



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/40662/2014

THE IMMIGRATION ACTS

Heard at Bradford
On 3rd September 2015

Determination Promulgated
On 7th September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR WAQAS HABIB
(ANONYMITY NOT DIRECTED)

Respondent

Representation:

For the Appellant: Mrs R Pettersen, Senior Home Office Presenting Officer

For the Respondent: Mr T Hussain, Counsel instructed by Harris and Green Solicitors

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Ince who, in a decision promulgated on the 24th February 2015, allowed the appeal against the decision to refuse the application of Mr Waqas Habib for further leave to remain on private and family life grounds. For ease of exposition, I shall hereafter refer to the parties in accordance with their status in the First-tier Tribunal;

that is to say, I shall refer to Mr Habib as 'the appellant' and to the Secretary of State as 'the respondent'.

The issue raised in this appeal

2. The respondent gave several reasons for refusing the appellant's application. These are set out in an explanatory letter that is dated the 17th October 2014. They included what were said to be the appellant's failure to meet (i) the "eligibility requirements" for leave to remain under Appendix FM of the Immigration Rules, either as a partner or parent of a child who is settled in the United Kingdom, (ii) the exceptional circumstances test for a grant of leave to remain on family life grounds, either under Section Ex.1 of Appendix FM or outside the Rules, and (iii) the requirements for a grant of leave to remain on private life grounds under paragraph 276ADE.
3. The fact that Judge Ince allowed the appeal without apparently engaging with any of the above reasons for refusing the application is, perhaps surprisingly, not one of the bases upon which this appeal has been brought. Rather, the sole ground upon which permission to appeal was sought and granted is that Judge Ince may have applied an "impermissibly high standard of proof" in finding that the appellant did not employ deception in the English language test which he sat on the 25th July 2012 and that he thus met the "suitability requirements" under Appendix FM. I am therefore constrained only to consider whether Judge Ince erred in this regard.

The findings of the First-tier Tribunal

4. The reasons why Judge Ince found that the appellant had not employed deception in his English language test are set out at paragraphs 20 to 27 of his decision:

"Credibility"

20. I was satisfied that the Appellant told me the truth when he appeared before me. He gave his evidence [in which he denied having used a 'proxy'] in a straightforward manner, was generally not evasive or inventive, being quite prepared to admit to not knowing an answer to a particular question. His evidence was consistent with what he had stated beforehand. He was not really shaken on cross-examination and appeared to be totally at ease with his testimony. I accept that he became confused about whether he was informed on the day of the test that he had passed, but take account of the fact that he was being asked to recall events some 2½ years earlier.

Analysis

21. I have the advantage over the Respondent in that I have heard credible evidence from the Appellant, whereas the Respondent only dealt with the matter on the limited documentation provided to her.
22. It is accepted by all parties that if the Respondent fails to prove that the Appellant practised deception, then the Appellant succeeds in his appeal. I remind myself that the burden of proof is on the Respondent.
23. The evidence produced by the Respondent amounts to two generic statements explaining what the Respondent understands the process to be when ETS reviewed its test results and a specific statement from Mr Addy exhibiting what the Respondent

was sent by ETS, namely a spreadsheet which apparently indicates that a proxy attended the test undertaken by the Appellant in July 2012.

24. As I indicated to Mr Spence, the spreadsheet, even with what limited elaboration is provided by the Respondent's witness statements, does not demonstrate anything of the sort. It merely indicates that the test certificate is "invalid". Nowhere is there mentioned the words "proxy test taker" - a passport number is mentioned but no explanation is given what this refers to. At its highest, by itself, all the spreadsheet states is that ETS believed that the test certificate was invalid.
25. I take account of what has not been produced by the Respondent or ETS. There is no expert analysis of the recording of the Appellant's test; no indication as to the features of the alleged proxy taker's speech patterns which enabled him to be identified as such; no details confirming that the correct tape recording was analysed; no details of the apparently numerous other instances when the proxy tester attended on behalf of others; moreover, given the importance of the matter, I find it significant that ETS did not, for instance, seek to obtain a recording of the Appellant's voice for comparison purposes; in addition, the Appellant's evidence that his photograph was taken was not challenged and if his photograph was taken (which appears plausible as this is an increasingly common way for identity to be established when attending such tests) this begs the question why it has not been produced by ETS to establish whether the Appellant attended.
26. Accordingly, I am drawn to the conclusion suggested by the Appellant in his witness statement, namely that just because ETS believe that the certificate issued to him is invalid, this does not mean that the same was obtained by deception, still less by the use of a proxy test taker. The evidence before me from the Respondent is woefully inadequate and does not establish that a proxy test taker attended on the Appellant's behalf at the test on 25 July 2012 or that the Appellant did not attend that test.
27. Accordingly, on the evidence before me, I do not consider that the Respondent has discharged the burden of proof upon her. I therefore allow this appeal."

The Secretary of State's argument

5. As previously noted, the grounds state that the above analysis demonstrates that the judge imposed an "impermissibly high standard of proof". Having recited a number of passages from the witness statements submitted in support of the respondent's case, the grounds go on to argue that the respondent had "reasonably concluded that the appellant had used deception" and that the judge "failed entirely to provide adequate reasons for its findings to the contrary". In granting permission to appeal, Judge Grimmett found it arguable that the judge erred in his conclusion at paragraph 24 in light of the evidence at paragraph 28 of Ms Colling's witness statement. For her part, Mrs Pettersen focussed upon Judge Grimmett's observation that Judge Ince had not engaged with paragraph 28 of Ms Grimmett's witness statement.

Discussion

6. It is not disputed that the judge directed himself in accordance with the correct standard of proof; namely, 'the balance of probabilities'. The argument that he in fact applied a higher standard does not bear scrutiny. Whilst the respondent's evidence undoubtedly raised a case for the appellant to answer, Mrs Pettersen did not seek to

argue that it was conclusive and thus incapable of rebuttal. Indeed, I note from paragraph 29 of Mr Millington's statement that the respondent's evidence of deception is essentially dependent upon an assurance from ETS that the underlying technology is "well established and tested". It has not however been possible to subject that assurance to any form of independent scrutiny due to a confidentiality agreement between ETS and the vendor of the relevant software. It was thus open to the appellant to adduce rebuttal evidence in support of his appeal, and that is precisely what he did. The judge considered the evidence that the appellant had not practised deception and he thereafter gave reasons for preferring it to the respondent's evidence that he had. Whilst the judge was wrong to assert that there was no mention of a "proxy test taker" within the respondent's evidence, this was not an error that in any sense infected his finding that the appellant was a truthful and accurate witness. I therefore conclude that this appeal is nothing more than a quarrel with factual findings that were reasonably open to the Tribunal upon the evidence that was before it.

Notice of Decision

7. The appeal is dismissed.

Anonymity is not directed

Signed

Date

Judge Kelly
Deputy Judge of the Upper Tribunal