



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11891/2016

THE IMMIGRATION ACTS

Heard at Field House
On 4 January 2018

Decision & Reasons Promulgated
On 8 March 2018

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD MIZANUR [R]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer
For the Respondent: Mr A Syed-Ali

DETERMINATION AND REASONS

1. The Secretary of State (to whom I shall refer hereafter as the respondent, as she was before the First-tier Judge), appeals with permission to the Upper Tribunal against the decision of a First-tier Judge who allowed the appeal of Mr [R] (to whom I shall refer hereafter as the appellant as he was before the judge) who had appealed against

a decision of 22 April 2016 refusing his application for further leave to remain in the United Kingdom.

2. In the refusal letter it was accepted that the appellant had shown that he met the requirements to qualify for leave to remain under family life as a partner ten year route, but it was concluded that his presence in the United Kingdom was not conducive to the public good because his conduct made it undesirable to allow him to remain in the United Kingdom. This was on the basis that it was alleged that he had fraudulently obtained a TOEIC certificate from Educational Testing Services (ETS) by using a proxy test taker for a test taken on 9 January 2013.
3. The appellant had been in the United Kingdom since 30 November 2009. He had married his wife on 11 November 2012 and the couple have a child born on [] 2013. Their daughter is a British citizen by birth.
4. The appellant's evidence before the judge was that he had not made a false representation nor had he submitted a false English test certificate and had genuinely sat for the examination and had successfully completed the assessment and obtained the certificate. He confirmed that at the time when he took the test he was living in Bow and the journey to do the test was relatively easy. He referred to the bus he took and the tube line. He recalled that on the day he took the test there was nobody next to him nor did he know anybody taking the test. When he had been initially questioned in April 2016 about the taking of the test he was unable to remember certain details but subsequently he refreshed his memory and was able to recall accurately thereafter.
5. He had good qualifications in English before coming to the United Kingdom and after arrival had completed a course in business management which was taught in English. He made the point that the respondent had not provided any evidence in support of the allegations made against him. He had not contacted ETS about the allegation but contacted his solicitor and followed instructions as to how to challenge the decision.
6. The judge had before him the witness statements of Ms Collings and Mr Millington which he summarised. The respondent's representative referred to a report by Dr French but that report was not contained within the respondent's bundle. It was subsequently sent to the judge who took it into consideration. The judge noted within the respondent's bundle a print off recording the results of the appellant's ETS test as "questionable".
7. At paragraph 13 of his decision the judge said that the respondent had produced sufficient evidence to show that the appellant had a case to answer but that evidence in the form of the various witness statements had been the subject of consideration in a number of decisions by the higher courts which were not the subject of any particular dispute before him and it was not necessary to recite them. He noted Dr

French's report and no issue was taken with it by the appellant's representative. He considered the respondent's evidence was generic and secondary.

8. No information had been given as to why or on what basis the appellant's results were said to be questionable other than suspected large scale deception at particular test centres. He noted there was no evidential link between the appellant and any fraud or deception and none of the evidence provided by the respondent contained a specific discussion of actual evidence relating to the appellant. He considered that the fact that the results were taken to fall into the "questionable" category did not mean that the results could not be concluded as having been genuinely obtained. He concluded that the Home Office evidence against the appellant was not conclusive and in itself failed to reach the required standard of being more likely than not.
9. The judge then went on to consider the appellant's evidence in response. That included a photograph of him taken on the day of the test and the respondent accepted that this was a photograph of him taken from the computer but the test was conducted on the day of the examination. The respondent's case was that an imposter standing beside him may have stood in for him.
10. The judge considered that the cross-examination by the Presenting Officer left the appellant unscathed. He had been helpful and cooperative and gave a detailed account of the day of the examination in question and detail, including details of his travel arrangements to and from the centre. His documents included evidence of long and successful study in and of English. There was therefore no obvious reason why he should have feared taking an English test in 2013 particularly bearing in mind that he had previously successfully taken the test. He had not been given a further opportunity to take the test. The judge considered that his taking of the matter to his solicitor, rather than attempting to contact ETS was reasonable.
11. Looking at the matter as a whole the judge found that the appellant had given a robust and cogent account of undertaking the test in person in 2013. Beyond raising a case to answer the respondent's evidence fell short of implicating the appellant and on the balance of probabilities the judge concluded that the appellant took the test in person and obtained scores without use of a proxy or any form of deception. There was therefore no reason to suspect that his presence in the United Kingdom was not conducive to the public good. The judge noted the respondent did not take issue with the remainder of the requirements applicable to the appellant under the Immigration Rules to allow him to remain in the United Kingdom under the family life as a partner (ten year routes). The judge concluded that the appellant met the requirements under the Immigration Rules.
12. He went on to consider whether the claim could succeed under Article 8. He concluded that the appellant had an obvious private and family life with his wife, that it was also obvious that the right would be interfered with should he be required to leave the country. He went on to consider whether the interference was in accordance with the law. He considered that in this case it appeared that the

appellant had complied with the Immigration Rules and therefore the interference could not be said to be in pursuit of one of the legitimate aims set out in Article 8(2) or proportionate to the pursuit of the legitimate aim. The appeal was therefore allowed.

13. In her grounds of appeal the respondent argued that the initial burden on the Secretary of State had been met and the evidential burden fell upon the appellant to offer an innocent explanation and that it was clear from the judge's determination that he had not appreciated that the evidential burden was met and had he properly considered the evidence he would have reached a different conclusion. It was also argued that the ETS verification system was adequately robust and rigorous and the Secretary of State had to rely on information provided to her by an applicant which had been certified as being true by a third party, and if the certificate were withdrawn by the third party as in this case and the third party was no longer able to vouch for the validity of the information then the basis of the leave was also removed.
14. It was also argued that the only avenue of appeal open to the appellant was on the basis of human rights and the judge had not carried out a proper assessment in accordance with the Razgar guidance. It was argued that there were no compelling circumstances to justify the consideration of the appellant's case outside the Immigration Rules. The point was made that there was nothing to prevent the appellant from returning to Bangladesh with the sponsor in order to continue their family life there.
15. Permission to appeal was granted by a Judge of the First-tier Tribunal who accepted that there was an arguable challenge with regard to the ETS issue. There is no mention in his decision of the Article 8 point.
16. In his submissions Mr Tarlow relied on the grounds and argued that the judge had not apparently considered the relevant case law and had given either no or no adequate reasons on the Article 8 issue.
17. In his submissions Mr Syed-Ali argued that although the judge had not referred to the case law on the ETS cases what he had said in his judgment was entirely in accordance with the principles set out in the case law. He had properly addressed the generic evidence. As regards Article 8, though the reasoning was not exhaustive, the judge was clearly aware of the law and had considered the facts. The evidence had been considered and proper findings had been made. There was no material error of law.
18. I reserved my determination.
19. As regards the ETS issue, I consider that the challenge is a matter of disagreement only. The judge did not go through the relevant case law as might have been expected, but it is clear from his decision, for example at paragraphs 13 and 15, that

he was aware of the fact that there was an evidential burden on the respondent which had been discharged, but he then went on to consider whether the appellant was then able to discharge the burden which switched to him and concluded that he had done so. His reasoning in this regard is clearly sound. Paragraphs 16, 17 and 19 of the decision in particular set out good reasons why the judge on the particular facts of this case concluded that the burden on the appellant had been discharged despite the initial discharging of the evidential burden on the respondent by means of the Collings and Millington witness statements.

20. As regards the Article 8 issue, the judge's reasoning in this regard is slender. However the effect of his decision is clearly that the requirements of the Immigration Rules were in his view met and that had clear significance to the lawfulness of the interference with his family and private life rights and also the proportionality of the decision. Ideally no doubt his decision would have been more fully reasoned, but in the circumstances I consider that what he had to say was an adequate evaluation of the Article 8 issue in the circumstances. Accordingly I find no error of law in his decision, and the decision allowing the appeal on human rights grounds is upheld.

No anonymity direction is made.



Signed

Date 1.2. 18

Upper Tribunal Judge Allen