



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/38962/2014

THE IMMIGRATION ACTS

**Heard at Bradford
On 28th April 2015**

**Decision & Reasons Promulgated
On 29th May 2015**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

**MUHAMMAD UMAR FAROOQ
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Cleghorn, Counsel

For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Caswell made following a hearing at Bradford on 8th December 2014.

Background

2. The Appellant is a citizen of Pakistan born on 9th May 1991. He entered the UK with leave on 6th April 2010 which was subsequently extended until July 2014. Shortly before expiry he applied for further leave on private and family life grounds in the UK and was refused on 25th September 2014.

3. As a part of his application for further student leave the Appellant took a TOEIC English speaking and writing test through ETS in Manchester on 26th September 2012 and on 11th October 2012 a listening and reading test. His test for 26th September 2012 was cancelled. In the reasons for refusal letter the Respondent states:

“During an administrative review process ETS have confirmed that this test was obtained through deception. Because the validity of these test results could not be authenticated the scores from the test taken on 26th September 2012 have been cancelled. Your client is specifically considered a person who has sought leave to remain in the UK by deception following information provided to us by ETS that an anomaly with the speaking test indicated the presence of a proxy test taker.”
4. He was therefore refused on the grounds that he did not meet the suitability requirement S-LTR.2.2A for consideration of limited leave to remain in the UK as a partner under E-LTRP and/or parent under E-LTRPT and/or on the grounds of private life under paragraph 276ADE.
5. It was the Appellant’s case that he never used a proxy test taker and has not used deception.
6. The Judge relied on the statements supplied by the Respondent in relation to the methodology used to identify where deception had taken place which she set out in the determination. She was satisfied that the evidence was cogent and, although the Appellant gave evidence in English, this was in December 2014 when he had been in the UK for a further two years after taking the test. His present English language level had no bearing on what it was at the time the tests were taken. The Appellant could not succeed on family or private life grounds under the Rules since he did not meet the suitability requirements.
7. The Judge also considered the claim under Article 8. She recorded that the adults had resolved that the Appellant’s wife and children would not join him in Pakistan because when they last went there with her ex-husband they were kidnapped and held at her in-laws’ house with no proper food and no electricity. The ex-husband refused to allow them to return to the UK and threatened and beat them. They only managed to return to the UK in 2012 with the help of the Pakistani police. She said that there was no evidence of any ongoing interest from the ex-husband and although there was a recent referral for the older child to the Children’s Emotional Wellbeing Service she was satisfied that any support needed could be provided by both parents in Pakistan where they could integrate into society there; both had strong links to that country.
8. She took into account the evidence from the older child that she did not want to lose her father and that she wanted to live with them both in the UK. The Judge reminded herself that the Appellant had only been living with his wife and the children since January 2014 and only caring for them whilst his wife worked since March 2014. There was no supporting evidence of whether the Appellant’s wife could earn a sufficient sum to

meet the financial requirements for her husband to join her and no medical evidence to suggest that there were any serious mental health problems.

9. She concluded as follows:

“It is of course not the children’s fault if others have acted badly but at the same time the Appellant has sought to undermine the immigration system and has shown disregard for the laws of the UK by using deception. He and his wife have furthered their relationship and his with the children in the full knowledge that he has no status in the UK and might have to return to Pakistan. Considering the short length of time that the Appellant has been involved with this family I find the best interests of the children are to remain in the UK with their mother where they have the benefit of British citizenship. I accept that the Appellant has a close and positive relationship with them as well particularly significant in Z’s case but the positive impact on the children and on the Appellant’s wife having him remain in the UK with them is outweighed in this case by the interests of maintaining immigration control. I make that finding having regard also to the matters contained in Section 117A and B of the Nationality, Immigration and Asylum Act 2002.”

10. She dismissed the appeal.

The Grounds of Application

11. The Appellant sought permission to appeal on the grounds that the Judge’s findings were demonstrably contrary to the weight of evidence before her and even if deception had been used, which was denied, S-LTR2.2A is a discretionary ground for refusal. The Judge failed to reason why discretion ought not to have been exercised in the Appellant’s favour, particularly in the light of her findings that the parties were in a genuine and subsisting marriage and it was in the best interests of the British children to remain in the UK.
12. She placed undue weight on two statements submitted by the Respondent which have not been verified, and misdirected herself in attaching weight to the statements in the absence of further evidence linking his particular oral test to the language college in 2012 to the fact that his result went through the purported search engine and shown as invalid. The Appellant has been deprived of an opportunity to challenge and explore the evidence.
13. The evidence relied on is general and does not deal with the Appellant’s particular test. The refusal letter refers to the cancellation of the test, and at paragraph 29 of one of the statements, ETS confirmed that even questionable results, which were inconclusive in terms of whether a proxy test taker was used, were still cancelled on the basis of administrative irregularity. In the current case there was nothing to adduce directly from ETS or TOEIC to expressly and unequivocally state that a proxy test taker was identified. No reasons were given for the invalidation. Moreover the score sheet invalidates two scores which are presumed to be the speaking

and writing tests and expressed as 180 and 180 whereas the official score report in the Respondent's bundle confirmed that he scored 180 and 160 which is inconsistent and undermines the quality of the evidence provided by ETS.

14. The Judge failed to take into account that at paragraph 22 of Peter Milligan's statement it confirms that ETS has a policy to cancel test scores on mere suspect behaviour and it cannot be verified as to whether the result was cancelled for that reason. There was no evidence to confirm whether or not human verification had taken place in the Appellant's case and according to the witness statement there were 6,600 cases of false positives since only 80% were confirmed by human verification. The witness statement itself states that the voice recognition software was imperfect and could potentially flag up results on the basis of background noise. There was no evidence from ETS as to who the analysts who carried out the human verification were.
15. If the allegation of deception is unfounded the Appellant meets all of the requirements of Appendix FM for leave to remain in the UK in reliance on EX.1 and the finding that he has a genuine and subsisting relationship with a British child and it is in the interests of the British children to remain in the UK.
16. Permission to appeal was granted by Judge Cruthers for the reasons stated in the grounds on 9th February 2015.

Submissions

17. Ms Cleghorn relied on her grounds. She also stated that, according to the Home Office website, the ETS licence expired on 6th April 2014 and anyone relying on an ETS test in an application made after 1st July 2014 would not be considered to have made a valid application.
18. She relied on her challenge in the grounds to the procedures adopted by ETS and submitted that the Judge had plainly erred in failing to consider the discretionary nature of SL-TR2.2. Discretion ought to be exercised in the Appellant's favour because it was accepted that it was in the children's best interests to be with both of their parents. This was a genuine family. It was clear that the children had undergone a traumatic experience on their last visit to Pakistan and did not want to return. Both were British citizens at school in the UK and they did not speak Urdu. Moving to Pakistan was simply not an option. The Appellant met the other requirements set out in 117B.
19. Mr Diwnycz informed me that he had consulted a senior colleague who had told him that ETS do not give information to the Home Office of certificates which had become invalid because of the passage of time. In this particular case ETS notified the Home Office of their view that the Appellant had practised deception on 14th April 2014 when, according to the official score report, the test was still valid. At C1 of the bundle it

states that the test was valid from 26th September 2012 to 25th September 2014.

Consideration of whether there is an error of law

20. I rely on Mr Diwnycz's report of the senior colleague when he told me that ETS do not include in their reports of invalidity tests which become invalid simply because of the passage of time. If it were otherwise, there would clearly be grave concerns about the reliability of the data because there would be no way of distinguishing between invalidity because the ETS licence has expired and invalidity because of deception.
21. So far as the evidence itself is concerned i.e. the witness statements and the printout, the Judge was entitled to rely on them. As she set out in the determination, the tests were analysed not only by voice recognition software but by two analysts, working independently, one of whom was experienced.
22. According to Peter Milligan an individual test result which has been invalidated on the basis of test administration irregularity rather than an individual's results being analysed would usually result in an invitation to a free re-test and in any event are clearly distinguishable by ETS in the spreadsheets provided to the Home Office. In this case there is no evidence that the Appellant was offered a re-test and nothing in the spreadsheet.
23. I accept that the official score report refers to a speaking score of 180 and writing score of 160 whereas the printout refers to both being 180 but I understand that the printout is completed by the Home Office from information provided by ETS and that in itself does not render the printout unreliable.
24. So far as the false positives are concerned from the voice recognition, only 80% are confirmed by human verification. However that does not mean that those 80% are marked as invalid. According to the witness statement human verification is required in every single case. It is simply not true to suggest that the system is only 80% accurate.
25. The burden of proof is on the Respondent to establish deception. The standard of proof is the civil standard, the balance of probabilities and applying that standard, on the basis of the evidence before her, the Judge was entitled to conclude that it had been discharged.
26. Article 8 was not pleaded in the grounds although Ms Cleghorn sought to submit that no proper Article 8 analysis had taken place. That is plainly wrong. From paragraphs 24 to 31 the judge conducted a detailed analysis of all of the relevant factors and reached a conclusion open to her.

27. However there is an error in respect of S-LTR2.1 which is a discretionary ground for refusal and not mandatory as the Judge appeared to believe.
28. Under S-LTR2.1 the applicant will normally be refused on grounds of suitability if any of paragraphs S-LTR.2.2-2.4 apply.
29. S-LTR2.2 states that (a) whether or not to the applicant's knowledge false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document in support of the application) or (b) there has been a failure to disclose material facts in relation to the application.
30. The issue here is whether the normal course should be followed.
31. It is the Appellant's case that he meets the requirements of EX.1, aside from the suitability requirements because he has a genuine and subsisting parental relationship with a child who is a British citizen and it would not be reasonable to expect the child to leave the UK. He also has a genuine and subsisting relationship with a partner who is in the UK and a British citizen and there are insurmountable obstacles to family life with that partner continuing outside the UK.
32. On an application for entry clearance he would be refused under paragraph 320(7B) having used deception in his application for leave to remain, although if he left the UK voluntarily, not at the indirect or direct expense of the Secretary of State more than twelve months ago, 320(7B) would not apply. He would of course face a ten year ban if he was removed or deported from the UK. There would inevitably therefore be a delay in his being able to return.
33. Whilst he has a genuine and subsisting relationship with his spouse it cannot be said on the findings of the judge that there are insurmountable obstacles to family life continuing with her outside the UK because she has close links to Pakistan, albeit that she is a British citizen, and there is no recent evidence of any adverse interest in her there.
34. So far as the children are concerned, on the findings of the Judge, the Appellant has a good relationship with them. There was some evidence of some past traumatic events occurring in Pakistan, although not of any continuing interest by the children's father, but no evidence of any serious health problems. Their best interests lie in remaining in the UK where they have the benefit of British citizenship.
35. There is no evidence one way or the other in relation to the couple's finances.
36. Like the first Immigration Judge I place weight upon the fact that the Appellant's relationship with his partner and her children is of relatively short duration. I accept that it would be unreasonable to expect the children to leave the UK, and there would undoubtedly be a period of separation, but against that, in twelve months' time, the Appellant would

be able to apply for entry clearance if he left voluntarily to re-join his wife and her children here. He has been guilty of practising deception, and there would have to be substantive reasons why the normal course of events should not be followed.

Notice of Decision

37. The original judge erred in law and her decision is set aside. It is re-made as follows. The Appellant's appeal is dismissed.

38. No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Taylor