Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10174/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 June 2018	**On 25 June 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

AZIMUNNOOR CHOWDHURY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E. Waheed, counsel.
For the Respondent: Mr D. Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal dismissing the appellant's appeal against the respondent's decision of 30 March 2016 refusing his application for indefinite leave to remain on the basis of his long residence in the UK in the light of a finding that he had fraudulently used a proxy to take his TOEIC language test in 2012 and a conviction for battery against his wife for which he received a suspended sentence of four months' imprisonment.

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Background.

2. The appellant is a citizen of Bangladesh born on 1 January 1987. He arrived in the UK with a student visa in October 2005 and was granted further leave to remain in 2009. In March 2012 he took the disputed TOEIC exam and used it in October 2012 to apply for leave to remain as a spouse. That application was ultimately successful, and leave was granted until 8 January 2017.

3. He applied for indefinite leave on 26 October 2015, by which time he had been in the UK for 10 years. The application was refused under the provisions of para 322(2) of the Rules as he had made a false representation in support of his previous application and under para 322(1C) because of his conviction for battery. Further, the respondent was not satisfied that the appellant could meet the requirements for leave under article 8 or that there were exceptional circumstances justifying further consideration outside the Rules.

The hearing before the First-tier Tribunal.

4. He appealed against this decision and his appeal was heard on 23 May 2017. The judge's decision is dated 24 October 2017 and was promulgated on the same day. On the issue of whether the appellant had taken the language test himself or had obtained his certificate falsely by using a proxy, the respondent relied on the generic evidence referred to by the judge at [6] and [7] of his decision: the witness statements of Rebecca Collins and Peter Millington, an explanatory statement from Kelvin Hibbs explaining and introducing further material on the investigation known as Operation Façade and a further statement from Professor French on the reliability of voice recognition software supplemented by the use of trained pairs of listeners.

5. The appellant gave oral evidence in English, the judge noting that this was without any difficulty whatever. He maintained his claim that he had attended the TOEIC exam in person and had not cheated. He said that he had taken all four parts of the test, speaking, reading, writing and listening on the same day. He was referred to the lookup tool relied on by the respondent, which showed that there were two dates when he took the test, but he maintained that he only went once.

6. When considering the evidence, at [32] the judge referred to the fact that the lookup tool showed that the tests in question took place over two days whereas the appellant maintained that he had only attended on one day. As the appellant had led no evidence to show the procedure for taking the test or that it was even possible for it to be completed in a single day, he accepted that the test results were obtained for the appellant on two days and said that since, even on his own evidence, he only attended on one day, that was a strong indication that he must have used a proxy.

7. He also referred to the fact that there was strong evidence of endemic cheating at the venue where the test was taken, to the very poor recollection shown by the appellant

of the process undertaken and to the fact that he had chosen a venue far from his home area. He accepted that the appellant spoke good English, but this was of little weight given the passage of five years and neither of his supporting witnesses had been able to give more than hearsay support about him taking the test. The judge said that, overall, he rejected the appellant's account as incredible and found that he was guilty of cheating in the exam as alleged.

8. The appellant had argued that he should, in any event, be entitled to an additional period of up to two years leave under para 276A1 but the judge said that it was not open to him to grant an appeal against the refusal of indefinite leave on the basis that there might be another more restricted entitlement which the appellant might have applied for. The judge went on to consider article 8 but found that there was no consideration of sufficient weight leading to a different conclusion to that formed by the decision-maker in the application of the Rules. The appeal was, accordingly, dismissed.

The grounds of appeal and submissions.

9. The lengthy grounds of appeal raised nine issues which can briefly be summarised as follows: the decision was fundamentally undermined due to the delay of four months (or more accurately five months) between the hearing and promulgation; the judge wrongly described the appellant as from Pakistan rather than Bangladesh and such an error of fact could amount an error of law; he had failed to engage with material evidence and failed to consider the appeal lawfully under long residence route; he had erred on the burden and standard of proof relating to deception; he failed to give proper reasoning when considering deception; he erred in relation to the legal burden and failed to put specific, inconsistent points to the appellant so giving him an opportunity to address these issues; he made perverse and irrational findings of fact; he erred in his approach to the claim under para 276 ADE(1) and 276B and, finally, also erred in his approach to article 8.

10. In his submissions, Mr Waheed focused primarily on the first ground and the long delay between the hearing of the appeal and the issuing of the decision, arguing that this delay cast real doubts on the safety of the judge's finding on the issue of deception. He referred to the judgment of the Court of Appeal in Secretary of State v RK (Algeria) [2007] EWCA Civ 868 and accepted that delay alone would not amount to an error of law in the absence of a nexus being shown between the delay and the safety of the decision. He submitted that the facts in RK (Algeria), where there had been no challenge save for a very minor matter to the credibility of the applicant's account, could be distinguished from the present case where the appellant faced a serious charge of deception.

11. He submitted that there were proper concerns about the judge’s decision arising from the documentary evidence. The two TOEIC certificates, annexed to the respondent’s appeal papers, had been produced by the appellant. Both certificates showed a test date of 21 March 2012. The certificate relating to speaking and writing had scores

consistent with the lookup tool but spelled one of the appellant's names as Azimunoor. The certificate for listening and reading had scores apparently inconsistent with lookup tool, which gave the later date for the tests, and his name was spelled as Azimunnoor. The fact that both certificates gave the same date for the tests provided support, so Mr Waheed argued, for the appellant's contention that he had only attended on one day.

12. Mr Clarke submitted that the appellant had failed to show a nexus between the findings and the delay and that the judge had reached a conclusion properly open to him. The evidence produced by the respondent was strong and compelling and the appellant had failed to discharge the evidential burden of showing that there was a likelihood that he had taken the test himself. The other grounds did not raise any arguable issues of law and in essence were seeking to re-open questions of fact.

<u>Assessment of the issues.</u>

13. There was a long delay between hearing the appeal on 23 May 2017 and signing and issuing the decision on 24 October 2017. As the grounds say, there is no other indication that it was prepared earlier than the date on which it was signed and there is no explanation for the delay in or annexed to the decision. However, as is clear from the judgment in <u>RK (Algeria)</u>, delay alone does not support an argument that the judge has erred in law. A nexus has to be shown between the delay and the safety of the decision.

14. The generic evidence adduced by the respondent was without doubt sufficient to discharge the evidential burden of proof in that it called for an explanation from the appellant. The judge drew an adverse inference against the appellant from the fact that, according to the lookup tool, the tests in question took place over two days. However, the certificates produced by the appellant give the same dates for all four tests and the certificate for listening and reading gives scores seemingly inconsistent with the scores recorded on the lookup tool. These discrepancies are by no means determinative, but they are capable of affecting the assessment of the credibility of the explanation given by the appellant, when considered in the context of whether the respondent has discharged not only the evidential but also the legal burden of establishing deception.

15. In summary, these factors, taken with the substantial delay in a case involving an allegation of dishonesty, undermine the safety of the decision and provide a nexus between the delay and the safety of the decision. For these reasons, I am satisfied that there is an error of law such that the decision should be set aside.

16. In the circumstances, I need not deal with the other grounds, which as the judge granting permission rightly said appear to have less merit than the first ground. However, it does seem to me that the judge may have erred on the issue of whether he could consider granting limited leave to remain in a case where there had been a refusal of indefinite leave to remain. This issue was considered in the respondent's

decision letter where it was not accepted that the appellant would be eligible for a grant of leave by way of an extension of long residence as he would not meet the requirements of para 276A1 in relation to para 276B(ii). However, the matter has not been fully argued and I make no finding on this ground. As the appeal now needs to be remitted to the First-tier Tribunal for the decision to be re-made, it will be open to the parties to raise and argue this issue, if relevant. I am satisfied that the proper course, taking into account the Senior President's Practice Direction, is for the appeal to be remitted to the First-tier Tribunal for reconsideration.

Decision.

17. The First-tier Tribunal erred in law. The appeal is remitted for reconsideration by the First-tier Tribunal by way of a full rehearing before a different judge.

Signed: H J E Latter Dated: 21 June 2018

Deputy Upper Tribunal Judge Latter