



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01411/2016

THE IMMIGRATION ACTS

Heard at Field House
On 14 February 2018

Decision & Reasons Promulgated
On 09 March 2018

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MIR SANJIDA IFFAT
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Duffy, Senior Presenting Officer

For the Respondent: Mr S Hyder, of Reza solicitors

DECISION AND REASONS

Introduction

1. The Secretary of State is the appellant before the Upper Tribunal. For the sake of convenience, I shall refer to Mir Sanjida Iffat as 'the claimant' herein.
2. The claimant is a citizen of Bangladesh, born 10 March 1989. She entered the United Kingdom on 16 January 2009 with leave to enter as a student and was subsequently granted leave to remain as a Tier 4 (General) Student, conferred until 10 July 2014. On 2 May 2013 the claimant's leave was varied to that to leave as a Tier 1 (Post-

Study) partner, until 23 August 2014. She sought an extension of that leave by way of an application made on 13 August 2014, but such application was refused in a decision of the Secretary of State made on 26 February 2016. It is this decision that is the subject of the underlying appeal to the Tribunal.

Secretary of State's Decision

3. The core rationale deployed by the Secretary of State for concluding in the decision of 26 February 2016 that the claimant's application must be refused pursuant to paragraph 322(5) of the Immigration Rules reads as follows:

"In your Tier 4 application dated 7 September 2012, you submitted a TOEIC certificate from Educational Testing Service ("ETS").

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 by the use of a proxy test taker. Your scores from the test taken on 22 February 2012 at Synergy Business College of London have now been cancelled by ETS. On the basis of information provided to her by ETS, the SSHD is satisfied that your certificate was fraudulently obtained and that you used deception in your application of 7 September 2012.

In fraudulently obtaining a TOEIC certificate in the manner outlined above, you willingly participated in what was clearly an organised and serious attempt, given the complicity of the test centre itself, to defraud the SSHD and others. In doing so, you displayed a flagrant disregard for the public interest, according to which migrants are required to have a certain level of English language ability in order to facilitate social integration and cohesion, as well as to reduce the likelihood of them being a burden on the tax payer.

Accordingly, I am satisfied that your presence in the UK is not conducive to the public good because your conduct makes it undesirable to allow you to remain in the United Kingdom."

Decision of the First-tier Tribunal

4. The claimant appealed this decision to the First-tier Tribunal. The appeal came before First-tier Tribunal Judge R. Scott on 4 July 2017 and was allowed "*under the Immigration Rules*" in a decision promulgated on 21 July 2017.
5. At the hearing before the First-tier Tribunal the claimant gave evidence of the English language examinations she had undertaken in the past and further confirmed that she had personally taken the English language test on 22 February 2012. In relation to the events on day of the test itself the claimant evidence was summarised by the First-tier Tribunal in the following terms:

- “29. She took the English test in person at the ETS centre near Cross Harbour. It was a long building about five minutes’ walk from the station. She chose it online as the date was suitable for her. She went there three times, once to book the test and then on two separate days for each part of the exam. She could not remember exactly what happened when she entered the building as it was a long time ago. However, she explained that she got there early, went through the security gate, someone checked her identification and told her where to go. There were about 25 to 30 people there. There were a few invigilators, but she could not remember exactly how many.
30. There were two different exams on two different dates. One was speaking and writing, the other was listening and reading. As regards the speaking and reading test, she could not remember what came first. The candidates had to listen to a recording. She had to find the answers from the voices on the tape – there were different choices saying different things. The questions were multiple choice. She could not remember the topic of the tape recordings but knew that they described different situations. She could not remember the detail as it was five years ago. As regards the speaking and writing, she thought the speaking test was about pronunciation and vocabulary and in the writing test she thought she had written an essay. However she said that she was not a little confused as to which elements were in the TOEIC test and which were in her IELTS test in 2008.
31. She described the setup of the exam room, there was a little desk with a computer in front of her. She had more students in front of her. Invigilators came and told them what to do. They had to wear headphones. There were not the same number of people on both days of testing. There were fewer people at the speaking test than at the listening test. The listening test was less than one hour. The longest test was the reading test – she felt that it had taken a long time. The speaking test was about half an hour. The reading test involved different comprehensions and the candidates had to find the right words from it and answer multiple choice questions.”
6. In support of her case before the First-tier Tribunal, the Secretary of State relied upon statements from Rebecca Collings and Peter Millington as well as a report from a Professor French, none of which refer specifically to the claimant. Reliance was also placed on a witness statement authored by Hilary Rackstraw which whilst substantially generic in the evidence also purported to refer specifically to the claimant’s circumstances – incorrectly stating that the claimant was one of many individuals in respect of whom indefinite leave to remain was refused by the Home Office. In fact, the claimant has never applied for or been refused ILR.
7. The Secretary of State further relied upon the contents of a ‘look-up tool’ which identified that (i) the claimant’s test result was classified as invalid by ETS, (ii) 68% of the results of the tests taken at Synergy Business College on 22 February 2012 were classified as ‘invalid’ and (iii) that the other 32% of test results for that date were classified as being ‘questionable’.

8. Finally, the Secretary of State relied upon a Project Façade report into Synergy Business College which, *inter alia*, stated that between 24 November 2011 and 15 January 2013 Synergy Business College undertook 4,894 TOEIC tests of which 49% have been identified as invalid and the rest as questionable.
9. Having summarised accurately the above evidence and properly directed itself to the relevant case law, the First-tier Tribunal set out its conclusions in paragraphs 42 to 50 of its decision. At paragraph 42 the Tribunal observe that the claimant had obtained A grades in her English examinations in 2004 and 2006 and passed an IELTS English test in 2008. It correctly directed itself thereafter, that neither of these matters “*are evidence of English ability at the date of the ETS test [in 2012]*”. The same point is made at paragraph 43 regarding of the claimant’s ability to speak English without an interpreter at the hearing before the First-tier Tribunal.
10. In paragraph 44 of its decision the First-tier Tribunal observe that even if the claimant had been fluent in English at the date of the disputed TOIEC (ETS) test there may have been other reasons why she did not wish to take the test at that time e.g. a lack of time to prepare for the test, a lack of confidence or a need for a fast result. The Tribunal continues, at paragraph 45, by stating:

“None of these possible motivations, or any others were however put to the appellants by the respondent. The only challenge to her was that she could not remember sufficient detail about attending and taking the test to support her claim that she had in fact taken it herself.”
11. The central thrust of the First-tier Tribunal’s reasoning and conclusions is to be found in paragraph 48 onwards of its decision:

“48. I find that she performed well under cross-examination about sitting the test. This is notable because her statement did not canvass in any way the circumstances of her sitting the test, such as how she got there or what happened during the test. Her statement was only her denial of the allegations, her explanation of her English fluency and her assertion that she would not cheat. This would suggest that she had not necessarily recently contemplated the circumstances of sitting the test. If she were lying about having sat the test, she would therefore have had to “make it up as she went along.” However, during cross-examination about the test she did appear to be recalling events from her memory with more information and detail coming to her as she went through events in her head, and this appeared to me to be genuine not “making it up as she went along”, but natural and unrehearsed. She could not remember all the details she was asked about, and she said that she was getting confused between the detail of events at the ETS test and the IELTS 2008 test. However, I consider that this did not undermine her evidence, but was plausible, and consistent with her genuine attempt to recall events which took place about five years ago. The appellants nevertheless provided a reasonably detailed account above of why she chose that test centre, how and when she went there, and what happened during the test. I found her to be an honest witness.

49. I have found above that the respondent's evidence is sufficient to raise the issue of deception in this case. However, I also consider that the appellant has provided an innocent explanation that she took the test herself. I have found that she was a credible witness and that she gave a plausible, innocent account of sitting the test, and that this was enough to suggest that she did in fact attend and sit the test herself. The appellant has therefore discharged the evidential burden on her.
50. I find the reasons above that the respondent has not rebutted the appellant's plausible explanation. Accordingly, the respondent has not proved her allegations against the appellant to the required standard. She has not proved deception on the appellant's part and the appellant's appeal therefore succeeds."

Grounds of Challenge

12. At the hearing before the Upper Tribunal focus was laid by Mr Duffy on the assertion that the First-tier Tribunal had erred in failing to provide adequate reasons for accepting the claimant's evidence that she had taken the TOEIC (ETS) examination on 22 February 2012. It was further particularly asserted that the First-tier Tribunal had erred:
- (i) In taking into account the claimant's English language abilities and other qualifications;
 - (ii) In failing to have regard to the fact that a person who is able to speak English may well have other reasons for using a proxy to take an English language test; and,
 - (iii) In failing to view a DVD of the BBC Panorama programme which, it was said, showed students (not at the claimant's college) standing next to terminals whilst proxy test takers took English language tests for them - such DVD having been provided by the Secretary of State to every immigration hearing centre.
13. Taking these in turn, in my conclusion the First-tier Tribunal did not err in its approach to the fact that the claimant had passed examinations in English in 2004 to 2008. The Tribunal was at pains to remind itself that such matters were not of particular relevance (see paragraph 42). The First-tier Tribunal also properly directed itself that there may be reasons why an applicant would wish to use a proxy test taker even if they had the required level of English language abilities (see paragraphs 42 to 44).
14. As to the alleged failure of the First-tier Tribunal to view the DVD of the BBC Panorama programme which was, it is said, sent to all First-tier Tribunal hearing centres, this ground is hopeless. There is no evidence before me that the First-tier Tribunal judge was asked to view this DVD. It is not sufficient for the Secretary of State to send one DVD to each hearing centre when there are many thousands of appeals relating to this same issue and expect the Tribunal itself to determine

whether it needs to view the DVD in any particular case. If the Secretary of State wants to rely upon evidence at a hearing before the First-tier Tribunal she should, at the very least, notify the particular appellant of the intention to rely on such evidence, provide a copy of the DVD to the appellant on good time for the hearing, and provide a copy of the DVD to the Tribunal in each case. In the instant case, the aforementioned steps not having been taken, it was still open to the Presenting Officer to seek an adjournment on the day of the hearing before the First-tier Tribunal to enable the production of such evidence. No such application was made. Indeed, there is no record of the DVD even being mentioned at the hearing before the First-tier Tribunal. In my view it is an entirely inadequate (and some might go as far as saying abusive) for the Secretary of State to send a copy of a DVD to a hearing centre, fail to specify prior to the hearing that she intends to place reliance on such DVD in the particular appeal, fail to mention the DVD at the hearing the appeal and then subsequently to seek to rely upon the First-tier Tribunal's failure to view the DVD as a ground of appeal when the decision of the Tribunal goes against her.

15. Turning finally to the overarching submission that the First-tier Tribunal failed to provide adequate reasons for its conclusion, I disagree. The Tribunal correctly directed itself in law, took account of all material matters, did not attach excessive weight to any particular piece of evidence and considered all of the evidence in the round. With respect, it is difficult to see what further reasons the First-tier Tribunal could have deployed in light of the evidence made available to it. Ultimately, the Tribunal was impressed by the claimant's evidence and in particular the evidence as the events that took place on the day of the test. The First-tier Tribunal was, in my view, entitled to come to the conclusion it did in relation to such evidence.
16. In short, I find that the First-tier Tribunal reached a conclusion that was open to it on the evidence - albeit a generous one - having taken into account all material matters and not having taken account of any matters which were immaterial to its considerations.
17. Consequently, I find that the First-tier Tribunal's decision does not contain an error of law and it is to remain standing.

Signed:



Upper Tribunal Judge O'Connor

Dated 09 March 2018