



IAC-AH-SAR-V1

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

Appeal Number: IA/02909/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 4 February 2016**

**Decision & Reasons Promulgated
On 17 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

**MR SALAH-UD-DIN SALLAH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Unrepresented

For the Respondent: Mr S Staunton, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Jones QC (the Immigration Judge) to dismiss his appeal against the respondent's decision to cancel his leave to enter or remain in the UK.
2. The appellant was previously represented by Makka Solicitors Limited but at the hearing before the Upper Tribunal represented himself.

3. Judge of the Upper Tribunal Grubb gave the appellant permission to appeal to the Upper Tribunal on 16 October 2015 because the Immigration Judge had determined the appeal solely on the basis that the appellant relied upon Article 8 of the European Convention on Human Rights (ECHR). This was incorrect, as the respondent now concedes.
4. By virtue of Section 82(1) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act), the appellant is entitled to appeal a cancellation of his leave which is treated as a refusal of leave to enter at a time when he was in possession of current entry clearance on the basis that the decision is not in accordance with the Immigration Rules or is otherwise unlawful. Further, the appellant was issued with a "One-Stop Warning" under Section 120 of the 2002 Act on the basis that the appellant was asked to state any reasons why he thought he should be allowed to stay in the UK in form IS.82C, i.e. the notice of refusal of leave to enter.

Background

5. The appellant first came to the UK as a student to study at Ealing and Hammersmith College with valid leave from 16 October 2013 to 26 October 2015. However, as a result of information from Educational Testing Services ("ETS"), it came to light that he had used a false English language certificate as part of his application for leave to remain as a student when this was granted on 16 October 2013. As a result of this the scores that he obtained from the test taken on 21 August 2013 at Eden College were cancelled by ETS. This information came to light following a broadcast by the BBC of its Panorama programme on 10 February 2014 in which undercover reporters gained access to several test centres in the UK and revealed that the tests undertaken by persons subject to immigration control were subject to significant fraud. The fraud included persons other than the stated individuals taking the required tests.
6. It appears that the appellant returned to see his family in Pakistan on 15 December 2014. When he returned to the UK on 16 January 2015 he was refused leave to enter and his visa was cancelled. A detailed explanatory statement has been supplied by the respondent dated 7 March 2016 explaining the full circumstances.

The Hearing

7. As the appellant was unrepresented I called on the respondent to explain the background to the appeal. Mr Staunton referred me to the explanatory statement dated 7 March. He explained that under the ETS system the appellant was supposed to have taken an examination which formed the basis of his leave. The ETS system had been abused in that individuals had taken the test for them. I suggested that as it was accepted by the respondent that the Immigration Judge had made a material error of law in relation to the appellant's appeal rights, it was appropriate to set aside the decision and to hear the appellant's substantive response to the allegations. Both the appellant and Mr

Staunton were keen for the matter to be dealt with at the first hearing before the Upper Tribunal rather than adopting the more usual course of adjourning for witness statements to be filed and for oral evidence to be given on a later date. I therefore allowed the appellant to give brief oral evidence to answer the allegations which had been made against him.

8. I then proceeded to hear brief oral evidence from the appellant with his explanation for the alleged fraud. I am satisfied that he understood the nature of the allegations against him, having received the explanatory statement and supporting witness statements from Mr Millington and Ms Collings.
9. I then explained to the appellant that I was going to set aside the decision of the First-tier Tribunal. He indicated that he was keen to proceed with his case on the day of the hearing. He explained that he said that he had undertaken the test in order to obtain his visa in 2012. The relevant test is described as a "TOEIC" test. The appellant confirmed that he "took the test (himself)". However, when he was interviewed at the airport it was sometime after the test had been taken and he could not remember all the details. He said that he had not been shown "any evidence" but he had done his best to respond to the questions asked of him. He said he had been detained for eight hours. He was convinced that he could "prove himself" to be innocent. He said as a result of the respondent's decision he had been deprived of the opportunity to complete his course which would require him to undertake approximately one year of additional study.
10. The respondent relied on the witness statements of Rebecca Collings and Peter Millington. Mr Staunton said that in carrying out its investigation considerable detail had been gone into and the tests from the ETS had been analysed but found to be invalid. Plainly, the examinations were invalid. The witnesses explained how the tests are validated. Voice recognition was used to confirm that the appellant had not been the person taking the relevant tests. Details of the institution at which the appellant studied (Eden College) were given in Appendix G.
11. I then called on the appellant to make any submissions. He reiterated that he had taken the test, he thought, in 2013. This was a considerable time before his arrival into the UK in January 2015 when he had been stopped. He may have been confused. He did not remember the name of the college or date when he took the test.
12. The respondent simply relied on the reasons fully set out in the explanatory statement. He said that the exams were clearly subject to fraud, as the Panorama programme had exposed. It was clear from the interview record that the appellant could not remember the date when he took the exam which tended to suggest that he had not taken it. I was referred to paragraph 321A (2) of the Immigration Rules. This allowed the respondent to cancel leave in circumstances where false representations had been made.

13. I allowed the appellant a last word. He said he wished to “prove himself” by completing his course. He wished for another chance.
14. At the end of the hearing I reserved my decision as to the final outcome of the appeal having found the error of law.

Discussion

15. When the events giving rise to the cancellation of leave came to the respondent’s attention the appellant was a student at Ealing and Hammersmith College with valid leave from 16 October 2013 till 26 October 2015. The respondent was satisfied that false representations had been used to obtain that leave. In particular, the ETS had issued him with a TOEIC as part of his student application. It seems that using the voice verification software ETS was able to detect that a single person was undertaking multiple tests. ETS undertook a check of the appellant’s test as well as a number of others and confirmed to the respondent that there was “significant evidence” to conclude that the certificate issued in his case had been fraudulently obtained. Accordingly, the scores issued from the test which the appellant had taken (in fact on 21 August 2013 at Eden College) were cancelled by ETS. As a result of the information supplied by ETS, the respondent was satisfied that false representations had been used for the purposes of obtaining a Tier 4 (General) Student leave to remain residence permit. Accordingly, the appellant had his leave cancelled in the slightly dramatic manner described above. It is now necessary to look at that evidence in greater detail to see whether that was justified as the First-tier Tribunal, erroneously, failed to consider the appeal on its merits, thinking that the only matter that could be considered was the appellant’s human rights. No appeal is made against the decision of the FtT to dismiss the appellant’s human rights appeal, if any.

Conclusions

16. The appellant had full appeal rights under Section 82(1) of the 2002 Act as Judge Grubb noted. Having carefully considered the merits of the respondent’s case and the appellant’s response to it I will now set out my conclusions.
17. The substantive allegation is that the appellant fraudulently obtained an English language certificate to which he was not entitled. The examination, taken in September 2013, was administered by ETS, a non profit making organisation. The BBC exposed the nature of the fraud perpetrated in February 2014. It appears that the *modus operandi* were for proxy test takers to take the test. On some occasions the true candidate would attend the test centre but a proxy would then take the test after the candidate was photographed. The candidate would then leave the test centre.

18. The Immigration Rules entitle the respondent to cancel leave where it is established that any misrepresentation had been used to obtain the leave (321A (2)). The respondent's evidence consists of hearsay evidence, some of it double hearsay. However, the techniques utilised by ETS to investigate the fraud included computerised voice recognition and test centres were subject to independent investigations by ETS. Ms Collings and Mr Millington provide full details in their statements.
19. The burden rests on the respondent to show that the requirements for cancelling the appellant's leave were satisfied. This must be shown on the ordinary civil standard of proof. I am satisfied having considered the evidence filed in support of the case that false representations were made in the form of the test results supplied in support of the application for further leave. Unfortunately, the appellant's test results cannot be relied upon. He was unable to give any plausible explanation for the apparent fraud, indeed, had limited knowledge of the test he had taken. He was unable to say in interview, for example, where he had taken that test.
20. In the circumstances, I am satisfied that all the material circumstances were taken into account. I am satisfied to the civil standard of proof that applies to these proceedings that the appellant did make false representations to obtain his English language test certificate and that the grounds for cancelling his leave were satisfied.

My Decision

Having found a material error of law in the decision of the First-tier Tribunal, it is necessary to set aside that decision.

I substitute a decision of the Upper Tribunal to dismiss the appellant's appeal against the respondent's decision to cancel his leave.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT **FEE AWARD**

I make no fee award in this case.

Signed

Date

Deputy Upper Tribunal Judge Hanbury

