Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00066/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 August 2019	**On 25 September 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

SOHEL AMIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Symes of Counsel instructed by Diplock Solicitors Ltd
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Bangladesh, has permission to challenge the decision of Judge S H Smith of the First-tier Tribunal (FtT) sent on 13 May 2019 dismissing the appeal against the decision made by the respondent on 9 March 2018 refusing leave to remain:

   (i) because she was satisfied that the appellant had used deception in a TOEIC test at Westlink College in 2012;

(ii) because the appellant did not have a valid CAS and so possessed insufficient funds to meet the requirements of Appendix A of the Rules.

2. I am grateful to both representatives for their succinct submissions.

3. The appellant's first and principal ground contends that the judge failed to take into account, when assessing the issue of his proficiency in the English language and its relevance to the issue of whether the appellant used deception in a TOEIC test in 2014, the fact that he had obtained an IELTS certificate in 2009 and that the Entry Clearance Officer took no issue regarding this when granting him entry clearance as a student at that time. Mr Symes pointed out that the letter from the college also indicated that the college was independently satisfied as to the level of the appellant's English language proficiency.

4. I would accept that the judge did not expressly refer to the 2009 IELTS certificate and that (despite reference at paragraph 14 to the evidence that the appellant passed other language tests), I cannot be sure the judge took it into account at all. However, I am not persuaded that this gives rise to any material error.

5. What the judge concluded at paragraphs 36 and 37 was as follows:

> "36. I accept that the appellant is now proficient in English. However, my attention has not been drawn to any materials which demonstrate that the appellant had successfully completed an English language test administered by an approved test centre before his reliance on the impugned certificate issued by ETS in respect of the April 2012 test. At page 23 of his bundle, there is a certificate dated 12 July 2014 of an international English language test administered by Cambridge English language assessment, part of the University of Cambridge; such documents are often known as "IELTS" certificates. I accept that, at page 24 of his bundle, the CAS from the London School of Commerce states that the appellant had successfully completed "the pre-sessional academic English part of the programme", and a number of the course modules. However, that was not a formal test, and the CAS itself relies on the appellant's certificate provided by ETS. It also added that ill-health had necessitated the appellant taking additional time to complete the course, suggesting that limited significance should be ascribed to his attendance at the course modules.
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> 37. If follows, therefore, that the appellant has not demonstrated that he enjoyed a level of proficiency in English of the level he claims to have had at the point he took his test administered by ETS. By the time the appellant took his IELTS test in July 2014, and obtained his BA in 2015, he had been immersed in this country for some years. The fact he spoke English then does not necessarily mean that he was as proficient in the language at the time of the impugned test in 2014."

6. What I observe from the above is that the matter the judge was assessing was the level of the appellant's proficiency in English. The fact that the appellant had successfully completed an English language test administered by an approved test centre before his reliance on the impugned certificate issued by ETS in respect of the April 2012 test does not on its own demonstrate proficiency to the requisite level. At

most the UWC document of 30 May 2009 demonstrates that one of the bases for admission was "IELTS scores." The document does not state what this score was nor has the appellant produced evidence of what his score was (despite voluminous documents provided). It must also be borne in mind that the context of the judge's inquiry was whether the appellant had shown that in 2012 that his level of proficiency in English was such that his recorded test results were consistent with a demonstrated level of proficiency.

7. The appellant's second ground takes issue with the judge's findings at paragraph 31-34. At paragraphs 32-34 the judge stated:

> "32. I accept that the test is now a considerable period of time ago. The delay by the respondent in considering the appellant's 2014 application means that he has lost the benefit of some of the ability he would have had to recall those events. However, I consider the inability of the appellant to recall even basic details of the speaking assessment to give rise to credibility concerns surrounding the account he provided in his witness statement. For example, at [32] of his statement, the appellant describes in more detail than he was able to under cross-examination what took place. He outlines, in broad terms, the difficulty in recalling events from that long ago, but was able to provide far more detail in his statement, which as dated 18 April 2019. If it were the case that the appellant genuinely experienced such difficulties in recalling the test, his statement would not have featured the detail that it does. He is unlikely to have remembered matters such as the route he took, and the public transport links he used. Still less would he have been able to remember details concerning the fact that he was asked to comment on pictures (as outlined at [32]), that he was provided with time to prepare his answers, and the automatic expiry of one phase of the speaking test, before the computer advanced to the next phase. Similarly, he was able to provide a reasonable degree of detail concerning the other parts of the test in his statement, in a way which gives rise to credibility concerns surrounding his now claimed inability to recall any details over and above those outlined above.
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> 33. The level of detail one would expect someone in the position of the appellant to recall, given the detail provided in his statement, surpasses that which the appellant was able to provide for me. The appellant's statement, given its detail surpasses that of his oral evidence, could easily have been prepared with the benefit of assistance or coaching. Whereas it is relatively easy to find out what should have happened at a test centre, being able to speak with detail orally about a test is something which would have required genuine attendance and participation.
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> 34. The appellant is a man of intelligence; his bundle features details of his academic studies in the fields of marketing and business studies. Under the circumstances, I find his inability to provide any details about the speaking test he claimed participating to undermine his case that he did, in fact, attend and participate in the test. I bear in mind the weighty nature of an allegation of deception, and the inherent improbability which may be said to characterise the likelihood of someone attempting to engage in such notice (although, the evidence suggests that at the Westlink College, cheating was the norm, rather than the exception)."

8. The grounds submit that the judge erred in treating as adverse to the credibility of the appellant's attempted explanation of the circumstances in which he undertook the TOEIC test in 2012 the fact that he could not in oral evidence replicate the detail he had provided in his witness statement. As put by Mr Symes in oral submissions, a witness cannot always match the degree of detail contained in a witness statement, especially one prepared in order to get everything down in the one place. That, he submitted, was to be expected. The difficulty with this ground is that it amounts to a mere disagreement with the judge's assessment of the appellant's evidence. Clearly in the judge's assessment the appellant failed to come up to proof and there was an inability evinced by his oral evidence to recall even basic details of the speaking assessment. In counting against the appellant his inability in oral evidence to recall even basic details of the speaking test, the judge properly took account of his evidence as a whole, making allowances for the fact he was being asked to recollect events from seven years ago. It was open to the judged to find that the contrast between the detail given by the appellant at paragraphs 24-30 (paragraphs 27-28 in particular) of his witness statement and the meagre details he gave in oral evidence amounted to a material inconsistency.

9. The appellant's third ground assails the judge's reliance on the fact that the respondent had refused the appellant's application under the substantive requirements of the Rules on the basis of an absence of a CAS. It was submitted that given the failure of the respondent to make a decision in respect of his application for four years, the judge should have found that it was procedurally unfair of the respondent to rely on the absence of a CAS which was an inevitable result of the respondent's delay. There is a suggestion in paragraph 18 of the appellant's grounds that this third ground was capable of succeeding on its own. I cannot agree. This ground is dependent on there being an error in the judge's treatment of the deception issue. Having found that the judge did not materially err in her handling of the deception issue, the appellant could not have succeeded under the Rules in any event.

10. Permission was not granted on ground 4 and in any event the judge's decision on the falsity of this document had no bearing on the judge's assessment of the issue of deception in taking the TOEIC test.

11. For the above reasons I conclude that the judge did not materially err in law.

No anonymity direction is made.

Signed Date: 23 September 2019

H H Storey

Dr H H Storey
Judge of the Upper Tribunal