



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000408

First-tier Tribunal No: HU/52374/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 24 August 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

SHARIF MIAH
(No anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Biggs of Counsel

For the Respondent: Mr Diwnycz a Senior Home Office Presenting Officer

Heard at Phoenix House (Bradford) on 7 August 2023

DECISION AND REASONS

1. The Appellant was born on 26 March 1990. He is a citizen of Bangladesh. He appealed against the decision of the Respondent dated 30 March 2022, refusing his application for leave to remain as a spouse. The Appellant appeals against the decision of First-tier Tribunal Judge Sills, promulgated on 24 January 2023, dismissing the appeal.
2. The brevity of the decision is due to the concession made by Mr Diwnycz concerning the assessment by the Respondent and subsequently the Judge who relied on the now acknowledged faulty assessment of the TOEIC Language Test.

Permission to appeal

3. Permission was granted by First-tier Tribunal Judge Murray on 20 February 2023 who stated:

“2. It is arguable that the First-tier Tribunal’s assessment of the Appellant’s test result is irrational for the reasons set out in the grounds given that the Judge accepted that the test result was considered ‘questionable’ and there were anomalies in the Respondent’s evidence. Whilst the Article 8 grounds are less arguable I do not refuse permission as the two issues are related.”

The First-tier Tribunal decision

4. Judge Sills summarised his findings regarding the English Language test as follows:

Suitability

...
17... I do not consider that the evidence relied upon by R, the ‘questionable’ test result, the generic witness statements contained in R’s bundle, and the information provided about Queensway College, is sufficient to establish that it is more likely than not that A cheated in the test.

...
22.Having considered all of the evidence, I am satisfied that the fact that the voice file attached to A’s test result is not A’s voice, when considered alongside the evidence of widespread cheating at Queensway College, is sufficient for R to establish on balance that it is more likely than not that someone else took the test on A’s behalf and that he did cheat in the test. I consider it is significantly more likely that A cheated than that there is an innocent explanation, namely that A did not cheat and the wrong test voice has been attached to his file. The allegation of fraud is made out. A does not satisfy the suitability provisions.

5. It is not necessary for me to recite the findings regarding “insurmountable obstacles” or Article 8, given the concession regarding the English Language test.

The parties positions

6. Mr Diwyncz conceded in essence that the findings at [13 to 17] of the Judge’s decision were based on an inadequate assessment by the Respondent of the evidence relating to the TOEIC English Language test and were incompatible with the findings relating to the voice recording and all were consequently unsustainable. Mr Diwyncz conceded that the fault in no small part was due to the Respondent not providing representation at the hearing before the First-tier Tribunal in what he called these “fiendishly difficult” cases. He submitted that the decision should be set aside and the matter remitted to the First-tier Tribunal for a de novo hearing with no findings being preserved. Given the concession by Mr Diwyncz it is unnecessary to set out the Appellant’s grounds, skeleton argument, or oral submissions. Mr Briggs agreed regarding the setting aside and remittal.

Discussion

7. Given the concession made by the Respondent, through no fault of the Judge, I am satisfied that the Judge materially erred.

Notice of Decision

8. The Judge made a material error of law. I set aside the decision. I remit the appeal to the First-tier Tribunal for a de novo hearing with no findings being preserved, for the appeal to be heard by a Judge other than Judge Sills.

Laurence Saffer

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 August 2023