



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

Appeal Number: IA/36019/2014

THE IMMIGRATION ACTS

**Heard at Stoke
On 13 April 2016**

**Determination
Promulgated
On 14 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHENGNING XING

Respondent

Representation:

For the Appellant: Mr A McVeety, Home Office Presenting Officer
For the Respondent: No Appearance

DETERMINATION AND REASONS

1. Although this is an appeal by the Secretary of State I will refer to the parties as they were in the First-tier Tribunal.
2. The appellant, a citizen of China, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 7 September 2014 to cancel his leave to remain in the UK as a student on the grounds that false representations were made in that the appellant had fraudulently obtained his ETS language certificate submitted as part of his application for leave to remain in the UK. The Secretary of State also considered that there had been a change of circumstances in the appellant's case as his ETS certificate was deemed to be invalid. The appellant's appeal was allowed

by First-tier Tribunal Judge Brookfield and the Secretary of State appeals with permission to this Tribunal.

3. In summary the First-tier Tribunal Judge allowed the appeal because she found that the evidence submitted by the Secretary of State in relation to the allegation that the appellant had fraudulently obtained an ETS English language certificate was not specific to the appellant in this case. The Judge found that the Secretary of State had not discharged the burden of proof to establish that this appellant had perpetrated a deception. The Judge concluded that the decision of the Secretary of State was not in accordance with the law and allowed the appeal.
4. There was no appearance by or on behalf of the appellant at the hearing before me. However in advance of the hearing the appellant's representatives advised that the appellant was unable to attend the hearing as he had gone back to China. I considered the provisions of the Tribunals Procedure (Upper Tribunal) Rules 2008 and I note that the appellant's representative has complied with the requirement of rule 17A (1)(a) of the Rules. I further note that the Secretary of State is the appellant in the appeal before me and, bearing in mind the overriding objective, I decided to determine the appeal on the basis of the evidence before me. Mr McVeety relied on the grounds of appeal whilst acknowledging the decision in the recent case of **SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof)** (which has not yet been reported).
5. In the grounds of appeal the Secretary of State contends that the Judge made a material error in that she made a mistake as to a material fact in accepting the appellant's evidence that he sat the IELTS test in 2011 rather than the evidence from the Secretary of State that he sat the test in 2013. However, it is clear from reading paragraph 9(v) of the decision that the Judge decided not to rely on the fax evidence produced in relation to the appellant's test results because the document provides no reasons for the conclusion that the appellant's test was invalid and not because of the discrepancy as to the date the test was taken. Further, this was only one of the reasons for allowing the appeal and the Judge only considered this issue having decided at paragraph 9 (iv) that the Secretary of State had not discharged the burden of proof on her to establish that the appellant had perpetrated a deception. Accordingly the Judge made no material error in relation to the date on which the appellant sat the test.
6. The Secretary of State further contends that the First-tier Tribunal Judge erred in failing to provide adequate reasons for finding that the Secretary of State has not discharged the burden of proof upon her to establish that the appellant used deception. The grounds detail how it is said that the evidence establishes deception. However the Judge clearly evaluated the evidence at paragraph 9(i), (ii) and (iii) and concluded for the reasons given there that the general evidence submitted did not establish that this appellant had perpetrated deception. The Judge considered all of the evidence and reached a conclusion open to her on the basis of this

evidence. There is no material error in the Judge's consideration of this evidence.

7. It is contended in the third ground that the Judge erred in commenting on what the Secretary of State failed to provide rather than engaging with the evidence actually provided and that this revealed that the Judge applied an elevated standard of proof. However, it is clear from the determination that the Judge did engage with the evidence submitted. The Judge highlighted the fact that there was insufficient evidence specific to this appellant to establish that he had perpetrated deception. This was a legitimate concern and demonstrates why the Judge found that the evidence produced was not sufficient to discharge the burden on the Secretary of State.
8. The grounds of appeal put forward by the Secretary of State have not been made out. I conclude that there is no material error of law in the decision of the First-tier Tribunal.

Conclusion

9. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.
10. The decision of the First-tier Tribunal shall stand.
11. I make no anonymity direction.

Signed

Date: 13 April 2016

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT FEE AWARD

I maintain the fee award made by the First-tier Tribunal.

Signed

Date: 13 April 2016

Deputy Upper Tribunal Judge Grimes