



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000256

First-tier Tribunal No: HU/52548/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On

8th of May 2024

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

MD AKTARUZZAMAN
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Lewis, of Counsel, instructed by Lawmatic Solicitors

For the Respondent: Ms E Blackburn, Senior Home Office Presenting Officer

Heard at Field House on 30 April 2024

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Bangladesh born on 5th March 1982. He arrived in the UK on 11 January 2009 with Tier 4 student leave. He had leave in this capacity until 28th November 2015 but on 4th June his leave was curtailed to expire on 9th August 2014 as his sponsor licence was revoked. He made a fresh application for student leave on 7th April 2014 but he was served with a notice contending he had cheated in a TOEIC test taken at Colwell College. He challenged this decision by way of a judicial review which was conceded by the respondent on 3rd March 2021. On 16th April 2021 the appellant submitted a human rights claim

but this was refused on 11th May 2021. His appeal against the decision was dismissed on Article 8 ECHR grounds by First-tier Tribunal Judge Courtney after a hearing on the 1st November 2023.

2. Permission to appeal was granted on all grounds by Upper Tribunal Judge O'Callaghan on 29th January 2024 on the basis that it was arguable that the First-tier judge had erred in law in the consideration of the report of Mr Stanbury. He also extended time to admit the application to appeal.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether any such error was material and whether therefore the decision should be set aside.

Submissions – Error of Law

4. In grounds of appeal from Mr P Lewis it is argued for the appellant, in short summary, as follows.
5. It is argued that the First-tier Tribunal failed to have regard to relevant evidence and made illogical findings at paragraphs 22 and 23 of the decision. The expert Mr Stanbury argues that fraudulent test centres would, for technical reasons, have preferred to replace all the candidates tests with those done by proxy test takers in a hidden room rather than just those who had paid to cheat. The First-tier Tribunal rejects this evidence stating that the “hidden room” theory is purely speculative. However this is not the case as Mr Stanbury cites evidence from Project Façade investigations that they were used in two fraudulent test centres (Queensway College and College of Skills and Learning Birmingham). Mr Stanbury explains that it would be technically easier to switch the entire room than individual PCs to the hidden room proxy taker, and also that it would not be particularly difficult to set up a hidden room for someone with computer networking expertise, and require few if any extra skills to setting up a genuine test room. This position is not properly represented by the First-tier Tribunal in the decision. It was also illogical to criticise Mr Stanbury for making assumptions based on scant information when he was not given the information required by ETS who had refused to answer questions.
6. Secondly, it is argued, the First-tier Tribunal erred in law by making a mistake of fact in stating at paragraph 33 that the score the appellant achieved on 18th April 2012 was insufficient to obtain a B2 and so he needed to cheat as he could not afford to fail the test. This, it is argued, is inaccurately stated as the appellant's speaking score on 18th April was 160, the minimum required for B2, and thus he had no reason to cheat in the speaking test.
7. In a Rule 24 notice of 5th March 2024 Ms J Isherwood for the Secretary of State accepts that the First-tier Tribunal has made speculative findings on the evidence of Mr Stanbury and does not oppose the finding of an error of law. It is argued that the matter should be remitted to the First-

tier Tribunal for hearing de novo after the case of Varkey & Joseph is heard in the Upper Tribunal, as this appeal will make findings on Mr Stanbury's evidence.

8. Ms Blackburn confirmed that the respondent still took the position outlined by Ms Isherwood even though the appeal in Varkey & Joseph had been dismissed, although she submitted that it could be possible to remake the decision in the Upper Tribunal as it might be possible for the appeal to be just by way of submissions.
9. It was clear therefore that an error of law was found by consent by both parties.
10. Both parties also accepted that no findings could be preserved from the decision of Judge Courtney. Mr Lewis submitted that the remaking should take place in the First-tier Tribunal due to the large amount of material. I found that the appeal should be remitted to the First-tier Tribunal due to the very large amount of remaking. The bundles are more than 500 pages long, and this would be a human rights appeal where further updating evidence was likely. The appellant had given oral evidence previously and was likely to do so again.

Conclusions - Error of Law

11. An error of law is found by consent on the basis of errors of law as outlined by the appellant above. No findings are preserved from the decision.
12. The unreported decision in Varkey & Joseph [UI-2022-002694 & UI-2022-002695] was dismissed in a decision of a Presidential Panel dated 11th March 2024, although the appellants have appealed to the Court of Appeal, and a decision on permission is awaited. The case of Varkey & Joseph does not overturn the reported case of DK & RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 IAC. It will be for a new First-tier Tribunal to decide this appeal by reference to the reported cases at the time of hearing on consideration of all of the evidence put forward by the appellant and respondent.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal with no findings preserved.
3. I remit the remaking of the hearing to the First-tier Tribunal, the hearing to be heard by a Judge other than Judge of the First-tier Tribunal Courtney.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber
30th April 2024