



IAC-FH-NL-V1

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

Appeal Number: IA/02760/2015

THE IMMIGRATION ACTS

Heard at Manchester

On 21 March 2016

Determination prepared 21 March 2016

**Decision & Reasons
Promulgated
On 05 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

**MR FAISAL BILAL
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr G Harrison, Senior Presenting Officer
For the Respondent: Mr Marrington

DECISION AND REASONS

In this appeal the Appellant is referred to as the Secretary of State and the Respondent as the Claimant.

1. The Claimant, a national of Pakistan, date of birth 18 November 1990, appealed against the Secretary of State's decisions, on 7 January 2015, to

make removal directions under Section 10 of the Immigration and Asylum Act 1999 having refused a spousal application for further leave to remain based upon his marriage. The appeal against removal directions came before First-tier Tribunal Judge Foudy (the Judge) who, on 14 April 2015, allowed the appeal on the basis that the reasons for refusal, reliant upon the Claimant's claim for leave to remain, had not been substantiated and the judge dealt with the matter entirely on that basis. Thus the appeal succeeded under Appendix FM of the Immigration Rules HC 395.

2. The core of the refusal for leave to remain related to a so-called ETS exercise because the Claimant had applied for, taken and passed English language tests. The dispute was whether or not the Claimant had allowed somebody else to take the test on his behalf. Ultimately, since that was the core of the refusal, the evidence provided to the Tribunal was directed at the tester and the Claimant's good faith. The judge decision tried to work out the extent the Home Office evidence was reliable in establishing that the Claimant had not taken the necessary language test but had allowed somebody else to take it.
3. A number of problems arise from this exercise but not least the judge failed to address the evidence of a Miss Rachel Collings whose general evidence was served along with that of a Mr Peter Millington which it was intended should be read together as to establish the general principle of the likelihood being that the Claimant had allowed a third party to take the test. It may be when the full Judgment of the President's (IAC) decision (23 March 2015) is published in the case of IA/31380/2014 and another that the sustainability of the ETS voice recognition testing systems will become clearer.
4. It is clear that that ETS evidence can be open to significant criticism as to its sufficiency albeit an expert opinion provided by Dr Harrison of 5 February 2015 disputes over the technical evidence and the sufficiency of ETS material. It may not be as great as is sometimes thought. The Upper Tribunal, in IA/31380/2014 and another, accepted in full Dr Harrison's evidence in all material respects.

5. Be that as it may the judge did not address the evidence of Miss Collings but went on to conclude with unchallenged findings of fact that the Claimant was a truthful witness of fact and the judge found that as a fact the Claimant had undertaken the disputed tests himself. In the circumstances, whether or not the ETS evidence is properly reliable to secure the Secretary of State's decision was somewhat sidestepped by the findings of fact the judge made concerning the Claimant not least "the Appellant did not submit unreliable English test certificates to the Respondent and I am satisfied he has not used dishonesty in an application to remain in the UK". In addition, the judge made some positive findings in support of the Claimant's case, namely the rapidity and willingness with which the Claimant had undertaken, when requested, a second test.
5. Ultimately, the grounds of appeal do not challenge the judge's findings of fact upon the reliability of the Respondent and in the circumstances, even if I too have significant concerns about the provision of evidence about the format and reliability of the assessments made, the fact is that the Claimant succeeded irrespective of reservations about the sufficiency of that evidence. The fact that for the Claimant there was the expert report of Dr Harrison which raised concerns over the investigative methodology which ultimately makes no difference to the outcome of the appeal today. It is not suggested that the judge's decisions were perverse, irrational or had failed to take into account material evidence relating to the Claimant's undertaking of the disputed test. In those circumstances I am satisfied that it has not been demonstrated that there was an error of law by the judge.
6. The Original Tribunal's decision stands.
7. The appeal is dismissed.

NOTICE OF DECISION

The appeal of the Secretary of State is dismissed

No anonymity direction is made.

Signed

Date 25 March 2016

Deputy Upper Tribunal Judge Davey