Upper Tribunal
(Immigration and Asylum Chamber)
Appeal Number: HU/24065/2016

THE IMMIGRATION ACTS

Heard at: Field House	Decision and Reasons Promulgated
On: 4 September 2018	On: 27 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MR MOHAMMED SHAMSUL HASSAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr G O'Ceallaigh, counsel, instructed by Bindmans LLP
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Bangladesh, born on 3 June 1973. He appeals with permission against the decision of the First-tier Tribunal Judge who dismissed the appellant's claim for indefinite leave to remain in the UK on the basis of the length of his residence in the UK. The decision was promulgated on 20 March 2018. The Judge found at [126] that as a result of the cumulative weight of all the features he had set out that the appellant did not personally take the ETS TOEIC test at Synergy Business College - 'SBC'. He found at [122] that whilst the appellant entered himself for the test, and whilst he may well have been present at the SBC site when the test took place, as he himself accepts in his evidence, it was conducted on his behalf by a proxy. This he found to have been established by the source data and lookup tool material produced.

2. He therefore concluded that his conduct, namely, participating in a fraud on the occasion of his TOEIC test on 29 August 2012, fell within the grounds for general refusal under paragraph 322(5) of the Rules, allied with those same considerations at paragraph 276ADE(i) and 276(b)(iii), which the respondent '…..was entitled to use her discretion in applying to him in all the circumstances, even though it is not disputed that he has had ten years' lawful continuous residence in the UK' – [130].

3. He noted that the appellant's child did not fall for consideration under private life as he was only five years old at the date of application in April 2016 [137]. Although he is now approaching seven years' continuous residence in June 2018, the child has not at the date of the appeal decision reached that position as a qualifying child '….so that it should be considered whether it is for him to accompany his parents when they are removed to Bangladesh' [138].

4. He nevertheless stated that if he were deciding the matter on the basis that the child has reached seven years of age, he would consider that it would be reasonable for him to accompany his parents when they were removed to Bangladesh [139].

5. He had regard to various authorities including EV (Philippines) & Others v SSHD [2014] EWCA Ciuv 874, which should be counterbalanced by the observation of Lady Hale in Makhlof v SSHD [2016] UKSC 59.

6. He found that for this child who is autistic, and which made him all the more dependent on his parents and whose condition will not have enabled him to establish social attachments within an educational environment that would normally be expected of a child of his age, it would be in his best interests by reference to s.55 for him to remain with his parents, taking into account that he is not a British child with a right of access to educational and healthcare benefits that would follow from this [141].

7. He considered the appeal under Article 8 of the Human Rights Convention. There were no obstacles to the appellant continuing his private and family life with his wife and child in Bangladesh. There were no elements regarding the proportionality of the individual removal sufficient to outweigh the public interest in the maintenance of the effectiveness of the same immigration controls that the appellant sought to avoid, even if he obviously has a command of the English language, combined with his history of employment in the UK, which could well enable his possible employment at a future time if he were allowed to remain [158]

8. On 25 June 2018, First-tier Tribunal Judge I D Boyes granted the appellant permission to appeal, on the ground that the Judge has assumed the reliability and cogency of the expert evidence which is unfair to the appellant. Permission was granted on all other grounds.

9. Mr O'Ceallaigh, who did not appear before the First-tier Tribunal, relied on the grounds of appeal seeking permission drafted by counsel who represented the appellant before the First-tier Tribunal, Mr S Knafler QC.

10. It is contended that the Judge failed properly to construe both the expert evidence and the case law.

11. The Judge did make some reference to the decisions in MA [2016] UKUT 450 and SM and Qadir (ETS – Evidence - burden of proof) [2016] UKUT 299 (IAC). He concluded that it was appropriate to base his approach on the most recent case law found in Nawaz, which according to the Judge confirmed that reliance could be placed on the evidence of Professor French regarding the viability of the methodology and that the ETS scheme for rooting out false results was not unfair.

12. Notwithstanding lip service paid to the need to scrutinise the personal credibility of the appellant, the overall impression conveyed by the decision is that the appellant's fraud was, to all practical purposes, established by the expert evidence.

13. Mr O'Ceallaigh referred in that respect to paragraphs [82-87] of the First-tier Tribunal's decision. At [85] the Judge stated that the decision of R (on the application of Nawaz) [2017] UKUT 00288 established that the methodology followed by the respondent was sound and viable for ascertaining that the deception had been present. He also found at [122] that the appellant's test was conducted on his behalf by a proxy, and this is established by the source data and lookup material in this regard.

14. However, Mr O'Ceallaigh referred to the grounds and submitted that Nawaz was not the most recent case law. Both that case and the "sister case", Kaur were considered by the Court of Appeal in the decision of Ahsan and Others v SSHD [2017] EWCA Civ 2009 at [32]. It was noted that these were cases in which the issue was not whether the applicants had in fact cheated but whether the secretary of state's belief that they had, was rational.

15. Nawaz and Kaur go no further than indicating that the earlier evidence that the Judge regarded as either decisive or nearly so, simply raised a case that required addressing.

16. Mr O'Ceallaigh submitted that the consistent approach of the Court of Appeal as well as the Presidential Upper Tribunal decision which was affirmed by the Court of Appeal, was that each case is fact specific and requires to be considered in the light of the factors set out at [18] of the decision in Majumder [2016] EWCA Civ 1167.

17. As indicated in MA [2016] UKUT 450 the more recent evidence of the data experts, indicates that the systems employed by ETS were so inadequate and that so much important information about them remains missing, that one simply cannot say whether the presence of another voice on a student's voice files results from a fraud perpetrated with the knowledge and consent of that student or by the test centre without the student's knowledge or consent.

18. Mr O'Ceallaigh submitted that the Judge's characterisation of the appellant's factual evidence at [101] to [104], was unfair and incomplete. This included findings that the appellant's account of the events was incredible because it was "far fetched, even surreal" to imagine that he was both working in Canterbury and also was able to undertake English language classes at Synergy Business College in London.

19. However, he submitted that none of these issues were put to the appellant at the hearing. Further, the Judge disregarded the significant facts in this respect. Nor did the presenting officer or the Judge put to the appellant that £180 was such a small sum he could not have covered both lessons and the examination.

20. Nor were any allegations ever put to the appellant that contrary to his assertion that he studied and underwent testing at SBC in order to improve and measure his English language skills, his purpose was to obtain a TOEIC certificate for use in immigration purposes albeit it that, fortuitously, he did not need to use it.

21. Cogent evidence provided by the appellant regarding his intention was not considered.

22. Mr O'Ceallaigh submitted that his approach to the child of the family was also incorrect. The Judge concluded that when the child reached the age of 7 it would be reasonable for him to be returned to Bangladesh, notwithstanding the provisions of paragraph 276ADE(iv) or s.117B(6) of the NIAA 2002.

23. However, the principal reason for this conclusion appears in part at [141] to be, that the child, not being British does not have the right of access to educational and healthcare benefits, which is a misdirection If the conclusion was reached that it was not reasonable for the child to go to live in Bangladesh, then, inevitably, he would be granted indefinite leave on a basis that entitled him to those benefits.

24. The other principal reason for the conclusion was that it would be in the child's best interests to remain with his parents. That however was on the basis that, in accordance with his decision, his parents would have to live in Bangladesh. That is a misdirection because, if the conclusion was reached that it was not reasonable for the child to go to live in Bangladesh, then inevitably he and his parents would be granted leave to remain.

25. Further, in considering the question of whether it would be reasonable to expect the child to live in Bangladesh, the Judge did not assess the medical evidence about the child's autism and it would clearly be in his best interests to continue to receive high quality treatment for it in the UK.

26. Nor did the Judge have any basis for surmising as he did at [142], that the family were holidaying in Bangladesh in 2014 and therefore maintained good connections there. That was never put to the appellants at the hearing. Had that been put to him, he would have made it clear that neither he nor his wife or son had been to Bangladesh, even once, since they came to live in the UK. Further, there are good personal reasons why they would not return to Bangladesh unless it was absolutely necessary. The Glyndwr University sent the appellant one letter addressed to him at his former address in Bangladesh, but that was simply a mistake on their part.

27. On behalf of the respondent, Mr Whitwell submitted that there has been a detailed examination by the Judge.

28. He did not simply take the generic evidence in itself as establishing that there was dishonesty. He found at [120] that taking all the features together, and looking at them as a whole, they cumulatively established that the real reason that the appellant entered himself for the TOEIC test during the 60 day window of opportunity afforded him, was so as to meet the English language requirement under the Immigration Rules for extension of his leave. The only credible reasons for taking that test with SBC was so as to cover all his options in obtaining further student leave [121]. A fair reading of the lookup tool shows that there had been a 92% validity rate.

29. Mr Whitwell accepted however that there is no evidence that the Judge or the presenting officer put any matters to the appellant for consideration.

30. With regard to the child, the Judge was not assessing the position on the basis of having been in the UK for a period of seven years; in those circumstances the finding that it would be in his best interests to remain with the family are sustainable.

31. In reply, Mr O'Ceallaigh submitted that the Judge failed to take into account the appellant's ability in English. Nor did he consider that he was taking the test on a voluntary basis. He accordingly did not take into account his ability at all. He submitted that the Judge had already reached his conclusions that there had been fraud without giving proper consideration to the need to consider the appellant's explanation as part of the evidence as a whole.

32. With regard to the child, the question at the time was what would his best interests require.

Assessment

33. The First-tier Tribunal Judge has given a lengthy decision of some 29 pages.

34. It is correct, as submitted, that the Judge did make some reference to the decisions in SM and MA as well as the underlying expert evidence considered in MA at [80-81]. However, he did set out in considerable detail the earlier evidence of Mr Collings, Mr Millington and Professor French, amongst other materials, indicative of the appellant having been involved in a TOEIC fraud.

35. He ultimately concluded that it was appropriate to base his approach on recent case law, found in Nawaz which he stated confirmed that reliance can be placed on the evidence of Professor French as to the viability of the methodology adopted by the Home Office and that the ETS scheme for rooting out false results was not unfair.

36. However, it appears that the Judge failed to undertake a proper assessment of the personal credibility of the appellant. As submitted, the overall impression conveyed by the decision is that the appellant's fraud was, for practical purposes, established by the expert evidence. This is particularly evident at [85].

37. Further, Nawaz was not the most recent case law. As noted in Ahsan, Nawaz was referred to as a case where the issue was not whether the appellants had in fact cheated but whether the respondent's *belief* that they had, was rational.

38. Cases such as Nawaz and Kaur go no further than indicating that the earlier evidence that the Judge regarded as highly decisive or nearly so, simply raised a case that required addressing.

39. Accordingly, the consistent approach of the Court of Appeal and the Upper Tribunal had been that each case is matter specific and needs to be considered in the light of all the factors set out at [18] of Majumder, supra. That is particularly so when having regard to the conclusions in MA, where the more recent evidence of the data experts indicated that the systems employed by ETS were so inadequate that it cannot simply be said whether the presence of another voice on a student's voice file results from a fraud perpetrated

with the knowledge and consent of that student, or by the test centre, without the student's knowledge or consent.

40. The Judge failed properly to appreciate that, and it appears that he was prepared to accept that the appellant's guilt was all but established for the practical purposes on the basis of that evidence.

41. I also find that the Judge did not properly assess the factual evidence put forward by the appellant, justifying the findings at [101 to 104]. He disregarded the fact that the appellant was, in any event, studying elsewhere in East London in 2012, namely at the Central College of London, which was not questioned. That appeared to be part time work. In fact the appellant worked for about 20 hours a week in Canterbury but mostly on weekends, leaving him free to study during the week, and that Canterbury is not far from London by train. As submitted, this constitutes a tenable response to the concerns, which were never put to him.

42. Nor was it ever put to the appellant at the hearing that the sum of £180, to which he referred, was such a small sum that he could not have covered both lessons and the examination. That however arguably deprived the appellant of the opportunity to explain. It overlooked the appellant's evidence at [59] that he paid the sum of £180 on one occasion. He was never asked what that covered; whether it included the costs of lessons and how many lessons he had. The appellant might have been able to explain that the £180 in fact covered being provided with sample questions and an explanation about the test, as well as being allowed to use the college computer to undertake a mock test on one occasion and the undertaking of the test itself.

43. The Tribunal also did not have proper regard to the evidence provided by the appellant that his intention had been to obtain an IELTS qualification. There is no suggestion of any fraudulent activity but he was unable to do so because of the need to provide an original passport to sit the examination, whereas the respondent retained his original passport and provided him with a certified copy which was acceptable to SBC and Glyndwr University.

44. I also find for the reasons already set out, that the Judge adopted the incorrect legal approach to the appellant's child. In particular, there was a failure to assess the medical evidence relating to his autism and whether it would be in his best interests to continue to receive such high-quality treatment in the UK.

45. I accordingly find that the decision of the Judge involved the making of an error on a point of law. I accordingly set it aside. The parties agreed that in that event it will have to be re-made by the first-tier Tribunal.

46. I am satisfied that the extent of judicial fact finding which is necessary for the decision to be re-made is extensive, and in the circumstances, it is appropriate to remit the case to the First-tier Tribunal for a fresh decision to be made.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside. The appeal is remitted to the First-tier Tribunal (Hatton Cross) for a fresh decision to be made by another Judge.

Anonymity direction not made.

Signed Date 20 September 2018

Deputy Upper Tribunal Judge Mailer