Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/07405/2015**

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 26 January 2016	**On 3 February 2016**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R S HAFIZ

Respondent

Representation:

For the Appellant: Mr M Matthews, Senior Home Office Presenting Officer
For the Respondent: Mrs J Moore, of Drummond Miller, Solicitors

DETERMINATION AND REASONS

1. The parties are as described above, but the rest of this determination refers to them as they were in the First-tier Tribunal.

2. The appellant is a citizen of Pakistan, born on 17 December 2013. He has not asked for an anonymity order, and none has been made.

3. The appellant's leave to remain in the UK was based in part on his claim to have passed an English test in Birmingham in May 2013. Based on information from Education Testing Services (ETS) that the test certificate

had been falsely obtained and had been invalidated, the respondent cancelled the appellant's leave. He appealed to the First-tier Tribunal.

4. Designated Judge J G Macdonald allowed the appellant's appeal by decision promulgated on 7 August 2015. He found that the respondent had not discharged the burden of showing that deception had been used. He thought that statements provided by two civil servants were "generic in nature" and did not relate to the "individual appellant who denies that he engaged in deception" (paragraph 25). He found nothing in the evidence to link the appellant to the widespread abuse of ETS certificates (paragraphs 26 and 27).

5. The SSHD sought permission to appeal to the Upper Tribunal on grounds headed, "Failing to give adequate reasons for findings on a material matter". The grounds rehearse the evidence on which the respondent relied, and say that it included a "spreadsheet" which identified the appellant by name and recorded the test taken on 1 May 2013 as invalid.

6. On 4 December 2015 Designated First-tier Tribunal Judge McClure granted permission to appeal to the Upper Tribunal:

> … In light of the decision in *Gazi* IJR [2015] UKUT 327 it is arguable that the failure to act upon the evidence presented from the witnesses giving reasons why the English language test certificate was invalid is an arguable error of law.

7. Mr Matthews submitted thus. At paragraph 26 the judge failed to understand the evidence before him. The judge said that the document "ETS SELT source data" was not self-explanatory, but it is precisely that: a clear statement that the appellant's test certificate, identified by his name and the certificate number, has been found to be invalid. The judge says there must be a process and an explanation, but that is what the witness statements provided. The judge says that who completed the document is not stated, but the source is plainly ETS, even if an individual name is not given. There is no requirement for an individual to give evidence. The judge continues, "On what basis the evidence was obtained is also not made clear"; that does not seem to mean anything. The judge says that this is the only document linking the appellant to the alleged deception and that it cannot stand on its own without elaboration, but the witness statements supply that. The judge says that there is a lack of direct and clear evidence, when such evidence was obviously before him.

8. Mr Matthews accepted that it was open to the judge to conclude either way, and that he was not bound to find for the respondent, but he said that a decision which arose from failure of understanding could not stand. The case required to be remitted to the First-tier Tribunal for hearing of new.

9. Mrs Moore submitted along these lines. The judge was entitled to find that the Secretary of State failed to discharge the burden of proof, did understand the nature of the evidence before him, and gave sufficient reasoning for disregarding it. Although the judge granting permission relied heavily on *Gazi* (a decision not published at the time the Secretary

of State framed the grounds of appeal to the Upper Tribunal) that case is not authority that evidence of this nature automatically establishes deception. To the contrary, the President of the Upper Tribunal in *Gazi* took a highly adverse view of the evidence presented by the respondent. For example, at paragraph 14, he mentions "a discernible element of bombast" in the statements relied upon by the respondent, and at paragraph 15 he describes some of the averments as containing "an unmistakable self-serving element". The Upper Tribunal in *Gazi* thought as little of the evidence as the judge did in this case, and for similar reasons.

10. Mr Matthews in reply pointed out that *Gazi* is a case on judicial review, raising different considerations, and not the last word in ETS-related litigation. He said that "test cases" arising from such statutory appeals, rather than judicial reviews, are due to be heard soon, both in the Upper Tribunal and in the Court of Appeal. He repeated his submission that the judge gave inadequate reasons for finding for the appellant in this particular case.

11. I reserved my determination.

12. *Gazi* does not go as far in favour of the respondent as the judge granting permission appears to have thought; but nor does it go nearly as far in favour of the appellant as Mrs Moore contended. Although the case arose in a different context, the President was satisfied that the respondent's evidence (in all respects similar to the evidence in this case) "was sufficient to warrant the assessment that the [test] had been procured by deception" (paragraph 35). Although not infallible or beyond challenge, the Upper Tribunal was "satisfied that the evidence upon which the impugned decision was made has the hallmarks of care, thoroughness, underlying expertise and sufficient reliability."

13. The decision in the present case does come close to a finding that the evidence relied upon by the Secretary of State is simply insufficient, which would not be consistent with *Gazi,* and would not be justified on reference to the evidence. Mr Matthews' rebuttal had much to be said for it. If there had been nothing more in the determination, the respondent's grounds might have been sufficient to set it aside.

14. Reading the determination in full, I note that the judge had the benefit of oral evidence from the appellant, including his explanation that he sat the test and his denial that he cheated. At paragraph 27 the judge reminds himself that the appellant "has demonstrated a good command of English both before and since the test complained of" and goes on that the appellant therefore "does not readily fall into the category of someone who might be likely to cheat." He then says that given that the burden of proof is on the Secretary of State, it has not been discharged. This was obviously a "touch and go" case. It is of course true that someone who has no real need to cheat may nevertheless do so, for whatever reason (perhaps for certainty of outcome, or convenience). On the other hand, proven ability to pass such a test (as the appellant had done previously)

and a good command of English are indications in his favour. The judge had the advantage of hearing and observing the witness. There is no explicit favourable credibility finding but such must be implied. These appear to be the factors which the judge found, just, to tip the balance. The matter is again "touch and go" but in my view the final conclusion is one which was open to the judge, a legally adequate explanation for it has been given, and no error has been shown sufficiently material to require the determination to be set aside.

15. The determination of the First-tier Tribunal shall stand.

29 January 2016
Upper Tribunal Judge Macleman