. Of course there is a need to exercise caution when considering whether an appellant who could speak English had no reason to engage in deception. Reference was made to paragraph 57 of MA. However as Counsel pointed out the observations in MA have to be seen in the context of the instant case where a positive credibility finding had been made in contrast with MA where at paragraph 55 the Tribunal had concluded that MA's case was a fabrication in all material respects. It was in that context that the Tribunal had made its findings in paragraph 57.
20. It is not disputed that cases of this type are inherently fact-sensitive. I do not find that when the decision is read as a whole the judge materially erred in placing too stringent a burden on the Secretary of State or had regard to irrelevant matters. It is possible that another Tribunal might have reached a different conclusion but I am not satisfied that in this appeal the judge materially erred in law in finding that the Secretary of State had not made out the allegation of fraud.
21. It was properly accepted Ms Ahmad that the case turned on the fraud allegation and in the circumstances I do not consider there was any material error of law in the judge finding that the decision breached the appellant's Article 8 rights. It is implicit in paragraph 48 of the decision that the judge had in mind the issue of precariousness and I have **no** doubt she looked at matters through the lens of Section 117B as she says in paragraph 50 of her decision.

Decision

22. The Secretary of State's appeal is dismissed and the decision of the First-tier Judge stands.

Anonymity Order

The First-tier Judge made no anonymity order and I make none.

TO THE RESPONDENT **FEE AWARD**

The First-tier Judge made no fee award and I make none.

Signed

Date 25 June 2018

G Warr, Judge of the Upper Tribunal