



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/26876/2016

THE IMMIGRATION ACTS

Heard at Field House
On 6 June 2018

Decision & Reasons Promulgated
On 11 June 2018

Before

UPPER TRIBUNAL JUDGE PITT

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MD RASHED AHMED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Ms S Ferguson, Counsel instructed by Capital Solicitors

DECISION AND REASONS

1. This is an appeal against the decision dated 15 March 2018 of First-tier Tribunal Judge Sweet which allowed Mr Ahmed's appeal against the refusal of leave as a spouse of a British national.
2. For the purposes of this decision I will refer to the Secretary of State as the respondent and to Mr Ahmed as the appellant, reflecting their positions before the First-tier Tribunal.

3. The background to this matter is that the appellant came to the UK from Bangladesh on 16 January 2010 with leave to enter as a Tier 4 (General) Student. He had leave in that capacity until 31 July 2014. On 27 March 2014 that leave to remain was curtailed so as to expire on 26 May 2014. In the interim, on 17 July 2013, the appellant had married a British national. He therefore applied to remain on that alternative basis and on 5 May 2014 he was granted leave to remain as the spouse of a British citizen, that leave being valid until 5 December 2016. He then made an in time application on 28 November 2016 for further leave to remain as a spouse.

4. That application was refused by the respondent in a decision dated 29 November 2016. The application was refused as it was found that the appellant did not meet the suitability requirements of the Immigration Rules, in particular paragraph S-LTR.1.6. which states:

“The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.”

5. The respondent’s reasoning as regards that paragraph was that in an application for further leave as a student made on 5 April 2012 the appellant had relied on a TOEIC certificate from the Educational Testing Service (ETS) which had been obtained by proxy.

6. The appellant appealed that decision and thus the matter came before First-tier Tribunal Judge Sweet. The hearing before Judge Sweet turned, with the agreement of both parties, on the issue of the TOEIC certificate, the respondent conceding that if the appellant’s claim to have genuinely taken the test was credible the appeal should succeed; see [12] of the decision.

7. The decision set out at [4]-[5] the materials considered by the judge which included all of the relevant evidence provided by the appellant and the respondent including all of the respondent’s witness statements, expert reports and “other documents relating to the appellant’s ETS test”. The judge also set out the respondent’s reasons for refusal at [6] and the Home Office Presenting Officer’s submissions at [12].

8. At [9] the judge indicates that the appellant gave evidence “in accordance with his witness statement”. That document is at pages 112-117 of the appellant’s bundle and is dated 1 March 2018. In particular, at paragraphs 17-30 the appellant set out details of having taken the ETS test in 2012. This reads as follows:

“17. I would like to state at the outset that I categorically deny using fraud in acquiring my TOEIC speaking certificate. The Home Office has not provided any further information or documentation evidencing my alleged fraudulent activity despite my solicitors raising this concern in the grounds of appeal. I therefore have not been given a fair or reasonable opportunity to assess and understand the evidential basis of the Home Office’s decision.

18. I reiterate that I did not acquire any of my English language certificates using fraud or deception and the Secretary of State has not provided me with any evidence that the TOEIC certificate was fraudulently obtained.
 19. In respect of the TOEIC assessments which I did in 2012, I took the Listening and Reading tests together and the Speaking and Writing tests together on separate days.
 20. I booked the tests myself and I paid the fees for the tests in cash although I cannot recall the exact amount that I paid. The money was paid at the College.
 21. The assessments took place at the Synergy Business College which was based at 4 Seldson Way, London, E14 9GL. At the time I was living at 12 Greenland House, Ernest Street, E1 4SL which was about 2 or 3 miles from the College and I travelled there by bus.
 22. The Listening test was a multiple choice-based assessment and it took me about 35 minutes to complete.
 23. The Reading test had three types of questions. I had 75 minutes to complete the test.
 24. The Speaking test consisted of 11 questions on different topics and I was in a separate booth. There was about another 15-20 people who did the test that day and there was another gentleman, who I assumed was an invigilator or tutor, was in the room at the same time. I can recall that the Speaking test took place in the morning and it took me about 20 minutes to complete.
 25. The Writing test took me about 50 minutes to complete. This test included 8 questions and I had to answer all the questions.
 26. The Speaking and Writing tests were computer-based assessments whilst the Listening and Reading assessments were paper based.
 27. On the day of the assessments, I was required to show my original passport as proof of my ID and the lady at the reception took my signature and maintained a copy of it.
 28. I believe the Home Office have acted very unfairly in refusing me leave without at least giving me the opportunity to do another English test.
 29. I am happy and able to do a further English language test in speaking to demonstrate my proficiency if necessary. I have undertaken two English language tests since I did the TOEIC assessments which proves that I am a genuine person and can pass the required English language tests.
 30. There was therefore absolutely no reason for me to use fraud in my previous application as my English language skills are good enough to be able to pass Home Office approved assessments without resorting to cheating."
9. First-tier Tribunal Judge Sweet found that the appellant provided credible evidence that he had not used fraud when taking the ETS test. His substantive findings are at [14]-[16] as follows:

- “14. The burden of proof is on the appellant and the civil standard of the balance of probabilities applies. The appellant first arrived in the UK in January 2010 with leave as a Tier 4 (General) student valid until 30 April 2013. His leave was extended to 31 July 2014, but was curtailed to expire on 26 May 2014. He was granted leave to remain as a spouse of a British citizen of 5 May 2014 until 5 December 2016. He married his British-born wife, Thania Mirza, who gave credible evidence before me, on 17 July 2013.
15. In respect of his application the respondent concluded that the appellant had used fraud in taking the ETS test and the TOEIC certificate following the test taken on 22 February 2012 at Synergy Business College of London. The respondent reached this conclusion on the basis of its findings following investigations into the validity of tests provided by a number of ETS providers. This evidence is set out in the various witness statements of the respondent, of Kelvin Hibbs, Rebecca Collings and Peter Millington. The respondent also relies on the expert report of Professor French dated 20 April 2016.
16. Having heard the appellant’s credible evidence (and that of his spouse), I am satisfied that he did not use fraud in the taking of his test. I base this conclusion on my assessment of his status as a credible witness and the fact that he has taken and passed two subsequent English language tests, at Trinity College London, on 19 May 2014 and 1 November 2016. Furthermore, I take into account that he has customer service roles with both McDonalds and Pizza Hut, which requires him to be fluent in the English language. The Presenting Officer submitted that it was significant that the appellant could not produce evidence that his college (which has since closed) actually arranged the test for him, but as the test took place over 5 years ago and the college no longer exists, I do not consider that the absence of such proof is significant in respect of the appellant’s overall case.
17. For all the reasons I conclude that the appeal should be allowed and the appellant’s leave should be extended under the Immigration Rules.”
10. The respondent maintained that the decision of the First-tier Tribunal disclosed a material error of law. It was conceded by Mr Clarke that paragraph 1 of the grounds could not be material where, if the judge’s findings on the appellant not having used deception were upheld, the appeal would have had to be allowed, albeit under Article 8 rather than under the Immigration Rules. That was an error but not a material one which could require set aside.
11. The next substantive ground is set out in paragraph 4 of the grounds which states:
- “It is not clear why the evidence of the from the appellant which the Tribunal relies upon at [16] would preclude the use of a proxy test-taker during the test.”
12. The grounds go on at paragraph 5:
- “In reaching the material finding the Tribunal relied on the appellant’s English language ability and other English qualifications [16]. It is respectfully submitted that the test is not whether the Appellant speaks English, but whether, on the balance of probabilities, the Appellant employed deception. The witness statements and the spreadsheet provide the necessary evidence to demonstrate that he did employ deception. Plainly, there may be reasons why a person who is able to speak English to the required level would

nonetheless cause or permit a proxy candidate to take an ETS test on their behalf, or otherwise to cheat. As demonstrated in the judgment of MA Nigeria [2016] UKUT 450 records at [57]:

‘Second, we acknowledge the suggestion that the Appellant had no reason to engage in deception which we have found proven. However, this has not deflected us in any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere. We are not required to make the further finding of why the Appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter’.

13. The respondent then submits:

“6. It is respectfully submitted that the Tribunal has materially erred by failing to give adequate reasons for holding that a person who clearly speaks English would therefore have no reason to secure a test certificate by deception.”

14. Notwithstanding comment in the grant of permission, Mr Clarke accepted that there was no challenge in the grounds to the judge having applied an incorrect burden and standard of proof. Rather, he maintained that the decision did not show that the judge had properly applied the correct test by way of weighing the respondent’s strong or “compelling” evidence on the use of deception here and measuring the appellant’s evidence raised against the respondent’s case. Mr Clarke also referred me to cases from the Administrative Court and the Upper Tribunal where other judges have found that the respondent’s evidence was of sufficient weight that it was found to have been rebutted by the appellants in those cases. Those cases also confirmed the strength of the respondent’s evidence, growing over time and culminating in the evidence of Professor French which, agreed by both parties before me, found that the likelihood of a “false positive” to be low, less than one per cent of the overall number of results.

15. It is not my conclusion, however, that the First-tier Tribunal erred here in its approach to the evidence provided by the respondent or the appellant. As set out above in [7], the First-Tier Tribunal decision shows that the judge took into account the respondent’s evidence. At [15] the judge sets out the evidence of the respondent as part of the assessment of whether deception had been used, including specific reference to the report of Professor French. The judge had the opportunity to hear oral evidence from the appellant and his wife. As above, the appellant’s oral evidence confirmed the details provided in his witness statement as to his recollection of what happened when he took a TOEIC test in 2012. This was in addition to the evidence of his strong English language skills.


16. Neither case law on ETS nor a proper application of the legal test for allegations of deception precludes a judge from finding that an appellant has rebutted even the increasingly strong evidence of the respondent. In my judgment, reading the decision fairly, the judge here found that the detail of having taken the test provided by the

appellant and the evidence of his English language skills was sufficient to rebut the material provided by the Secretary of State and that was an assessment that was reasonably open to him. The respondent is correct that being able to speak English well is not determinative of not having used deception, following MA (Nigeria). The decision here does not show that the judge found that to be the only determinative factor, however. I do not find that the grounds show a material error on a point of law, therefore.

17. There was agreement before me, however, that the appeal had to be allowed under Article 8 ECHR and not the Immigration Rules.

Decision

18. The decision of the First-tier Tribunal does not disclose a material error on a point of law other than being allowed under Article 8 ECHR.

Signed: 
Upper Tribunal Judge Pitt

Date: 8 June 2018