



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/31826/2014**

Appeal Number:

THE IMMIGRATION ACTS

Heard at: Stoke-on-Trent

Decision & Reasons

On: 16th May 2016

Promulgated

On: 20th May 2016

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAGHIR AHMED

(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant:

Mr Mills, Senior Home Office Presenting Officer

For the Respondent:

Mr A. Khan, Whitestone Solicitors

DETERMINATION AND REASONS

1. The Respondent is a male national of Pakistan born on 19th January 1984. This is an ETS case: that is to say a case where the Secretary of State has alleged that Mr Ahmed had used a proxy to take his English language test, and that this deception was such that his leave to remain as a Tier 4 (General) Student Migrant must be curtailed and a decision made to remove him from the United Kingdom pursuant to s10 of the Immigration and Asylum Act 1999.
2. On the 12th December 2014 the First-tier Tribunal (Judge Gladstone)

allowed his appeal against those decisions. She heard oral evidence from the Respondent and had regard to the material before her. Having done so she found there to be insufficient evidence to establish that the Respondent had exercised deception.

3. The Secretary of State now has permission to appeal against the decision of Judge Gladstone. There are two grounds of appeal:
 - i) That she acted unfairly in refusing to allow the Secretary of State to rely on further evidence
 - ii) That she erred in placing insufficient weight on the evidence that had been submitted, namely the statements made by Peter Millington and Rebecca Collins. She had described these statements as generic; the Secretary of State disagrees.
4. Before me Mr Mills realistically conceded that in light of the decision of McCloskey J in SM & Qadir (ETS Evidence – burden of proof) [2016] UKUT 00299 (IAC) he could not sustain an argument on ground (ii) alone. However, if ground (i) was made out, the Secretary of State had a case. That was because this concerned the decision of the First-tier Tribunal to refuse the late application of the Secretary of State to submit the ‘spreadsheets’ relating to the Respondent. The HOPO on the day had come to court with these documents but the Judge had refused to admit them. The Secretary of State now submits that this evidence would have linked the Respondent to the alleged deception in a way that the Millington and Collins statements had not, and that in refusing to admit them the First-tier Tribunal deprived the Secretary of State of a fair hearing and therefore contrary to the interests of justice.

My Findings

5. Before me the parties agreed that the decision of the President in the case of Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) had some relevance to the issue raised by ground (i). Although the Secretary of State did not seek an adjournment, she made an application based on a plea of fair hearing. The headnote of Nwaigwe sets out the core guidance:

If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right

to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284.

6. Mr Mills submitted that the decision to refuse to admit the spreadsheets was unfair. The First-tier Tribunal had elevated expediency over all else, and had failed to consider the fact that the Respondent could have had a fair hearing even if those documents had been admitted into the evidence: this much is evidenced by the decision in Qadir.
7. I appreciate the Secretary of State's concern. She had the documents at the hearing, without them she was doomed to fail, and this went to a substantive matter of public policy, namely the stamping out of fraud in the immigration system. Those are all cogent arguments as to why the spreadsheets should have been admitted.
8. A brief examination of the chronology, however, reveals that there is rather more to it.
9. This matter first came before Judge Gladstone on the 27th October 2014. The then appellant (the Respondent before me) was represented by a Mr Muhammad, and the Secretary of State by an experienced Presenting Officer (HOPO), Mr Bilsland. Mr Bilsland explained that the Secretary of State had failed to comply with directions and that he had with him no evidence with which to support the allegation of deception made in the notice of decision. The case had been on a 'float list' and so had not been allocated to a HOPO in advance of the hearing. That was why the omission had not been identified earlier. With apologies, he asked that the matter be adjourned so that the Secretary of State could provide evidence. Mr Muhammad pointed out that the decision had been taken, and the appeal lodged, over two months earlier. He protested that the Secretary of State had had sufficient time to prepare her case and objected to the adjournment. Judge Gladstone weighed these competing arguments and decided to adjourn. In doing so she made the following directions:

"Respondent to file and serve the statement of Mr Peter Millington dated 23rd June 2014 and Ms Rebecca Collins dated 23rd June 2014 **together with any other evidence upon which she relies** on or before the 6th November 2014" (emphasis added)

10. The appeal came back before Judge Gladstone a month later, on

the 27th November 2014. Coincidentally Mr Bilsland was the HOPO, and the case had once again been placed on a float list. It was called on at 3pm. The Tribunal found that the Secretary of State had complied with her direction to serve the statements of Millington and Collins. They had been filed and served under cover of letter dated 28th October 2014. No other evidence had been provided. At the start of the hearing Mr Bilsland made an application. He asked that he be permitted to adduce the spreadsheets. They had been available previously but had not been admitted because of an "oversight". The Respondent was represented by Mr Khan who objected that the Secretary of State had already been given more time, and had twice failed to comply with directions. He further pointed out that he had been at court that day since the morning but no representative of the Secretary of State had pointed out to him that they would be making this application. They now sought to do so without notice and late in the day. He strenuously objected to the inclusion of the spreadsheets.

11. Judge Gladstone once again weighed these competing arguments. At paragraphs 32-36 she sets out her deliberations. She decided to proceed, having regard to the fact that the Secretary of State had already failed to comply with two sets of directions, the latter one made by her and specifically directed at the missing evidence. It would not be fair and just to Mr Ahmed to proceed and she was concerned to avoid any further delay. She proceeded to hear the appeal without giving permission for the spreadsheets to be admitted. As I note above she allowed the appeal, finding there to be no support for the allegation of deception. The statements produced were generic. Mr Ahmed had given evidence before her in English and had maintained his innocence. He had always complied with the conditions attached to his leave.
12. Having had regard to that chronology I am not satisfied that Judge Gladstone acted unfairly in refusing that further application. The question is whether the Secretary of State was deprived of her right to a fair hearing. The history of the appeal demonstrates that this cannot be so. The initial directions were sent out on the 14th September 2014. On the 8th October 2014 the Secretary of State filed and served a bundle which contained no material relating to the alleged deception bar the bare assertion made in the refusal letter and an interview with Mr Ahmed in which he asserted that he had taken his ETS test personally, attending at Collwell College in Leicester and describing the contents of the test. So it was that Mr Bilsland was armed with no evidence at all when he was sent into court on the 27th October 2014. Given that the bundle had been served in compliance with directions the First-tier Tribunal would have been perfectly entitled to refuse his application for an adjournment. It did not do so. In fairness to the Secretary of State the Judge decided to give her another opportunity to produce evidence. The directions made are clear. This was the Secretary of State's opportunity to remedy the defects in her case. If there is complaint to be made, it is

about the Secretary of State's failure to act, rather than the fairness of Judge Gladstone's decision. Her decision was one open to her on the evidence before her and it cannot be said to have deprived the Secretary of State of a fair hearing.

Decisions

13. The determination of the First-tier Tribunal contains no error of law and it is upheld.
14. I was not asked to make a direction for anonymity and on the facts I see no reasons to do so.

Upper Tribunal Judge Bruce
17th May

2016