



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

Appeal Number: IA/38638/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 22 September 2015**

**Decision & Reasons
Promulgated
On 6 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

**ASHRAF CHOUDHURY
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. P. J. Lewis, Counsel

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

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of Immigration Judge I. Ross promulgated on 9 March 2015. Judge Ross dismissed the Appellant's appeal against the Respondent's decision to cancel leave to remain as a Tier 4 student.

2. In the decision granting permission to appeal, Judge Lambert stated that there was an obvious lack of reasoning in the adverse credibility finding, that it was an extremely short decision given the complexity of the evidence involved in these cases, and that there was “an arguable failure, bearing in mind the burden of proof on the Respondent with regard to dishonesty, to consider the extent to which the Appellant’s particular test result has been shown by the Respondent’s evidence to be linked to the evidence of invalidity provided by ETS.”

Submissions

3. I heard submissions from both representatives. Mr. Lewis submitted that there was a lack of real reasoning given the type of evidence before the judge and the issues involved. There had been evidence before the judge that the Appellant had previously taken two IELTS tests and passed with high marks in 2008 and 2011. This was a more difficult test. The judge had failed to have regard to this fact. Paragraph 12 of the cancellation report specifically refers to TOEIC tests being easier than IELTS. There was no reference to the fact that the Appellant was studying at a reputable and established university. By the time of the appeal, he had passed his second year of a law degree. Evidence that he was a good student who engaged in class had been provided, but there was no reference to it. The Appellant intends to become a barrister. He was not working. These were all factors which should have been taken into account to indicate that he was a genuine student with a history of taking and passing English language tests.
4. It was submitted that the fact that the Appellant could not remember the date of his test, given that it had been taken three years ago, enhanced rather than undermined his credibility. It was submitted that no reasons were given in paragraph [12] for rejecting the Appellant’s evidence. The only evidence provided were the generic witness statements of Rebecca Collings (“RC”) and Peter Millington (“PM”). I was referred to the case of R (on the application of Gazi) v Secretary of State for the Home Department (ETS – judicial review) IJR [2015] UKUT 00327 (IAC), which referred to the very real possibility of human error in such cases. I was also referred to paragraph 47 of PM’s statement which stated that a test may 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 have been invalidated on the basis of a “match”. It was submitted that there was a real need to consider the evidence given the serious consequences for the individual, and that anxious care should be given having considered all of the evidence.
5. Mr. Duffy submitted that the judge had been entitled to take on board the statements. I was referred to paragraph 28 of RC’s statement, and paragraph 31 of PM’s statement. There was less than a 2% margin of error in order for a candidate’s name to appear on a spreadsheet. It was submitted that it was hard for the Appellant to shift the burden of proof once the judge had considered the two statements. Either the Appellant employed a proxy test taker, or he is the proxy test taker. He submitted

that the judge was entitled to make the finding made in the last bullet point of [12], as the evidence was before him. He submitted that while Gazi found that the statements were generic evidence; this was evidence of the process not of the individual. He submitted that the statements were strong evidence which the judge was entitled to take into account, and it was not necessary for the judge to give further reasons. The evidence was very strong, beyond the balance of probabilities.

6. As Mr. Duffy had referred to a spreadsheet, I asked him if there was one, there not being one in the Respondent's bundle, and there being no reference to a spreadsheet in the decision. He referred to a document entitled "Addendum" to which the spreadsheet was attached. I found a copy of this in the file, although not part of the Respondent's bundle. It appeared to have been put on the file prior to the hearing in the First-tier Tribunal. Mr. Lewis indicated that he had not seen this before.
7. In response to Mr. Duffy, Mr. Lewis submitted that the judge had no regard to the fact that the Appellant had taken two previous tests or any other facts in his decision. The analysis in Gazi indicated that there was clear scope for human error given that the analysts had very little training. He also pointed out the failure of the judge to refer to the addendum and spreadsheet.

Error of law decision

8. I considered that the decision involved the making of an error of law as the judge had failed to give adequate reasons for his finding that the Respondent had satisfied the burden of proof to show that the Appellant had engaged in dishonesty.
9. Paragraph [12] contains the totality of the judge's findings. The judge relies entirely on the generic evidence provided by the Respondent. There is no reference to any evidence which links the Appellant to the evidence of invalidity provided by ETS. The judge fails to make any reference to the spreadsheet.
10. Further, the judge fails to take into account any evidence of the Appellant's English language ability. Paragraph 40 of Gazi refers to the decisions being taken in the First-tier Tribunal and states "Within these one finds emphasis on self-evidently important issues such as the appellant's evident English language ability, demeanour and previous life events." There is no reference in this decision to any of these "self-evidently important issues". The cancellation report itself at paragraph 10 states that the interview was conducted in English "a language that the Appellant both spoke and understood fully", but there is no reference to that in the decision. There is no reference to the fact that he had previously passed two English tests which the cancellation report acknowledges are harder than TOEIC. There is no reference to the fact that he has completed two years of a law degree at an established university.

11. There is no explanation given as to why the judge did not believe the Appellant's evidence that he did not know the date of his test, or that he had lost the letter inviting him to take it.
12. For these reasons, I found that the decision involved the making of an error of law. I announced this at the hearing, and stated that I would proceed to remake the decision.

Remaking

13. I heard further short submissions from both representatives. Mr. Duffy relied on the cancellation report, the two statements of RC and PM, and the Addendum and attachments. He submitted that the Respondent had met the burden of proof to show that the Appellant had used deception.
14. Mr. Lewis submitted that the generic statements had been criticised in Gazi. The case had acknowledged that there would be human error, and there had been a human error here in identifying the Appellant as having undertaken the test by proxy. He had passed a more difficult exam twice. He had given detailed answers to complex questions at interview. There was no suggestion that his evidence of having taken the test in August, at around 9am /10am, was not consistent with the facts. His inability to recall further details was evidence of his credibility. The only evidence provided was the generic statements which were not enough to identify that an individual had undertaken a test using a proxy test taker. Compelling evidence had been provided by the Appellant in response. The spreadsheet did not indicate whether the test had been cancelled due to irregularity when several tests had been cancelled as part of a batch. Even taking the spreadsheet into account, the burden of proof had not been met.

Decision

15. In coming to my decision, I have taken into account the documents in the Respondent's bundle, the Addendum and attachments, and the documents contained in the Appellant's bundle provided at the hearing. In addition to the submissions above [13] and [14], I have also taken into account the submissions made in relation to the error of law ([3] to [7] above).
16. I find that the Respondent has failed to discharge the burden of proof to show that the Appellant used deception for the purpose of obtaining leave.
17. In the cancellation report the Respondent states:

"ETS has a record of your speaking test. Using voice verification software, ETS has detected where a single person has sat multiple tests. ETS undertook a check of your test and found that there was significant evidence to conclude that you did not sit the test and that the English certificate was fraudulently obtained."

18. The cancellation report refers to “significant evidence” to conclude that the Appellant did not sit the test, but the Respondent has not provided any of this “significant evidence” from ETS. I have no details from ETS relating to the centre where the Appellant took his test, and the date and the time at which the Appellant took his test. The cancellation report states that ETS are able to detect when a single person has sat multiple tests, yet I have no evidence from ETS to show that one person undertook multiple tests at the test centre which the Appellant attended on the day and at the time that he took his test.
19. In paragraph 10 of the cancellation report it states that the Appellant said that he sat his test at Queensway College. He could not remember the exact date but he said that it was in August 2012 at approximately 10 o'clock. There is no evidence from the Respondent to suggest that this is not the case so as to undermine the Appellant's credibility. The cancellation report refers to him having taken the test on 29 August 2012 at Queensway College, but there is no evidence from the Respondent or from ETS relating to tests taken at Queensway College on 29 August 2012.
20. The Respondent stated in the Addendum that the spreadsheet provided is from the “ETS Lookup Tool”, a database providing information on candidates. It is entitled “ETS SELT SOURCE DATA”. However there is nothing on this document from ETS to confirm that it is a print out from their database. This document indicates that the Appellant's test is “invalid”, but does not give any details.
21. I do not find that this document can be relied on to prove that the Appellant used a proxy test taker to take his English test. It merely states that the Appellant's test is invalid. It is not clear from this document that the reason that the Appellant's test has been declared invalid is because of the possibility of irregularity as referred to in paragraph 47 of PM's statement. There is no “substantial evidence of invalidity” on this spreadsheet.
22. As accepted by Mr. Duffy, the witness statements of RC and PM are evidence of the process, not of the individual. I have no evidence beyond the spreadsheet which relates to the Appellant himself. I am mindful of the criticism of the two statements in Gazi, and the very real possibility of human error in invalidating a test result.
23. I find that the Appellant was interviewed twice by the Respondent. At paragraphs 7 and 10 of the cancellation report it records that on both occasions it was noted that English was “a language that the Appellant both spoke and understood fully”. The report refers to the Appellant having already passed an IELTS test, acknowledged as being harder than a TOEIC test (paragraph 12 of the cancellation report). The cancellation report also refers to the Appellant's study. He was studying an LLB (Hons) Law Course at Birmingham City University, a reputable and established university. He was not working. These are all issues which the Respondent should have taken into account when considering the

Appellant's circumstances and the possibility that the Appellant's test had been declared invalid due to human error.

24. The Respondent has failed to provide the "significant evidence" which she claims to have relating to the Appellant's particular test result. She has not provided any evidence from ETS regarding the date and time that the Appellant sat his test and the centre at which he sat it. She has relied on the generic witness statements and a printout from a database, but there is no confirmation on this printout that it is been provided by ETS, and it contains no details.
25. Given all the above, I find that the Respondent has failed to discharge the burden of proof to show that the Appellant employed deception to qualify for leave to remain. I find that the Appellant's leave should not have been cancelled.

Notice of Decision

There decision of the First-tier Tribunal involved the making of an error of law and is set aside.

I remake the decision allowing the Appellant's appeal.

No anonymity direction is made.

Signed

Date 5 October 2015

Deputy Upper Tribunal Judge Chamberlain