First-tier Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/37261 /2014**

THE IMMIGRATION ACTS

Heard at Field House
On 6 November 2015

Decision & Reasons Promulgated
On 2 December 2015

Before

JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MR MD BADRUL ISLAM
(No anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr M Hassan of Counsel
For the respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in this appeal is the Secretary of State for the Home Department. The respondent is Mr Islam. However for the convenience, I shall continue to refer to Mr Islam as the appellant and the Secretary of State as the respondent which were the designations they had in the proceedings before the First-tier Tribunal.

2. The appellant appealed to the Upper Tribunal against the determination of First-tier Tribunal Judge R Cooper of 31 March 2015 allowing the appellant's appeal against

the decision of the respondent dated 4 September 2014 refusing his application to remain in the United Kingdom as a spouse of a British citizen pursuant to paragraph 321A of the Immigration Rules.

3. First-tier Tribunal Judge Zuker granted the respondent permission to appeal on 3 June 2015, stating that it is arguable that the Judge materially erred in law by his approach to the evidence generally and referred to the guidance in **R (on the application of Abu Shahdat MD Sayem Gazi) JR/12120/2014.**

First-tier Tribunal Judge's findings

4. The First-tier Tribunal allowed the appellant's appeal for the following reasons which I summarise.

5. The respondent alleges fraud and therefore the burden is on the respondent to provide cogent evidence to support that allegation, on a balance of probabilities that this appellant used deception in order to obtain his TOEIC Certificate in 2012.

6. There is no evidence from the respondent demonstrating that the certificate which has not been invalidated by the ETS was in fact relied upon by the appellant to obtain further leave to remain. The respondent has simply made an assertion in her Refusal Letter. However the appellant in a statement confirms he relied on this to apply for an extension of his Tier 4 Student visa. The Home Office had identified that the appellant had a pending application for leave to remain as a spouse and "was seeking to rely upon the invalid certificate".

7. The respondent relied on statements of Mr Peter Millington and Miss Rebecca Collings providing background information concerning the relationship between the Home Office and ETS. These are generic statements and they do not relate to this appellant directly, but they set out the processes by which ETS reportedly identified and confirmed the identity of those people who had sought to obtain a certificate by deception, the procedures by which the ETS sought to verify test results, and the way in which ETS informed the Home Office of those certificate holders have been cancelled or invalidated. The makers of the statements did not attend the hearing.

8. The witness statement of Matthew Harold is the only evidence that specifically relates to this appellant. He exhibits a spreadsheet (Annex A) which records that the appellant speaking score of 190 (which I understand is out of a possible 200) is "invalid". This evidence appears from the date at the top of the screenshot, to have been printed on 11 November 2014, yet was only produced at the hearing itself.

9. These statements of Mr Millington explains in considerable detail the procedure by which ETS have sought to verify the test scores of those sitting their tests, (including TOEIC language tests). He sets out the background to the development and introduction of Biometric Voice Recognition Technology, which was then used by ETS to analyse the TOEIC test data. Mr Millington confirms that the ETS acknowledged the voice recognition technology was imperfect, and that samples would be incorrectly flagged as false positives. He states that flagged matches were

then subjected to human verification to ensure greater accuracy. He confirms at paragraph 45 that 20% of those flagged by the voice recognition technology were not confirmed, once human verification had taken place, but he states matches were rejected where there was any doubt. In paragraph 46 he states that where the ETS believe an impostor was involved with the test because speech samples displayed marked similarity, "scores will be cancelled" and then the tests analysed, where ETS (ETS's office of testing integrity) identifies the speech sample indicates the same individual has taken tests in place of numerous candidates, "their approach is to invalidate the test result".

10. At paragraph 47, Mr Millington confirms that even where match has been identified and verified "an individual's test result may still be invalidated on the basis of test administration irregularity including the fact that their test was taken at a UK testing centre when numerous other results have been invalidated on the basis of a match".

11. The Judge stated:

> "In her reasons for refusal letter the respondent states "during an administrative review process, ETS have confirmed that your clients test obtained was through deception. Because the validity of your clients test results could not be authenticated, your client scores ... have been cancelled". However the evidence before me is not that his test scores have been cancelled, indeed it is still listed in the spreadsheet as being 190. The spreadsheet simply said that his test is invalid."

12. The Judge also stated:

> "There is no evidences before me to indicate whether this particular appellant's test or has been individually subject to analysis or assessment by ETS, or simply whether it is the case that he was unfortunate enough to attend a college where there are high number of irregular scores. These are matters which could have been clarified had Mr Harold been present, but he was not."

13. The Judge additionally stated:

> "The only evidence before me that actually relates to this appellant is one line in a spreadsheet, without any supporting evidence to show the bases on which his test has been treated as invalid."

14. The statement of Rebecca Collins was considered which sets out in some detail the timeline of the work done with ETS to analyse the data. In paragraph 26 she says that in late March 2014 The Home Office was informed by ETS that they have been able to "identify impersonation and proxy testing using voice recognition software". In paragraph 28 she describes that ETS described that any test categorised as cancelled (this later became known as invalid) had the same voice for multiple test takers. On questioning, they advised that there were certain that there was evidence of proxy test taking or impersonation in these cases". She refers in paragraph 29 to there being correspondence with ETS about the difference between those categorised as "questionable" as opposed to those which were "cancelled/invalid".

15. There are certain inconsistencies between these explanations set out in Rebecca Collings statement and that of Mr Millington, but these are not material that could be pursued in the absence of the respondent's witnesses. I therefore attach less weight to the evidence that has been produced by the respondent, as it is not evidence that could be tested.

16. The Judge stated:

> "I find that the appellant has provided evidence, which was not challenged by the respondent, about the process he undertook to obtain his TOEIC test. I find he has also provided evidence, albeit postdating the time of his original TOEIC test, confirming he has obtained merit at grade 5 of the Trinity College graded examination in spoken English (equivalent to entry level certificate in ESOL International (level 3 and B1. 1 of the CEFR.), Indicating that he has more skills in this area than the minimum required by the respondent in marriage applications."

17. Taking all the evidence into account the respondent has not discharged the burden on her to demonstrate with cogent evidence on the balance of probabilities that this appellant obtained his TOEIC test result of the use of deception.

18. The Judge allowed the appeal pursuant to the Immigration Rules.

Grounds of appeal

19. The respondent in her grounds of appeal states as follows. The Judge has made a material error of law in the determination by stating that the Secretary of State has not discharged the burden of proof in demonstrating that this appellant used deception. The first-tier Tribunal Judge's reasoning for this is entirely inadequate.

20. The Judge indicates at paragraph 45 that the witness statements and the extract from the spreadsheet do not assist the respondent's case which is incorrect. Though witness statements, when read in conjunction with one another, details extensively the investigation undertaken by ETS on this appellant's case, along with thousands of other applicants, and the process of identifying those tests found to be "invalid". It is clear from the statements that ETS identified this appellant after a lengthy and systematic investigation.

21. The Judge should have given due consideration to the specific evidence which identifies this appellant as an individual who has exercise deception together with the witness statements outlining the investigation process.

22. The Judge relies on the appellant's evidence of what happened at the test centre in paragraph 30. However the Judge fails to note that this account is entirely uncorroborated and thus provides only very limited assistance in determining the deception.

The hearing

23. At the hearing I heard submissions as to whether there is a material error of law in the determination.

Decision on error of law

24. I have given anxious scrutiny to the determination of First-tier Tribunal Judge who allowed the appellant's appeal under the Immigration Rules for leave to remain in the United Kingdom as a spouse. The Judge essentially found that the respondent, on whom the burden lies, had not proved that the appellant's application was correctly refused under paragraph 321A of the Immigration Rules in respect of the English language test and as such, the respondent had not demonstrated that the appellant employed fraud.

25. In the Judicial Review application **JR/12120/2014** President McCloskey stated that the litigation context in which this challenge (the ETS English language test) unfolds is conveniently identified in an earlier decision of this Tribunal promulgated in September 2014, **R (Mahmood) – v – Secretary of State for the Home Department [2014] UKUT 00439 (IAC), at [1]:**

> "This is another of the currently plentiful crop of "ETS" judicial review cases. These have gained much currency during recent months, stimulated by action taken on behalf of the Secretary of State for the Home Department ("the Secretary of State"), the Respondent herein, in the wake of the BBC "Panorama" programme broadcast on 10 February 2014. "ETS" denotes Educational Testing Services, a global agency contracted to provide certain educational testing and assessment services to the Secretary of State. In order to secure leave to remain in the United Kingdom, by virtue of the relevant provisions of the Immigration Rules it was incumbent on the Applicant to provide evidence that he had obtained a specified type of English language qualification. The action taken on behalf of the Secretary of State, which the Applicant challenges by these proceedings, was based on an assessment that the English language certificate on which he relied had been procured by deception."

26. The Judge correctly identified that the burden of proof is on the respondent and it is on a balance of probability. However the Judge failed to take into account certain evidence and to place sufficient emphasis on material evidence and came to a legally erroneous conclusion.

27. The evidence provided by the respondent was a statement from Mrs Rebecca Collings who stated that "ETS described that any test characterised as cancelled (which later became known as invalid) had the same voice for multiple test takes. On questioning the respondent was advised that they were certain that there was evidence of proxy test taking or impersonation in those cases. The Judge did not give good reasons for why the witness statement of Mr Peter Millington could not be relied on in respect of this particular appellant. Mr Peter Millington stated, "it is clear that in order to be characterised as 'invalid' on the spreadsheet provided to the Home Office the case has to have gone through a computer program analysing

speech and then two independent voice analysts. If all three are in agreement that a proxy has been used then the test would be characterised as 'invalid'".

28. The evidence of both witnesses is clear that when a test result is characterised as "invalid", it has gone through rigorous checks including a computer program analysing speech and two independent voice analysts. The Judge by accepting the evidence of the two witnesses fell into material error by finding that the respondent has not proved that the appellant has used deception. Although the Judge advised himself in the determination that the respondent's standard of proof is on a balance of probabilities, it is implicit in the determination that a higher standard of proof was employed. That brought the Judge into material error.

29. The Judge at paragraph 43 stated that "there are certain inconsistencies between these explanations set out in Rebecca Collings statement and that of Mr Millington, but these were not matters that could be pursued in the absence of the respondent's witness. I therefore attach less weight to the evidence that has been produced by the respondent, as it is not evidence that could be tested".

30. The Judge materially erred in not setting out these inconsistencies. There was a failure by the Judge to take into account all the evidence in the appeal and give adequate reasons for why the respondent had not discharged her burden of proof that the appellant used deception.

31. The features of the general grounds for refusal in Part 9 of the Immigration Rules were considered by the Asylum and Immigration Tribunal in **JC (Part 9 HC395 - burden of proof) China [2007] UKAIT 00027** ('**JC**'). Part 9 of the Immigration Rules contains "general grounds" for the refusal of entry clearance or leave to enter (paragraphs 320, 321), for the cancellation of leave to enter or remain (paragraph 321A) and for refusal of variation of leave to enter or remain or for curtailment of leave (paragraph 322). These provisions represent, as it were, the list of general grounds which the Home Secretary currently thinks must or should operate to complement the substantive Immigration Rules. They cover circumstances where the respondent considers that a person should not be permitted to enter or remain even though he meets the ordinary substantive requirements of the Immigration Rules. They are general grounds for saying "no". Each of the general grounds has an exclusionary, rather than an inclusionary, intent. The applicant is not showing why he qualifies; rather the decision-maker is seeking to show why the applicant is, or should normally be, *dis*qualified. (See **JC**, paras. 8, 10 and 14.)

32. Each of the general grounds depends for its application on the decision-maker being able to establish a precedent fact or facts, and in relation to all of the general grounds the burden of proof is on the decision-maker to establish the facts relied upon (**JC**, para. 10). The reason why the burden rests on the decision-maker is that each of these grounds alleges in one way or another failing or a wrongdoing on the part of an applicant (**JC**, paras. 11-12). The standard of proof is at the higher end of the spectrum of balance of probability, but the standard is flexible in its application, and the more serious the allegation or the more serious the consequences if the allegation

is proven, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities (**JC**, para. 13). However, once the decision-maker establishes the underlying facts, the burden shifts to the appellant, even when the general ground concerned is discretionary, stating that refusal should "normally" be refused (**JC**, para. 15).

33. In respect of paragraph 321A(ii), the precedent fact on which the application of this provision depends is that the appellant produced a false English test result with his application, and the burden of establishing this fact lies on the respondent (**JC**, paras. 16-17).

34. The ETS entity is one of a small number of Home Office suppliers of so-called "Secure English Language Testing" ("SELT") and was appointed in 2011. The test is taken by an applicant and he is notified by the ETS of their grades and ETS issue a certificate which is then forwarded to the respondent for further leave to remain.

35. The respondent provided evidence in the form of statements from two witnesses that there was evidence of fraud at the ETS test centres. The full procedure of the test are set out in the President's determination so I will not repeat it here. Suffice it to say that it is evident that ETS informed the Home Office that they had been able to identify impersonation and proxy testing using voice recognition software. ETS sent the Home Office the results of their analysis of the first batch of test centres on 24 and 28 March 2014. Ms Rebecca Collings in her statement stated that any test categorised by ETS as cancelled, which later became known as "invalid", had the same voice for multiple test takers. On questioning, ETS "advised that they were **certain** there was evidence of proxy test taking of impersonation in those cases". [Emphasis mine]

36. There was no dispute that the appellant's test results were amongst 10,000's test scores analysed and his test was deemed to be "invalid" i.e. that the ETS was certain there was evidence of proxy test taking or impersonation in her case.

37. I take into account President McCloskey's observation "At this juncture, it is appropriate to highlight the single piece of documentary evidence relating to the decision in the Applicant's case which has been produced by the Secretary of State. It consists of a photocopied excerpt from a spreadsheet taking the form of a horizontal line containing six pieces of information: the "ETS Registration ID", the Applicant's first and last names, the test date, the Applicant's date of birth and the name of the test centre. Neither the word "*invalid*" or "*cancellation*" or any derivative of either appears". Mr Millington stated that the technology used entailed over 70,000 pairings of nonmatching comparisons and that the matching samples produced values that were higher than values from the non-matching samples the majority of the time, with a **less than 2% error rate**. [Emphasis mine.] I take into account that the statement of Mr Millington is that "the ETS accepted that voice biometric technology is currently imperfect … too many false positives would fatally undermine the integrity of the voice biometric system". However, Mr Millington stated "In recognition of the risk of 'false positives'", ETS "…. subjected each flagged match to a further human verification process". This required the recruitment of

additional staff who, it is said, received "mandatory training in voice recognition analysis" and were "initially mentored by experienced OTI analysts". The statement continues "Having engaged the necessary number of analysts, the process operated was that each 'flagged comparison' would be considered by two analysts separately. Each analyst would then form an opinion. The purpose of the exercise was to establish whether, in both analysts' opinion, the samples constituted a "match", having been thus designated by the "biometric engine." Given the evidence by the respondent it is clear that the Home Office accepts the results provided by the ETS and conduct no further investigations.

38. The respondent has the burden of proving the existence of the factors upon which reliance is placed to found the exercise of the power conferred by paragraph 321A of the Immigration Rules. The stringent civil standard applicable in cases of fraud has been achieved by the respondent's evidence: see **RP (Proof of Forgery) Nigeria [2006] UK AIT 00086**. It is argued that the evidence provided by the respondent is generic and in the absence of individual evidence pertinent to the appellant, the Appellant's test performance cannot be shown to be fraudulent. I consider less than 2% error rate to be proof by the respondent by evidence on a balance of probabilities.

39. I have a duty to enquire, and determine, whether there is sufficient evidence to justify the respondent's belief that appellant attempted to get further leave to remain in the United Kingdom through deception. I have to consider the evidence against this specific appellant. I have conducted this enquiry on the evidence and the onus lies on the respondent to prove to the satisfaction of the court, on the balance of probabilities, the facts relied on by the respondent.

40. Even applying a standard at the higher end of the spectrum of balance of probability, on the evidence, I find that the respondent has established the precedent fact of the production of a false English test result. The burden therefore now shifts to the appellant to show that the respondent's decision to exercise her power under paragraph 321A is improper.

41. The appellant's case is that he has produced a valid English test result and that the respondent has not discharged her burden of proof. There is no other credible evidence provided by the appellant to challenge the respondent's case other than to set out the procedure as to what happens at the test centre. Having this information in itself does not mean that the appellant took the test. He could have acquired this information by any other means and would not have to take the test to know the procedure at the test centre.

42. Having considered all of the evidence in this case as a whole, I find that the appellant fraudulently, in an attempt to mislead the respondent, provided his English-language test results which she knew to be obtained by fraud. I find that the respondent has discharged her burden of proof. I find that the respondent has demonstrated on the requisite standard of proof that the appellant's appeal falls to be refused pursuant to paragraph 321A of the Immigration Rules.

43. I therefore set aside the decision of the First-tier Tribunal allowing the appellant's appeal and substitute my decision and dismiss the appellant's appeal.

DECISION

I set aside the decision of the First-tier Tribunal allowing the appellant's appeal

I dismiss the appellant's appeal.

Dated this 25th day of November 2015

Signed by

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Mrs S Chana
A Deputy Judge of the Upper Tribunal Chana