



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/00050/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 12th July 2019**

**Decision & Reasons Promulgated
On 22nd July 2019**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

**BILALWAL HAMEED
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Appeared in person with his wife, Ms K Gul

For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Watson, promulgated on 25 March 2019, dismissing his appeal against the refusal of leave to remain as a student.
2. The Appellant applied for leave to remain as a Tier 4 (General) Student Migrant on 4 October 2012. His application was refused on 30 January 2018 on the grounds that he submitted a fraudulent English language certificate. The Appellant appealed to the First-tier Tribunal on the grounds that he had not used a proxy test taker and had attended the test hearing

centre himself. Permission was granted by the First-tier by Tribunal Judge Simpson on 4 June 2019.

3. Ms Gul submitted that the copy of the voice recording was not requested until one month before the hearing. This was because the Appellant was not really legally represented and assumed that the Respondent would provide the voice recording at the hearing. It was only when they realised that was not in fact the case that they sought to obtain the voice recording.
4. Mr Jarvis asked the Appellant and his wife some questions about how they had gone about obtaining the voice recording. Ms Gul referred to an e-mail that was handed up to the judge at the appeal hearing. The letter and e-mail showed that on 10 January 2019 the Appellant wrote to the post-decision casework unit stating that the e-mail address she had been given, in order to obtain the voice recording, had not worked and requested confirmation of the correct e-mail address. There was also evidence that the Appellant had sent e-mails requesting the voice recording and they had bounced back. Mr Jarvis stated that the address to which the Appellant's wife had written was the incorrect address, but she was not to know that. It would appear that the Appellant's wife had made efforts to obtain the voice recording but that had not been possible.
5. Mr Jarvis submitted that there may have been some procedural unfairness because the Appellant had requested the voice recording in advance of the hearing but had been given an incorrect e-mail and, through no fault of his own, had been unable to obtain a copy of that voice recording in order to contest whether it was his voice on the recording or someone else. Given the Appellant maintained he personally took the test, the voice recording was crucial to determining the appeal. The judge's failure to consider the Appellant's efforts to obtain the voice recording had arguably amounted to procedural unfairness.

Conclusion and Reasons

6. The judge concluded at paragraph 14: "I have a document produced by the Appellant which indicates that one month before this hearing he requested a copy of the voice recording. He has been aware of the problem with the test results since 30 January 2018 but did nothing to approach either ETS or the college until very shortly before the hearing. His wife is British born and educated and he has had this assistance available to him throughout this process and I find his inaction to tackle the allegation of fraud not consistent with a genuine test taker."
7. I am of the view that this finding has led to procedural unfairness because the Appellant was unrepresented at the hearing and his wife who assisted him has no legal training. Their assumption that the voice recording would be provided by the Respondent at the hearing was not unreasonable. The

burden was on the Respondent to prove that a proxy test taker took the test rather than the Appellant. In the circumstances, it was not unreasonable for the Appellant and his wife to assume that the Respondent would have evidence that someone other than the Appellant took that test.

8. When the Appellant realised that the voice recording would not be produced by the Respondent his wife tried to obtain the voice recording and it is clear from the evidence before the judge that they were given an e-mail in order to request such a recording and that e-mail had failed to work because the address was incorrect. Therefore, through no fault of their own they had not been able to obtain the voice recording. They had written, unfortunately to the wrong address, in order to clarify the correct e-mail address. There has been no response to their letter of 10 January 2019 from the Respondent.
9. In the interests of fairness, the Appellant should be allowed to ascertain whether his voice was on the recording relied on by the Respondent. This was factually important to the determination of whether he had used a proxy test taker. In the circumstances there has been procedural unfairness in this appeal. The Appellant through no fault of his own has been unable to obtain the voice recording in order to be able to challenge it and in that respect the Appellant has been denied a fair hearing before the First-tier Tribunal. I am satisfied that paragraph 7.2 of the Practice Statement of 25 September 2012 is met and the appeal should be remitted.
10. There are other errors in the decision which also give me cause for concern and upon which permission to appeal was granted. However, it is not necessary to determine those issues given my findings above.
11. Accordingly, I set aside the decision of the First-tier Tribunal promulgated on 25 March 2019 and I remit the matter to the First-tier Tribunal for rehearing. None of the judge's findings are preserved.

Notice of decision

Appeal allowed

No anonymity direction is made.

J Frances

Signed
Upper Tribunal Judge Frances

Date: 19 July 2019

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award. The appeal is remitted and the matter remains outstanding.

J Frances

Signed
Upper Tribunal Judge Frances

Date: 19 July 2019