



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/38617/2014

THE IMMIGRATION ACTS

Heard at Field House  
On 6<sup>th</sup> May 2016

Decision & Reasons Promulgated  
On 31<sup>st</sup> May 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR IMDAD HUSSAIN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Acharjee, Solicitor  
For the Respondent: Mr S. Whitwell, Presenting Officer

REASONS FOR FINDING AN ERROR OF LAW

1. The Appellant is a citizen of Bangladesh, born on 1<sup>st</sup> January 1986. He appealed against a decision of the Respondent dated 8<sup>th</sup> September 2014 to refuse the Appellant's application for further leave to remain in the United Kingdom on the basis of the Appellant's family and private life. The Appellant's appeal was allowed by Judge of the First-tier Tribunal Price sitting at Newport on 7<sup>th</sup> July 2015. The Respondent appeals with leave against that decision and for the reasons which I have set out below I have set the decision of the First-tier Tribunal aside on the grounds of a material error of law.

2. The Appellant entered the United Kingdom on 9<sup>th</sup> October 2010 with leave as a Tier 4 (General) Student valid until 31<sup>st</sup> August 2012. On 21<sup>st</sup> August 2012 the Appellant was granted further leave to remain as a Tier 4 (General) Student until 28<sup>th</sup> June 2014. On 11<sup>th</sup> March 2014 the Appellant married M A who has settled status in this country having been granted humanitarian protection on 27<sup>th</sup> September 2012 (“the Sponsor”). Her leave is due to expire on 12<sup>th</sup> September 2017 when she will be eligible to apply for indefinite leave to remain. The couple have a child, M, born on 24<sup>th</sup> April 2015. The Appellant submitted an application for further leave to remain on 12<sup>th</sup> June 2014 as the dependant of the Sponsor.
3. The Respondent refused the application stating that Educational Testing Service (ETS) had confirmed that the Appellant’s test score in a past English language test was obtained through deception. The Appellant had taken the test on 27<sup>th</sup> June 2012 but because the validity of the test results could not be authenticated the scores had been cancelled. The Respondent considered the Appellant to be a person who had sought leave to remain in the United Kingdom by deception having come to that view following information provided by ETS that an anomaly with the Appellant’s speaking test indicated the presence of a proxy test-taker.
4. The Appellant’s application was refused under the suitability requirements S-LTR.2.2(a). That is where false information and representations or documents have been submitted in relation to the application including false information submitted to any person to obtain a document used in support of the application. The Appellant’s claim to have a family life with his spouse was rejected on suitability grounds but for the sake of completeness the Respondent considered eligibility under Appendix FM on the basis of family life. The Respondent did not accept that the marriage was genuine and subsisting noting that the Appellant was withdrawing money from his bank in Birmingham whereas his spouse was withdrawing money from her account in Middlesex. Even if it were accepted that the Appellant was in a genuine and subsisting relationship it was not considered disproportionate to interfere with any family or private life to require the Appellant to leave the United Kingdom and apply for a spouse visa from Bangladesh.
5. On appeal the Judge noted that the Appellant had undertaken his English language test at Colwill College in Leicester when he was living at Birmingham at the time. The Appellant did not take the test in Leicester in order to employ the services of a proxy test-taker. 35 miles was not that far for the Appellant to travel to take the test and it was a reasonable explanation that he was unable to obtain a convenient time slot in one of the Birmingham venues. The Appellant was not aware that his certificate had been invalidated until he received the Respondent’s decision to refuse leave. He had not been informed in the previous two years that his test result had been invalidated nor had he been given any opportunity to challenge the decision. The Appellant was in a genuine and subsisting relationship with his spouse. It was not reasonable for the Appellant to return to Bangladesh to make an out of country application.
6. The Judge had before him generic evidence from three officials of the Respondent, Mrs Rebecca Collings, Mr Peter Millington and Mr Kevin Hibbs. He was not

satisfied that there had been an individual examination of the Appellant's case and there was no reference in the statements to the Appellant's personal circumstances. There was no evidence that Colwill College was one of the prime locations where fraudulent proxy test-taking was taking place. Referring to the Appellant as "the client" the Judge continued that a question had to be raised as to why the client had not received earlier notification of the ETS decision. In the interests of fairness the Appellant should have received such a notification with an opportunity to challenge the decision. Mr Hibbs' statement attached a spreadsheet recording the Appellant's name with the insertion of the word invalid but that did not persuade the Judge that the decision taken in respect of the Appellant's test was individual to him. The technology used by ETS could be imperfect and samples could be incorrectly flagged as batches i.e. false positives. The Respondent had not discharged her burden of proof in respect to the allegation of deception.

7. The separate withdrawals from banks in Middlesex and Birmingham did not persuade the Judge that this was not a genuine and subsisting relationship. A letter from the YMCA Housing Officer, 8<sup>th</sup> January 2015, indicated that the Appellant's spouse had introduced the Appellant to the Housing Officer as her fiancé and he visited her for two days every week. That document had not been challenged. The couple now had a son which demonstrated the genuine and subsisting nature of the relationship. The Appellant had spent the majority of his life in Bangladesh and had the appropriate skills to integrate there. However he had lost ties with his family since arriving in the United Kingdom. He now had a son which was a significant obstacle to the Appellant returning to Bangladesh. His wife could not return there as she had fled the country. At paragraph 45 the Judge found that in light of the dependency by the Appellant's wife upon the Appellant and the fact that he has a son of less than 5 months old, even returning to Bangladesh for a short time (the majority of applications were processed within three months) to make an entry clearance application would be a disproportionate interference with the Appellant's family life.
8. The Respondent appealed against that decision arguing that the witness statements she relied upon when read in conjunction with one another detailed extensively the investigation undertaken by ETS in this Appellant's case along with thousands of other applicants. The Judge had given inadequate reasons for rejecting the Respondent's evidence. Further the Appellant and his representative had failed in their duty to the Tribunal by failing to disclose the fact that there was objective evidence available which revealed that Colwill College in Leicester was the subject of a criminal enquiry because of the cheating that took place there, that this necessarily undermined the favourable findings of Article 8.
9. Permission to appeal was refused by Judge of the First-tier Tribunal Saffer on 3<sup>rd</sup> December 2015 who said that the Respondent was merely disagreeing with the Judge's findings on the three witness statements. There was no evidence to support the allegation of dishonesty at Colwill College in the three generic witness statements, a document regarding the investigation into Colwill College was not before the Judge at first instance.

10. The Respondent renewed her application for permission to appeal which came before Deputy Upper Tribunal Judge Archer on 25<sup>th</sup> January 2016. In granting permission to appeal he wrote that it was arguable the Judge had failed to correctly apply the case of **Gazi** and gave inadequate weight to the generic evidence of the use of a proxy test-taker. The Judge had arguably failed to consider the spreadsheet which confirmed that the Appellant's case was individually considered. Permission to appeal was granted on all grounds though there appeared to be no substantive challenge to the finding that the Appellant was entitled to a grant of leave under paragraph 276ADE and that issue might need further exploring at the hearing.
11. The Respondent's appeal came before me on 14<sup>th</sup> March 2016 when I adjourned the matter to the first available date to await the outcome of a pending Upper Tribunal decision of the President. That decision is now reported as **SM [2016] UKUT 00229**. At the resumed hearing before me both parties had a copy of the decision. The headnote to **SM** states:
  - (i) The Secretary of State's generic evidence combined with her evidence particular to these two Appellants sufficed to discharge the evidential burden of proving that their TOEIC certificates had been procured by dishonesty.
  - (ii) However given the multiple frailties from which this generic evidence was considered to suffer and in the light of the evidence adduced by the Appellants, the Secretary of State failed to discharge the legal burden of proving dishonesty on their part.
12. For the Respondent it was argued before me that the Respondent had discharged the burden of proof as could be seen from the spreadsheet entry. It was clear from **SM** that the evidence of the Respondent did discharge the burden of proof. Judge Price appeared to be saying that anything less than 100% accuracy meant that the evidence was insufficient but that was wrong in law. There was information in the public domain about Colwill College which had a high invalidity rate. As to paragraph 276ADE one could not satisfy that paragraph if one did not meet the suitability criteria which this appellant did not because of the alleged deception. There was a need for oral evidence to be given taking into account two further documents which the Respondent wished to rely on, including a report from Dr French who had reviewed the evidence before the Tribunal in **SM**.
13. For the Appellant reliance was placed on the decision of the First-tier Tribunal. There was no nexus between the extract from the spreadsheet referring to invalidity and the generic statements of the Respondent's witnesses. Dishonesty had to be proved to a higher standard with the burden on the Respondent. The Article 8 circumstances of the Appellant were now different. His child had medical difficulties which were shown in a statement submitted subsequent to the First Tier hearing.
14. There was a difficulty for the Respondent in that S-LTR.2.2 referred to false documents being submitted in the instant application. The Appellant had passed the English test some time before this application which is the subject matter of the appeal. Subsequently the Appellant obtained an English language qualification from

Trinity College, London. Thus the question mark over the English language certificate did not relate to the application under appeal. If it was not in relation to this application the Appellant was in a different category. This was a case where the Judge had taken all the evidence in the round and considered the matter in some detail. The First-tier Tribunal who had refused permission to appeal said that the Home Office grounds were just a disagreement and that was correct.

15. In reply the Respondent argued that the statements did take the First-tier through the process of how a decision was arrived at. The Judge's decision under paragraph 276ADE was challenged in the grounds of onward appeal. This appeal would have to be decided outside the Immigration Rules under Article 8 if the Appellant could not succeed under the suitability requirements. The Appellant's spouse had not been present at the last hearing and it was difficult to see how the Judge had arrived at his decision that this was a genuine and subsisting marriage without hearing from her. The Appellant's solicitor replied that she had not been present because she had needed to stay at home to care for the couple's child. She was, however, present today.

### **Findings**

16. There are two arguments in this case put forward by the Respondent. The first is that the Judge has failed to deal adequately with the generic evidence simply dismissing it out of hand. It is clear from the decision of **SM** that the Respondent's generic evidence is sufficient to discharge the evidential burden of proving that the certificate had been procured by dishonesty. The Judge at first instance was, therefore, wrong in law to conclude that they did not. There are, however, difficulties with the generic evidence and in the case of **SM**, having heard other evidence from the Appellants, the Upper Tribunal were able to find that the particular Appellants in the case before them had not been involved in proxy test-taking. Such further evidence was not before the Judge or at any rate not considered by him in the instant determination before me and the rejection, therefore, of the Respondent's evidence was an error of law.
17. The Appellant argues that even if that is the case that is still irrelevant to the issue because the objection taken by the Respondent to the Appellant's application for leave to remain as the dependant of his wife was based on evidence submitted in relation to an earlier application and not this application. That in my view is based on an incorrect reading of S-LTR.2.2 which refers to false information submitted to any person to obtain a document used in support of the application. If the Respondent's case is correct the Appellant submitted false information to the Respondent on 21<sup>st</sup> August 2012 to obtain leave to remain as a Tier 4 (General) Student. That grant of leave was then used as the basis of the application for leave to remain as a dependant (the refusal of which has given rise to the present proceedings). If the Appellant had had no leave, under Tier 4 or otherwise, he would not have been able to submit the application he made in 2014. The Respondent is correct that the Appellant's ability to meet the suitability requirements in the 2014 application ultimately depend on the validity or otherwise of the 2012 certificate of English language.

18. It follows that any assessment of Article 8, whether under the Rules or outside them, must inevitably be affected by whether the Appellant meets the suitability requirements of the Immigration Rules. If the certificate was awarded wrongly as the Respondent contends the Appellant falls foul potentially of the suitability requirements and cannot succeed under paragraph 276ADE. I therefore set aside the decision of the First-tier Tribunal in its entirety with no findings of fact preserved for this appeal to be re-heard. I give leave to the Respondent to file and serve the report of Professor French dated 20<sup>th</sup> April 2016 and the Home Office report of Project Facade, the criminal enquiry into Colwill College, Leicester. I also give leave to the Appellant to produce the statement of M A, 29<sup>th</sup> April 2016 and the correspondence regarding M's medical condition. It is open to the Appellant and his spouse to file and serve any further statements they wish to rely upon including: any further medical evidence; the circumstances in which the English language test was taken and the difficulties or otherwise which might be caused by the Appellant returning to Bangladesh to make an application for entry clearance from there.

**Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. The appeal will be re-heard on a date to be fixed when the Appellant and his spouse can give oral testimony. A Bengali interpreter will be required on the next occasion.

I make no anonymity direction as there is no public policy reason for so doing.

Signed this 27<sup>th</sup> day of May 2016

Deputy Upper Tribunal Judge Woodcraft

**TO THE RESPONDENT**  
**FEE AWARD**

No fee was paid or is payable and therefore there can be no fee award.

Signed this 27<sup>th</sup> day of May 2016

Deputy Upper Tribunal Judge Woodcraft