



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11550/2016

THE IMMIGRATION ACTS

Heard at Field House
On 14th August 2018

Decision & Reasons Promulgated
On 12th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KAZI RUHULLAH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Holmes (Senior Home Office Presenting Officer)
For the Respondent: Mr M Biggs (Counsel)

DECISION ON ERROR OF LAW

1. It is convenient to refer to the parties as they were before the First-tier Tribunal. In what follows, Mr Ruhullah is the appellant and the Secretary of State the respondent. In a decision promulgated on 25th September 2017, First-tier Tribunal Judge M R Oliver (“the judge”) allowed the appeal brought by the appellant against a decision to refuse his human rights claim, following an application for indefinite leave to remain made on 14th April 2016. In refusing that application, the Secretary of State found that the appellant obtained a TOEIC certificate by means of a proxy test taker. His scores from a test taken on 16th November 2011 had been cancelled. The Secretary of State refused the application for leave under paragraph 322(2) of the Immigration Rules (“the

rules”), also finding that the requirements of Appendix FM and paragraph 276ADE were not met.

2. The judge found that the allegation of deception was not made out, that the appellant was a credible witness and that he was telling the truth in his claim that he himself took the test leading to the TOEIC certificate. He also found, in the private life context, that the adverse decision amounted to a disproportionate response.
3. An application for permission to appeal was refused on 5th April 2018. The Secretary of State’s grounds asserted that the judge failed to correctly assess the burden of proof, that he misunderstood the evidence and failed to appreciate that the evidential burden in TOEIC cases was discharged in the present appeal. The Article 8 assessment was flawed. The judge refusing permission found that it was open to the judge to find that no deception or fraud was used and that any error in the Article 8 context was not material.
4. The application for permission was renewed and, on 20th June 2018, a Deputy Upper Tribunal Judge granted permission. Noting that the Secretary of State’s appeal bundle included a report from Professor Finch and witness statements made by Rebecca Collings and Peter Millington, she held that it was arguable that more was required by way of reasoning on the part of the judge to substantiate his conclusion that the appellant was telling the truth.
5. In a detailed Rule 24 response, it was contended that the judge gave adequate and sufficient reasons for concluding that the appellant had not committed fraud and applied guidance from the relevant case law correctly. The analysis of the evidence showed that the judge found that the evidential burden falling on the Secretary of State was met, so that the determinative issue was whether the legal burden was discharged. The judge did not fall into error by taking into account, as a collateral factor, the appellant’s ability to speak English with proficiency. So far as Article 8 was concerned, if the grant of permission extended to enable a challenge in this context, the decision showed that the judge did not err. Refusal of the appellant’s application for leave was explained solely by reference to the alleged TOEIC deception and as this fell away in the light of the judge’s findings of fact, refusal of leave or the appellant’s removal would be plainly disproportionate.

Submissions on Error of Law

6. Ms Holmes said that all the grounds were relied upon. The judge clearly erred. At paragraph 11 of the decision, for example, it was apparent that the evidence relied upon by the Secretary of State was more than a mere spreadsheet. There were witness statements from Ms Collings and Mr Millington and a report from Professor French. More reasoning was required in relation to the judge’s finding that the appellant was a credible witness. The judge’s mention of Project Façade in paragraph 9 suggested a need to look closely at the evidence and what appeared in the decision was inadequate. At paragraph 10, the judge found the appellant to be a credible witness but did not properly explain why or how this finding was reached. Paragraph 7 contained a brief

analysis but no more. At paragraph 12 the judge took the appellant's demeanour into account but, again, the reasoning was not sufficient, particularly when taken in conjunction with the lack of detail in the decision about the appellant's answers to questions put in cross-examination. As made clear in the grounds, guidance from the case law showed that there might be many reasons for deception or fraud. The judge was obliged to look at the evidence carefully. There was insufficient to show why the judge found the appellant to be credible or why the appellant's account outweighed the evidence the Secretary of State relied upon.

7. Mr Briggs said that it was apparent from the Secretary of State's grounds that five points were made. First, that the judge had not adequately assessed whether the legal burden had been discharged, at paragraphs 2 to 9 of the grounds. Secondly, that the judge came to the wrong conclusion regarding the absence of evidence of the *modus operandi* of the fraud, at paragraph 10 of the grounds. Thirdly, that the judge fell into error in holding that the appellant had not used deception because his English was good enough, at paragraphs 11 and 12. Fourthly, that the judge failed to appreciate that the evidential burden was met in the light of the evidence before the Tribunal, at paragraph 13 and, finally and fifthly, that the judge failed to make an adequate Article 8 assessment, at paragraphs 15 to 17 of the grounds. Added to those grounds by the judge granting permission in the Upper Tribunal was, in effect, a sixth, namely that the judge had given inadequate reasons for the conclusion reached on credibility. In her oral submissions, Ms Holmes added two more points, first that the judge had relied upon the wrong case law and secondly that he erred in finding that less evidence than usual had been made available in the present appeal, by the Secretary of State.
8. Turning to the grounds, Mr Biggs said that the essential task in a TOEIC case was for the judge to acknowledge the evidence before the Tribunal and decide, having heard the evidence, whether a claimant had used deception or not. The judge acquitted himself in relation to that task. He gave sustainable reasons for finding the appellant to be credible and to have given a truthful account, with the result that the Secretary of State failed to prove that he cheated.
9. So far as the legal burden was concerned, the judge clearly considered this in the light of the evidence and found that it was not discharged. So far as the second essential point put by the Secretary of State was concerned, at paragraph 10 in the grounds, reliance was placed on paragraph 17 of the witness statement made by Rebecca Collings, but that concerned a BBC letter and test centres other than the location of the appellant's test. There was nothing in the point. So far as the third was concerned, a careful reading of the decision showed that the judge did not find that the appellant did not use deception because his English was of a sufficiently high standard. At paragraph 12 of the decision the judge properly acknowledged that there was no deficiency in the appellant's English and took this into account, as he was entitled to, as a collateral factor. The appellant had no motive to cheat. The judge did not, however, fall into error in this context. The guidance given in SM and Qadir at paragraph 69 was still good. There was nothing wrong with the judge's approach.

10. So far as the fourth point was concerned, it was obvious that the judge proceeded on the basis that the evidential burden was met by the evidence relied upon by the Secretary of State. This was apparent from paragraph 12 of the decision where he dealt with the legal burden. The judge's approach was to analyse the evidence on the basis that the evidential burden was met, and then consider whether the legal burden was discharged and the Secretary of State had made out the case.
11. Fifthly, so far as Article 8 was concerned, the judge did not expressly go through the Razgar questions or refer in terms to section 117B of the 2002 Act. Nonetheless, paragraph 13 of the decision contained adequate reasoning. Leave to remain was refused on the basis of only one adverse factor, the alleged fraud, and this fell away in the light of the judge's findings. The judge clearly accepted that Article 8 was engaged and was entitled to find that removal would be disproportionate. This was entirely consistent with guidance given in Ahsan [2017] EWCA Civ 2009, at paragraph 88 of the judgment. The only justification for the interference in the appellant's protected rights was the TOEIC finding and if this fell away, there was no justification, with the result that the appeal fell to be allowed. It would then be up to the Secretary of State to consider an appropriate period of leave.
12. Turning to the sufficiency of reasons for the credibility finding, the judge proceeded in a regular fashion. At paragraph 6 of the decision, he noted the witness statement and the appellant's detailed account of events on the day of the test. He went on to consider what emerged in cross-examination in the following paragraphs and acknowledged the evidence relied upon by the Secretary of State. The judge had all of this clearly in mind. At paragraph 11, the judge correctly found that the evidence relied upon by the Secretary of State was less than the usual amount in TOEIC cases. The only evidence bearing directly on the appellant was the spreadsheet showing his results. The Project Façade document, the witness statements and Professor French's report were present but did not relate directly to the appellant's particular circumstances and, overall, all of this was less than the evidence available in MA and other cases. The judge did not err in paragraph 12 of the decision in taking into account the way in which the appellant gave his answers and the case law mentioned in the Secretary of State's grounds, including Shehzad and Majumber, endorsed in SM and Qadir at paragraph 69 of the judgment in that case. The absence of a motive for deception and performance in cross-examination were highlighted there as relevant factors. The judge was entitled to conclude that the appellant had told the truth. Finally, it was apparent from the decision the judge had in mind the correct case law, as shown in paragraph 12, for example.
13. In a brief response, Ms Holmes said that the decision did not reveal the answers the appellant gave in cross-examination. Offering a detailed account of events on the day of the test or referring to internet research were not sufficient reasons to support to the judge's credibility finding. The reader of the decision would not be aware of the strong evidence against the appellant.

Findings and Conclusions on Error of Law

14. In my judgment, the decision of the First-tier Tribunal contains no material error of law and shall stand. The judge had to decide a case in which the only substantive reason given by the Secretary of State for refusing the appellant's human rights claim was the finding that he used deception in obtaining a TOEIC certificate. The decision letter, dated 18th April 2016, contains this adverse finding and what followed was a brief assessment of the application for leave in the light of the rules contained in Appendix FM and paragraph 276ADE. Save for brief findings regarding integration into Bangladesh, if the appellant were required to leave the United Kingdom, there is nothing else of substance.
15. The bundle relied upon by the Secretary of State in the appeal before the First-tier Tribunal included witness statements made by Rebecca Collings and Peter Millington, a report from Professor French and a document regarding Project Façade. Bearing directly on the appellant's circumstances was a spreadsheet recording his results in the language tests. A careful reading of the decision shows that the judge had in mind the salient features of the Secretary of State's case and the appellant's response to it. He assessed the evidence before him, setting out at paragraphs 6 and 7 the appellant's oral evidence, which included adoption of his witness statement. He engaged with what emerged in cross-examination, making pertinent observations regarding particular questions at paragraph 10 of the decision, as he was entitled to do.
16. A sensible reading of paragraph 12 shows that the judge proceeded on the basis that the evidential burden was met by the Secretary of State. He did not err in taking into account, as a collateral factor, the way in which the appellant's evidence was given and his proficiency in English. Reading that paragraph with paragraphs 6, 7 and 10, it is clear that these factors were given due weight but were not determinative in themselves. They were part of the overall assessment, consistent with guidance given in SM and Qadir.
17. The overall conclusion reached at paragraph 12, that the appellant told the truth and did not use deception in obtaining the test certificate, was open to the judge in the light of the evidence before the Tribunal. The initial evidential burden having been met by the Secretary of State, the appellant's response included an account in which he set out what happened on the day and included the core claim that he took the test himself. That account was tested in cross-examination. The judge had proper regard to guidance from Shehzad and Majumber.
18. So far as Article 8 is concerned, the Secretary of State's case is set out in paragraphs 15 to 17 of the grounds but it is not entirely clear whether permission was granted on this aspect. In any event, I conclude that the judge's reasoning at paragraph 13 of the decision, although brief, is sufficient to show that there was no error of law. He correctly identified the allegation of deception as the only ground of refusal of the leave application. Having found that this had no substance, the judge was entitled to conclude that refusal of the human rights claim and any consequent removal would amount to a disproportionate response. Recent guidance has been given in Ahsan and

Others [2017] EWCA Civ 2009, at paragraph 88 of the judgment. In this context, whether removal would amount to a breach of Article 8 depends not on a multi-factorial assessment of proportionality but on the single factual question of whether a claimant cheated in a TOEIC test. If permission was granted on the Article 8 ground, no material error has been shown in the judge's brief assessment, in the light of this guidance.

19. The overall result is that the decision of the First-tier Tribunal, containing no material error of law, shall stand.

Notice of Decision

The decision of the First-tier Tribunal shall stand. The Secretary of State's appeal is dismissed.

Signed

Date

Judge R C Campbell,
Resident Judge

Deputy Judge of the Upper Tribunal

ANONYMITY

There has been no application for anonymity in these proceedings and I make no direction on this occasion.

Signed

Date

Judge R C Campbell,
Resident Judge

Deputy Judge of the Upper Tribunal