



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14985/2017

THE IMMIGRATION ACTS

Heard at Bradford
On 14 August 2018

Determination Promulgated
On 22 August 2018

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YASIR LATEEF

Respondent

Representation:

For the appellant: Mrs Peterson, Senior Home Office Presenting Officer
For the respondent: Mr Ahmed, Counsel

DECISION

1. The respondent ('the SSHD') has appealed against a decision of the the First-tier Tribunal ('FTT') dated 21 May 2018 allowing the appeal of the respondent ('the claimant') against a decision dated 31 October 2017 refusing his application to remain under and outside the Immigration Rules. In this decision the SSHD noted that the claimant arrived in the UK as a student in 2011 and his leave as such was extended to 17 January 2015. On 16 January 2015 he applied for leave outside the Immigration Rules. This was refused but then reconsidered and maintained in the decision under appeal in these proceedings. This refusal was

based upon: (i) being satisfied that the claimant used deception in relying upon a false TOEIC certificate obtained after a test at Colwell College on 17 July 2012, when he made his application for further leave on 29 August 2012, and; (ii) in any event the claimant being unable to meet the substantive requirements of the Immigration Rules.

FTT

2. At the hearing before the FTT the claimant's Counsel conceded that the Immigration Rules could not be met but invited the FTT to allow the appeal on human rights grounds, i.e. it would be proportionate to provide the appellant with a short period of leave to enable him to obtain a CAS and make an in-time application as a student.
3. The FTT concluded that although the SSHD displaced the initial burden of establishing deception, the claimant provided an innocent explanation and therefore did not use deception, and allowed the appeal under Article 8 of the ECHR.

Upper Tribunal hearing

4. Mrs Peterson, on behalf of the SSHD, relied upon all the grounds of appeal but focussed upon the FTT's failure to provide adequate reasons to explain the conclusions that the appellant did not exercise deception.
5. Mr Ahmed, on behalf of the claimant, clarified that he did not wish to defend the FTT's indication that he met the Immigration Rules. He clearly did not. Mr Ahmed however invited me to find that the FTT's finding that the claimant did not exercise deception was open to it and it is upon this basis that the Article 8 appeal was properly allowed.
6. Both parties invited me to remit to the FTT if I was minded to find that the deception finding was infected by a material error of law. At the end of the hearing I indicated that the SSHD's appeal was allowed and the matter remitted to the FTT.

Discussion

Finding on deception

7. The FTT correctly found that the SSHD had displaced the evidential burden of proof initially. In addressing the claimant's explanation for the evidence relied upon by the SSHD i.e. that there was "widespread" abuse at Colwell College and his test had been identified as invalid, the FTT focussed its attention entirely on the claimant's English-speaking ability. The FTT correctly noted that the fact that the claimant was able to give his evidence in English at the hearing did not

particularly assist in determining his English ability in 2012 but went on to find that nearer the time of the test in July 2012 the claimant was able to evidence that he completed an English course at Shakespeare College in May 2012 and was accepted on a BTEC business course commencing September 2012, which he successfully completed in January 2014. The FTT found that these two matters supported the claim to have reached the level of English required and “negates any motive for taking a proxy test”.

8. The FTT went on to conclude that “taking all the evidence together”, the claimant had “no apparent motive for using a proxy test taker” and for this reason found the claimant had not used deception.
9. I acknowledge that in SM and Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 229 (IAC) at [69] the Upper Tribunal held that in considering an allegation of dishonesty in the TOEIC context, relevant factors include inter alia what the person concerned had to gain from being dishonest and whether the Tribunal’s assessment of English language proficiency is commensurate with the TOEIC scores – see also the Court of Appeal in Qadir v SSHD [2016] EWCA Civ 1167 at [18-25]. However the appellant’s English ability is only one factor and is not determinative. The consideration of the individual’s explanation is intrinsically fact-sensitive - see MA (ETS - TOEIC testing) [2016] UKUT 00450 (IAC).
10. The fact that the claimant passed a general English course and complete a BTEC in English, does not in itself give any clear reliable indicator as to the *level* of his English-*speaking* ability. In any event, as pointed out in MA (ETS) at [57] there is a range of reasons why those proficient in English may engage in TOEIC fraud ranging from a lack of confidence to disdain for the requirements of the Rules. The FTT has failed to consider whether any of the range of reasons applied in this case. The FTT also failed to carefully consider whether the level of English testing for the purposes of the two courses was commensurate with the levels required for the TOEIC certificate. It was not for the SSHD to file evidence calling into question the reliability of the English requirements in the two courses. It was for the claimant to establish an innocent explanation. Although the FTT took “all the evidence together” this was done solely in the context of the claimant’s claimed motive. No consideration has been given to other relevant factors appertaining to the knowledge of the Colwell College test-centre and why it was chosen. In short, the FTT has provided inadequate reasons for finding that the claimant did not employ deception and failed to take relevant factors into account.

Article 8

11. As acknowledged by Mr Ahmed, the claimant could not meet the Immigration Rules and the FTT was wrong to state otherwise at [21].

12. In finding that the claimant's removal would breach Article 8 the FTT failed to take into account relevant considerations.
13. First, there has been no acknowledgment that the claimant has been unable to meet the requirements of the Rules for a very long period. He has not studied since 2014. More importantly he led no evidence that he was close to meeting the requirements for his intended course – a BA in Business Management. His application in January 2015 was made outside the Rules. Any finding on deception did not lead to the curtailment of his leave. In these circumstances the FTT was required to consider why it would not be proportionate for him to return to Pakistan to apply for entry clearance. Any deception finding had not materially impacted upon the decision to refuse leave. This was predicated upon the claimant himself accepting he could not meet the Immigration Rules – see the 31 October 2017 letter at pg 4 of 6.
14. Secondly, there has been a complete failure to take into account the relevant public interest considerations set out at section 117B of the Nationality, Immigration and Asylum Act 2002.

Remedy

15. Both representatives agreed that the decision should be remade by the FTT. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and I have decided that this is an appropriate case to remit to the First-tier Tribunal. This is because completely fresh findings of fact in relation to detailed evidence surrounding the claimant's attendance at Colwell College and all the surrounding circumstances relevant to the allegation of deception are necessary.

Decision

1. The decision of the First-tier Tribunal involved the making of a material error of law. Its decision cannot stand and is set aside.
2. The appeal shall be remade by First-tier Tribunal de novo.

Signed: *UTJ Plimmer*

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
15 August 2018