



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13087/2016

THE IMMIGRATION ACTS

Heard at Field House
On 23 July 2018

Decision & Reasons Promulgated
On 11 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MR NAZMUL ISLAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Hasan, Solicitor of Kalam Solicitors
For the Respondent: Mr E Tufan, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Bangladesh, date of birth 25 November 1985, appealed against the Respondent's decision, dated 20 May 2016, to refuse leave to remain on the basis of marriage. His appeal against that decision came before First-tier Tribunal Judge Obhi who, on 28 February 2018, dismissed the appeal on human rights grounds.

Permission to appeal that decision was given by Upper Tribunal Judge Reeds on the basis that the Judge had failed to consider the Appellant's evidence relating to his innocent explanation in conjunction with the issues raised as to an adverse ETS decision, and also failed to consider published policy in connection with and addressing Section 117B(6) NIAA 2002 as amended.

2. The Reasons for Refusal Letter refers to the applicant having submitted in the application, dated 24 October 2013, a TOEIC test certificate, dated 5 December 2012, and that that certificate was fraudulently obtained and it had been used as a basis of deception in the application. As a fact, contained within the Respondent's bundle put before the Tribunal Judge was a print out of documentation as noted within the internal processes of the Home Department, in particular the part of the application form which was actually submitted. That application form makes plain that an ETS test certificate was being provided showing English language at level B2 from a registered provider and the date of the test was said to be 20 February 2013 (not 5 December 2012).
3. Against that factual background the Appellant put in evidence in a statement which I have seen his contentions that he was not issued with a certificate from December 2012. He had not submitted any such certificate and he had been told, shortly after taking a test in December 2012, that all the tests were cancelled: He would need to re-take his test at a different centre. He duly did so, obtained the certificate of 20 February 2013 and presented it with his October 2013 application.
4. The Appellant's evidence before the Judge also included his description of taking the test and his description of his pertinent English language skills prior to taking the TOEIC test in 2013. Within the Respondent's bundle there was the clear evidence that of the ETS results and in particular the generic evidence with which all should be familiar, but also the results from the college and the ETS test results. The certificate referred to is dated 5 December 2012 and it says that the certificate ending in the numerals 9037 for Mr Nazmul Islam, date of birth 25 November 1985, was invalid, and

indeed the test centre look-up tool shows the extraordinary proportion of certificates and the extent to which they were found to be questionable and invalid, and in addition there is the schedule before the Judge of, and listing the certificate numbered 9037, was invalid.

5. The Appellant gave evidence that he simply did not submit that certificate, he had not used a proxy test taker back in November 2012, and more importantly had never submitted it, as indeed it looks like the Respondent's evidence actually shows. The Judge makes no reference to Appendix K of the Respondent's bundle and simply says that on the Judge's analysis the Appellant must have submitted the 2012 certificate. The reasoning is confusing, circuitous and is set out in [D 24]. The Judge did not, in ultimately 'seemingly' rejecting the explanation, actually address the fact other than to accept that at a later date the Appellant had taken the test in February 2013. The Judge goes on to speculate that "... There is no way in which the Respondent could have known that unless that unless the Appellant told the Respondent or had made some general enquiry with ETS". It seemed to me that that is itself indicative that if there was enquiry of ETS for whatever reason that matter might have been addressed to the Respondent, but I do not, as the Judge did, speculate on that issue.
6. What is clear is that an ETS letter later written was contained within the Appellant's bundle before the Judge. The letter is unspecific as to which test was being referred to by ETS other than to say:-

"As you should be aware, because of the validity of your test results could not be authenticated, those scores from the test taken on 20/2/13 at South Quay College have been cancelled. As such, your Certificate is no longer valid."

The letter does not explain on what basis it was cancelled and it may be it is simply a fact that test certificates have a life of two years, after which they have no further validity.

7. There is in that explanation nothing to indicate an assertion that the Appellant had used a proxy test taker, simply that for one reason or another the results could not be authenticated. The Judge from that infers, it seems to me, that that must be an indication that the Appellant had submitted the 2012 certificate and that therefore he had knowingly participated, both in taking a test using a proxy test taker: He sought to use deception by reliance on that 2012 certificate when he, as a fact, had not, and nor does the Respondent's document, Appendix K, suggest he did.
8. I therefore reach the view that irrespective of the weight of evidence that was properly there in relation to proxy test taking, the decision was founded on a completely erroneous basis and the Judge made a significant mistake in engaging with the 2012 certificate, absent of clear evidence that that certificate had been submitted by the Appellant, of which, as I understand it, there was no evidence.
9. For that reason it is not impossible, I do not seek to speculate on it, that a proxy test taker was used to obtain the first certificate, but there was not the evidence before the Judge to show on a balance of probabilities that that was the case. It may be that there is, as we know from the generic evidence some scope for error. Nor is it the Respondent's case, even if the 2012 certificate was not presented, the use of the proxy test taker taints the 2013 certificate. On the face of it the Appellant gave, as it were, an innocent explanation as it is so-called, as to his background, his circumstances, his prior qualifications.
10. Mr Tufan makes the fair point that there may be a variety of motives for people to use a proxy test taker, not least the fear of failure and its importance, but he does not seek to say there is any one cause, nor is any Tribunal obliged to find one. For the reasons I have given I find the Original Tribunal's decision is not rational and failed to get to grips with 'independent' evidence that was available as to the nature of the application that was made and Appendix K of the Respondent's bundle.

11. For these reasons I have decided that the Original Tribunal's decision cannot stand. It follows also that the view expressed by the Judge at paragraph 28 is open to considerable concern about the rational basis of it, and bearing in mind the evidence of a test certificate which, on the face of it, from 2013, has not been shown even now to be the product of a proxy test taker and therefore the error made in relation to the 2012 certificate does not carry forward to taint the 2013 certificate.

12. For these reasons therefore I have concluded the matter will have to be remade with a proper consideration of the evidence and that applies equally in relation to, although I would not be unduly optimistic, and the issue of the British national child with whom it is said there was a genuine and subsisting relationship and whether it is reasonable for the child to leave the UK as a British national. No findings of fact to stand.

NOTICE OF DECISION

The appeal is allowed to the extent that it must be remade in the First-tier Tribunal, not before First-tier Tribunal Judge Ochi.

ANONYMITY

No anonymity direction is made.

Signed

Date 20 August 2018

Deputy Upper Tribunal Judge Davey