Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11717/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 January 2019	**On 22 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DARSHANBHAI TUSHARBHAI DESAI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms L Kenny, Home Office Presenting Officer
For the Respondent: Mr F Khan, Counsel

DECISION AND REASONS

1. This is an appeal by the Secretary of State. The Respondent, to whom I shall refer as the Claimant, is a national of India born on 20 July 1984. He arrived in the UK on 15 September 2007 and sought leave to remain and was granted leave over a number of years. His application for indefinite leave to remain was refused on 26 September 2017, due to the fact that part of his leave was based on an application for a residence card which was refused and thus the Claimant was not entitled to benefit from Section 3C leave and had no valid leave after 10 August 2015. In any event, the Secretary of State refused the application with reference to paragraph 322

of the Immigration Rules on the basis he was satisfied that the Claimant had used deception in a previous application to gain leave to remain as a Tier 1 (Entrepreneur) Migrant in 2012, that application having been made on 8 May 2012. The TOEIC certificate had been declared invalid by ETS on the grounds that voice recognition software detected the presence of a proxy tester who had sat the test in the Claimant's place. The test had been taken on 18 April 2012 at Elizabeth College and the results had been cancelled by ETS.

2. The Claimant appealed that decision. His appeal came before Judge O'Garro of the First-tier Tribunal for hearing on 9 August 2018. In a decision and reasons promulgated on 21 September 2018, the Judge allowed the appeal, finding at [29] that the Claimant was a credible witness; that he gave his evidence in English, had undertaken an HND in civil engineering which would have required a high level of English language proficiency [32], and there was no reason for him to have used deception or to have employed a proxy test taker [33]. At [34] the Judge held as follows:

> *"I have seen the Appellant, heard what he has to say about the ETS tests he took and I believe him. It is for the Respondent to prove the allegation of fraud and she has not done so. I find that the Respondent has not provided the standard she is required to provide to discharge the burden of proof to the high standard she is required to do in order to satisfy me that the Appellant had used deception in a previous application. I find that the Respondent has not made out the case against the Appellant".*

3. The Judge then went on to consider the appeal under Article 8, finding at [36] that he had submitted no evidence there would be very significant obstacles to his reintegration in India pursuant to paragraph 276ADE(vi) of the Immigration Rules. The Judge went on to consider the appeal outside the Rules and found that the circumstances of the case were exceptional, the public interest does not carry the most weight on the facts and findings in this particular case and the decision of the Respondent was not proportionate [52].

4. The Secretary of State sought permission to appeal against this decision on two grounds. Firstly, that the Judge had failed to give adequate reasons for findings on a material matter, the point there being made that the Judge had not adequately addressed whether the Claimant had provided an innocent explanation, it having been found that the Secretary of State satisfied the evidential burden. It was submitted in relying on the Claimant's English language ability and qualifications the Judge had applied the wrong test *cf.* MA (Nigeria) [2016] UKUT 450 at 57. The test was whether on the balance of probabilities the Claimant employed deception and the Judge had materially erred in failing to give adequate reasons for holding that a person who clearly speaks English would, therefore, have no reason to secure a test certificate by deception.

5. The second ground of appeal asserted that the Judge had further erred in allowing the appeal on the basis of Article 8, the burden remaining upon the Claimant to show that he could not return to India with his wife and child without encountering significant obstacles. The Judge had erred in utilising Article 8 as a general dispensing power, and the Judge had failed to identify what about this particular case was so exceptional as to even warrant consideration outside the Rules given that the Judge found the Claimant did not meet the private life requirements of the Immigration Rules.

6. Permission to appeal was granted upon renewal to the Upper Tribunal by Upper Tribunal Judge Smith in the following terms:

> *"I grant permission principally on ground 2. The judge has referred to some of the relevant factors in Section 117B when assessing the Article 8 claim outside the Immigration Rules. However, it is arguably not clear where or how the judge has factored in the fact that the Appellant and his family do not meet the Immigration Rules, that the judge finds there will be no unlawful interference with their family life caused by removal and that their stay has been precarious throughout. It is arguable that the judge has failed to explain how or why the Respondent's decision breaches the family's human rights when those factors are weighed in the balance, taking account in particular the public interest in removal of those who have no basis of stay. Section 117B(1) and the desirability of the maintenance of effective immigration control is arguably not factored into the balance at all notwithstanding that this is the basis of the public interest in cases such as this.*
>
> *Ground 1 is weaker, but it is arguable that the judge has placed undue weight on the fact that the Appellant speaks English and has failed to explain how else his evidence suffices to discharge the burden placed on him. The fact that the Appellant speaks English is a relevant factor, but it is arguable that the judge has found in his favour based on this factor alone without considering whether he may have exercised deception notwithstanding his linguistic ability".*

Hearing

7. At the hearing before the Upper Tribunal, Ms Kenny sought to adopt the Secretary of State's grounds of appeal. At [27] of the decision the Judge accepted that the Secretary of State had discharged the burden of showing deception and thus it fell to the Claimant to provide an innocent explanation. She found there was no reason why the Claimant would utilise deception or use a proxy test taker but this was not the test. The Judge needed to ask whether there was an innocent explanation *cf.* Shehzad and Chowdhury [2016] EWCA Civ 615. Given that the Claimant did not provide an innocent explanation, he did not discharge the burden

of proof, and the judge failed to cite the authority MA (Nigeria) [2016] UKUT 00450 (IAC) at [57].

8. In relation to the second ground of appeal, Ms Kenny submitted that the decision was not properly reasoned. The burden was upon the Claimant to show family life could not continue anywhere other than in the UK. Ms Kenny submitted that there was no finding by the judge as to whether or not it would be in the child's best interest to remain, nor any proper consideration of the public interest. She submitted it was not at all clear why full consideration was given to Article 8 outside the Rules given the Claimant's inability to meet the requirements of paragraph 276ADE of the Rules. She submitted that the factors in favour of the Claimant were insufficient to justify the overall conclusion that he should succeed in his appeal.

9. In his submissions, Mr Khan submitted that the Judge had given adequate consideration to the assertion by the Secretary of State that dishonesty had been employed to obtain the certificate. The judge had considered all the relevant authorities *cf.* Gazi [2015] UKUT 00327 (IAC) and SM and Qadir [2016] UKUT 00229 (IAC) and was aware that the burden of proof was on the Secretary of State. He submitted that an innocent explanation had been given by the Claimant. Bearing in mind the allegation was made in 2017, which was five years after the test had been taken, it was clearly more difficult for the Claimant to establish his *bona fides* due to the passage of time. However, materially the Claimant had undertaken a course to prepare for the test, he had undertaken this course on 24 January 2012, this was an English Language City & Guilds, the course also was on 6 February 2012 and his exam took place in April. The judge was entitled to take account of the fact that when the Claimant arrived in the UK in 2007 he had already undertaken successfully an IELTS test.

10. Mr Khan accepted that for all sorts of perverse reasons a person might want someone else to take the exam, however this Claimant had a good level of English, enough to undertake an HND in civil engineering, he followed that course and passed it, and this gives rise to a reasonable inference that his English is proficient. There was no blemish on his immigration history, he had never produced a false document or done anything untoward, thus it was highly unlikely that the TOEIC was improperly obtained and there was no error of law in this respect.

11. In relation to the Article 8 aspect of the case, Mr Khan sought to rely on the decision in Budhathoki [2014] UKUT 00341 (IAC). He submitted that the Judge's findings and reasons met the test, everything was set out in sufficient detail and it was possible for a person looking at the judgment to be satisfied as to why the appeal had been allowed. The Judge considered Article 8 outside the Rules using the traditional Razgar analysis. The Judge expressly stated that she had taken account of the public interest considerations at [47]. The Claimant is able to maintain himself financially with the support of his brother. Mr Khan submitted that the public interest in deporting a person who has a clean record, English language ability, the

ability to work, who owns property and is fully integrated, must be reduced. He submitted there was no material error of law, the judge had applied the proper legal test and was entitled to reach this conclusion.

12. In reply Ms Kenny submitted that the consideration of the ETS should not be diminished. If the judge had erred in her assessment of the ETS point, then this impacted on the Article 8 assessment.

13. I reserved my decision, which I now give with my reasons.

Findings and reasons

14. In respect of the first ground of appeal, I have concluded that the Judge erred materially in law in her assessment of the allegation of deception by the Secretary of State. Whilst at [20]-[34] the Judge gave careful consideration to the evidence submitted on behalf of the Secretary of State (the "generic evidence") and the material caselaw, directing herself at [28] that "*there is an evidential burden on the appellant to advance an innocent explanation*" the Judge did not go on to make a finding that the Claimant had provided an innocent explanation. Further, whilst the Judge expressly found the Claimant to be a credible witness, the reasons she provided all related to the Claimant's English language ability and this was the sole basis for her finding at [33] that the Claimant had not utilised deception.

15. In respect of the second ground of appeal, as Upper Tribunal Judge Smith correctly identified in the grant of permission to appeal, the Judge at [35] recorded the fact that the Claimant cannot meet the requirements of Appendix FM of the Rules but did not appear to factor this into her assessment of the proportionality of his removal. Further, at [52] it is unclear why the strength of the Claimant's private life falls within the category of cases that requires great weight to be given to his private life. Whilst the Judge also found at [52] that "*the public interest does not carry the most weight*" no consideration appears to have been given to section 117B(1) which provides that: "*(1) The maintenance of effective immigration controls is in the public interest."* I find that had the Judge correctly directed herself she may not have reached the same conclusion on the basis of the evidence before her.

16. For the reasons set out above, I find material errors of law in the Judge's decision. I set that decision aside and remit the appeal for a hearing *de novo* before the First tier Tribunal at Hatton Cross.

Notice of Decision

The appeal by the Secretary of State is allowed, with the effect that the appeal is remitted for a hearing *de novo* before the First tier Tribunal.

No anonymity direction is made.

Signed Rebecca Chapman Date 20 February 2019

Deputy Upper Tribunal Judge Chapman