



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/16906/2017**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 5th March 2019

**Decision and Reasons
Promulgated**

On 19th March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

**MR MOHAMMAD MIZANUR RAHMAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Balroop (Counsel)

For the Respondent: Mr S Kandola (Home Office Presenting Officer)

ERROR OF LAW DECISION AND REASONS

1. This is an error of law hearing. The appellant appeals against the decision of the First Tier Tribunal (Judge S. Meah) (FtT) promulgated on 4th January 2019 in which the appellant's human rights appeal was dismissed.

Background

2. The appellant is a citizen of Bangladesh, born on 8.1.1986. He entered the UK as a tier 4 student on 23.9.2009 and was granted leave until June 2014. His application on human rights grounds on the basis of family life with his

British citizen (BC) partner, was refused. He failed to meet the Suitability requirements because he had previously used a fraud to obtain his English language certificate.

3. The FtT found that the SSHD had discharged the initial burden of proof and that the appellant failed to provide an innocent explanation. The FtT found that he had used a proxy taker. The FtT further considered if there was family life under Article 8 and where the best interests of the BC child lie. The FtT concluded that although a qualifying child, aged 14 months, it was reasonable for the child and family to return to Bangladesh.

Grounds of appeal

4. In grounds of appeal the appellant argued that the FtT erred by placing too high a burden on the appellant to show an innocent explanation, which only needed to satisfy the minimum level of plausibility.
5. The FtT inadequately reasoned the finding that there was no innocent explanation, having regard to the appellant's evidence and failed to consider emails with ETS (A/B page 4-7).
6. The FtT failed to give sufficient weight to the fact that the child was a qualifying child in assessing where his best interests lie and the reasonableness of relocation.

Permission to appeal

7. Permission to appeal to the Upper Tribunal (UT) was granted by FTJ L. Murray on 4.2.2019 in respect of ground one. In granting permission the FTJ took the view that it was arguable that the FtT placed too high a burden of proof on the appellant re innocent explanation and failing to take into account the email communication. First tier Tribunal Judge Murray found no arguable errors in the remaining grounds.
8. A renewed application to the UT was refused by UTJ Blum who considered that the FtT had fully dealt with the issues relating to the qualifying child and his best interests.

Preliminary issue

9. Mr Balroop raised a preliminary issue and sought to rely on part 2 Regulation 5(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to make a further application to renew his application for permission to rely on grounds of appeal as to the FTT's finding and conclusions as to the best interests of the British citizen child (**SF & ors**(guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC). Mr Kandola opposed the application. I rejected the application as there was no such power for renewal of grounds of appeal in Regulation 5 and further the appellant had exhausted all steps open to him; his application having been rejected by the FTTJ

and on renewal by UTJ Blum with which I concur. I proposed to deal only with the error of law argument as to the FtT's approach to the ETS issue.

Submissions

10. Mr Balroop contended that the FtT failed to refer to and take into consideration the evidence of the communications by email between the appellant's solicitors and the ETS requesting copies of the transcript. This was relevant to the assessment of innocent explanation. The FtT failed to give anxious scrutiny to the appellant's oral evidence about his attendance at the test centre and taking the test, which met the minimum level of plausibility. The appellant had not been asked for further information in cross examination or by the FtT which would have enabled the FtT to reach proper findings. As it was the FtT found that the appellant's evidence was vague and lacked tangible detail and there was no evidence to support such a finding. The appellant had established evidence that reached the minimum level of plausibility and given reasons why he had chosen the particular hearing centre. The FtT disregarded other factors as to the reasons why he would not have cheated.
11. Mr Kandola argued that there was no error of law in the decision. The FtT had carried out a fact sensitive analysis in reaching its findings and decision. The FtT found that the initial burden had been made out by the respondent and thereafter looked at the evidence for an innocent explanation [28]. The FtT was able to test the appellant's evidence and reach a conclusion that it was vague and lacking in detail. The record of proceedings showed that there had been some questions put to the appellant and there was adequate cross examination on which the FtT based its findings of fact at [29] in addition to which the appellant had produced a witness statement. It was accepted that there was no reference to the emails in the decision, but the appellant had been asked about that as per the ROP.

Decision

12. I find that there was no material error of law in the decision and reasons of the FtT which shall stand. It is contended that the FtT failed to consider the minimum level of plausibility in terms of the raising of an innocent explanation. In particular the FtT failed to refer to the emails appearing at pages 4-7 of the Appellant's bundle. The FtT was entitled to reach the findings as to the appellant's evidence that it was vague and lacking in tangible detail. The FtT had the opportunity to assess the appellant at the hearing and to also take into account the content of his witness statement. He was represented at the hearing and so had every opportunity to raise matters of relevance to his appeal. I consulted the record of proceedings (ROP) and read out those excerpts that were legible which in general showed that there was some cross examination of the appellant, who had stated that he selected the centre because it was near his home. Whilst acknowledging that he was not asked for detail about this, it was clear that such evidence could have been adduced in any event and was in the appellant's witness statement. The evidence of the emails was in the

appeal bundle and it is apparent that the appellant was asked about them. The emails consist of a request for further information and the tape recordings of the tests, and do not add anything to the appellant's case. The FtT found that the respondent had established a prima facie case to show that there was deception [26]. The FtT considered the appellant's evidence that he attended the centre and took the test, and it found his evidence to be vague and incredible [29-30]. The FtT also took into account that the appellant's test was one of the 10% to be found invalid [32]. The FtT concluded that the respondent's evidence was more than sufficient to show that the appellant cheated in obtaining the TOIEC [36].

13. I am satisfied that the FtT followed the proper legal approach [17] & [25] having regard to the various burdens of proof and having regard to the evidence before it and did not in my view impose a higher burden on the appellant to establish an innocent explanation. The FtT considered all of the evidence before it and found that the appellant's evidence was not reliable and failed to reach the minimum level of plausibility.

Decision

14. I dismiss the appeal. There is no material error of law disclosed in the decision which shall stand. The appellant's appeal on human rights grounds is dismissed.

Signed

Date 13.3.2019

GA Black

Deputy Judge of the Upper Tribunal

NO ANONYMITY ORDER

NO FEE AWARD

Signed

Date 13.3.2019

GA Black

Deputy Judge of the Upper Tribunal