



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

Appeal Number: HU/05250/2015

THE IMMIGRATION ACTS

Heard at: Manchester

**Decision and Reasons
Promulgated**

On: 7th June 2017

On: 13th June 2017

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

The Secretary of State for the Home Department

Appellant

And

**Md Samsul Hoque Tarafder
(no anonymity direction made)**

Respondent

Representation:

**For the Appellant: Mr Harrison, Senior Home Office Presenting
Officer**

For the Respondent: Mr Timson, Counsel instructed by Maya Solicitors

DECISION AND REASONS

1. The Respondent is a national of Bangladesh born on the 15th June 1984.
2. On the 2nd September 2015 the Secretary of State refused him leave to remain on human rights grounds. The basis of the refusal was an allegation that the Respondent had, on the 17th April 2012, used a proxy to take an English language test on his behalf. This meant that his application for leave to remain as a partner and a parent fell to be

refused on 'suitability' grounds. That was the only ground for refusal.

3. On the 1st August 2016 the First-tier Tribunal heard the Respondent's oral evidence about the day that he took his English language test at Portsmouth College, a test administered by the ETS. The determination notes that the Respondent gave that evidence in "perfect and fluent" English. He gave details of the length of both tests, the contents of the tests, how they were conducted, what he had to do, and to whom he had to show his passport, and said that he had not used anyone else to take the test. Having regard to the evidence presented by the Secretary of State for the Home Department, namely witness statements by Rebecca Collins and Peter Millington, the Tribunal found the evidential burden that lay on the Secretary of State to be discharged: "I am satisfied on the basis of their evidence that the necessary evidential threshold to require the Appellant to explain the circumstances surrounding the test has been met". The Tribunal went on to find that it was "blindingly obvious" that the Respondent had no need to use a proxy since his English is excellent. He had given clear and detailed evidence about when he took the test. The Tribunal weighed this in the balance along with the fact that the test recordings had long since been destroyed and that the Respondent had thereby been deprived of an opportunity to have his own analysis conducted. Weighing all of those matters in the balance the Tribunal was not satisfied that the overall burden on the Secretary of State was discharged. The charge of deception was not made out and it followed that the appeal had to be allowed on human rights grounds, it being accepted that there is a British child in this family.
4. The Secretary of State for the Home Department's appeal raises several points, most of which are nothing more than an attempt to re-argue the case. It is suggested, for instance, that the Tribunal somehow erred in placing weight on its acceptance that Mr Tarafder did attend the test centre on the day in question: "in any event, any attendance at the test does not preclude the use of a proxy test taker". This ground does not identify any error of law. It is a submission which at best might be put in the First-tier Tribunal, and in fact in this case was not.
5. I deal only with those grounds pursued before me.
Did the Tribunal make contradictory findings about whether the evidential burden had been discharged by the Secretary of State?
6. The short answer is no. The determination quite clearly finds the evidential burden to be discharged. The determination does note that there is a possibility of false results in the fraud detection system, but this does not amount to a contradictory finding. It amounts to discussion of the evidence, which is followed by the clear finding in favour of the Secretary of State for the Home Department.

Did the Tribunal take the correct approach?

7. Yes. The Tribunal considered whether the Secretary of State for the Home Department had produced evidence capable of discharging the evidential burden, moved on to consider whether Mr Tarafder had produced a plausible innocent explanation, and then weighed up all of that evidence in the round, whilst reminding itself that the legal burden ultimately lies on the Secretary of State to the civil standard. That was the approach recommended by the President in SM & Qadir (ETS-evidence- burden of proof) [2016] UKUT 299 (IAC) and it is the approach that the Tribunal has applied.

Was there an error in failing to address the 'spreadsheet'?

8. At paragraph 6 of the determination the Tribunal mentions the statements of Millington and Collins. It makes no mention of the 'spreadsheet' which specifically mentions Mr Tarafder. The Secretary of State contends that this must be an error, since it means that the Tribunal did not weigh that evidence in the round in the final reckoning. Mr Harrison points to paragraph 9 where the Tribunal states that it has "not been provided" with a statement of report specifically relating to Mr Tarafder.
9. This was the only ground that was in my view remotely arguable. It is an odd omission that the spreadsheet is not mentioned. Having regard to the decision as a whole I am not however satisfied that the Secretary of State has established there to be any material error. I am satisfied that the Tribunal did take the spreadsheet into account. It must have done: otherwise it is very difficult to see how it could possibly have found the evidential burden of proof to be discharged on the basis of two wholly generic statements about the ETS fraud. I note the direction at paragraph 5 that the evidence is to be summarised only briefly.
10. Mr Harrison's point about paragraph 9 does not establish that the spreadsheet was missed. What the determination there says is "I have not been provided by the Respondent with a statement or report specifically relating to Mr Tarafder *explaining in detail* why the person listening to the interview and those against which it has been compared believes the recordings to be of the same person...." (my emphasis). That was a statement of incontrovertible fact.

Decisions

11. The determination of the First-tier Tribunal contains no error of law and it is upheld.
12. There is no order for anonymity.

Upper Tribunal Judge Bruce
7th June 2017