



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

Appeal Number: HU/11702/2018

THE IMMIGRATION ACTS

Heard at FIELD HOUSE

On 6th March 2019

**Determination
Promulgated**

On 18th March 2019

Before

**DEPUTY JUDGE OF THE UPPER TRIBUNAL
G A BLACK**

Between

**MR MD JAKIR HOSSAIN
NO ANONYMITY ORDER MADE**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Collins (Counsel)

For the Respondent: Mr S Whitwell (Home Office Presenting Officer)

ERROR OF LAW DECISION AND REASONS

1. This is an error of law hearing. The appellant appeals against the decision of the First Tier Tribunal (Judge Fox) (FtT) promulgated on 8th January 2019 in which the appellant's appeal against a refusal of leave to remain was dismissed. It was alleged that the appellant had used a proxy tester for his ETS language certificate.

Background

2. The appellant is a citizen of Bangladesh. The FtT found that the SSHD had discharged the initial burden of proof that there was evidence of dishonesty [25-28]. The FtT found that the appellant failed to provide an innocent explanation [33].

Grounds of appeal

3. In grounds of appeal the appellant argued that the FtT erred by failing to consider if the appellant's innocent explanation had reached the "minimum level of plausibility". The FtT erred in rejecting the evidence for lack of corroboration. The appellant's level of English demonstrated that he had no reason to cheat. The FtT failed to take into account that the appellant contacted ETS to obtain evidence about the test. The FtT erred in failing to consider the human rights Article 8 claim.

Permission to appeal

4. Permission to appeal to the Upper Tribunal (UT) was granted by FTJ N Haria on 29.1.2019. In granting permission the FTJ considered that it was arguable that the FtT failed to apply the correct evidential burden to the raising an innocent explanation. All grounds were arguable.

Submissions

5. At the hearing before me Mr Collins representing the appellant relied on the grounds of appeal and argued that whilst the FtT had identified the correct burdens of proof the FtT failed to go beyond the second stage. The appellant had given detailed evidence as to how and when the test was taken and his representative had requested information from ETS. This was a case where the SSHD failed to produce the generic bundle of evidence.
6. In response Mr Whitwell contended that the FtT had embarked on a fact sensitive approach having regard to the fact that the appellant did not give evidence and his case was submissions only. The respondent had provided a supplementary bundle with the supporting evidence including the look up tool and the invalid certificate. The FtT found that the appellant's evidence amounted to an assertion that he took the test and this was viewed in the context that all the test taken that day were invalidated.

Discussion and conclusion

7. At the end of the hearing I found that there was no material error of law. My reasons are as follows. The FtT considered the correct burden and standard of proof set out at [6]-[7] and I find no basis to argue that the FtT applied a standard that was too high. No specific arguments were made having regard to the self directions at [7] and [37] indeed Mr Collins acknowledged that the FtT correctly identified the burden of proof. The FtT found that the respondent had satisfied the initial burden on him to show that there was evidence of dishonesty. There is no challenge to that

finding [26] notwithstanding that the generic bundle was not produced but there was sufficient evidence from the respondent. It is argued that the FtT failed to assess the appellant's innocent explanation having regard to the minimum level of plausibility. The FtT did not accept the appellant's evidence that he had attended the test centre nor that he had no reason to cheat having regard to his language ability [29 -30] as evidenced. The FtT found that this claim as to his language qualification was not reliably supported [35] and that there were other reasons why someone might cheat. The FtT was entitled to come to the decision that it did on the findings made having regard to the evidence before the Tribunal. The FtT in effect concluded that the appellant's assertion failed to meet the minimum level of plausibility and failed to provide an innocent explanation [37]. As to the argument that the FtT did not go on to stage three, that is misconceived given that the FtT did not find there to be an innocent explanation and therefore the burden did not return to the SOS to counter that.

Decision

8. The appeal is dismissed. There is no material error of law disclosed in the decision which shall stand.

Signed

Date 14.3.2019

GA Black
Deputy Judge of the Upper Tribunal

NO ANONYMITY ORDER

NO FEE AWARD

Signed

Date 14.3. 2019

GA Black
Deputy Judge of the Upper Tribunal