



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

Appeal Number: IA/26003/2014

**THE IMMIGRATION ACTS**

**Heard in Bradford  
On 14<sup>th</sup> April 2015**

**Decision &  
Promulgated  
On 22<sup>nd</sup> May 2015**

**Reasons**

**Before**

**UPPER TRIBUNAL JUDGE D E TAYLOR**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**AZULFIQAR AZIZ  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mrs R Pettersen, Home Office Presenting Officer  
For the Respondent: Mr Janjua, Janua & Associates

**DECISION AND REASONS**

1. This is the Secretary of State's appeal against the decision of Judge Bagral made following a hearing at Bradford on 24<sup>th</sup> October 2014.

## **Background**

2. The claimant is a national of Pakistan born on 1<sup>st</sup> January 1987. He entered the UK as a student on 7<sup>th</sup> May 2011 valid to 27<sup>th</sup> August 2012 and was subsequently granted further leave to remain in the same capacity until 6<sup>th</sup> April 2014. On 18<sup>th</sup> December 2013 he married a British citizen and applied for further leave to remain as a spouse.
3. The application was refused on 18<sup>th</sup> June 2014 because the Secretary of State concluded that the claimant failed to meet the suitability requirements of Appendix FM of the Immigration Rules, namely S-LTR.2.2(a), since she was satisfied that he had obtained leave to remain by deception. He had submitted an English language test certificate purporting to verify the results of a test taken on 17<sup>th</sup> July 2012 which had been deemed to be obtained through deception by the Educational Testing Service. It is the Secretary of State's case that the information provided by ETS shows that the claimant's speaking test had been taken by a proxy test taker.
4. The claimant denies using a proxy. He confirmed that he had not committed deception at the time of his Tier 4 extension application and he undertook the English language test himself. At no time had he been informed by the institution of his studies that his English language certificate was not accepted. Nor had he been informed in writing by ETS or interviewed by them or by the police.
5. In a detailed and thoughtful determination the judge concluded that the Secretary of State had failed to discharge the onus upon her to establish that the claimant had perpetrated a deception.
6. She wrote as follows:

“After much consideration I am not satisfied that the evidence as presented is sufficient in probative value and has the cogency required in order to discharge the onerous burden on the respondent to prove fraud. I have reached this conclusion for the reasons set out below:

- (i) I am not satisfied that a set of redacted email exchanges between the Home Office Presenting Officer and various officials of the Home Office is sufficient to substantiate an allegation of fraud.
- (ii) The content of the emails consists of stated conclusions that the test results have been found to be invalid but no evidence has been adduced to substantiate the conclusions reached. The extract from the ETS look up tool simplify records the Appellant's name and his invalid status results. No data has been adduced to show how those invalid results were reached.
- (iii) There is no evidence from ETS or the college substantiating the allegation against this Appellant.

(iv) No voice recordings have been produced. No reasons have been given as to why they have not been made available and there is no evidence of the analysis under taken specific to this Appellant and by whom.”

7. The judge concluded that the claimant met the requirements of the Immigration Rules for leave as a spouse but, should she be wrong about that, it was not reasonable and not proportionate to expect him to return to Pakistan solely for the purpose of making an entry clearance application. She allowed the appeal under the Rules and on human rights grounds.

### **The Grounds of Application**

8. The Secretary of State sought permission to appeal which was granted by Judge Bird on 2<sup>nd</sup> February 2015.

9. First, she argued that the judge had failed to provide adequate reasons for her decision and had disregarded documents provided in support of the deception allegation including witness statements from Mr Peter Milligan, a witness statement from Miss Rebecca Collins and an ETS look up tool document which showed that the claimant's test had been categorised as invalid.

10. Second, she had materially misdirected herself in law in applying an impermissibly high standard of proof in determining the deception issue and failed to properly reason why the documents did not discharge the requisite standard of proof.

11. Third, she had misdirected herself in the consideration of Article 8 not identifying any unjustifiably harsh consequences for the claimant as per the decision in Nagre v SSHD [2013] EWHC 720 which established that the consideration of the Immigration Rules and exceptional circumstances together provide full coverage of an individual's rights under Article 8.

### **Submissions**

12. Mrs Pettersen relied on her grounds. The judge had wrongly stated the law in concluding that the Secretary of State had an “onerous” burden upon her, and had failed to look at all of the evidence taken together, including the witness statements, which was sufficient to discharge the burden of proof. There was nothing exceptional about the claimant's circumstances and he had not demonstrated why he could reapply for entry clearance.

13. Mr Janjua submitted that there was no error of law in this decision. The claimant had not been provided with any details of how the ETS decided that he had committed fraud, which he strenuously denied. No detailed original report had been provided. It was not possible to know the qualifications which the decision maker had; ETS had merely indulged in speculation. He had not been given any opportunity of a retest.

### **Consideration of whether There is an Error of Law**

14. The evidence before the judge was as follows.
15. First, there is an extract from the Home Office Guidance in relation to the handling of ETS applications. It says that ETS undertook an analysis of speaking tests to identify whether tests were taken by a substitute or proxy test taker. The analysed results were split into two areas. Invalid, where voice analysis showed that cheating in the test took place, and questionable, where analysis had not proved cheating but where concerns were deemed sufficient to withdraw the test result.
16. She also provided two witness statements, the first from Peter Milligan, Assistant Director at the Home Office responsible for the unit which processed in-country Tier 4 student applications. He records that in February 2014 BBC Panorama broadcast a television programme which revealed widespread abuse within UK test centres which administered the TOEIC, including the use of proxies to undertake speaking and listening tests on behalf of candidates and the provision of correct answers for those sitting written tests.
17. The Home Office requested that ETS investigate the validity of results across UK testing centres, as a consequence of which ETS provided a list of candidates whose test results showed substantial evidence of invalidity.
18. The ETS employs voice biometric technology to analyse test data which extracts biometric features from an individual's speech to generate a voice print which is run against samples to establish whether the sample is likely to be a recording of the same person who had generated the voice print, or a different person. The technology was used to flag comparisons where the result was suspicious but, because it was acknowledged that the technology used was imperfect, and samples could be incorrectly shown as false positives, each flagged match was subjected to a further human verification process. Each was verified by two analysts working entirely separately who would listen to the samples and confirm whether in their opinion it was the same or a different person speaking. Only where both analysts independently concluded that samples were of the same person would that case be treated as a match. It was ensured that at least one analyst was experienced.
19. Peter Milligan said that he was confident that two independent analysts would be able to effectively identify matches and, over 33,000 possible matches by the system, 80% were confirmed after human verification. The process mitigated significantly against the risk of a false positive.
20. He said that where a match had not been identified and verified, an individual's test result might still be invalidated on the basis of test administration irregularity, including the fact that their test was taken at a UK testing centre where numerous other results had been invalidated on the basis of a match. In those cases the individual would usually be invited to take a free retest. Those cases were clearly distinguished by ETS in its spreadsheets provided to the Home Office from tests where there was a substantial evidence of invalidity.

21. Rebecca Collins is a grade 6 civil servant. She also provided a witness statement detailing the background to the decisions taken, where an invalid result had been identified, in relation to Section 10 removals.
22. So far as this particular claimant is concerned, the Presenting Officer provided an extract from the look up tool identifying the claimant by his name and his date of birth and showing his test results as invalid.
23. I am satisfied that the judge erred in law.
24. First, as alleged in the grounds, it does appear that she applied an impermissibly high standard of proof in referring to the “onerous burden “on the Secretary of State”. There is no higher standard of proof required to provide deception other than the civil standard, namely the balance of probabilities.
25. Second, there is no reference in the paragraph which records the evidence which she considered, to the witness statements from Mr Milligan and Miss Collins which set out in detail the process which was applied by ETS to identify fraud.
26. Third, the Article 8 conclusions are clearly infected by the positive findings made that the claimant fulfilled the suitability requirements for leave to remain as a spouse.
27. The decision is set aside.

### **Remaking the Decision**

28. I heard brief oral evidence from the claimant who confirmed that he had not been guilty of practising any deception. He said that he had only found out about the allegation after he made the visa application for leave to remain as a spouse. He was asked whether, after receiving notification whether he went to his previous college or to ETS to ask them for more details about his test result. He said that he had not approached his college because it was closed, nor ETS, but he had asked his solicitor to take the matter up.
29. Mrs Pettersen submitted that the claimant’s appeal should be dismissed. It could be inferred from the fact that he was not invited to take a retest that his test result was invalidated on the basis of individual investigation and not simply because he was part of a batch of invalid results. Moreover anyone who claimed to have validly taken a test would have attempted to clear their name and this claimant had taken no steps himself to challenge ETS.
30. Mr Janjua submitted that the evidence against the claimant was unclear, confusing and not transparent. No details of the names of the centres had been produced and effectively ETS and the Home Office could pick and choose whom to designate as having taken an invalid test. The Home Office were relying for their evidence on the third party who had permitted abuse. It was unclear as to who would be invited to retake the test. There was no clear evidence of deception. He reminded me that the

consequences of the allegation being maintained were serious for the claimant. He faced a ban from the UK for ten years. His wife was pregnant and would be put under extreme pressure if the claimant was required to leave.

## **Findings and Conclusions**

31. I am satisfied that the Secretary of State has discharged the burden of proof upon her to show, on the balance of probabilities, that the claimant does not meet the suitability requirements of Appendix FM as set out in S-LTR.2.2(a).
32. First, the Secretary of State is plainly entitled to rely upon the evidence provided out her from ETS, which is the world's largest private non-profit educational testing and assessment organisation, administering approximately 50,000,000 tests per annum in 25,000 test centres in 192 countries. Details of how that evidence has been obtained are in the witness statement of Peter Milligan. It appears to be robust, with not only voice biometric technology being deployed but also an independent check by two analysts, one of whom is experienced, working separately. She is not obliged to provide the names of the centres concerned, nor the details of the equipment used, nor the qualifications of the analysts concerned. The standard of proof required is the civil standard and not a higher one.
33. In this particular case there is clear evidence from the ETS look up tool that the claimant himself has been individually identified as having an invalid test result. The fact that he was not offered the chance of a re-test indicates that the conclusion reached was on the basis of an analysis of his test rather than the fact that he took a test at a centre where there was large scale abuse.
34. It is significant that the claimant did not seek to challenge the allegation of deception directly with ETS. If he had genuinely taken the test as he claims it would be expected that an approach to ETS would have been made.
35. Mr Janjua's vague and unsubstantiated assertions that there could be collusion between the Home Office and ETS to allege deception are without any foundation.
36. I appreciate that the claimant's wife is now pregnant and that this decision has harsh consequences for them as a couple. No submissions were made in relation to the discretionary nature of Sections S-LTR.2.2 and no evidence was taken. Although the application would normally be refused, it is not mandatory. Accordingly the appeal is remitted back to Judge Bagral to remake the decision in the light of the findings in this determination.

## **Decision**

37. The judge erred in law and her decision has been set aside. The following decision is substituted. The claimant's appeal is remitted back to the first tier judge to remake the decision.

No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Taylor