



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

Appeal Number: HU/11503/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 13 September 2018**

**Determination
Promulgated
On 9 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

**MR NEEAJ KUMAR
(ANONYMITY HAS NOT BEEN DIRECTED)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Chohan, Counsel for Lincoln Lawrence Solicitors,
Isleworth

For the Respondent: Mr Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India born on 4 August 1982. He appealed the Entry Clearance Officer's decision of 22 September 2017 refusing him leave to remain based on his family life with his wife, a British citizen. His appeal was heard by Judge of the First-Tier Tribunal Solly on 19 March 2018 and was dismissed on all grounds in a decision promulgated on 17 April 2018.

2. An application for permission to appeal was lodged and permission was granted by Judge of the First-Tier Tribunal Hollingworth on 2 July 2018. The permission states that it is arguable that compelling circumstances existed which enabled the Judge to proceed to consider whether there would be breach of Article 8 outside the Rules. The permission refers to there being no voice recording supplied by the Home Office of the appellant's speaking test. The appellant was not represented at the First-tier hearing and had not requested the recording. At paragraph 42 of the decision the Judge finds that the appellant undertook a 10 to 15 minute test at the college but given the overwhelming pattern of results from the college that day the Judge finds that this oral test might not be the one submitted to ETS. The permission also states that the Judge found the appellant did not take part knowingly in deceit when everything is taken into account. It states that at paragraph 44 of the decision the Judge states that she was not in a position to make any positive findings about the appellant's oral English language skills on 21 March 2012. The permission states that it is arguably unclear whether the Judge was satisfied that the appellant would have passed the test in question. At paragraph 50 of the decision the Judge states that false information, representations or documents were submitted by the appellant's test centre but the permission states that as the appellant was unrepresented it is arguable that with the adducing of additional evidence on the day of hearing on the part of the respondent, the shifting of the evidential burden, the distinctions enshrined in the Immigration Rules appertaining to deceit and the effect of deceit irrespective of the knowledge of the appellant, the consequences of not seeking the recording and the cumulative effect of these factors in relation to the existence or otherwise of compelling circumstances, means that the appellant was placed at a disadvantage and unfairness may have arisen.
3. There is a Rule 24 response on file and this response also raises a complaint with the Judge's decision. This is that the Judge finds the appellant to be credible regarding having personally attended and taken an oral TOEIC test at an ETS affiliated institution on the basis that he gave consistent oral evidence on this point, but the Judge completely ignores the widely known fact that individuals did indeed attend these test centres but stood to one side while a proxy took the test for them. Knowledge of the examination room, route to the building etc is therefore of very little probative value. The response states that when the Judge makes her positive credibility findings he then speculates that the college, unbeknownst to the appellant, submitted the recording of a proxy rather than the recording of the appellant. The response states that this conclusion is not supported by any evidence and is essentially perverse. The response goes on to state that given the clear evidence of an invalidated ETS test and the lack of substance in the appellant's response to it the Judge was bound to find that deception had been proven on the balance of probabilities. The response then refers to the permission stating that there may have been unfairness in the conduct of the hearing and stating that at paragraphs 4 to 10 of the decision the Judge was assiduous in ensuring that the appellant had a fair hearing. The Judge

observed at paragraph 46 that the appellant had never asked for the recording and declined the opportunity to adjourn on the day to better prepare his case, which could have included provision of the recording. With regard to Article 8 the response states that it is accepted that greater depth and detail would have been preferable but although this is an error of law, it cannot be a material one given the strength of the public interest at play when deception is established and the lack of compelling circumstances put forward by the appellant to argue that public interest was outweighed.

The Hearing

4. Counsel for the appellant submitted that he is relying on the grounds of application.
5. I was referred to the fact that this appellant was not represented at the First-Tier hearing. Counsel referred to the 5000 word dissertation written by the appellant as part of his Masters Degree and submitted that no record of the speaking test was produced at the hearing. He submitted that at the same time as the appellant was doing the test he was also doing a post-graduate diploma. There therefore would have been no necessity for him to get a proxy to carry out his English test. He submitted that credibility must go in the appellant's favour.
6. I was referred to paragraphs 29 and 44 of the decision. Counsel submitted that there is a contradiction. At paragraph 44 the Judge states that she is not in a position to make any positive findings about the appellant's oral English language skills on 21 March 2012. At paragraph 29 the Judge refers to the appellant attaining a Masters Degree in July 2014 on a course that was only taught in English.
7. Counsel submitted that when the appellant made his Tier 1 application the problems with the ETS were not raised. It was only in 2017 that the appellant realised that there was any problem with this. His most recent application was refused because it was found that the appellant is not suitable under Section S-LTR2.2 because of the problems with the English test. He submitted that this appellant now has a British wife who has a child in the United Kingdom. He submitted that it is clear from the decision that the Judge believes the appellant who, six years later, has described exactly what happened when he went for the test.
8. Counsel submitted that the Judge then found that there were difficulties because of the look up tool and suitability and the fact that the ETS look up tool demonstrates an invalid test. He submitted that the appellant's wife is a broker in the city and has a child at secondary school and they are both British.
9. Counsel then asked me to consider the Rule 24 response submitting that this appellant has waited four years since he applied for leave as a Tier 1 Entrepreneur. He submitted that because of the length of time this was

taking the appellant withdrew his application and submitted the application we are now dealing with. He submitted that this appellant was let down on the day of the hearing by his representative but went ahead because he thought things were straightforward.

10. Counsel submitted that the Judge does not find that the appellant was a party to any fraud and submitted that the Judge believed this appellant and was entitled to do so and that to refuse the appeal based on what was before the Judge must be an error of law.
11. The Presenting Officer made his submissions relying on the Rule 24 response. He submitted that the Judge found the appellant to be credible but it was open to her to consider the evidence before her including the look up tool, and she based her decision on all the evidence before her. He submitted that the day the appellant supposedly did his English test, the college where he sat the test had a 91% fail rate and 9% questionable test results, and he submitted therefore, that this appellant must have received a false certificate. He submitted that the Judge has properly considered all of the evidence in particular at paragraph 48 when she refers to suitability and paragraph S-LTR.2.2 which states that whether or not to the appellant's knowledge, false information, representations or documents have been submitted in relation to the application and there has been a failure to disclose material facts relating to the application then the applicant will normally be refused on grounds of suitability. He submitted that paragraph 48 makes it clear that this appellant is not suitable and the Judge was correct to dismiss the appeal.
12. The Presenting Officer referred to paragraph 44 of the decision in which the Judge states that she is not in a position to make any positive findings as to the appellant's oral English language skills on 21 March 2012 and he submitted that this must be an accurate statement as the hearing was in 2018. She has considered whether the appellant knew about the deceit and she then considers all the evidence provided by the respondent including Professor French's statement. At paragraph 46 the Judge states that the appellant did not ask for the recording so she does not accept that the failure to provide the recording is material. The appellant at no time expressed the wish to test the recording. He submitted that the Judge's decision was open to her in law and he submitted that her credibility findings are not contradictory.
13. He submitted that there is now an issue about the appellant's marriage and whether it is genuine. He made reference to a domestic incident and submitted that this adds weight to the Judge's overwhelmingly negative findings.
14. Counsel for the appellant submitted that the Judge does consider suitability at paragraphs 48 and 49 of the decision and the only reason the Judge dismissed the appeal is the question of the ETS testing. He submitted that based on what was before the Judge and based on the terms of her decision her conclusion is wrong. She clearly believes the

appellant is telling the truth, accepts that he did not knowingly contribute to a scam and surely a de novo hearing must be the way to deal with this appeal.

15. I was referred to the refusal letter in which the appellant's wife's British child is mentioned and I was referred to the appellant's application form which refers to the present civil marriage and goes on to refer to his wife's son aged 11. He submitted that this child is now at secondary school and is British and his mother is also British, although they were both born in India.
16. He submitted that this appellant is now exempt from the English language requirement as he has a Masters Degree and passed every module in this degree. He then wrote a 5000-word dissertation and I was asked to find that based on all the evidence before the Judge there must be a material error of law in her decision. I was asked to set aside the decision and remit the claim to the First-Tier Tribunal.

Decision and Reasons

17. The terms of the Rules make it clear that if deception has been used with or without the appellant's knowledge, that appellant must be deemed not to be suitable in a future application.
18. I accept that the appellant was not represented at the First-Tier hearing but he was given the choice of going ahead with the hearing or adjourning the claim to enable him to obtain a recording of the oral test and to enable him to consider the documents which were lodged late by the respondent. I find that the Judge was correct to include the respondent's evidence and that there was no unfairness as the appellant was given an opportunity to have the case adjourned because of the late documents from the respondent and because there was no recording of the test. It is true that the appellant at no time asked for a recording of the test but he was given the opportunity to adjourn the hearing and obtain one. The Judge makes reference early on in the decision to the generic report from Professor French and some of the documents referred to in his report which were before her. The Judge states that these were relevant to the ETS testing generally and linked the appellant's test score to the look up tool and provided evidence about the appellant's speaking test on 21 March 2012. The Judge found that the documents which were received late were relevant to the issues and the look up tool and they should have been made available earlier. She allowed this supplementary bundle to be admitted in evidence but she then asked the appellant if he needed time to study them and she was prepared to grant an adjournment. The appellant took a short break to discuss the matter with his wife and then stated that he wished to proceed. At paragraph 10 the Judge states that the appellant was very clear in wishing to proceed with the hearing. There was no unfairness relating to the acceptance of the late bundle or the fact that the recording was not available to the appellant. He had not

requested the recording and he made it absolutely clear that he wanted the hearing to go ahead.

19. The issue in the application is the appellant's suitability on the basis that a TOEIC certificate from a test undertaken on 21 March 2012 was obtained fraudulently. At paragraph 27 the Judge refers to the appellant, after he found out about the problems with the test results, not going to the college and not making any enquiries with them.
20. The Judge goes on to consider the appellant's studies and why he took the test where he did. She notes that his wife did not know him at the time of the test. She then refers to the evidence produced by the respondent which states that 101 tests undertaken at the European College for Higher Education on 21 March 2012 showed that 91% were invalid and 9% were questionable. The appellant's test was found to be invalid. The judge observed the witness statements by Peter Millington and Rebecca Collings and the litigation about the ETS method of identifying fraud in the testing process. She refers to the evidence of Dr Harrison and Professor French. She goes on to deal with the ETS look up tool which demonstrates an invalid test.
21. At paragraph 38 the Judge states that the respondent has established the initial evidential burden of furnishing proof of deception which is on the Secretary of State.
22. The Judge then goes on to deal with the appellant's evidence about what exactly he did when he took the test and she accepts the appellant's reasons for taking the test at the European College. The Judge believes that the appellant did not take part knowingly in deception and she notes that when his MA ended he was then exempt from a separate ETS test. I do not find that paragraphs 29 and 44 are a contradiction. She makes some positive findings at paragraph 29 but at paragraph 44 she states accurately that she was not in a position to make any positive findings regarding the appellant's oral English language skills on 21 March 2012.
23. At paragraph 48 she quotes S-LTR.2.2. This makes it clear that if false information is submitted whether or not in the appellant's knowledge, this affects suitability. At paragraph 49 she states: "I consider the ETS testing for 21 March 2012 to be so overwhelmingly negative" and either with or without the appellant's knowledge of deception she finds that the appellant is not suitable.
24. With regard to Article 8 the Judge deals with this from paragraphs 52 to 54. She gives satisfactory reasons for finding that Article 8 within the Rules cannot be satisfied and that Article 8 outside the Rules fails for want of evidence and argument. Article 8 outside the Rules was not raised before the Judge.

25. The Judge has given a very clear and concise decision and has considered all of the evidence before her and weighed it up and has found that for well explained reasons the appeal has to be dismissed.
26. There is no material error of law in the First-Tier Tribunal Judge's decision and the decision to dismiss the appeal promulgated on 17 April 2018 must stand.
27. Anonymity has not been directed.

Signed

Date 31 October 2018

Deputy Upper Tribunal Judge I A M Murray

A handwritten signature in cursive script, appearing to read 'I A M Murray', written in black ink.