



In the Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11387/2016

THE IMMIGRATION ACTS

Heard at Field House
On 31 May 2018

Decision & Reasons Promulgated
On 3 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR EKANAYAKE MUDIYANSELAGE HB EKAAYAKE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms GS Petersen of counsel

For the Respondent: Mr C Avery, a Home Office presenting officer

DECISION AND REASONS

Introduction

1. In this appeal I will refer to the parties by their designations before the First-tier Tribunal (FTT) notwithstanding their roles are reversed.
2. The appellant is a citizen of Sri Lanka who was born on 16 of December 1979.

The Appellant's Immigration History

3. The appellant entered the UK on 10 February 2012, having obtained entry clearance as a tier 4 General Migrant on 10th February 2012. On 5 April 2012 he married Ms Hasangani de Silva Lokupinnadoowage (the sponsor) who is also a Sri Lankan national born on 15 April 1979. On 27 May 2012 the appellant applied for leave to remain as a Tier 4 (General) Student Migrant. That application was refused. He claims to have taken an English language (ETS) test on 1 November 2012 but the respondent disputes that, claiming that he was part of a fraudulent proxy test. Candidates who took such tests have been the subject of investigation by the respondent. Accordingly, on 15 April 2016 the respondent decided to refuse a subsequent application for leave to remain on the grounds that the appellant was a partner of a UK sponsor.

The appeal proceedings

4. The current appeal arises out of hearing in the First-tier Tribunal (FTT) which was fixed to deal with the appellant's appeal against the above refusal following a hearing at Hatton Cross on 20 September 2017. On 16 October 2017 Judge Veloso (the immigration judge) allowed that appeal on human rights grounds. His decision was promulgated on 18 October 2017.
5. The subsequent appeal against that decision by the respondent forms the subject of the current appeal to the Upper Tribunal.
6. Judge Alis identified two arguable grounds of appeal:
 - (i) The immigration judge attached too much weight to the appellant's ability to speak English and not enough to the possibility that the appellant may have committed fraud, a matter that the judge granting permission thought may not have been adequately dealt with;
 - (ii) The immigration judge may not have adequately assessed the appellant's article 8 rights and carried out the required balancing exercise...

The hearing

7. The respondent's representative submitted that the immigration judge may have erred by assuming that the appellant's ability to speak English was a decisive issue, which it was not. As the immigration judge had appeared to acknowledge in paragraph 44 of his decision, the fact that the appellant's spoken English was good by the date of the hearing, several years after he arrived in to the UK, was not an indication as to his proficiency at the date of the test. The immigration judge had found that the respondent had raised at least an initial suspicion sufficient to discharge the evidential burden but not the subsequent legal burden – the appellant having produced evidence that he acted in good faith and had not lied about taking his English language test. The immigration judge had not dealt adequately with the evidence and applied the burden and standard of proof but had adopted a flawed

approach to proportionality, giving too much emphasis to the appellant's ability to communicate in English.

8. The appellant's representative argued that there it was not an error to prefer the evidence of the appellant as to the test he claimed to have taken. It was not "cut and dried" that the appellant had taken an invalid test. I was referred to the case of **Nawaz [2017] UKUT 00288**, which Ms Petersen acknowledged may not be quite on point. However, she pointed out that the real issue was: "why the appellant would pay a proxy to take a test that he, having worked for an English bank in Sri Lanka, would easily have passed? I was then referred to the case of **SM and Qadir [2016] UKUT 00229-**. Paragraph 18 of the decision in this case considered **SM and Qadir**, pointing out that the respondent had the burden of showing evidence that TOEIC certificate was obtained by deception. Secondly, the appellant had an evidential burden of raising an innocent explanation for the suggested deception. Thirdly, the Secretary of State had to discharge the legal burden of showing on the balance of probabilities that the deception in fact took place. Mr Peterson argued that the immigration judge had properly looked at the evidence, set out clear conclusions and applied the correct burden and standard of proof. I was then referred to H 1 in the respondent's bundle, where the respondent's own document suggested that the test centre where the appellant had taken his test was merely "questionable". This did not indicate a particularly high level of satisfaction that fraud had been committed in the respondent's view, it was suggested. I was also referred by Miss Peterson to paragraphs 38 - 46 of the FTT's decision, where the immigration judge stated that the respondent would normally refuse the applicant admission where his presence in the UK was must not be conducive to the public good. This would justify refusal on suitability grounds under S-LTR1.1.6 of paragraph R-LTRP.1.1(c)(i) of Appendix FM. The appellant was able to give evidence as to where the test centre he attended was and weighing up the appellant's evidence the immigration judge concluded he had been telling the truth. It was highly likely the appellant spoke proficient English at the material time, given his background working for an English bank. The appellant had been given a second test because of what happened at the first test centre. He had been a credible witness. I was then referred to the case of **M A Nigeria** which dealt with the question: whether a person is engaged in fraud in procuring a TOEIC English language proficiency qualification was intrinsically fact sensitive. The appellant had been found to be honest. I was again referred to the case of **Nawaz** in which the appellant was also alleged to have exercised deception in his English language test. It was suggested that the facts in that case were different from those in this. I was referred against to **Qadir** and asked to conclude that the appellant met all the requirements of the Immigration Rules.
9. The respondent briefly replied to indicate that the immigration judge's apparent knowledge of the test procedure was not great. Mr Avery stood by the grounds. I was invited in the event that I was with the respondent to set aside the decision and remake it either in this tribunal or the FTT.

10. At the end of the hearing I reserved my decision as to whether there was a material error of law in the decision of the FTT and if so what the appropriate means of disposal was.

Discussion

11. The appellant's application for leave to remain on 15 April 2016 was refused on the basis that the respondent was not satisfied that the English language test he claims to have taken (the E T S test) was genuine. In particular, the respondent believes that proxy test takers may well have taken the test. This justified refusal on the basis that the appellant did not fulfil the "suitability criteria" in S - L T R .1 .6 (presence not conducive to the public good because of conduct). The respondent noted that the test had been taken at the New London College, which was a "questionable" institution where proxy test takers were suspected to have carried out tests on behalf of candidates. Thus, the respondent concluded, it was doubtful that the appellant had in fact obtained the ETS required for his application as a Tier 4 General Migrant.
12. There appears to be no dispute that the immigration judge correctly applied the burden and standard of proof to the facts of this case. However, clearly, the immigration judge's conclusions are disputed. The appellant says the respondent's appeal amounts to no more than a disagreement with the outcome of the appeal. The appellant says the immigration judge's conclusions were sound and justified by the authorities in relation to the approach to this type of evidence.
13. In the course of his evidence before the FTT the appellant could not, apparently, recall the name of the centre where he took the test other than to say that it was in Hounslow. He was able to recall some details of the test but was unable to say whether he received an email confirmation or receipt for his payment for the test (£230).
14. The grounds criticise the immigration judge for taking account of the appellant's knowledge of the test centre/exam process as favourable credibility factors, when the investigation into the exam process by the Panorama programme revealed proxy test takers had been engaged in some take cases to sit alongside legitimate candidates within the examination centre. The immigration judge is also criticised for attaching any/excessive weight to the appellant's ability to communicate in the English language. It was said that even if the appellant's ability to communicate in English was at a similar level to that on display at the date of the hearing, which took place in September 2017, this did not illuminate either the quality of his English at the time of the test nor did it refute the fact that the appellant would have had a strong incentive to pay a proxy to take the test. Many candidates engaged such proxy test takers, for example, because they considered that greater certainty of outcome would flow from that method of exam taking than taking the test oneself. One can well understand that a candidate may lack confidence as to his ability to speak, yet along take a test in, a foreign language, however much he had spoken it in the past.

Conclusions

15. It is not clear from the immigration judge's decision that the respondent made such nuanced arguments before the FTT as are contained within the grounds of appeal. Those grounds have been supported orally in the Upper Tribunal. The immigration judge made a generous assessment of the appellant's credibility, noting at paragraph 45 that the test had been taken three years prior to the application and five years prior to the hearing. He did not in my view attach excessive weight to the appellant's ability to speak English either at the date of the hearing or his perceived ability to speak that language at the date of his ETS test. However, this was a matter the immigration judge was entitled to consider given the appellant's past history of employment for HSBC and the Finance Company before he left Sri Lanka. It was undoubtedly a negative credibility factor that the appellant was unable to recall whether he received a receipt for his payment to the test centre or an email confirmation in relation to the test. However, overall, the immigration judge was entitled to reach a generous view of the appellant's credibility even though other judges may have been more sceptical.
16. It follows from the fact that the immigration judge applied the correct burden and standard of proof (at paragraph 18 - 20 of the decision) and made an assessment of the appellant's credibility, which I have found to be sustainable, that the immigration judge was entitled to conclude that the appellant did not qualify for refusal of further leave to remain on the grounds of lack of suitability grounds (i.e. under S - LTR.1.6 of the Immigration Rules). It is not now disputed that the appellant has formed a family and private life with the sponsor and his child in the UK, which is protected by article 8 of the ECHR. Accordingly, given that the requirements of the Immigration Rules were probably met, the decision that the appeal to him ought to be allowed under section 6 of the Human Rights Act 1998, was one the immigration judge was entitled to come to in all the circumstances.

Notice of Decision

The respondent's appeal against the immigration judge's decision to allow the appellant's appeal on **human rights grounds is dismissed.**

No anonymity direction is made.

Signed

Date 30 June 2018

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

The immigration judge made no fee award and I make no fee award.

Signed

Date 30 June 2018

Deputy Upper Tribunal Judge Hanbury