Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05282/2017

THE IMMIGRATION ACTS

Heard at Field House
On 24th September 2018

Decision & Reasons Promulgated
On 5th October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR MD ASAD MIAH
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the appellant: Miss J Isherwood, Home Office Presenting Officer
For the respondent: Mr M Bhviyan, Counsel, instructed by Haque and Hausman Solicitors

DETERMINATION AND REASONS

Introduction

1. Although it is the Secretary of State who is appealing, for convenience I will hereinafter refer to the parties as in the First tier Tribunal.

2. The appellant is a national of Bangladesh, born on 1st January 1988.

3. He came to the United Kingdom on 16 November 2010 with leave as a student. He was granted a series of further leaves.

4. On 13 September 2015 he underwent a religious ceremony of marriage which was registered civilly on 21 March 2016. His wife, Mrs Taslima Begum, is a British national originally from Bangladesh. They now have a baby who is British.

5. He made an application on 7 April 2016 for leave to remain on the basis of his family and private life. This was refused on 17 March 2017. His application was considered under appendix FM of the immigration rules and refused on the basis of suitability. In applications he made on 9 November 2011 and 15 April 2013 for further leaves as a student he had submitted a TOEIC certificate from educational testing service (ETS). Checks suggested the certificate had been obtained through personating. A second basis for refusal related to the financial requirements and the evidential proofs. It was accepted he was in the genuine subsisting relationship with his wife but the respondent did not see any insurmountable obstacles to family life continuing in Bangladesh.

6. His appeal was heard by First-tier Tribunal Judge Lingham at Taylor House on 2 May 2018. Both parties were represented. His appeal was allowed in a decision promulgated on 24 May 2018.

7. The respondent has been granted permission to appeal that decision. It was contended that to allow the appeal was inconsistent with the judge's comments at paragraph 71 to 73. Paragraph 71 ends:

> `... The consequences of the decision would not cause him to encounter very substantial difficulties or exceptional circumstances or unjustified harshness for him '.

Paragraph 72 reads:

> `for these reasons, I am satisfied that the appellant's article 8 rights outside the rules or under EC HR jurisprudence is not made out. The decision would not cause the UK to act in breach of its obligations under the EC HR. '.

Finally, at paragraph 73 the judge states:

> `Based on my assessment of the facts, I am satisfied that the appellant's removal would be a proportionate and a justified measure against the

> respondent's legitimate aims of protecting the societies economic interest through immigration control.'

In the final paragraph, Para 74, the judge states:

> 'The appellant's appeal ground under Article 8 ECHR fails for those reasons'.

Then, in apparent contradiction of this, under the heading `Decision' the judge states:

> `the appellant's appeal under the rules is allowed. The appellant's appeal under EC HR ground is allowed'.

The grounds suggest that this was a slip of the pen.

8. Alternatively, the grounds contend that to allow the appeal was irrational given the finding that the appellant had failed to satisfy the judge as to his account.

9. It was also pointed out that the appellant's representative had conceded the appellant could not meet the immigration rules and so the judge's allowance of the appeal under the rules, if not by mistake, was perverse.

The Upper Tribunal

10. Miss Isherwood relied upon the grounds advanced. She acknowledged that the challenge was directed towards the decision relating to the taking of the test.

11. Mr Raza started by acknowledging that the judge had found the respondent had discharge the initial legal burden about the taking of the test. However the judge found the appellant then adequately explained matters. Paragraph 37 sets out how the judge came to that decision.

Consideration

12. The test was taken at Ashton College, Birmingham with the reading parts taken on 1 October 2011 and the speaking and writing parts on 19 October 2011. The respondent had produced a screen-print indicating the test for 19 October 2011 had been scored at 160 on the writing and 170 on the speaking. However, the results subsequently were declared invalid. Statistics for the college for that date indicate 70% of the results were declared invalid with the balance questionable. 121 tests were taken that day. The respondent provided the information from the Lookup tool plus the generic statements from Ms Collings, Mr Millington and the report from Prof French. There was also a

statement from a member of the respondent staff explaining the core aspects of these reports.

13. SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC) found the Secretary of State's generic evidence, combined with her evidence particular to the appellants, sufficed to discharge the evidential burden of proving that the TOEIC certificates had been procured by dishonesty. The respondent produced computerised spreadsheet entries derived from the "Look up Tool". Para13 explains this further :

> On the face of the documents ETS devised a dichotomy of "invalid" and "questionable" TOEIC test results. The Home Office, in turn, has developed a system whereby upon receipt of the ETS testing analysis outcomes these are matched to the person who has the name, date of birth and nationality of the certificate holder. This is known as the "Lookup Tool".

14. This is repeated in the decision of R (on the application of Nawaz) v Secretary of State for the Home Department (ETS: review standard/evidential basis) [2017] UKUT 00288 (IAC). There, the Upper Tribunal held that evidence obtained by use of the Look-up Tool, and subject to the human verification procedure, is an adequate basis for the Secretary of State's deception finding in these cases, in the light of Flynn & another [2008] EWCA Crim 970 [24 – 27], and the evidence of both Dr Harrison and Professor French.

15. In the same way, the ability to describe the location of the test centre and the fee paid may be of limited value. There are cases where the person has attended at the test centre and stood beside the proxy test taker. In the circumstance such evidence is of limited probative value though each case will turn on its facts.

16. The decision of First-tier Tribunal Judge Lingham indicates an awareness of the switching burden of proof. At paragraph 23 the submission of the presenting officer to the judge stated the correct position and the judge at paragraph 36 found the respondent had discharged the initial evidential burden.

17. Having done so, the judge then had to consider whether the appellant could counter this. At para 37 the judge found the appellant’s explanation as to why he would sit an examination in Birmingham when he was living in London was credible. The judge gave reasons. The judge pointed out a train journey between the two locations is about two hours which is the same time it could take to travel across London. The judge also accepted the appellant's explanation as to why he has selected the particular college. The judge also pointed out that the college had not been prosecuted.

18. The appellant told the judge that he has studied English in his home country to degree level. As was explained in MA (ETS – TOEIC testing) [2016] UKUT 00450(IAC) a person competent in English may still cheat –para 57:

> …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.

19. The judge referred to the appellant giving his evidence in English. The judge accepted the appellant had a good command of English. The judge balances this comment by stating that the testing issue was seven years earlier and in the meantime the appellant would have improved his ability in English.

20. The judge referred to the frailties inherent in the generic evidence produced by the respondent and found that the appellant had provided a fluid account.

21. It is clear from the decision that the judge appreciated the caselaw relevant to this type of case. The judge was aware of the initial legal burden upon the respondent and found that this was established. Thereafter it was a matter for the judge to look at all the evidence to see if the appellant's account meant the results could be relied upon. The judge found this was the case and gave reasons. It is clear from reading the decision that the judge did not simply determine this on the bases at the time of hearing the appellant appeared proficient in English. The judge indicated awareness that with the passage of time is English was likely to have improved. Thereafter, the assessment was a matter for the judge. Consequently, I can find no material error of law in the approach taken by the judge.

22. The appellant has a limited right of appeal, namely, it is confined to human rights issues (Section 84(1) (c) of the Nationality, Immigration and Asylum Act 2002. If a protected human right is engaged then when considering the final stage of the Razgar approach the judge is looking matters through the prism of any relevant immigration rule (see Mostafa (article 8 in entry clearance) [2015] UKUT 112.) They are required to have regard to the provisions of section 117 B.

23. The judge records at paragraph 19 the appellant's representative acknowledges the rules were not met. However, consideration of the rules was still relevant in relation to the proportionality of the decision. At paragraph 55 the judge states that the appeal fails on the rules. The appeal is not actually under the rules and the judge is mistaken here. However the judge then goes on to consider matters outside the rules and section 117 B. The judge was satisfied as to the appellant's financial independence and that there was accommodation for the family. The judge had regard to the

circumstances into which they entered their relationship. The judge acknowledged the fact his spouse and child have British nationality.

24. When the decision is read as a whole paragraph 70 to 74 is inconsistent with the rest of the decision. It is my conclusion that when the decision is read as a whole this aspect was written in error. The judge clearly intended to allow the appeal outside the results.

Decision.

No material error of law has been established in the decision of First-tier Tribunal Judge Lingham. Consequently, that decision allowing the appeal shall stand

Francis J Farrelly

Deputy Upper Tribunal Date 26th September 2018