IAC-HW-AM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05405/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
on 21st April 2016	**on 25th April 2016**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

UMAR FAROOQ

Appellant

and

IMMIGRATION OFFICER, GLASGOW AIRPORT

Respondent

For the Appellant: Mr J Bryce, Advocate; Maguire Solicitors (Scotland) Limited

For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This decision should be read along with my decision dated 16th March 2016.

2. This decision should be read also along with Mr Bryce's written submissions dated 18th April 2016 regarding the making of a recommendation.

3. It was common ground that Mr Bryce had correctly identified that the Upper Tribunal has no statutory power to make a recommendation.

4. Mr Matthews submitted that it was unnecessary for the Upper Tribunal to make an informal recommendation. There was no reason to think that the respondent would not give effect lawfully and fairly to the Upper Tribunal decision (as it stands at present, and assuming it survives any further challenge which may be taken).

5. I go no further than to record my broad sympathy with the position set out in the written submission for Mr Farooq: having succeeded in his appeal, the respondent should offer a remedy which as nearly as possible returns him to the position he would have been in otherwise. It would be difficult and is in any event not appropriate to try to be any more prescriptive than that.

6. The Immigration Officer's appeal to the Upper Tribunal is dismissed. **The decision of the First-tier Tribunal, allowing Mr Farooq's appeal, is to stand**.

22 April 2016
Upper Tribunal Judge Macleman

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05405/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
on 14 March 2016	**on 18 March 2016**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

UMAR FAROOQ

Appellant

and

IMMIGRATION OFFICER, GLASGOW AIRPORT

Respondent

For the Appellant: Mr J Bryce, Advocate; Maguire Solicitors (Scotland) Ltd

For the Respondent: Ms S Aitken, Presenting Officer

DECISION AND REASONS

7. The Immigration Officer is the appellant in the Upper Tribunal, but for continuity and ease of reference this decision describes the parties as they were in the First-tier Tribunal.

8. The appellant is a citizen of Pakistan, born on 8 August 1989. He has not asked for an anonymity order. He arrived at Glasgow Airport on 24 January 2015, returning from abroad. The respondent served him with notice of refusal of leave to enter and cancellation of leave, based on information from English Testing Services (ETS) that he had used a false ETS certificate in an application which had resulted in Tier 1 leave being issued to him on 15 June 2012.

9. First-tier Tribunal Judge Fox allowed the appellant's appeal by decision promulgated on 5 August 2015.

10. At paragraphs 9 - 11, the judge found that the respondent adduced no evidence which implicated the appellant directly or indirectly in fraudulently obtaining a certificate; that the affidavits provided by the respondent were generalised; and that there was no evidence that the appellant had not himself attended the testing centre and taken the test, as he said in evidence he had done.

11. I note that at paragraph 13 the judge allowed the appeal under Article 8 of the ECHR because there would be disproportionate interference with private life. The respondent has not challenged that conclusion, and having passed without notice until now, there would be no basis for altering it.

12. The respondent applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal. The grounds maintain that the usual evidence supplied by the respondent in ETS cases (of which there have been many in the last two years) clearly shows the processes a test result has to go through in order to be categorised as invalid, and that the judge failed to provide reasons for his finding that there was not evidence that the appellant had not himself attended and taken the test. The grounds say that had the judge properly taken the evidence into account, he would have found to the contrary.

13. The respondent's application to the First-tier Tribunal was late by 22 days. The reason given for seeking an extension is that it would be unfair not to admit a late application when permission has been granted in numerous other cases on the same arguments. Nothing is said about how the delay came about.

14. On 29 December 2015 First-tier Tribunal Judge Grimmett refused the application, finding no circumstances to explain or excuse the delay, and also opining that the grounds disclosed no arguable error of law.

15. The respondent sought permission to appeal from the Upper Tribunal. The application duplicates the request for an extension of time. It then says that Judge Grimmett failed to engage fully with the grounds of appeal, and that the witness statements produced by the respondent outlined the investigation process which identified the appellant as an individual who had practised deception, being specifically referred to in an extract from an ETS spreadsheet.

16. A decision by an Upper Tribunal Judge dated 2 February 2016 states:

> This is an ETS case. The grounds are 22 days out of time … I accept the explanation given by the respondent and extend time. There is an arguable error of law.
>
> … A judge is entitled to prefer the evidence of an appellant over that of the respondent in ETS cases. However, in this case the judge having done this arguably fails to properly reason the decision and it is arguably unclear why he reached the conclusion he did.
>
> I admit the appeal and grant permission.

17. (The grant should have read, "I admit the application".)

18. It might be doubted whether in terms of the Tribunal Procedure (Upper Tribunal) Rules 2008 Rule 21(7) the respondent had advanced any reason why the application to the First-tier Tribunal was not made in time. I raised the matter with Mr Bryce, who had not dealt with the timeliness of the application for permission in his rule 24 reply to the grant. He advised me that he did not consider that this was a matter which the Upper Tribunal was in a position to revisit. No further submissions for either side were made on the point. Mr Bryce was right, but I think it is as well to place the matter on record.

19. The respondent had provided in the First-tier Tribunal (at a rather late stage, and after being pressed for disclosure by the appellant) a second spreadsheet which contained an identification number which could in part at least be related to the identification number on the ETS certificate on which the appellant appeared to have relied. Ms Aitken submitted that the general evidence provided by the respondent in ETS cases was in principle sufficient, and that second spreadsheet forged the last link in the chain to establish that the certificate was invalid, that is to say, obtained by fraud; that the judge had gone wrong by thinking that the evidence in front of him was only generic; and that the decision should be set aside and reversed.

20. Mr Bryce sought to show various deficiencies in the respondent's evidence. He pointed out that even the apparently more accurate second spreadsheet contained 10 digits which matched the reference on the appellant's certificate, but the last 5 digits of that reference were absent. He stressed that the respondent had been constantly on notice from the appellant throughout the proceedings to produce the evidence on which she relied. He argued that although the reasons given by the judge were brief, they were sufficient. If there was no evidence, it was enough simply to say so. The appellant had given oral evidence that he did take the test and although the judge did not explicitly say so, the only inference to be drawn was that he had found the appellant to be a reliable witness. There was nothing in the grounds to justify the decision being set aside, but even if it were to be remade, that should be in the appellant's favour.

21. In reply, Ms Aitken said that the evidence was not that the record produced (the second spreadsheet) did not match the certificate. There was a match in respect of the appellant's name, date of birth, date of test, and so on. It was not that the references did not correspond, but that the

reference on the spreadsheet was incomplete, because a computer "drop down box" had not been fully expanded. The full form of the evidence was available to the respondent, although not yet produced. She asked for it to be admitted in any remaking of the decision.

22. On that last point, I upheld the submission for the respondent that the application came far too late. The appellant, through his representatives, has been pressing throughout for production of the full evidence against him. The usual directions for prompt production of evidence apply. It was far too late for the respondent to try to improve her case. In any event, the case did not progress to a rehearing.

23. Mr Bryce drew my attention to the record of a "Border Force credibility interview" with the appellant on 24 January 2015 at the airport, Appendix B of the respondent's bundle in the First-tier Tribunal. He pointed out that the appellant's account then was consistent with what he has said since, and that the interviewing officer recorded him as having "answered in a fluent manner", having been "credible at interview" and as being fluent in English. Mr Bryce suggested that this record had not been noticed in the respondent's subsequent decision-making and if it had, matters might not have proceeded as they have. That point may go rather far, but the item was not mentioned by the judge, and it would have been a factor in the appellant's favour, had the case gone to a remaking.

24. I reserved my decision.

25. Mr Bryce was ready to try to persuade me that the usual evidence produced by the respondent is insufficient to prove the use of deception in obtaining ETS certificates in cases of this general nature. It is unnecessary to go into that issue in detail in the present case. In my opinion, although of course the respondent's evidence is not necessarily always decisive, it is capable of proving the use of deception and of attaching that to particular instances. The evidence may sometimes fail to attach to the individual case, and any evidence an appellant offers has also to be weighed. That is what the judge did here. Although his reasons are as terse as they could be, I think they are sufficient to the case, if only just. He did not find the match to be proved, and at best the evidence for the respondent was incomplete. He must have found the appellant a credible witness.

26. I am not persuaded by the respondent that the decision of the judge errs in law, so as to require it to be set aside.

27. The judge's decision, allowing the appellant's appeal, shall stand.

28. Mr Bryce embarked upon submissions with a view to the Upper Tribunal making a direction. The points raised were somewhat complicated and depended on the whole immigration history, on the appellant's business history, on certain transitional provisions, and on the outcome of this

appeal. Ms Aitken was not fully prepared to deal with the point, and reasonably sought time to deal with it.

29. It is possible, in light of my decision above, that the respondent will approach the case in such a way that directions will be unnecessary.

30. The case will be relisted for submissions, if necessary, only on the question of whether a direction should be made and, if so, in what terms. If a direction is to be sought, a draft of what is proposed, and an outline of its rationale, must be provided not less than two working days prior to the hearing. That hearing will take place on 21 April 2016 or on the next available date. The date may be fixed so as to accommodate the availability of Mr Bryce, if matters are not resolved in advance between the parties. If matters are so resolved, the Upper Tribunal should be advised immediately.

16 March 2016
Upper Tribunal Judge Macleman