



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/39394/2014

THE IMMIGRATION ACTS

Heard at City Centre Tower, Birmingham  
On 13<sup>th</sup> November 2015

Decision and Reasons Promulgated  
On 7<sup>th</sup> December 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR MD ABDUL KALAM  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M K Mustafa (Solicitor)  
For the Respondent: Mr David Mills (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Bart-Stewart, promulgated on 23<sup>rd</sup> February 2015, following a hearing at Taylor House on 6<sup>th</sup> February 2015. In the determination, the judge dismissed the appeal of Md Abdul Kalam, who subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

## **The Appellant**

2. The Appellant is a citizen of Bangladesh, who was born on 2<sup>nd</sup> July 1989. He appealed against the decision of the Respondent dated 16<sup>th</sup> October 2014, that the Appellant had made false representations in order to obtain leave to remain as a student in the UK from 11<sup>th</sup> June 2013 until 12<sup>th</sup> June 2015, in that his educational testing service certificate, confirming his ability to speak the English language, had been fraudulently obtained, by virtue of the test having been undertaken by somebody else.

## **The Appellant's Claim**

3. The Appellant's claim before the judge during the Tribunal hearing was that he had been shocked by the allegation that his certificate was fraudulently obtained because he had personally booked the test, paying a fee of £160 and that the test lasted for two days with listening and reading tests taking place, and that he had taken the test by arriving early on 20<sup>th</sup> March, with the test taking twenty to 25 minutes to complete (see paragraph 4 of the determination).

## **The Judge's Decision**

4. The judge rejected the Appellant's explanation that he had taken the test himself for the following preeminent reasons. First, after he had arrived at Heathrow Airport by flight from Bangladesh, the Appellant had been interviewed by the Immigration Officers, during which he subsequently admitted that, "I didn't take it" (see paragraph 14).
5. Second, there were witness statements of two Home Office officials, Rebecca Collings and Peter Millington, which detailed how the ETS analysed the results of the tests and decided which were undertaken by proxies (see paragraph 12). Their evidence, and particularly that of Peter Millington, was that there was clear evidence that where ETS have identified positive voices matches among two candidates with different names, it is because one person has sat the speaking and writing exam for both candidates and both candidates have fraudulently obtained their TOEIC certificate and employed deception in their application for leave to remain (see paragraph 16). This was the case here.
6. Third, whilst the Appellant at the hearing before Judge Bart-Stewart now argued the contrary to the evidence that was presented against him, the judge was clear in the holding that

"The Appellant has failed to adequately explain the discrepancy between the information that he gave when interviewed on 16<sup>th</sup> October to the explanation that he now gives. His Grounds of Appeal made no reference to that interview, nor did he seek to resile from the admissions at that stage" (paragraph 19).

7. Finally, the judge gave consideration to the Appellant's Article 8 rights, and the fact that the Appellant was married to a Bangladeshi national, who has settlement in the United Kingdom, and they have a British national child. The Immigration Rules and Appendix FM and paragraph 276ADE were considered, as was Section 55 of the BCIA 2009. The judge concluded that the Appellant and his wife had a 1 month old child, and the suggestion that they could not enjoy family life elsewhere was not sustainable as, "there is nothing presented before me why it would be unreasonable for the child to relocate with his parents" (paragraph 22).
8. This was expressly on the basis that, "a young child's best interests are with their parents. The child would not have independent family life or established any private ties" (paragraph 22).
9. Thereafter, consideration was given to Section 19 of the Immigration Act 2014 and the public interest requirements at part 5A with specific reference to Section 117B and the judge held the public interest clearly required the maintenance of immigration control in the circumstances of this case.
10. The appeal was dismissed.

### Submissions

11. At the hearing before me on 13<sup>th</sup> November 2015, Mr Mustafa, appearing on behalf of the Appellant, relied upon the Grounds of Appeal and took me through them. He made the following submissions.
12. First, he relied upon the case of **IC (Part 9, HC 395 - burden of proof) China**, which is to the effect that although there is a single standard of proof on the balance of probabilities, it is a flexible application, and that the more serious the allegation the stronger must be the evidence before the court for the allegation to be proven. Mr Mustafa submitted that if the allegation here was that false representations had been made, then the evidence had to be stronger than simply the witness statements of Rebecca Collings and Peter Millington, who were in any event not in attendance at this hearing.
13. Second, chapter 50 of the enforcement instructions and guidance, *persons liable to administrative removal under Section 10 (non-EEA)*, provides at paragraph 50.12) that, the evidence of deception should be clear and unambiguous in order to initiate action under Section 10. Mr Mustafa submitted that the witness statements produced by the two witnesses were generic and amounted to nothing more than a thesis on how to detect fraud.
14. Third, chapter 37 of the enforcement instructions and guidance - interviewing, provides (at paragraph 37.1) that,  

"if an interview takes place at a police station or in an approved immigration detention accommodation, a detained person must ... .. be allowed a continuous period of at least eight hours for rest, free from questioning, travel or any interruptions ... ..".

15. Mr Mustafa submitted that the Appellant had flown in from Bangladesh on a long flight, and that it is clear from the border force landing card, in the bundle, that he landed at 19:30 hours and that an IS81 was served on him, and he was thereafter interviewed at 1:20 a.m. in the morning, with no eight hour rest given to him at all. This was a clear breach of the policy of the Respondent herself.
16. However, Mr Mustafa submitted that he was not claiming that the breach of the policy rendered the entire interview invalid. What he was claiming was that the breach of the policy must affect the weight to be granted to the confession given during that interview.
17. Finally, there was the position of the child, and although consideration had been given to Section 55 of the BCIA, this had been undertaken in a formulaic manner (see paragraph 22). Mr Mustafa relied both upon the established judgment in ZH (Tanzania) [2010] UKSC 4, and the Tribunal decision in MK (India) [2011] UKUT 00473. He submitted that it was not reasonable to expect the Appellant's British child to relocate to Bangladesh, especially given that there was no low level criminality which had been the subject of a prosecution by the Secretary of State. If the Razgar tests were applied then it was clear that the decision was disproportionate to the Appellant's interests.
18. For his part, Mr Mills submitted that the decision of the Tribunal below was entirely sustainable for the following reasons. First, chapter 37 of the enforcement instructions in relation to "interviewing" was referring to interviews "at a police station" or "in approved immigration detention accommodation", neither of which was the case here, because the Appellant had been interviewed at Heathrow Airport. The Appellant was simply interviewed four hours after landing. He was interviewed at the airport. In any event, it was a very brief interview, such that even the Appellant made a mistake in relation to it because he claimed in his witness statement that he was interviewed at 4 a.m. in the morning, rather than 1:20 a.m., following which the Appellant readily admitted that he had not taken the test.
19. Second, reliance was being placed by Mr Mustafa upon the flexible application of a single civil standard of proof in IC (China), although it was well-known that that decision had been disapproved by the courts because there really was only a single standard of proof. It was confusing to talk in terms of different levels of evidence being required to meet this flexible standard. In any event, this was not a criminal case and there was no need to demonstrate a more than 51% degree of probability.
20. Third, the two witness statements by the two senior Home Office officials are simply intended to demonstrate how the fraud detection process works and it was never intended to be the only evidence relied upon.
21. Finally, as far as Article 8 was concerned there was no merit in this claim, because although the judge's treatment of the Article 8 aspect of the claim is brief at paragraph 22, given that there was strong evidence of established deception, this would outweigh the child's interests, even where the child was a British citizen child, and this had been recognised in ZH (Tanzania) where the child's interests were categorically stated not to be a "trump card". As far as the public interest

considerations are concerned, the child may well be a “qualifying child” but the additional test that had to be satisfied under the 2014 Act was whether it was “unreasonable” to expect the child to relocate to Bangladesh. Given that the Appellant’s wife herself was of Bangladeshi origin, and they both had a family back home, the public interest did require, in circumstances where deception had been exercised, for the Appellant to return to Bangladesh where he could enjoy his family life. It had to be bore in mind that the Appellant was a minister of religion and for him to have exercised the deception of the nature that he had was particularly one that demonstrated a high degree of moral turpitude.

22. In reply, Mr Mustafa submitted that the Appellant could succeed under Article 8 because it was not just a question of his 1 month old child at the time of the decision which was in issue but the fact that there was an older stepchild of the Appellant’s wife which, in circumstances where the best interests of the child must be taken into account, did require that the Appellant be allowed to remain in the UK. The Appellant was exercising a genuine and subsisting relationship with his child and his stepchild. The decision to remove him would amount to an indirect removal of a British citizen child.

### **No Error of Law**

23. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law such that I should set aside the decision (see Section 12(1) of TCEA 2007) and remake the decision. My reasons are as follows.
24. First, the decision that the Appellant had made false representations is not based upon one single piece of evidence alone. It is based upon a tried and tested system of fraud detection employed by the ETS head office, and as explained by the witness statements of two Home Office officials, Rebecca Collings and Peter Millington. The decision that the Appellant was culpable on account of having made false representations was to be determined on a balance of probabilities. The decision was also based upon the Appellant’s own interview record which is properly chronicled in the determination (see paragraph 14) where the Appellant admitted that he had not taken the test. The judge’s conclusion that the Appellant had indeed not taken the test, on the basis of the evidence before him, was not one that could remotely be said to be a perverse decision on the evidence.
25. Second, the suggestion that chapter 37 of the enforcement instructions and guidance on interviewing requires there to be an eight hour gap between questioning is predicated on the reference to, “if an interview takes place at a police station or in an approved immigration detention accommodation”. The Appellant was not in a police station or at an approved immigration detention accommodation. This means that what the Appellant said during his interview was admissible.
26. Third, the Appellant gave an account before the judge (see paragraph 4) which is totally at variance with what actually happened and the judge rejected this account on the basis that the discrepancies could not properly be accounted for at the hearing before the judge, and in particular the Appellant’s Grounds of Appeal made no reference to the interview, which has subsequently formed such a large part of the

challenge to the judge's conclusions, and nor did he seek to resile from the admissions that he had made (see paragraph 19).

27. Finally, there is the position of his wife and British citizen child which goes to a consideration of his human rights claim under the Immigration Rules at Appendix FM and paragraph 276ADE and Section 55 of the BCIA 2009. The judge (at paragraphs 22 and 23) had proper regard to all the relevant issues here and rejected the claim. Two matters are significant in this respect. First, the Appellant has to show not only that there is a British citizen child but that it would be "unreasonable" to expect the child to relocate with the Appellant to Bangladesh. Although the judge does not expressly refer to the decision, the case of **Zoumbas [2013] UKSC 74** is most important in this regard in that it develops the law a stage further from **ZH (Tanzania)** and makes it clear that, although the best interests of the child is to be with his or her parents, where the children are particularly young, then the child's going to the home country with the parent, does not in any way detract from the requirement of observing the "best interests of the child". In **Zoumbas** the children concerned were much older than this particular British citizen child. Mr Mustafa has drawn attention to a stepchild who is much older, but no such argument was raised before the judge, and no particular submission was developed in this regard to the stepchild of the Appellant, such as to suggest that requiring the Appellant and his family to go to Bangladesh would in any way be deemed to be "unreasonable".
28. Second, regard was had to Section 117B of the 2014 Act and the maintenance of immigration control. Mr Mills submitted that the fact that the Appellant was a minister of religion was particularly telling against him in a case where false representations had been made and fraudulent conduct engaged in, as this is one particular attribute that one would expect to be especially salient in a man of faith who was in a position of religious leadership. It is unnecessary for this Tribunal to decide this point. Suffice it to say, that the judge was entitled to conclude as he did at paragraph 23 and to say that the public interest considerations required the maintenance of immigration control in this case.

### Decision

29. There is no material error of law in the judge's decision. The determination shall stand.
30. No anonymity direction is made.

Signed

Dated

Deputy Upper Tribunal Judge Juss

30<sup>th</sup> November 2015