



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

Appeal Number: IA/35915/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 21 August 2015**

**Decision & Reasons Promulgated
On 7 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

AN IMMIGRATION OFFICER

Appellant

And

MR RENY THOMAS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr F Singarajah, counsel instructed by Paul John & Co Solicitors

For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against the decision, promulgated on 18 March 2015, of First-tier Tribunal Judge Herlihy (hereinafter referred to as the FTTJ).

Background

2. The respondent to this appeal was last granted leave to remain in the United Kingdom as a Tier 2 (General) migrant on 22 July 2014. He arrived in the United Kingdom on 23 July 2014 and was refused entry

and his leave to remain cancelled under paragraph 321A(1) of HC 395 (as amended). The reason for that decision is that an immigration officer considered that the respondent had obtained his previous grant of leave to remain in the United Kingdom as a Tier 4 migrant by deception. Reference was made to an *"IELTS (sic) certificate from Cauldron College dated 16 July 2013."*

3. At the hearing before the FTTJ, the respondent gave evidence, stating that he took three English language tests in 2013. The first was an IELTS in February 2013, the second was a TOEIC test taken in September 2013 and it is this test which is in issue and lastly, in December 2013 the respondent took a further IELTS because he needed a higher score in order to become a registered nurse. The FTTJ noted that the only evidence to support the claim that the respondent had employed deception was a single spreadsheet, which contained the respondent's details and that of the test centre. The FTTJ concluded that there was a *"total absence of evidence from ETS as to how they determined that the (respondent's) test was invalid"* and she allowed the appeal.
4. The grounds of application argue, that the FTTJ failed to give adequate reasons for findings on a material matter, namely her finding that there was *"no evidence"* to support the conclusion in the spreadsheet. Reference was made to the witness statements of Home Office employees and an email from ETS Taskforce dated 10 September 2014. It was argued that in order to be recognised as invalid, *"the case"* has to have been analysed by a computer programme and two *"independent"* voice analysts. It was argued that had the FTTJ *"properly"* taken the evidence into account, the outcome would have been the opposite. It was also said that the FTTJ erred in failing to give adequate reasons for finding that a person who clearly speaks English would therefore have no reason to secure a test result by deception.
5. FTTJ Nicholson granted permission, making reference to R (oao) Gazi v SSHD (ETS-JR) 2015 UKUT 00327, on the basis that it was arguably an error of law for a FTTJ to conclude that the generic evidence is not evidence supporting the conclusions in the spreadsheet.
6. The respondent did not lodge a Rule 24 response.
7. At the hearing before me, Mr Duffy argued that the FTTJ had overstated the case and was mistaken regarding the Secretary of State's evidence. She had not understood that voice recognition software was used; that there was only a 2 per cent margin of error; that the respondent's voice would have been matched with someone else who took the tests or perhaps the respondent had taken tests for others. He submitted that it would have been open to the FTTJ to reach the same decision on the evidence, if she had expressed herself differently. He urged me to find there to be a material error of law and to set aside the decision for a rehearing.
8. Mr Singarajah took me through aspects of the FTTJ's decision and

referred to the decisions in Gazi, Budathoki (reasons for decisions) [2014] UKUT 00341 (IAC) and MR (permission to appeal:Tribunal's approach) Brazil [2015] UKUT 00029. In essence, he argued that there was no doubt as to why the FTTJ had preferred the respondent's evidence and that the appellant's grounds amounted to no more than disagreement with the decision.

9. In reply, Mr Duffy agreed that the FTTJ was entitled to look at the evidence of both the Secretary of State and the respondent and weigh them up, however, the FTTJ had discounted the respondent's evidence and was wrong to say there was no evidence. The appearance of the respondent's name on the spreadsheet before the FTTJ meant that the evidence set out in what he accepted were generic witness statements, applied to the respondent.
10. At [7.10] of the decision and reasons the FTTJ refers to a "*total absence of evidence from ETS as to how they determined that the (respondent's) test was invalid.*" While this is a strongly worded finding, I take this to mean that the FTTJ found that the evidence from the Secretary of State, in the form of the generic statements, did not directly relate to the respondent's particular test results.
11. The FTTJ recognised in her decision that there was evidence, in the form of a spreadsheet, which related to the respondent. But that was all the evidence before her which related to the respondent's test results. There was no evidence as to how it was concluded that the respondent's name was on the list of invalid tests.
12. I have taken into consideration what Mr Duffy said about the 2 per cent margin of error, however I have also taken into consideration the findings in Gazi regarding the limitations of the generic evidence and the methods used to conclude that applicants have used a proxy test taker.
13. I find that the FTTJ balanced the generic evidence against the weight of the respondent's evidence and attached weight to the inclusion of the respondent's name on a spreadsheet. Between [7.3-7.9] the FTTJ assesses all the evidence before her and at 7.10 sets out her conclusions. She preferred the evidence of the respondent, which included his oral evidence, his unchallenged high scores in an IELTS examination taken shortly after the disputed test results and his ability to give evidence in English without difficulty. I find that the FTTJ was entitled to reach the conclusions she did.
14. While the findings of the FTTJ were concise, the losing party was left in no doubt as to why it had lost. I find that the appellant's arguments in this case amount to little more than a disagreement with the FTTJ's view of the generic evidence and her ultimate conclusion in this case.

Conclusions

- (1) The decision of the First-tier Tribunal did not involve the making of

an error on a point of law.

(2) I uphold the decision of the FTTJ.

Signed:

Date: 30 August 2015

Deputy Upper Tribunal Judge Kamara