Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02495/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 April 2018	**On 2 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

MRS HALIMA AL RASHEDY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Chowdhury
For the Respondent: Ms Pal

DECISION AND REASONS

1. This matter comes before me for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge Nash ("the FTTJ") promulgated on 22 January 2018, in which the FTTJ dismissed the appellant's appeal against the curtailment of her leave to remain on the basis she had made false representations in her application for entry clearance as a Tier 4 General Student migrant. The decision was made pursuant to paragraph 323(i) with reference to 322(2) of the Immigration Rules so that her leave to remain was to expire on 10 November 2014. That decision was made by the respondent on 11 November 2014, by which time the appellant had already left the United Kingdom on 19 September 2014.

2. The appellant sought leave to appeal to the First-tier Tribunal out of time. Time was extended by the First-tier Tribunal to enable her to do so. Her appeal was dismissed.

3. No anonymity direction was made in the First-tier Tribunal and none has been requested before me. I make no such direction.

Background

4. On 26 September 2013 the appellant made an application for entry clearance as a Tier 4 General Student. On 1 October 2013 she was granted leave to enter the UK in that capacity until 30 January 2015. With her application, the appellant submitted a TOEIC certificate issued by Educational Testing Service ("ETS"). The respondent noted in her reasons for curtailment of leave:

> "ETS has a record of your speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained.
>
> Your scores from the test taken on 16 July 2013 at Apex have now been cancelled by ETS.
>
> On the basis of the information provided to her by ETS, the Secretary of State is satisfied that there is substantial evidence to conclude that your certificate was fraudulently obtained. In light of this information the Secretary of State is satisfied that that [sic] you have utilised deception to gain leave to enter in the UK.
>
> Had the Home Office been aware of these facts at the time of considering your immigration status in the UK on 01 October 2013, you would not have been granted leave as a Tier 4 General student.
>
> According to Home Office records you left the UK on 19 September 2014 and have not since returned. When you left the UK, you still had valid leave to enter. The Home Office is satisfied that the submission of fraudulently obtained documents in support of an application to obtain entry clearance was done in order to circumvent the UK's Immigration Rules and therefore as a result of this it is not considered that the circumstances in your case are such that discretion should be exercised in your favour.
>
> The Secretary of State therefore curtails your leave to remain in the United Kingdom under paragraph 323(i) with reference to 322(2) of the Immigration Rules so as to expire on 10 November 2014."

5. The appellant appealed against that decision. The FTTJ dismissed the appeal on the ground that the decision was not in breach of the Immigration Rules. He found that the appellant "has not discharged the burden upon her", the respondent having discharged the evidential burden.

6. The appellant sought permission to appeal and this was granted. Hence the matter comes before me.

Submissions

7. For the appellant, Ms Chowdhury adopted the grounds of appeal to this tribunal. That said, she made certain concessions in her oral submissions. She accepted that, while the appellant did not have the respondent's bundle at the date of drafting her witness statement for the

appeal, the appellant had not been disadvantaged by this: she knew the case against her and Ms Chowdhury conceded there had been no application for an adjournment to consider the respondent's evidence. She accepted there was no prejudice to the appellant's position as a result of late production of the respondent's evidence. This was an appropriate concession given the detail in the respondent's reasons letter regarding the curtailment of her leave to remain. The appellant could have been in no doubt as to the issues to be decided in the appeal, particularly given she was legally represented.

8. Ms Chowdhury also accepted, contrary to the grounds of appeal, that the respondent's evidence, including the generic witness evidence and look up tool, was sufficient to discharge the initial evidential burden on the respondent; she did not challenge the FTTJ's findings in that regard. She submitted the crux of the appellant's case was that the FTTJ had failed to give due weight to the significant evidence adduced by the appellant to demonstrate her "grasp of the English language". Ms Chowdhury accepted the absence of the appellant from the UK and her consequent inability to give oral evidence at the hearing was not a material issue in the light of paragraph 28 of the FTTJ's decision; that said, she submitted it was inappropriate for the the FTTJ to draw adverse inference from the failure of the appellant to state in her witness statement that she had taken the test. It was submitted that, if the appellant had been present and this had been put to her, she would have been able to give a definitive answer to the question. As a consequence the FTTJ had made an adverse finding based on her failure to assert she had taken the test (albeit she had denied deception). The appellant's evidence was sufficient to discharge the burden on her.

9. In summary Ms Chowdhury submitted that this appeal was about the failure of the FTTJ to give appropriate weight to the evidence of the appellant, particularly the letter from her supervisor at Coventry University. That should have been given greater weight in the assessment of the appellant's evidence.

10. For the respondent, Ms Pal submitted that the FTTJ had taken into account all the evidence, including that of the appellant. There were specific references to the evidence of the appellant's supervisor. That evidence had not been ignored. The FTTJ had taken into account the appellant was disadvantaged by not being able to give oral evidence at the hearing. However, she had been aware of the issue since 2014 and had had opportunities to rebut the respondent's position. She could have asked for a copy of the voice recording taken at the test. The mere assertion by the appellant that she had not engaged in deception was not sufficient to discharge the burden on her; she had not provided an explanation as to what had taken place on the day of the test. Ms Pal asserted the FTTJ had taken all the evidence into account appropriately.

Discussion

11. It was appropriate for Ms Chowdhury to concede the respondent's evidence, including the look up tool which referred to the appellant by name, was sufficient to discharge the respondent's burden of proof (**Shehzad and Chowdhury [2016] EWCA Civ 615**).

12. The nub of the appellant's case in this appeal is that the FTTJ erred in law in failing to attribute sufficient weight to her evidence. Ms Chowdhury made it clear in her submissions that it was accepted that the respondent had discharged the initial burden of proof by producing the three witness statements and the look up tool. I agree with her; this was an appropriate concession, given the legal authorities on the issue.

13. There is no suggestion before me that the FTTJ failed to take into account any evidence; it is a matter of whether the FTTJ attributed appropriate weight. It is worth identifying that the appellant provided an 80 page bundle for the hearing before the FTTJ.

14. It is submitted that the appellant, being outside the UK and unable to return for the hearing, was disadvantaged in that she did not have the opportunity to set out her evidence as to how the test took place. I do not accept that. The appellant had known since 2014 that she had been investigated by the respondent and found to have acquired her TOEIC qualification fraudulently: there is an email from her solicitors at the time, Genesis Law, to the University addressing the issue. This is dated 14 October 2014. While, given the passage of time, it would have been difficult for her to obtain independent evidence to support her claim that she had not used to deception to obtain the certificate, there was nothing to stop her describing how she travelled to the test centre, its location and other detail relating to her taking the test. These are matters within her own knowledge. She could have provided an explanation. It was put to me by Ms Chowdhury that, because the appellant was not at the hearing, she had been unable to explain these matters. That is not the case: the appellant could have adduced such evidence in her witness statement and, given that she was advised by solicitors, I would expect such information to have been in her statement prepared for hearing. Those advising her knew that the burden of proof might shift to the appellant to provide a reasonable explanation to rebut the respondent's case. It was not suggested that the absence of the look up tool or the generic evidence until the date of hearing disadvantaged the appellant in any way; indeed Ms Chowdhury accepted the appellant was not prejudiced by late production of such evidence. There was no excuse for the failure of the appellant to explain the circumstances in which she had taken the test. Instead she had merely made a bare assertion that she had not used deception. This is not an explanation. The FTTJ appropriately took into account the difficulties for the appellant of adducing evidence to demonstrate she had attended the test centre.

15. The FTTJ took into account the nature and quality of the appellant's masters course and the letter dated September 2014 from Dr Mark Elshaw, her supervisor on a particular project at Coventry University. He bore in mind the positive terms of the letter which is described as a "reference". This document was not prepared for the appeal hearing; it has the appearance of an academic reference. It does not address the quality of her English language skills albeit it can be inferred that they were good at that time. Indeed the FTTJ finds at [54] that Dr Elshaw's statement "is consistent with a good command of English language". I infer the FTTJ is referring here to the appellant's English language ability. The FTTJ also notes the letter is dated September 2014 "not a long period after the contested test in July 2013". It is simply not correct for the appellant to assert (as in her grounds of appeal) that "no weight" was given to this document by the FTTJ.

16. At paragraph 49 of **MA (Somalia) [2010] UKSC 49**, 24 November 2010 it was said that "Where a tribunal has referred to considering all the evidence, a reviewing body should be very slow to conclude that that tribunal overlooked some factor, simply because the factor is not explicitly referred to in the determination concerned". McCombe LJ in **VW (Sri Lanka) C5/2012/3037** said "Regrettably, there is an increasing tendency in immigration cases, when a First-tier Tribunal Judge has given a judgment explaining why he has reached a particular decision, of seeking to burrow out industriously areas of evidence that have been less fully dealt with than others and then to use this as a basis for saying the judge's decision is legally flawed because it did not deal with a particular matter more fully. In my judgment, with respect, that is no basis on which to sustain a proper challenge to a judge's finding of fact".

17. This is not a case where the FTTJ gave little or no weight to the evidence of the appellant. He considered it in the round and give it the evidential weight he considered appropriate. That weight is consonant with the quality of the evidence before him. Given that the appellant was well aware of the issues to be decided (her solicitors having been alerted by the various legal authorities such as **MA (ETS – TOEIC testing) [2016] UKUT 000450 (IAC)** and others), the FTTJ was entitled to assume that the appellant had put her best case in her witness statement which was drafted specifically for the appeal. Despite the seriousness of the allegation against her, she failed to address the specific allegation of the respondent that she cheated in the test. She merely denied deception. That is not enough to amount to an innocent explanation such as to discharge the burden on her.

18. The FTTJ's decision is grounded in the evidence; it is reasoned and sustainable. It does not contain a material error of law. I uphold the decision of the FTTJ.

Decision

19. The making of the decision of the First-tier Tribunal did not involve the making of a material error of law.

20. The decision of the FTTJ is upheld.

A M Black

Deputy Upper Tribunal Judge Dated: 27 April 2018