



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/38399/2014

THE IMMIGRATION ACTS

Heard at Field House
On Wednesday 4 July 2018

Decision & Reasons Promulgated
On Monday 9 July 2018

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR PONNI VALAVAN SWAMINATHAN

Respondent

Representation:

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer

For the Respondent: Ms A Benfield, Counsel instructed by Gurney Harden solicitors

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Respondent appeals against a decision of First-tier Tribunal Judge Mrs Debra H Clapham promulgated on 26 May 2017 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 4 October 2014 refusing the Appellant leave to enter. The basis of the refusal of leave which occurred on the Appellant's return to the

UK from India, is that the Appellant had used a TOEIC English language certificate in a previous application which he had obtained by use of a proxy test taker. This is therefore a so-called "ETS case". As a result of the finding that the Appellant had obtained the certificate in an improper manner, the Immigration Officer cancelled the Appellant's leave to remain which was granted on 8 February 2013.

2. The Appellant is a national of India. He came to the UK as a student in October 2011. In February 2012, he applied for further leave to remain as a student which was granted on 8 February 2013. He went to India for a family visit in September 2014, returning in October 2014 at which point that leave was cancelled.
3. The Appellant's appeal against the Respondent's refusal was initially dismissed by First-tier Tribunal Judge Abebrese on 3 August 2015. That decision was set aside by Deputy Upper Tribunal Judge Chapman by decision dated 4 February 2016 because it was found to contain an error of law and the appeal was remitted to the First-tier Tribunal.
4. First-tier Tribunal Judge Clapham allowed the appeal on the basis that she was satisfied that the Appellant had not obtained the TOEIC certificate in the manner alleged because the Respondent had not made out his case to the requisite standard on the evidence.
5. The Respondent submits that it was not open to the Judge to conclude that the Respondent's case was not made out on the preponderance of the evidence and that the Judge had not provided adequate reasons for so finding or for finding that the Appellant had offered "an innocent explanation". It is said that the Judge did not appreciate that the Respondent's evidence met the evidential burden (as found by relevant "test cases"). In relation to the Appellant's evidence, the Respondent pointed to the Judge's findings based on the Appellant's English language ability and pointed out that this is not necessarily determinative of the issue whether an applicant might use a proxy test taker. There may be some other reason for the deception. It is also said that the Judge erred by according weight to the fact that the Appellant was aware of the examination process. The Respondent points to publicly available material, particularly the BBC Panorama programme, which shows that even those who exercised deception in this manner regularly attended the examination centres and would therefore be aware of the process.
6. Permission to appeal was granted by Deputy Upper Tribunal Judge Davey on 29 March 2018 in the following terms (so far as relevant):
 - "1. The relevant ETS TOEIC test took place on 3 October 2012. The Judge made an assumption [D66-68] about the level of the Appellant's English nearly five years after the test, taking into account other non-TOEIC tests and studies.
 2. The Judge had statements from Messrs Collings, Millington, Renshaw and Professor French, the statement of Dr Harrison, and the Appellant's innocent explanation that he had no need to use proxy test takers. But the Judge did not consider: - what the Appellant had to gain by using the proxy test taker

or lose by failing, the cultural environment in which he operated, family pressure, financial or other reasons to succeed, the Appellant's confidence in his abilities to undertake the test, the closeness of the English language proficiency and the TOEIC scores.

3. The Judge [D64 & 65] did not apparently understand the Respondent's case when she had the statements above, the 'look up tool' and evidence of corruption at Eden College International, between 20 March 2012 to 5 February 2014, showed that out of 2439 TOEIC speaking and writing tests 77% were invalid (i.e. 1878) and 561 results were questionable.
4. The exercise carried out by the Judge did not disclose sufficient and adequate reasons."
7. The matter comes before me to decide whether the Decision contains a material error of law. Both parties agreed that, if I found there to be an error of law in the Decision, given the basis of the challenge, the appeal would have to be remitted for a second time to the First-tier Tribunal in fairness to the Appellant because central to the appeal is his credibility and fresh findings would need to be made in that regard.

Decision and Reasons

8. Mr Walker did not seek to expand on what he accepted are quite lengthy grounds. He did not pursue the point that the Judge has erred by not watching the BBC Panorama programme on DVD (which is supplied by the Respondent to all hearing centres). In fairness to the drafter of the grounds, I think that ground is rather more nuanced than simply a failure to look at this evidence and goes to the issue whether the Appellant would be aware of the examination process by reason of what is shown in that programme (see summary of the grounds at [5] above). I have taken that into account also when determining whether there is an error of law in the Decision.
9. The grounds on which Mr Walker focussed were that the Judge had failed to give reasons for rejecting the Respondent's evidence when that evidence was accepted in cases such as SM and Qadir (ETS - Evidence - Burden of Proof) UTIAC 21 April 2016 to meet the evidential burden and that the Judge had failed to provide adequate reasons for accepting that the Appellant's evidence discharged the evidential burden on him.
10. I drew Ms Benfield's attention to [64] of the Decision where the Judge says this:

"I am mindful of the evidential burden in cases such as these. I am minded that there is an evidential burden on the Secretary of State to show that an Appellant has practised fraud. Once this has been established there is a shift in the evidential burden to the Appellant to address the concerns raised. In this particular case though I am at a complete loss to understand what evidence the Respondent has produced in the case of the Appellant before me."
11. That paragraph appeared to me to be a rejection of the evidence as meeting even the evidential burden on the Respondent.

12. I am though satisfied by Ms Benfield's submissions in reply that this does not disclose any legal error. Ms Benfield represented the Appellant also before the First-tier Tribunal and she pointed out that her skeleton argument before the Judge includes at [18] the concession that it is "accepted in this case that the evidential burden is met". It may have been helpful if the Judge had made that clear at [64] but I accept that, read in that context, where the Judge refers in the Decision to whether the Respondent's evidence meets the burden on him, she is there looking at the legal burden.
13. The reasons given by the Judge for rejecting the Respondent's evidence as meeting the legal burden appear at [65] of the Decision as follows:

"The hearing before me was indeed a relatively lengthy one but I have to say that I could not fathom exactly how the Respondent reached the conclusion that fraud had been used in this case. As in the case of Qadir it seems to have been based on generic evidence without any specifics having been mentioned whatsoever. I am therefore not certain that any case for fraud was made out at all."
14. In essence, the Judge's reasons are that the evidence is generic in nature and lacking in specifics in relation to the Appellant. Of course, that would not be a reason open to the Judge if she had not first considered the Appellant's evidence about the test and decided whether his evidence satisfied her that he had provided an "innocent explanation". Insofar as that paragraph also suggests that the Judge rejected the Respondent's evidence in its entirety as even satisfying the evidential burden, that does not disclose an error in the Decision either because the following paragraph, which considers the Appellant's evidence, begins with the words "[e]ven leaving this aside".
15. Turning then to the Judge's treatment of the Appellant's evidence, she has set out at [8] to [43] of the Decision in considerable detail the evidence she heard from the Appellant. She has also recorded, again in some detail, the submissions which she heard (at [45] to [59] of the Decision).
16. In response to the specific criticisms made of the Judge's treatment of the Appellant's evidence, as Ms Benfield pointed out, there is nothing to show that the Appellant was asked about other reasons why he might have used a proxy test-taker given his standard of English. Nor was that raised in submissions. The Appellant is recorded as having explained why he took the test he did and gave evidence as to the examination process.
17. The Judge having recorded the evidence and submissions, at [66] to [67] of the Decision, says this about the Appellant's evidence in response to the Respondent's allegations:

"[66] Even leaving this aside though and looking at the specifics of the Appellant before me and even leaving aside the fact that the test was taken some four years ago and the Appellant has been in the United Kingdom since,

his English is remarkably good. But even if one considers what his English would have been like at the time when he took the test, it is clear that he passed a previous Pearson test before coming to the United Kingdom and he also passed several modules on his course. I have no reason to doubt his evidence in this regard and indeed he submitted his Higher Secondary School Certificate to show his completion of his studies at the Corporation Boys Higher School in Chennai which was taught in English. After completing his A Level equivalent he then moved to Singapore where he worked for a Diploma in Hospitality Management at Queensfield Business School which he completed with distinction. That course too was conducted in English. He appears to have worked in Singapore at a fine dining restaurant communicating with customers in English and his Pearson English Test Certificate (to which I have previously referred) also confirms his proficiency in English. As far as I understand it, the validity of that test certificate has never been challenged. Taking all of the above in the round therefore I concur with the Appellant's Representative that there was absolutely no need for him to use a proxy.

[67] Miss Alexander made much of the fact that the Appellant could not remember the details of the test. Frankly at times I found her questioning to be confusing but I have every sympathy with the Appellant regarding the fact that he sat the test 4 years ago and simply could not remember specific details of it. What he did provide however seemed to me to be a consistent narrative of his attendance there, and the several aspects of the test. I did not find his account lacking in detail, in any event it would be a challenge for anybody to remember minute details of a test that took place some time ago. I thought the questioning regarding the headphones was somewhat contrived and the Appellant's answers I considered to be plausible."

18. Having recorded her views of the Respondent's evidence and her findings on the Appellant's evidence, the Judge reached her conclusion at [68] of the Decision as follows:

"Taking all of the above in the round, I am not satisfied that the Home Office have made out a case of fraud. Even if I am wrong in this I consider that there is nothing in the Appellant's account to suggest that he would have required a proxy in the first place and accordingly I allow the appeal."

19. That conclusion is one open to the Judge based on the evidence she heard for the reasons she gave, in particular at [66] and [67] of the Decision. Those reasons are adequate and rational. They do not show that the Judge took into account any factor to which she should not have had regard nor ignored any factor which was relevant to her consideration. This was not a case where the Appellant's English may have improved over time since the test in question; he had been taught in English at school in India, had passed an earlier test by a different provider which was not questioned and had work experience which would have required good language ability before he came to the UK. Even if the Judge does not mention in her conclusions, as Deputy Upper Tribunal Judge Davey noted, that Eden College was one of the centres where this deception was rife, that submission is noted at [48] of the Decision and, as Judge Davey noted, the Respondent's evidence was not that all tests at that college were found to be invalid; questionable does not necessarily mean that those results would ultimately be found to be invalid.

20. Another Judge may have reached a different conclusion on the evidence but I am quite unable to see any error of law in this Judge's approach. She had the benefit of hearing live evidence from the Appellant and was entitled to find him to be a witness of truth.
21. The Respondent's grounds do not disclose an error of law in the Decision. I therefore uphold the Decision with the consequence that the Appellant's appeal remains allowed.

DECISION

I am satisfied that the Decision does not contain a material error of law. I uphold the decision of First-tier Tribunal Judge Clapham promulgated on 26 May 2017 with the consequence that the Appellant's appeal stands allowed

Signed
Upper Tribunal Judge Smith



Dated: 6 July 2018