



IAC-AH-CO-V1

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

Appeal Number: IA/38905/2014

THE IMMIGRATION ACTS

**Heard at Manchester
On 24th November 2015**

**Decision & Reasons Promulgated
On 21st December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FA

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Miss C Johnstone, Senior Home Office Presenting Officer

For the Respondent: Mr J Holt of Counsel instructed by Sandbrook Solicitors

DECISION AND REASONS

Introduction

1. The Secretary of State appeals against the decision of Judge R Lloyd of the First-tier Tribunal (the FTT) promulgated on 29th April 2015.
2. The Respondent before the Upper Tribunal was the Appellant before the FTT. I will refer to him as the claimant.

3. The claimant is a male Pakistani citizen who applied for leave to remain as the spouse of a British citizen. The application was refused on 13th September 2014. One of the reasons for refusal was that the claimant had submitted an English language test which had been obtained by deception. The Secretary of State therefore referred to S-LTR.2.2(a) (which is set out below) of Appendix FM of the Immigration rules as a reason for refusal;

‘S-LTR2.2 Whether or not to the applicant’s knowledge –

- (a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application);’

4. The Secretary of State noted that following information provided by Educational Testing Service (ETS) it was believed that a proxy test taker had undertaken the test instead of the Appellant.
5. The claimant’s appeal was heard by the FTT on 17th April 2015. The FTT heard oral evidence from the Appellant and his spouse and found that the Secretary of State had not discharged the burden of proving that the claimant had used deception when undertaking his English language test. The FTT allowed the appeal under the Immigration rules.
6. The Secretary of State applied for permission to appeal. In summary it was submitted that the FTT had given inadequate reasons for not accepting the evidence produced by the Secretary of State. It was submitted that the two witness statements that had been submitted indicated that proxy test takers had been identified in a number of cases, and evidence had been submitted from ETS confirming that the Appellant’s test was invalid. Permission to appeal was initially refused on 6th July 2015, but subsequently granted on 28th August 2015 following submission of a renewed application. The judge granting permission stated, *inter alia*;

“Thus, the observation of the judge at paragraph 9 that there was no explanation as to why ETS reached the conclusion that a test result was not valid was arguably incorrect. If that is established then the conclusion of the judge that the Respondent had relied entirely upon ‘generic evidence’ may arguably disclose legal error.”
7. Directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FTT had erred in law such that the decision should be set aside.

The Secretary of State’s Submissions

8. Miss Johnstone relied upon the grounds seeking permission to appeal, and the grant of permission. I was asked to note that the Secretary of State had supplied two witness statements, which although did not specifically refer to the Appellant, explained the nature of the investigations that had been carried out which resulted in the discovery that there had been widespread deception in relation to English language tests operated by ETS. Miss Johnstone submitted that the FTT had given inadequate reasons for allowing the appeal, and the FTT was incorrect in paragraphs

19(ii) and 21 by stating that ETS had lost its licence to conduct the tests. It was however correct that the Home Office no longer used ETS to administer English language tests.

The Claimant's Submissions

9. Mr Holt made lengthy submissions. I mean no disrespect by not setting them out in full here. In very brief summary Mr Holt submitted that the decision of the FTT disclosed no error of law. The FTT was fully entitled to find that the Secretary of State had not discharged the burden of proof, and had given adequate reasons for making that finding. Mr Holt pointed out that the judge granting permission to appeal was wrong to state that the FTT had concluded that the Respondent had relied entirely upon "generic evidence". Mr Holt pointed out that the FTT had never stated that, and had specifically stated in paragraph 23 that the evidence relied on by the Secretary of State "is generic in part." I was asked to conclude that the decision of the FTT should stand.

My Conclusions and Reasons

10. I find no material error of law in the decision of the FTT. It is accepted that the burden of proof is on the Secretary of State, when an allegation of dishonesty or deception is made.
11. The Secretary of State has to discharge that burden, and the standard is a balance of probabilities.
12. The FTT did not conclude that the Secretary of State relied entirely upon generic evidence. The FTT was however correct to note that the two witness statements relied upon are generic. They make no specific reference to the claimant.
13. The FTT noted that the evidence relied upon by the Secretary of State amounted to the two witness statements and what is described as "a two line table" from ETS which does refer to the claimant, and indicates that the tests taken have been marked as invalid.
14. The FTT assessed the evidence. Although the FTT may have been technically incorrect in referring to ETS losing a licence, it is the case that the Secretary of State no longer relies upon ETS to undertake the English language test. The FTT noted that the Home Office no longer relied upon ETS and stated in paragraph 21, having noted that the witness statements were not specific to the claimant;

"Furthermore, I approach with caution test results obtained from a company that was responsible for the failures in the first place, given that that company has now lost its Home Office licence. It has not given evidence to show how it reached its decision that the Appellant had passed the English test by means of deception."
15. The FTT further noted that the claimant's language skills appeared to be adequate, and that he had undertaken a further test administered by Trinity College on 23rd May 2014.

16. The FTT correctly noted in paragraph 23 that the evidence needed to be considered in the round. The FTT has balanced the evidence submitted by the Secretary of State, against the evidence given by the claimant. The FTT noted that the two line table did not provide evidence to show how ETS reached the conclusion that the claimant had passed the English test by way of deception.
17. In my view the judge has analysed all the evidence placed before him, and was entitled to conclude that the Secretary of State had not discharged the burden of proof, and gave adequate reasons for reaching that conclusion.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision must be set aside. I do not set aside the decision. The appeal of the Secretary of State is dismissed.

Anonymity

The First-tier Tribunal made an anonymity direction and I continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) rules 2008.

Signed

Date 1st December 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The decision of the First-tier Tribunal stands and therefore so does the decision to make a fee award of £140.

Signed

Date 1st December 2015

Deputy Upper Tribunal Judge M A Hall