Neutral Citation Number: [2018] EWCA Civ 3037

Case No: C8/2016/2791

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 7 November 2018

Before:

LORD JUSTICE HADDON-CAVE

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Between:

KHAN

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

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The **Applicant** appeared in person

The **Respondent** did not appear and was not represented

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Judgment

(Approved)

LORD JUSTICE HADDON-CAVE:

1. This is an oral reconsideration hearing following an order of Sir Stephen Silber dated 29 August 2018, who refused permission to appeal on the papers in this case. By an appellant's notice filed on 12 July 2016, the appellant seeks permission to appeal the order of Upper Tribunal Judge Archer, by which he dismissed a First-tier appeal against a decision of the First-tier Tribunal by Judge Sullivan, who in turn dismissed an appeal against a decision by the Secretary of State to (a) reject the appellant's application to vary his leave to remain and (b) to remove him from the United Kingdom. This is accordingly a second-tier appeal to which the second-tier appeal rules apply. With second-tier appeals, the applicant must show either (a) that there is a real prospect of success on appeal and that the appeal raises an important point of principle or practice or that there is a compelling reason for hearing the appeal. The appeal is limited to points of law.

2. I have looked carefully at this case and read all the documents and in particular the skeleton argument prepared by counsel in this case, Mr Rajiv Sharma of 1 Gray's Inn Square Chambers. I have also had the benefit of submissions in person from the applicant, Mr Shafikul Islam Khan, who has made his submissions very carefully and politely today. In my judgment, this appeal has no reasonable prospect of success and raises no important point of principle or practice, and neither is there any compelling reason to hear the appeal under CPR 52.7.

3. The background facts can be stated shortly. In February 2014, a BBC Panorama program revealed widespread fraud being used in the Test for English for International Communications (TOEIC), which is used to credit points under the Immigration Rules.

A large number of candidates were said to have used proxies to take the oral tests which were administered by the Education Testing Service. This scandal has had some fallout.

4. As regards the applicant's background, a brief chronology will suffice. The applicant arrived in the United Kingdom from Bangladesh as a student in May 2019 and was granted leave to remain until 30 June 2010. On 15 July 2010 the Secretary of State for the Home Department granted the applicant leave to remain until 23 December 2012. On 22 December 2012 the applicant applied to vary his leave to remain to remain as a Tier 4 student migrant and sought an extension of time for submitting a confirmation of acceptance for studies (CAS). On 23 December 2012 the applicant's leave to remain expired. On 8 March 2013 the applicant submitted a CAS from Bell's College. Just over a year later on 31 July 2014, the Secretary of State wrote to the applicant informing him of concerns regarding test irregularities and the validity of a TOEIC certificate submitted in support of his leave to remain variation application. The applicant was asked to take a new test by 25 September 2014.

5. On 25 September 2014 the applicant's solicitors wrote to the Secretary of State for the Home Department (a) informing him that Bell's College was removed from the Tier 4 CAS register and (b) requesting an extension of time to allow the applicant to re-sit the TOEIC on 11 October 2014. It will be noted that this letter was received on the very last day of the three-month time limit that had been granted to the applicant on 31 July 2014 to provide a new TOEIC certificate. The next day, on 26 September 2014, the British Council informed the applicant that his identity document, a certified copy of his passport, was inadequate for re-sitting his TOEIC and that an original passport was

required. On 1 October 2014, the applicant rescheduled his TOEIC test for 11 October 2014. The applicant's rescheduled TOEIC test scheduled for 11 October 2014 was, however, cancelled due to his inadequate identification document. He had submitted simply a certified copy of his passport. It will be noted that there is no evidence that the applicant sought to obtain his original passport during this period.

6. On 28 October 2014, the Secretary of State refused the applicant's application to vary his leave to remain and issued the decision to remove him under the Immigration, Asylum and Nationality Act 2006 on the basis that (a) his CAS had been withdrawn and (b) he had no valid TOEIC certificate. The applicant's appeal of the Secretary of State's decision was refused by the First-tier Tribunal on 25 August 2015. His application to appeal that decision was refused by the Upper Tribunal on 20 May 2016, and the applicant's application for permission to appeal to the Court of Appeal was refused by Sir Stephen Silber on 29 August 2018. So it is that today the applicant in person seeks to renew his application in person to the Court of Appeal before me.

7. There are three grounds of appeal settled by counsel: first that the underlying requirement to re-sit the TOEIC test was improper; second, the decision of the Secretary of State was manifestly unfair and unjust and her discretion was improperly exercised; and third that the reason for the withdrawal of sponsorship was not considered.

8. **Ground one**

The appellant submits that there is no evidence that the appellant's TOEIC was invalidated, and instead of relying on the test certificate's invalidation of the appellant's

TOEIC results and requiring the applicant to re-sit the TOEIC on this basis, it is submitted that the Secretary of State should have investigated the TOEIC issue herself. Accordingly it is submitted that the First-tier Tribunal and the Upper Tribunal erred in that they proceeded on the assumption that the applicant was required to take a re-sit when she was not. It is submitted that a failure by the First-tier Tribunal and Upper Tribunal to consider whether the applicant was guilty of fraudulent or dishonest conduct in respect of his invalidated ETS TOEIC results was contrary to principle (see *R (Gazi) v Secretary of State for the Home Department (ETS – Judicial Review) (IJR)* [2015] UKUT 327 (IAC) and *SM and Ihsan Qadir v Secretary of State for the Home Department* [2016] UKUT 229 (IAC)).

9. The nature of the irregularities which caused the initial TOEIC test results to be invalidated are not evidenced in the papers. The proper approach to proving fraud in ETS cases has been considered in detail by this court in *Qadir v Secretary of State for the Home Department* [2016] EWCA Civ 1167 and *Secretary of State for the Home Department v Shehzad and Chowdhury* [2016] EWCA Civ 615: (1) the Secretary of State must show that there is, on the evidence, evidence of deception (the initial evidential burden); (2) if the Secretary of State clears this hurdle, the burden shifts to the individual claimant to prove a plausible, innocent explanation (again on the face of it); (3) if the individual provides such an explanation then the burden shifts back to the Secretary of State to disprove it (the legal burden); and (4) the standard of proof is on the balance of probabilities. Both *Qadir* and *Chowdhury* postdate the decision of the FTT and the UT below. It is therefore unsurprising that no reference was made to either in assessing whether the Secretary of State had discharged this initial evidential burden. That said, the failure by the appellant to challenge the underlying assumption

that his initial TOEIC English results were vitiated due to the irregularities is in my view fatal to his case and this application for permission to appeal. That finding of the First-tier Tribunal was not questioned before the First-tier Tribunal or the Upper Tribunal. Moreover, even if it had been questioned by the applicant, the applicant did not and has not provided a plausible, or indeed any, innocent explanation to shift the burden back onto the Secretary of State save for a denial. Accordingly, on this first ground there is no reasonable prospect of success.

10. **Ground two: fairness**

It is submitted on behalf of the applicant that requiring the applicant to provide a new TOEIC certificate was unlawful and the Secretary of State created an effective barrier to complying with this by failing to return his original passport. In short, this decision was unfair at common law.

11. The FTT held that the appellant had at least three months to re-sit the TOEIC. He had failed to take advantage of this opportunity, and there was no unfairness in the Secretary of State taking a decision some ten months later after the application was submitted. The Upper Tribunal found that there was no breach of the common-law duty of fairness. The First-tier Tribunal was correct to find the applicant had been given adequate time to re-sit. The Secretary of State had duly allowed the applicant's request for extension in line with the principles in *Patel (consideration of Sapkota – unfairness) India* [2011] UKUT 00484 (IAC) and *Thakur (PBS decision - common law fairness) Bangladesh* [2011] UKUT 00151 (IAC). The applicant did nothing to assist his own cause by way of requesting further time and/or the return of his original passport. Nothing in the correspondence from the applicant's solicitors suggests that

the applicant was unable to re-sit the test because he required his original passport. There is no evidence before the First-tier that it was impossible to undertake the English language test without his original passport. The mere fact that one test had been cancelled does not take the matter further. Crucially, in my judgment, the Upper Tribunal was entitled to conclude that the applicant had been given adequate time to re-sit the TOEIC. Further, no attempt appears to have been made by the applicant to obtain his original passport at any stage between the British Council informing him a certified copy was insufficient on 26 September 2014 and the cancellation of his re-sit on 1 October 2014 and the refusal of his leave to remain variation application on 28 October 2014. The failure by the Secretary of State to exercise his discretion in the applicant's favour was not *Wednesbury* unreasonable. Accordingly, there is no discernible error of law on this ground either.

12. **Ground three**

It is submitted on behalf of the applicant that the sponsorship was withdrawn through no fault of his and that he ought to have been given the opportunity to find an alternative sponsor (see *Secretary of State for the Home Department v Amjid Khan* [2016] EWCA Civ 137). In addition it is submitted that the Secretary of State was also required to provide him with suitable documents to enable him to find an alternative sponsor.

13. The first-tier Tribunal rejected the appellant's assertion that he did not know that the CAS had been withdrawn. He was aware by 25 September that Bell's College was no longer a Tier 4 sponsor, and he had been aware since 31 July 2014 that there were irregularities. In *SSHD v Mohammed* (supra) it was held that a Tier 4 student was to be

afforded an opportunity to submit information on a new CAS sponsorship institution to avoid the unfairness of refusing an application automatically following revocation of an original sponsor's licence where the fact was unknown to the applicant. In my judgment, however the FTT's finding that the applicant knew about the fact the Bell's College CAS status had been withdrawn is fatal to this ground. He was given an adequate opportunity to rectify matters and he did not take it.

14. The applicant feels a sense of injustice in this case, but the chronology suggests otherwise. The applicant should well understand, as it was explained to him, that his is only one of many cases in the system and the system has to have a series of rules and deadlines by which it can properly operate. The failure of the applicant to take the necessary steps in time has meant unfortunately that he has been the author of his own misfortune.

15. The final point to make is that the test for second appeals is, as I have explained, very high. It is not every case that comes before the court on a second appeal that can be given permission to appeal. It is only very rarely that permission will be given on the basis of CPR 52.7. There is no important point of principle in this case or compelling reason for an appeal. What essentially the case put before the court is is of a disagreement about the facts of this case and the weight to be given to it by the Upper Tribunal and the First-tier Tribunal.

16. So, for all those reasons, this application for permission to appeal is refused.

Order: Application refused