



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/33900/2015

THE IMMIGRATION ACTS

Heard at UT (IAC) Birmingham Employment
Tribunal
On 25 September 2017

Decision & Reasons Promulgated
On 27 October 2017

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

W U
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson, Counsel instructed by Law Lane Solicitors
For the Respondent: Mr P Singh, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan. He has permission to challenge the decision of First-tier Tribunal (F-tT) Judge NMK Lawrence sent on 2 January 2017 dismissing his

appeal against a decision made by the respondent on 26 October 2015 refusing him leave to remain as the partner of a British citizen.

2. In 2014 the respondent found the appellant had used deception in a previous application namely an English language test certificate submitted with an application he made on 13 December 2012 relating to a test he said he took on 17 July 2012 at New College of Finance. As a result, the respondent considered he did not meet the 'suitability' requirements of Appendix FM. The appellant's appeal against that decision was allowed by the judge on the basis that the respondent had not discharged the burden of proof regarding the deception point. Noting that the respondent had not considered the substantive requirements of Appendix FM, the judge remitted the case to the respondent for a decision on those. The respondent then issued a fresh decision dated 26 October 2015 again finding that the appellant did not meet the suitability requirement. The new refusal decision did not explain why the decision had been taken to disregard Judge Baldwin's finding on the deception issue and simply referred to information it had received from ETS saying the test he took had been recorded by ETS as 'invalid'. Shortly before the hearing before Judge Lawrence, the respondent adduced a witness statement from a Home Office officer Ms L Singh stating that the test taken by the appellant had been recorded as 'invalid'.
3. Judge Lawrence noted that the evidence from Ms L Singh should have been disclosed at least in the course of the previous appeal or soon after and that the respondent had not appealed the previous FtT decision. He noted the submission of Mr Richardson (who also represented on that occasion) that unless exceptional circumstances existed, which prevented the respondent from disclosing it, the Tribunal should not admit this evidence.
4. Notwithstanding this submission, the judge not only decided to admit this evidence but to treat it as the basis for concluding that the appellant had used deception in 2012. The judge's reasons are set out in paras 14 - 17 as follows:

"14. I have to consider the interest of justice when determining whether I should receive and act on the evidence. The evidence goes to the 'suitability' requirement under Appendix FM. Should the late submission of such a crucial piece of evidence prejudice the respondent's case. It appears to me that the appellant was notified when the respondent refused the appellant's marriage application. The date of that DECISION is dated 11.11.14. There is no evidence that the appellant made any enquiries with New College of Finance why his test certificate had been declared invalid. I fully accept that it is for the respondent to provide the evidence. However, in the circumstances where a test certificate has been declared invalid, I would have thought it prudent for the appellant to start making enquiries with the test centre. The allegation made by the respondent is so specific. It is that the test he took at New College of Finance is invalid. It could not be clearer than that. This sufficient for the

appellant to make preliminary enquiries of the test centre. It is not tenable for the appellant in these particular circumstances to sit and do nothing. In these circumstances I find it is in the interest of justice to receive the evidence served and lodged in the form 'Resp 2'.

15. Mr Lesley Singh's witness statement is dated 20th of December 2016. She provides evidence of the voice recognition technology used to identify person who took the tests. This method discloses voice patterns of candidates who took the test. If the same voice pattern is identified in more than one test than it is evidence that the various tests were taken by the same person and not the candidates themselves. In the instant appeal, it is the respondent's case, that the voice pattern technology disclosed the same voice pattern as in other tests and therefore found the appellant did not take the test himself.
16. The appellant did not give evidence to challenge Ms Singh's evidence. He did not seek an adjournment to make his own enquiries. I note that in his witness statement the appellant states he practiced for the test on YouTube, travelled to London at the cost of £35, paid £160 cash to a person called Parvez at the New College and '*sat the speaking and writing exam on the 17 July 2012*'. He describes the number of computer in the room, the breaks he took, he took the reading and listening test on the 21st July 2012.etc (see: 'App 1' page 3 para 11-18). The appellant also asserts that the respondent has failed to take into account the medium of instructions in Pakistan is English. I find the appellant has explained what happened on the days he took the tests. Further, he asserts the medium of instructions **in Pakistan is English (see: 'App 1' pages 4-5 para 19). However, these do** not address the 'deception' point raised by the respondent. This is the core of the allegation and not the amount of fees paid, the cost of travel and the like. In the absence of the any challenge to the core of the appellant I find the respondent has provided the Tribunal with sufficient strength and quality which survives critical, anxious and heightened scrutiny. The appellant has not sought to challenge the evidence. Consequently, I find that the appellant does not meet the 'suitability' requirement of Appendix FM.
17. Mr Richardson submits that I am bound by the First-tier Judge's decision in IA/47780/2014, on the 'deception' point. I find I am able to depart from it because I have been presented with evidence from Ms Singh and annexure."
5. The grounds of appeal contend that in deciding to rely on the new evidence from Ms L Singh the judge erred in law as the reasons he gave for departure from the findings of fact made by the previous judge on this same issue were erroneous. I consider this ground is made out. The judge's reasons for departure are contrary to the guidance given by the Upper Tribunal in **Chomonga (binding effect of unappealed decision)**

Zimbabwe [2011] UKUT 00312 (IAC) and the Court of Appeal in **Secretary of State for the Home Department UTB (Jamaica) [2008] EWCA Civ 977**. In these cases it was confirmed that the respondent is bound by the decision of a Tribunal except where “there is relevant fresh evidence that was not available at the date of hearing, or a change in the law”, although this principle has no application where “there is relevant fresh evidence that was not available at the date of the hearing, or a change in the law, and the principle has no application where there is a change of circumstances or there are new events after the date of decision” (per Burnton LJ at para 35 of **TB**).

6. In order to understand why I have concluded that Judge Lawrence erred it is important to recall what the state of the evidence was before Judge Baldwin. At para 9 Judge Baldwin records that he declined to adjourn the hearing (in June 2015) so that the respondent could furnish three witness statements evidencing the allegation of deception relied on. Judge Baldwin refused this application because the respondent had already had “nearly 6 months” in which to provide it. The judge did have before her a Print-Out which recorded the appellant as having two ‘individual results’ of invalidity. She considered that these print outs did not amount to evidence of sufficient strength and quality required for an allegation of deception. She also considered the appellant’s account of the circumstances in which he took the test and considered that it was “improbable that this Appellant would have used deception as he studied in English in Pakistan, his 2014 English Test Certificate was not challenged and his oral mastery of English before me was notably good.” (para 20).
7. Several observations are pertinent. First, the respondent did not challenge that decision in any respect. There was no challenge to the finding as regards the lack of evidence of deception or the finding that the appellant was likely to have had good English at the time.
8. Second, neither in the subsequent refusal letter nor in the submissions before Judge Lawrence, did the respondent provide any explanation as to why the missing evidence could not have been put before Judge Baldwin. Neither could Mr Singh offer any explanation before me.
9. Third, the evidence of Ms L Singh did not contain any new evidence; it simply confirmed in the terms set out in para 15 of Judge Lawrence’s decision (see above paragraph 4) that the appellant’s test results had been recorded by ETS as invalid.
10. Fourth, the respondent made no reference in her refusal decision to the significance or otherwise of the appellant’s good command of English and the improbability that he would have needed to use deception to pass the test.
11. Fifth, despite stating at paragraph that “[the appellant did not give evidence to challenge Ms Singh’s evidence [he must mean oral evidence]” Judge Lawrence proceeded to find in paragraph 16 that “the appellant has explained what happened on the days he took the tests”.

12. It is true Judge Lawrence goes on in the same paragraph to state that [these particulars about the circumstances under which he attended to take the tests] “do not address the ‘deception’ point raised by the respondent” (para 16). True it is too that these particulars do not conclusively bear on the deception issue. However, to say they “do not address” the deception point at all is manifestly contrary to the guidance given by the Upper Tribunal and Court of Appeal in SM and Ihsan Qadir v SSHD [2016] UKUT 229 IAC) and SSHD v Shehzad and Chowdhury [2016] EWCA Civ 615 cases as regards the contents of “an innocent explanation”.
13. The judge’s statement in this same paragraph (16) that “the appellant has not sought to challenge the evidence” is with respect contradicted by the evidence before the judge which included a statement by the appellant strongly disputing that he used deception.
14. I have no hesitation in concluding that in light of the above considerations the judge was wholly wrong to depart from the previous findings of Judge Baldwin that the allegations of deception had not been proven. I would add that Judge Lawrence’s suggestion that the appellant, prior to the hearing before Judge Baldwin, should have made enquiries of New College, is an odd piece of historic revisiting of a decision which found that the respondent had not discharged the burden of proof on her to prove deception.
15. I raised with the parties at the outset my concern that even if I found (as I now have) that Judge Lawrence erred on the deception point, that could be classified as a material error given that at para 18 Judge Lawrence had concluded that the appellant had not shown that there would be ‘insurmountable obstacles’ to the couple going to Pakistan to enjoy family life there.
16. Mr Richardson submitted that Judge Lawrence’s error regarding deception and suitability was material for two reasons. First, the respondent in the refusal decision had concluded that the appellant met all the substantive requirements of the Partner route. Second the test of insurmountable obstacles (and indeed the test of “very significant obstacles” under para 276ADE(1)(iv)) are not part of the Rules governing eligibility of partners under the partner route Mr Singh did not demur. I have concluded Mr Richardson is right on both counts. Accordingly I am satisfied the error of the judge was material and that his decision should be set aside.

Re-making the Decision

17. It is unnecessary for me to state in any detail my reasons for concluding that the decision I re-make is to allow the appellant’s appeal. Clearly the respondent had not proved deception and had no basis therefore for finding that the appellant failed to meet the ‘suitability’ requirements of the Rules. Clearly the respondent did not consider there was any other basis for refusing to grant leave to remain under the Partner route. As a result it cannot be said that there was any public interest in

refusing the appellant's application. The decision refusing his application was a disproportionate interference with his right to respect for family life.

To conclude:

18. The decision of Judge Lawrence is set aside for material error.
19. The decision I re-make is to allow the appellant's appeal.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date:4 October 2017



Dr H H Storey
Judge of the Upper Tribunal