



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/27371/2015

THE IMMIGRATION ACTS

Heard at Field House
On 1 November 2017

Determination Promulgated
On 3 November 2017

Before

Deputy Upper Tribunal Judge MANUELL

Between

Mr SYED ISTIAKE HOSSAIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs, Counsel
(instructed by JKR Solicitors)

For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant appealed with permission granted by Upper Tribunal Judge Martin on 24 August 2017 against the determination of First-tier Tribunal Judge Greasley who had dismissed the appeal of the Appellant who had sought leave to remain as a Tier 4 (General) Student Migrant. The Respondent's decision had been made on 16 July 2015 following an application made on 15 January 2013 so the previous version of section 82 of the Nationality and Asylum Act 2002 applied, i.e., the appeal was unrestricted. The decision and reasons was promulgated on 22 December 2016.
2. The Appellant is a national of Bangladesh. The Appellant had been granted leave to enter as a Tier 4 (General) Student Migrant on 10 February 2010. His application for an extension of stay was refused because he had submitted a TOEIC certificate from ETS, which ETS had notified the Respondent was invalid due to use of a proxy test taker. The Appellant was also refused because his CAS sponsor was no longer approved by the date of decision.
3. Judge Greasley found that the Respondent had demonstrated to a high degree of probability that the Appellant had acted dishonestly through the use of a third party proxy test taker. He found that the Appellant's evidence in rebuttal was insufficient and accordingly dismissed the appeal.
4. Permission to appeal was granted because it was considered arguable that the judge had erred by failing to consider whether it was realistic for the Appellant to have produced additional evidence and also by failing to consider the Appellant's account of what happened on the day of the test.
5. Standard directions were made by the tribunal. A rule 24 notice opposing the appeal was filed by the Respondent.

Submissions

6. Mr Biggs for the Appellant relied on the permission. In summary he sought to argue that the judge had wholly failed to provide adequate reasons for his findings. It was unreasonable to have expected the Appellant to obtain CCTV footage from the test

centre. It was simply impractical. Similarly it was unreasonable to have expected the Appellant to be able to produce a receipt for the test fee after all of this time. There was no reason for such a receipt to have been kept. The judge should have investigated the Appellant's motives, which would have produced a balanced approach to the evidence. The judge had speculated about material in the public domain available to the Appellant, and was wrong to have done so. The determination was unsafe and should be set aside and remade by another First-tier Tribunal judge.

7. Mr Wilding for the Respondent relied on the rule 24 notice and submitted that there was plainly no material error of law. In the first place the judge had found that the burden of proof resting on the Respondent had been discharged by the technical evidence produced. That finding, explained by reference to the reports and the Respondent's witness statements, was dispositive in itself. The findings were reinforced by the evidence as to the bad record of the colleges involved. The CCTV issue had been raised by the Appellant himself. The judge had discussed motive. The judge was entitled to find that there was a lack of evidence of actual attendance. It had obviously been open to the Appellant to produce such materials. The judge had referred to the evidence produced by the Appellant without a narrow focus. The onwards appeal should be dismissed.
8. In reply, Mr Biggs briefly emphasised the failure to examine motive and speculation on the judge's part. The judge's expectations had been unreasonable.

No material error of law finding

9. In the tribunal's view the grant of permission to appeal (albeit in limited terms) was based on a misreading of the determination. It was full and careful, setting out the procedural history, the evidence and submissions in detail, which was appropriate given the nature of the appeal. As Mr Wilding correctly submitted, the keystone of the judge's findings was that the legal burden of proof resting on the Secretary of State had been amply discharged by the evidence provided. The case against the Appellant was proved to a high degree of probability. The judge then proceeded to examine whether the Appellant was able to rebut the case against him, in an

impartial manner having overruled an attempt by the Respondent to submit late evidence.

10. The Appellant chose to put the possibility of CCTV footage in issue: see [26] of his witness statement, mentioned by the judge at [36] of his determination. It was for the Appellant to obtain such material or at least to try to obtain it and produce evidence if he maintained it would vindicate him. The judge accurately recorded that nothing at all was done and it counted against the Appellant. This was not a situation of a judge making exigent demands but rather of a judge drawing a logical conclusion from the Appellant's own evidence.
11. It was submitted that the judge had taken an unreasonable view of the absence of the alleged cash receipt for the test, but that submission has no substance either. The receipt was for £150, according to the Appellant, which it is reasonable to regard as a significant sum of money for most students, and for which no other evidence of payment could exist, unlike credit card payment or bank transfer. It was important evidence relating to a mandatory requirement for his continuing leave to remain and hence his studies. The judge was entitled to take an adverse view, especially when set against the other deficiencies in the Appellant's evidence, and the bad record of the Appellant's college.
12. Far from ignoring motive, the judge discussed it at [39] of his determination. His starting point was that the Appellant had achieved creditable scores in his IELTS test and had studied English previously (i.e., had no obvious motive to cheat), but gave reasons for finding that the lack of obvious motive on the Appellant's part did not dent the Respondent's strong technically based evidence, because there could be various other plausible explanations for the Appellant's not having taken the test in person. The judge gave sufficient consideration to motive in his evaluation of the Appellant's evidence.
13. The whole sorry ETS scandal has received extensive publicity and there has been a large volume of litigation, with many reported decisions. The judge was correct to state that information about the form taken by the examinations has inevitably reached the public domain, which diminishes the weight which the Appellant's explanation of his attendance attracted. To cite but one example, the decision in SM and Qadir v Secretary of State for the Home Department (ETS -Evidence - Burden of Proof) [2016] UKUT 00229

(IAC) contains such information and links to further information, including other reported cases, all instantly accessible. The judge's comments were not speculation, but an accurate statement of fact from a specialist tribunal. It is also plain from [42] of the determination that the judge took a number of relevant facts and matters into account when finding that the Appellant had failed to rebut the Respondent's evidence.

14. The tribunal agrees with Mr Wilding's submissions as to the judge's analysis and findings, which were open to him, and cannot be impugned as superficial or unreasonable. The tribunal concludes that Mr Biggs's submissions, like the onwards grounds, amount to no more than disagreement with the judge's decision. The tribunal finds that there was no material error of law in the decision challenged.

DECISION

The appeal is dismissed

The making of the previous decision did not involve the making of a material error on a point of law. The decision stands unchanged.

Signed

Dated 2 November 2017

Deputy Upper Tribunal Judge Manuell