



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

Appeal Number: HU/04081/2018

THE IMMIGRATION ACTS

**Heard at: Field House - London
On: 18 January 2019**

**Decision & Reasons Promulgated
On: 20 February 2019**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR JEWEL CHOWDHURY
(ANONYMITY NOT DIRECTED)**

Respondent

Representation:

For the Appellant: Mr T Lindsay
For the Respondent: Mr M Biggs

DECISION AND REASONS

1. This is the Secretary of State's appeal to the Upper Tribunal from a decision of the First-tier Tribunal (the tribunal) which it sent to the parties on 8 November 2018. In making its decision it allowed the claimant's appeal from the Secretary of State's decision of 24 January 2018, refusing to grant leave to remain under the Immigration Rules as a Tier 1 (Entrepreneur) Migrant.

2. The claimant, who was born on 30 June 1983, is a national of Bangladesh. He has resided in the United Kingdom (UK) for a number of years, having first been granted leave to enter on 17 January 2008 for the purposes of study. On 11 October 2010 he was granted further leave as a post-study work migrant, such leave extending until 11 October 2012. On 21 February 2012 the claimant undertook speaking and writing tests in English. As I understand it he passed the speaking element but failed the writing element. Thereafter, on 20 March 2012, he says he undertook the two tests again and, on that occasion, was successful with both. The Secretary of State, though, believes that for the purposes of that test he used a proxy test taker. However, that allegation was not raised at the time and on 12 July 2012 the claimant made his application for leave as a Tier 1 Entrepreneur Migrant. He provided some supporting documentation relating to finance. On 17 April 2013 the Secretary of State refused the application on the basis that the claimant had not submitted certain documentation he was required to submit. An appeal was lodged and the Secretary of State withdrew the decision of 17 April 2013 on 1 November 2013. Matters rumbled on and on 11 March 2015 the claimant was served with notices indicating that he was liable to be removed from the UK because he had used deception in seeking leave to remain (the proxy test taker allegation). There was an application for judicial review which led, on 7 July 2017, to the making of a Consent Order under the terms of which the Secretary of State agreed to reconsider the application of 12 July 2012. The Secretary of State did that but, on 24 January 2018 as noted above, he refused it. So, the claimant appealed to the tribunal.

3. The tribunal heard oral evidence from the claimant. It received submissions from representatives for each party. In making its decision it considered, first of all, the proxy test taker allegation. It noted at paragraph 17 of its written reasons what might be termed generic evidence relied upon by the Secretary of State in addition to an "official score report and look-up tool" which related to the claimant. It noted the evidence to the effect that there had been a problem of some significance with respect to deception deployed by applicants in relation to English language testing.

4. It then turned to other evidence which related to the claimant's own position. It noted that he had asserted he had taken the relevant test personally (paragraph 21 of the written reasons). It observed that he had sought to rely upon the fact that he had worked "in various customer facing roles on a full-time basis" which suggested he might have a good command of the English language (paragraph 22 of the written reasons) and that although he had used a test centre for the relevant test which was different to the one he had used earlier, he had offered a plausible explanation as to why he had done that (paragraph 25 of the written reasons). The tribunal also accepted that he had an incentive to use a proxy test taker given that he had failed an earlier test but that, nevertheless, he had successfully passed one element of that test so that the incentive was less than it might otherwise have been (paragraph 23 of the written reasons). Having considered all of those matters the tribunal went on to say this:

"27. I accept the matters are reasonably finally balanced in relation to the issue of deception. There is evidence to suggest that this appellant may well have used a proxy to undertake the test at Queensway College that he claims he sat personally on 20 March 2012. However, given the information provided by the appellant, and in particular the relatively low

incentive he had to arrange a proxy, having passed the speaking test only one month before, combined with the fact that the appellant had not been provided with a recording of the test undertaken by him in order that he can arrange for his own analysis to be done, I am not satisfied on the balance of probabilities that the appellant used a proxy to undertake the test.”

5. So, the proxy test taker issue was resolved in his favour. The tribunal then turned to the other requirements contained within the Immigration Rules which he had to meet in order to obtain the leave he was seeking.

6. As to that, the tribunal noted that it had been indicated in the Secretary of State’s written reasons for his decision of 24 January 2018, that he had failed to provide a letter to confirm the amount of money available to him from a third-party source. The tribunal said that appeared to relate to a requirement confirmed within paragraph 41-SD(b)(i) of the Immigration Rules but that the Secretary of State had himself referred to his having received a declaration provided by third parties. So, the tribunal saw no failure to comply with the Immigration Rules in that regard (paragraph 33 of the written reasons). The tribunal then noted that the Secretary of State’s written reasons contained an assertion that bank statements provided by the claimant were not acceptable because the relevant account was not in the claimant’s name. But the tribunal said that such an argument ignored the terms of rule 41-SD(b)(i) which, it was said, permitted third party funds. So, again, the tribunal did not detect any failure to comply with the Immigration Rules (paragraph 34 of the written reasons).

7. In light of the above the appeal was allowed. That was not the end of the matter however because the Secretary of State applied for and obtained permission to appeal to the Upper Tribunal. The bulk of the points made in the Secretary of State’s grounds related to the tribunal’s decision concerning the proxy test taker issue. However, it was also asserted that the tribunal had erred in its consideration of the “financial aspect” of the case by effectively substituting his own interpretation as to what specific evidence would be acceptable rather than applying the content of the Immigration Rules, with respect to a requirement to show evidence of third party funds in his own bank account. Permission to appeal was granted by a judge of the First-tier Tribunal who thought that the ground relating to the requirements of the Immigration Rules was arguable. As to the ground relating to the proxy test taker issue she thought what was said appeared to be a mere disagreement with the tribunal’s findings but said that, since she was granting permission on the other ground, she would not shut it out.

8. Permission having been granted the matter was listed for a hearing before the Upper Tribunal (before me) so that consideration could be given to the question of whether or not the tribunal had erred in law and, if it had, what should flow from that. Representation at that hearing was as stated above and I am grateful to each representative. I have taken into account what they have had to say in my decision.

9. In short, with respect to the ground concerning the proxy test taker issue, I agree with the granting judge that this does not go beyond re-argument with the tribunal’s findings. What the tribunal was required to do with respect to this issue was to consider the evidence, weigh it up, analyse it rationally, reach findings open to it, reach an outcome on the appeal which was not perverse, and adequately explain how it had reached the findings and the outcome on the appeal which it did.

10. It is, in my judgment, readily apparent from what the tribunal had to say from paragraphs 16-27 of its written reasons, that that is exactly what it did. It identified relevant matters which appear to weigh in favour of the claimant and relevant matters which did not. It reached a

view which it clearly explained that the claimant had not used a proxy test taker. It was entitled to say that he had a low incentive to arrange a proxy test taker and to take that matter into account. It understood that, ultimately, it was for the Secretary of State to show to a balance of probabilities that the claimant had committed deception and it decided that the Secretary of State had not achieved that. Accordingly, the tribunal did not err in law in the manner in which it is suggested, in the grounds, that it did.

11. As to the Immigration Rules point, there was much argument before me as to whether or not the tribunal had had regard to the wrong Immigration Rules or to a version of those Rules which had been amended prior to its deciding the appeal. But I cannot see, in looking at the tribunal file, that the Secretary of State's representative provided it with a copy of whatever Immigration Rules were said to be in force at the time and which were said to be applicable to the circumstances of this case. Whilst it might be said that the tribunal should be assumed to be aware of the content of each and every Immigration Rule, it seems to me that that is an unsustainable argument given the current length and complexity of those Rules. It does not appear that the representative for the Secretary of State drew attention to any amendments that there might have been to the Rules or drew specific attention to the content of any particular Rules said to be applicable. Nor is it asserted in the grounds that such was done. In these circumstances I have concluded that the tribunal was entitled to simply base its decision upon what had been said in the Secretary of State's written decision. It addressed those points and, on the material before it and the arguments put to it, it was in my judgment entitled to do so in the way that it did. So, I have concluded that the Immigration Rules ground is not made out either.

12. In the circumstances I have decided that the tribunal's decision did not involve the making of an error of law. Accordingly, that decision shall stand and this appeal to the Upper Tribunal is dismissed.

Decision

The decision of the tribunal did not involve the making of an error of law. Accordingly, that decision shall stand. It follows that the Secretary of State's appeal to the Upper Tribunal is dismissed.

Anonymity

The First-tier Tribunal did not grant anonymity. I was not asked to grant anonymity. I can see no reason why I should do so. Accordingly, I do not do so.

Signed:

Date: 19 February 2019

Upper Tribunal Judge Hemingway