



IAC-CH-SA-V1

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

Appeal Number: IA/35622/2014

THE IMMIGRATION ACTS

**Heard at Fields House
On 18th February 2016**

**Decision & Reasons
Promulgated
On 9th March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MR MD ARIFUL HOQUE SUNNY
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M A Syed-Ali of Counsel
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Bangladesh born on 29th August 1987. He appealed against a decision of the Respondent dated 30th August 2014 to refuse his application for leave to remain outside the Immigration Rules

under Article 8 (right to respect for private and family life) of the Human Rights Convention. His appeal was allowed at first instance by Judge of the First-tier Tribunal Clarke sitting at Taylor House on 9th June 2015 such that a lawful decision remained to be taken. The Respondent appeals with leave against that decision but for the sake of convenience I shall continue to refer to the parties as they were known at first instance.

2. The Appellant entered the United Kingdom on 17th September 2009 as a Tier 4 (General) Student with leave valid until 31st July 2012. This was extended until 28th June 2015. On 10th September 2013 the Appellant married Ms Rukiya Khanom, a British citizen (“the Sponsor”). On 25th July 2014 the Appellant submitted his application for leave to remain as the spouse of a settled person the refusal of which has given rise to the present proceedings.

The Explanation for Refusal

3. The Respondent refused the application under Section S-LTR.2.2(a) of Appendix FM to the Immigration Rules and paragraph 320 of the Immigration Rules. This provides that whether or not to the applicant’s knowledge: (a) false information representations or documents have been submitted in relation to the application including false information submitted to any person to obtain a document used in support of the application or (b) there has been a failure to disclose material facts in relation to the application the application is to be refused. By virtue of paragraph 320 leave to enter or remain in the United Kingdom is to be refused where false representations have been made or false documents or information have been submitted whether or not material to the application or material facts have not been disclosed in relation to the application or in order to obtain documents from the Respondent or a third party required in support of the application. (320(7A)).
4. The Respondent gave the following reasons for her decision:

“Educational Testing Service (ETS) is obliged to report test scores that accurately reflect the performance of test takers. For that reason ETS routinely reviews testing irregularities and questions test results believed to be earned under abnormal or non-standard circumstances. ETS’s score cancellation policy states that ETS reserves the right to cancel scores and/or take other action deemed appropriate where ETS determines your test centre was not following established guidelines set forth by the TOEIC programme. During an administrative review process, ETS have confirmed that your test was obtained through deception. Because the validity of your test results could not be authenticated your scores from the certificates submitted with your application of 13th July 2012 have been cancelled. You are specifically considered a person who has sought leave to remain in the United Kingdom by deception following information

provided to us by Educational Testing Service that an anomaly with your speaking test indicated the presence of a proxy test taker”.

5. The Appellant met the eligibility requirements but did not meet the requirements of EX1 because there were no insurmountable obstacles preventing the Appellant from continuing his relationship with his wife from outside the United Kingdom. There were no legal impediments or insurmountable obstacles to the Appellant and the Sponsor continuing their relationship overseas. The Appellant could not meet the requirements for leave to remain on the basis of his private life because he had failed the suitability requirements and therefore could not meet the Rules on eligibility grounds. The Appellant had entered the United Kingdom on 17th September 2009 and as at the date of the refusal letter had lived in the United Kingdom for four years and eleven months. He could not meet the requirement to have lived continuously in the United Kingdom for at least twenty years.
6. There were no exceptional circumstances as to why the Appellant’s application should be granted outside the Rules. When he entered the United Kingdom his leave was as a Tier 4 Student and therefore he was not in the United Kingdom on a route to settlement. He could have had no expectation that he would be allowed to remain in the United Kingdom indefinitely. His private life had accrued in the knowledge that he would have to return to Bangladesh one day. There was nothing to prevent the Sponsor from returning to Bangladesh with the Appellant. The Appellant’s removal remained appropriate because while there were no known criminal convictions the Appellant had submitted false information in the form of fraudulent English language certificates and therefore had tried to obtain leave by deception.

The Respondent’s Evidence

7. The burden of proof of establishing that the Appellant had submitted a fraudulent test certificate rested on the Respondent. To support that allegation the Respondent relied on three witness statements. The first was from Matthew Harold a Senior Case Worker at the Home Office. He stated that the decision to take enforcement action against the Appellant was taken in the light of the cancellation of the Appellant’s English language test result by the test provider. The test result had been cancelled by ETS because its own analysis indicated that the test result had been obtained via the use of a proxy tester. The Respondent was notified of this by way of an entry on a spreadsheet annexed to Mr Harold’s statement. This was the spreadsheet record that had all the names of the TOEIC test takers. “Invalid” was recorded against the named certificates of the Appellant.
8. The second statement was from Mr Peter Millington an Assistant Director at the Home Office who explained the procedure used by ETS in some detail. The voice biometrics technology used by ETS to analyse the

English language tests was considered to be reliable. He concluded at paragraph 48 that ETS could state that where matches had been identified the individuals taking English language tests which had been submitted on behalf of different test takers were highly likely to be the same person.

9. The third statement was from Rebecca Collings a Grade 6 Civil Servant working for the Respondent. She indicated how it was that the Respondent had become aware of the potential issues with testing ETS. In late March 2014 ETS informed the Respondent that it had been able to identify impersonation and proxy testing using voice recognition software. Early analysis demonstrated evidence of cheating but ETS confirmed that it would take time to complete analysis for all tests taken since April 2011. Paragraph 29 stated that ETS had explained that those applicants categorised as questionable (as opposed to cancelled or invalid) were inconclusive and one could not be certain of impersonation or proxy test taking. Where an individual's test result was still cancelled on the basis of test administration irregularity including the fact that their test was taken at a UK testing centre where numerous other results had been invalidated on the basis of a match that would come within the definition of questionable. ETS had analysed over 10,000 test scores at that point of which the majority were cancelled as invalid. The remainder were cancelled as questionable.

The Decision at First Instance

10. The Appellant appealed against the Respondent's decision on the grounds that the Respondent had wrongly considered the Immigration Rules. Judge Clarke having heard submissions (the Appellant did not give evidence) found that the Respondent's decision to refuse the Appellant's application was not in accordance with the law because there had been defects in the procedure. Rejecting the evidence of the three witness statements the Judge wrote at paragraph 11:

“What the witnesses are doing is merely describing the steps taken by ETS but there is no evidence from the individual at ETS who conducted this procedure when examining the Appellant's two test certificates. That is the missing link in the chain and the crucial one because in the absence of a witness testifying as to what they did there is the possibility for error by the compiler of the spreadsheet and the Appellant is denied the opportunity to cross-examine or at least make submissions as to the compilation of data”.

11. The Appellant had scored ESOL Grade 2, equivalent to A1, on 11th June 2014 some two years after the ETS test in question. The fact that the Appellant passed the test in June 2014 with distinction was of some relevance. The Respondent had not discharged the burden of proof upon her of showing that the Appellant had practised deception. The approach by the Respondent was tainted by considering that the application made by the Appellant was under Article 8 and there was for example no

consideration of the maintenance issue. She allowed the appeal to the extent that the decision remained outstanding for the Respondent to take.

The Onward Appeal

12. The Respondent appealed the decision arguing that he Judge had given inadequate reasons for her findings on a material matter. The Judge's point that the witness statements and the extract from the spreadsheet did not assist the Respondent's case was incorrect. The witness statements when read in conjunction with one another detailed extensively the investigation undertaken by ETS in this Appellant's case along with thousands of other applicants and showed the process of identifying those tests found to be invalid. It was clear from these statements that ETS identified this Appellant after a lengthy and systematic investigation. The Tribunal should have had due consideration to the specific evidence which identified the Appellant as an individual who had exercised deception together with the witness statements outlining the investigation process. The Appellant did not meet the suitability requirements of Section S-LTR.2.2(a) of Appendix FM.
13. The application for permission to appeal came on the papers before First-tier Tribunal Judge Fisher on 8th October 2015. In refusing permission to appeal he wrote that this case was one of many in which an Appellant had produced an ETS English language test certificate. The Respondent had produced the generic evidence relied upon in every case of this nature. At paragraph 11 of her decision the Judge gave adequate reasons why she found that the burden of proof had not been discharged. In essence the grounds were no more than a disagreement with that decision. The Judge reached a conclusion which was open to her on the evidence presented.
14. The Respondent renewed her application for permission to appeal arguing that Judge Fisher had not fully engaged with the grounds of appeal. The witness statements had outlined the investigation process which identified the Appellant as an individual who had practised deception and the extract from the ETS spreadsheet referred specifically to the Appellant.
15. The renewed application for permission to appeal came before Upper Tribunal Judge Taylor on 4th November 2015. In granting permission to appeal she wrote:

"It is arguable that the original Judge misdirected [herself] in considering that there was an error in procedure and allowing the appeal on a limited basis. The claimant applied for leave as a spouse which was considered in the refusal letter and refused on suitability grounds because the Respondent believed that the claimant had practised deception in his ETS. There was specific evidence in relation to this individual. Arguably the Judge erred in law in not providing adequate reasons for rejecting it."

The Hearing Before Me

16. The Appellant responded to the grant of permission in a skeleton argument submitted to me for the hearing. It was possible that an honest test taker had had the misfortune of taking the test at a centre where there was mass corruption and that as a result the honest taker's result might have a match and be invalidated. ETS did not provide the basis how they were able to distinguish these cases from those that were genuinely deception cases. ETS had made what was described in the argument as a "big blunder" by allowing unscrupulous operators to administer its tests who had a vested interest in showing 100% pass rate. Individual foreign students were now victimised instead of the test administrators. The Appellant had no incentive to use a false test taker as could be seen by the fact that when he took another test in June 2014 he had obtained a high score. Even if the Judge had considered the Respondent's witness statements in greater detail the outcome of the decision would have been no different. The basis of the Judge's reasoning was sufficiently demonstrated.
17. In oral submissions counsel argued that this was not a case to decide whether the Appellant had an in-country or out of country right of appeal. This appeal involved a general attack on the validity of the evidence supplied by the Respondent in English language test cases. There were defects in the Respondent's evidence. In this case the Appellant's name came in the list of candidates that were taking the test. The Appellant did not deny that he had used his TOEIC certificate because it had been honestly obtained. Given the evidence heard the Judge was entitled to make the findings that she did. The conclusion at paragraph 11 of the determination would still be the same even though the Judge had made no reference to paragraph 29 of Rebecca Collings' statement (for which see paragraph 9 above). Paragraph 47 of Peter Millington's statement said that where a match had not been identified and verified an individual's test result might still be invalidated on the basis of test administration. This could include the fact that their test was taken at a UK testing centre where numerous other results had been invalidated on the basis of a match. The Judge was correct to disregard the Respondent's refusal of the application on suitability grounds. Once the Judge had made a finding that the suitability ground did not hold the Judge's options were narrow. The Respondent had refused to engage with the application. It was correct to refer the matter back to the Respondent to make a decision on the FLR(M) application form.
18. In reply the presenting officer argued that this was a discrete point and the Respondent stood by her grounds. The findings of the Judge were flawed. There was some discussion as to whether there had been a recent decision on the validity of the TOEIC but neither party was able to cite that to me. In conclusion Counsel reiterated the difference between the judicial review decisions on whether or not an applicant had an in-country right of appeal from the present case. Even if the decision of the First-tier Tribunal

was set aside the matter should still be sent back to the First-tier to be heard again.

Findings

19. The evidence before the Judge which this case turned on was contained in an extract from a spreadsheet prepared by ETS which was exhibited to the witness statement of Matthew Harold. This has the Appellant's name, his date of birth and shows his test centre was the London School of Technology. It gives the certificate number and states that it was invalid not that it was questionable. It shows the test date was 20th June 2012 and that the speaking score was 180.
20. The Judge did not accept this spreadsheet evidence as proving that the Appellant had employed a proxy taker because there was no evidence from an individual at ETS who conducted the procedure when examining the Appellant's two test certificates.
21. This was as the Presenting Officer submitted to me a very narrow point. It is correct that the three statements relied upon by the Respondent are used in a very large number of cases. The important point however is that what individualises the evidence in this case is the annex to Mr Harold's statement. That annex is the spreadsheet extract which relates to the Appellant and not to any other test taker. The statements therefore are generic in terms of describing the procedure used by ETS to identify fraudulent tests but Mr Harold's statement is also specific to the issues in this case because the spreadsheet refers to this Appellant.
22. The Judge's argument that there was a missing link in the chain because there was no witness testifying as to how the spreadsheet was compiled is I find misconceived. The Respondent's evidence describes the procedure carried out by ETS in compiling the spreadsheets. The Respondent then produces the relevant extract from the spreadsheet which relates to the Appellant.
23. The burden of proof of showing deception rests on the Respondent and the standard of proof is the usual civil standard. As the Court of Appeal have pointed out there is only one standard of proof in such cases. However it is correct to point out that the more serious allegation the more cogent the proof needs to be. In this case the spreadsheet information is very detailed and identifies precisely this Appellant and that his test is invalid and not questionable. I do not consider that there is a missing link as the Judge identified at first instance. The three witnesses are reporting what they have been informed by ETS but I see no reason why what they are reporting is inaccurate. ETS were faced with a situation as Rebecca Collings points out in paragraph 30 that the numbers of tests to be analysed was huge and the level of cheating was "incredibly high". What was important was to show that this Appellant had an invalid test because of what was revealed by investigations by ETS. That there was not a

statement from an ETS employee but rather three statements from senior figures in the Respondent is not in my view something which can be used to impugn the results of ETS's investigations. The Respondent's statements are very detailed and it is clear from them how ETS have compiled the results which have been produced. It would not be reasonable to expect the entire spreadsheet to be produced as that would relate to persons other than the Appellant. All that could reasonably be expected to be produced was an extract from the spreadsheet which related to this Appellant and which showed that his test result was invalid. There could be no doubt why ETS formed the view that this Appellant's test result was invalid because it had been taken by a proxy taker.

24. This was not a case where an innocent applicant had taken a test at a fraudulent test centre and was therefore tarred with the same brush. The evidence which related to this Appellant was specific to this Appellant. That evidence amply demonstrated that the Appellant had not taken his test. That was deception and in relying subsequently on the test certificate obtained the Appellant was practising further deception.
25. Whether or not the Appellant two years later was able to take a test and pass it was irrelevant. The issue was not so much the Appellant's English language ability as that there was a time when he could not take a test on his own and had relied on someone else to take the test for him and had then used that fraudulently obtained test. That meant he fell foul of both the suitability requirements and paragraph 320(7A). The burden of proof on the Respondent had been discharged by the evidence produced. The Judge erred in law in not accepting that evidence.

The Re-hearing

26. The decision of the Judge therefore falls to be set aside and the issue remains as to the outcome in the case. I note that at the hearing at first instance neither the Appellant nor the Sponsor gave evidence. The Judge noted at paragraph 6 of her determination when informed that the Appellant was not going to give evidence:

"I therefore indicated that he should not adopt his witness statement prepared for the hearing or Ms Butt [the presenting officer] was entitled to cross-examine him".

27. The Respondent was entitled to find that the Appellant could not meet the Immigration Rules because he had fallen foul of the suitability requirements and because of the deception employed. For the Appellant to succeed outside the Rules the Appellant would have to show that there were compelling circumstances why the appeal should be allowed. The question of whether the Appellant and the Sponsor could meet the financial requirements was irrelevant. Whether or not the Appellant could meet those requirements he could not meet the suitability requirements and therefore failed under the Rules.

28. As Upper Tribunal Judge Taylor pointed out when granting permission to appeal the Respondent had considered the Appellant's application for leave as a spouse in some detail. The Respondent's view was that the Appellant and Sponsor could continue their family life together in Bangladesh. The Judge was given no oral evidence (that could have been examined in cross examination) to contradict that. The family life of the Appellant and Sponsor had been built up whilst the Appellant's status here was precarious in that he only had leave to remain as a student.
29. Given the lack of oral evidence it would not have been possible for the Judge to have found that the application would have been granted such that it could be argued that there was little useful purpose to be served in requiring the Appellant to return to Bangladesh to make his application for entry clearance from there. The Appellant needed to establish far more than he has done until now to show that he could succeed under the Rules. The Appellant could not meet the Immigration Rules and could not demonstrate any compelling reasons why his appeal should be allowed outside the Rules.
30. The relationship between the Appellant and the Sponsor appears to be accepted as genuine and subsisting and there was family life between them. That family life would be interfered with by requiring the Appellant to return to Bangladesh to make his application for entry clearance from there but that interference would be in accordance with the legitimate aim of immigration control since the Appellant's leave in this country had been obtained through deception by the use of a false language certificate. It had been built up as a result of the deception employed. That is a factor which weighs heavily on the Respondent's side. I find it would be proportionate to the legitimate aim being pursued that the Appellant should return to Bangladesh and if he so wished to make an application from there to return to this country. It follows that the appeal in relation to family life must be dismissed.
31. The Appellant's private life had been established whilst his stay here was precarious and was based on the use of a false document. Little weight could be given to it. It was proportionate that the Appellant's private life in this country should be interfered with (by requiring him to leave) pursuant to the legitimate aim being pursued. I therefore dismiss the Appellant's appeal under both the Immigration Rules and Article 8.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I remake the decision by dismissing the Appellant's appeal against the Respondent's decision to refuse leave and to give directions for the Appellant's removal.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 1st day of March 2016

.....

Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 1st day of March 2016

.....

Deputy Upper Tribunal Judge Woodcraft