



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16289/2017

THE IMMIGRATION ACTS

Heard at Field House
On 19th July 2019

Decision & Reasons Promulgated
On 24th July 2019

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

MR MOLLAH A K AZAD
(NO ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Biggs, Counsel, instructed by Law Dale Solicitors.

For the respondent: Mr Walker, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Bangladesh. On 29 August 2017 he applied for leave to remain on the basis of his family life with his British wife. This was refused on 17 November 2017.

2. His application had been considered under appendix FM of the immigration rules. The refusal was on the basis he did not meet the suitability requirements. On 24 February 2012 he had applied for further leave to remain as a student. He had submitted an English language testing certificate. The test was taken at Westlink College, Essex on 18 October 2011. Based upon information from the Educational Testing Service (ETS) the respondent concluded the certificate had been obtained by deception, namely, by the use of a proxy test taker. In light of such conduct the respondent concluded his continued presence in the United Kingdom would not be in the public interest.

The First tier Tribunal

3. His appeal was heard by First-tier Tribunal Judge Adio on 2 April 2019. In a decision promulgated on 30 April 2019 his appeal was dismissed. The judge concluded he had obtained the test certificate fraudulently as alleged. Consequently, the judge found he did not meet the suitability requirements in the rules.
4. The judge was not dealing with the matter directly under the rules but through the prism of the rules. Having found the rules were not met the judge then went on to consider the appeal in the context of article 8 beyond the specific rules. In particular, the judge considered the proportionality of the decision in relation to his married life. The respondent had accepted a genuine and subsisting relationship but concluded that family life could continue in Bangladesh.
5. First-tier Tribunal Judge Adio concluded the decision was proportionate. The judge continued to accept the existence of family life. The judge referred to the appellant's precarious immigration status. His wife is a British citizen who has lived in the United Kingdom for 20 years and is employed here. The judge acknowledged she would find it difficult to adjust to life in Bangladesh. The judge concluded the consequences of the decision would be that the appellant and his wife would be separated, at least temporarily. The judge felt the appellant could integrate again into life in Bangladesh. Bearing in mind the finding in relation to suitability the judge concluded the decision was proportionate.

The Upper Tribunal

6. The challenge to the decision relates to the proxy allegation. Permission to appeal to the Upper Tribunal was granted on the basis there was no evidence that showed a continuous link between the voice recordings analysed and the impugned test result relating to the appellant. The appellant had accepted that the voice recording was of someone other than himself. However, it was arguable this fact alone was an insufficient basis for the judge to conclude the

test had been taken by a proxy. It was also arguable the judge had conflated the legal burden with the evidential burden.

7. Mr Biggs appeared for the appellant as he did in the First-tier Tribunal. He relied upon the grounds for which permission was granted. He submitted that the First-tier Tribunal Judge had not properly applied MA (ETS-TOEIC testing) [2016] UKUT 00450. He argued that the respondent had not made an evidential link to show the voice recording analysed related to the appellant.
8. The second argument advanced was that the judge had conflated the evidential burden with the legal burden. An evidential burden is not a burden of proof. In the context of a 'proxy' appeal the legal burden always remained with the respondent. The evidential burden is initially upon the respondent to show a case to answer. If this is done by evidence then it is then for the appellant to explain. The third stage is then consideration of these two aspects in order to consider whether the respondent has discharged the legal burden of proof.
9. In the decision the judge has used phrases which indicates the distinction between the legal and the evidential burden has not been demonstrated. For instance, the grounds assert that the judge treated the appellant as subject to a true burden of proof rather than an evidential burden. To illustrate this, reference is made to paragraph 9 where the judge stated the appellant 'must show that there is an innocent explanation'. At paragraph 24 the judge referred to the argument of Mr Biggs that it had not been demonstrated by evidence that the recording related to the appellant. The judge stated:

"The difficulty with that argument is that the voice recording has been linked to the Appellant's result and the Appellant has admitted that it is not his voice sic: read [.This] leads to only one conclusion that a proxy test taker must have taken his test for him. This coupled with the fact that the test has been declared invalid makes it difficult for the appellant to provide an innocent explanation."

Later in the same paragraph the judge refers to the appellant not having the benefit of the doubt. Reference was then made to paragraph 25, where the judge stated 'I find that the evidence adduced by the appellant in rebuttal has not been sufficient'.
10. Mr Biggs was not pursuing the third ground advanced
11. Mr Walker accepted that the judge's comments at paragraph 24 that there could only to one conclusion from the appellant admitting it is not his voice was too sweeping. On this basis he acknowledged that there was a material error of law in the decision.

Conclusion.

12. On the basis of the arguments advanced and the acceptance of a material error of law by the presenting officer it is my conclusion that the decision cannot be sustained. Consequently, the matter should be remitted back to the First-tier Tribunal for a rehearing. It is agreed that the undisputed finding that the voice recording analysed does not relate to the appellant is preserved.
13. There is merit in the point made by Mr Biggs in relation to the proofs to show a continuous link of proofs that the voice recording analysed related to the appellant. The Upper Tribunal in MA(ETS-TOEIC testing)[2016] UKUT 00450 considered this point but this did not form part of the ratio. A case management review raised the question of whether the appellant's voice had been properly recorded and transferred to ETS and whether the voice recordings provided by ETS to the Upper Tribunal related to the test which he took. The respondent argued that the central issue was whether the appellant used a proxy to undertake the speaking test and that this encompassed these two issues. The Upper Tribunal referred to a prehearing meeting with three experts engaged in computing and database programming. This is set out in detail at paragraph 15 of the decision. It refers to candidates being required to register on a computer their personal details and their passport and there was software known as a Manager Application recording each candidates responses. The experts accepted a lack of clarity in relation to the process. The material is not available in the present appeal to properly consider this point further and in any event given outcome on the other point argued it is not necessary.

Decision

The decision of First-tier Tribunal Judge Adio materially errs in law and is set aside. The deal is remitted back to the First-tier Tribunal for a rehearing. The agreed finding that the voice recording is not the appellant is preserved.

Signed
Deputy Upper Tribunal Judge Farrelly.

date: 20 July 2019

Directions

1. For the convenience of the appellant and his representatives the matter should be relisted if possible in Taylor House, excluding First-tier Tribunal Judge Adio.
2. A hearing time of under two hours can be anticipated.
3. An interpreter is not required.
4. The respondent's papers contain a criminal enquiry known as Project Façade in respect of Westlink College. There is also documentation in relation to overall test results during a relevant period for the present appeal. The papers also contain the lookup tool relating to the appellant. These should be included in any new bundle. If the respondent can provide any more background information about how the voice recording produced is linked to the appellant's test it would be helpful.
5. Should the respondent establish a case for the appellant to answer then on rehearing the judge can assess the appellant's explanation and then consider the totality of the evidence to see whether the respondent has discharged the legal burden.
6. It is open to the appellant's representatives to provide any further evidence relevant to the appellant's family life which can be taken into account in assessing the proportionality of the decision. If there have been any material changes in circumstances, such as a birth of a child since, they should so advise the respondent so as to avoid any adjournment application.

Deputy Upper Tribunal Judge Farrelly.