Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/37198/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 June 2016	**On 6 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS JIELING LU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms E Ikiriko, Solicitor instructed by Melrose Solicitors
For the Respondent: Mr C Avery, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State for the Home Department. For the sake of clarity I shall refers to the parties as they were before the First tier. A decision was made against the Appellant on 16 September 2014 to refuse her leave to enter the United Kingdom. The Appellant is a national of China whose last period of leave to remain, as a Tier 1 Highly Skilled (Entrepreneur), was granted to her in September 2012, valid until 6 September 2015. Following a trip out of the United Kingdom and upon her arrival back in the UK on 16 September 2014 the Appellant was challenged by an Immigration Officer in relation to the

reliability of certain English language test results that she had relied upon in support of her earlier application for leave to remain.

2. In an interview with the Appellant at the airport on 16 September 2014, interviewing officer Kuljit Birdi asked the Appellant questions about how she had acquired her English language certificates. This was no doubt because the Respondent's systems had alerted the port that the Appellant was one of very many whose English language test certificates were disputed as a result of the now well-known inquiry into proxy testing in an attempt to obtain a false English language certificate. The Appellant denied that she had ever used a proxy in any English language tests and insisted that her results were genuine. Following Mr Birdi's interview with the Appellant, he recorded in certain standard questions contained on the interview form that the Appellant was able to answer questions in basic English, that she had answered in a fluent manner suggestive of the fact that she had not been coached in providing specific answers by person, and there were no points in the interview where the Appellant appeared to lack credibility. Nonetheless he refused leave to enter. The specific reason given in the notice is as follows:

> "You were given notice of leave to remain in the United Kingdom as a Tier 1 highly skilled entrepreneur on 15/09/2012 valid until 06/09/2015 but I am satisfied that false representations were employed or material facts were not disclosed for the purpose of obtaining the leave, or there has been such a change of circumstances in your case since the leave was granted that it should be cancelled. This is because information from ETS indicates that a false English language certificate was obtained which you have used as part of your application for a Tier 1 highly skilled entrepreneur visa on 15/09/2012. I consider this to be employment of false representations for the purpose of obtaining leave to remain and I therefore cancel your continuing leave. If your leave was conferred by an entry clearance, this will also have the effect of cancelling your entry clearance."

3. The Appellant appealed against that decision, the appeal coming before the judge on 23 October 2015.

4. The Appellant's evidence about the circumstances in which she sat her English language tests is set out at paragraph 14 of the judge's decision.

5. In support of the Respondent's case the Respondent relied upon now familiar standard witness statements from Rebecca Collings and Peter Millington dated 23 June 2014. There was in addition a witness statement from Hilary Rackstraw, Presenting Officer, to which was attached details of the tests taken by the Appellant at Premier Language Training Centre on 18 April 2012 and 15 May 2012. The judge heard evidence from the Appellant.

6. In a detailed decision the judge found that he was not satisfied that the Appellant had engaged in the services of a proxy test taker to take either or both of the tests of 18 April or 15 May 2012 on her behalf or otherwise

cheated. He was not satisfied that she gave false information in order to procure the certificates relating to her speaking and writing ability in either April or May 2012. The requirements of paragraph 321A(2) were therefore not fulfilled. The judge was not satisfied that the decision to cancel her entry clearance and to refuse her leave to enter was either correct or in accordance with the law or the Immigration Rules and he allowed her appeal (paragraph 20).

7. The Respondent sought permission to appeal against that decision in grounds dated 23 December 2015. Reference is made to the witness statements of Peter Millington and Rebecca Collings. It was pointed out that the spreadsheet of results provided by ETS declared that the Appellant's test results had been categorised as invalid and the grounds asserted that it was clear that in order for the Appellant's results to be categorised as invalid the case had to go through a computer programme analysing speech and then two independent voice analysts. If all three were in agreement that a proxy test had been used then the test would be categorised as invalid. In the light of that evidence it was said to be 'clear' that the First-tier Tribunal had erred in its finding on the appeal. It was said that it was clear from the evidence that where ETS invalidates the test result this is because there is evidence of proxy test taking or impersonation. It was said that the FtT had failed entirely to provide adequate reasons for its findings to the contrary.

8. A second ground at paragraphs 10 to 12 asserted that the judge had made a material misdirection in law in applying an impermissibly high standard of proof in determining the deception issue. When considering the evidence the FtT applied a standard far more onerous than a balance of probabilities at paragraphs 19(b), (d) and (g).

9. Permission to appeal was granted by First-tier Tribunal Judge Parkes on 20 May 2016, observing that the issues raised a vexed issue but the judge gave considerable attention to the history of this issue and the case law in addition to the evidence that was and was not presented. Judge Parkes noted that the Appellant attended the hearing and gave evidence. The Record of Proceedings shows that a Mandarin interpreter was used by the Appellant. Judge Parkes held that it was arguable that the judge had allied the present case with the Upper Tribunal decision in **Gazi** when there were differences, such as the Appellant's not giving evidence in English to demonstrate her ability, which may make such a course of action inappropriate. Permission to appeal was granted.

10. It is appropriate before I consider the parties' submissions to go into the reasoning of the judge in some more detail. At paragraph 2 the judge summarised the interview between the Appellant and Mr Birdi on 16 September 2014. He directed himself in law that it was for the Immigration Officer to establish on a balance of probabilities the factual basis for the contention that the grounds in subparagraph 321A(2) had been made out i.e. that false representations were made or false documents or information submitted in support of the Appellant's application or material facts not disclosed.

11. The judge referred to the history of this matter commencing with a BBC documentary on Panorama about the concerns about proxy test taking in ETS colleges. The judge refers at paragraph 9 onwards to the witness evidence of Ms Collings and Mr Millington. The judge refers to the recent case of **R (Gazi) v Secretary of State for the Home Department [2015] UKUT 00327**. The judge quoted the extract from **Gazi** wherein the President had stated, "it is far from clear whether this exercise (of invalidating results) entailed an examination of each case individually. The averment is opaque". At paragraph 10 the judge observed that the statements of Ms Collings and of Mr Millington were entirely generic. He observed at paragraph 11 that the Respondent had provided a printout from a spreadsheet which declared that the test results taken by the Appellant were considered invalid. The Appellant's evidence was that she had taken a speaking and writing test on 18 April 2012 and scored 190 for speaking and 140 in writing. She had wished to obtain a better result and on 15 May had re-taken the test scoring 200 in speaking and 190 in writing. Both of these results were said in the ETS spreadsheet to be invalid although of course there is no positive assertion within any of the Respondent's evidence to establish why, specifically, the Appellant's results are said to be invalid.

12. As noted above the Appellant gave evidence before the judge and her evidence is summarised at paragraph 14 of the decision. She described the circumstances in which the tests had been booked, and described the location and the process of the tests. She denied that she had used a proxy test taker. At paragraph 17 onwards the judge refers to further extracts from the judgment in **Gazi**. At paragraph 19 the judge held as follows:

> "Although I have no reason to doubt, and accept, that there has been widespread cheating and dishonesty involving the employment of proxy candidates and other abuse as identified in Miss Collings' statement, I am not satisfied that the evidence adduced in this appeal is sufficient to justify the conclusion that the Appellant either engaged a proxy test-taker in either of the speaking and writing tests which she took in April and May 2012 or that a false English language certificate was obtained and submitted in support of her application for leave to remain as a Tier 1 Skilled Entrepreneur. I reach those conclusions for the following reasons".

Those reasons are many and include the suggestion that the Respondent's evidence did not deal specifically with the reasons for questioning the validity of the Appellant's own test results, did not explain precisely how the conclusion that she had engaged a proxy test-taker had been arrived at, what the factual basis for that conclusion was or what anomalies had been detected and which had led to that conclusion.

13. At paragraph 19(d) it was stated that no evidence was adduced to support the proposition that the speech and/or speech patterns of the individual who took the tests on 18 April and 15 May 2012 were similar to the speech

patterns of any other individual or individuals who had or were believed to have taken the test on behalf of any other person or persons seeking leave to remain, still less to those of any individual who had been positively identified as and/or who had been convicted of and/or who had confessed to having taken the tests on behalf of any such person or persons.

14. At 19(f) the judge stated that:

> "What was stated by McCloskey J in **R (Gazi)** above in paragraphs 13-15 of his judgement is apposite. I respectfully agree with, and adopt what McCloskey J wrote in the parts of his judgement which I have set out above. No evidence was adduced to deal with his criticisms or with those made by Dr Harrison set out in McCloskey J's judgement."

15. At paragraph 19(h)(3) the judge stated that:

> "In the absence of other evidence indicating that the Appellant had engaged the services of a proxy test-taker or had otherwise cheated, the reasoning is in effect, that:
>
> > 'because we believe that large numbers of others who undertook the test the centre (Barking) at or about the time that you took your tests engaged the services of a proxy test-taker or cheated in some other way, you too did so.
>
> I do not consider that that is a legitimate, satisfactory or fair basis for reaching a decision in any particular case – at least without there being other evidence of anomalies in the recordings of the speech and/or speech patterns submitted as being those of the individual concerned (in this case of the Appellant) suggestive of fraud. I am in no doubt but that the above is not an appropriate or legitimate form of reasoning. It is not one which I consider it appropriate to apply."

Further, at paragraph 19(j) the judge says as follows:

> "In reaching my above conclusions, I have taken into account Mr Birdi's conclusion, both as to the Appellant's ability to answer the questions put to her and as to her general credibility (see above paragraph 3). I have no reason to doubt and accept what he wrote. I draw no adverse inference from the fact that while giving her evidence, the Appellant at times made use of the interpreter. I have very much in mind that it is now over three years since the tests were undertaken and because the Appellant's first language is, I am satisfied, not English, it is not surprising and I draw no adverse inference from, the fact that she wished at the hearing to have the assistance of an interpreter to avoid any risks arising from misunderstanding of the questions which were, or were likely to be, put to her in the course of the hearing and of her answers."

He then came to the conclusion at paragraph 20 which I have already set out above.

16. Mr Avery submitted that the judge had failed to give adequate reasons for his findings and had become bogged down in unnecessary detail. The judge appeared to misapprehend the purpose of Ms Collings' and Mr Millington's evidence which was not to provide specific evidence as to the manner in which the Appellant had cheated, but rather to describe the process by which the speech samples had been analysed. The judge appeared to expect greater detail of how it had been proven that the Appellant specifically had falsified her tests but this was a misplaced expectation. The description of the process in the Respondent's witness evidence together with the spreadsheet confirming that ETS had declared the Appellant's results as invalid was sufficient to discharge to a balance of probabilities that the Appellant had relied on a false document. Similarly the paragraphs identified in ground 2 represented a misapplication of the burden and standard of proof. The judge appears to have required an unreasonable degree of evidence from the Respondent in order to prove dishonesty on the Appellant's part.

Discussion

17. Following Mr Avery's submissions I indicated my preliminary view, which I now confirm, which is that the judge's decision was detailed, that he had had regard to the shortcomings in the evidence of Ms Collings and Mr Millington that had been identified by the President in the case of **Gazi,** and had agreed with the President's analysis in that regard. In the light of what the judge held to be a satisfactory explanation as to how the Appellant had gone about taking her tests, and making a very careful note that the Appellant had only *at times* made use of an interpreter during the appeal proceedings before him, he was satisfied that the Respondent had not made out its case to a balance of probabilities that the Appellant had cheated. It seems to me that the grounds of appeal are essentially a perversity challenge; ie ultimately that no judge could have allowed an appeal in those circumstances, merely on the basis of the evidence of Ms Collings and Mr Millington and the ETS spreadsheet result.

18. I find that the judge provided adequate reasons to support his finding that the Respondent had not met the burden upon her to demonstrate that the Appellant had engaged in deception.

19. If it had been necessary for me to re-make the decision I would have had regard to the more recent reported case of **SM & Qadir (ETS evidence – burden of proof) [2016] UKUT**. The head note of that case reads as follows:

> "(1) The Secretary of State's generic evidence combined with her evidence particular to these two Appellants sufficed to discharge the evidential burden of proving that their TOEIC certificates had been procured by dishonesty.

(2) However, given the multiple frailties from which this generic evidence was considered to suffer and in the light of the evidence adduced by the Appellants, the Secretary of State failed to discharge the legal burden of proving dishonesty on their part."

20. The President had in that case heard oral evidence from Ms Collings and Mr Millington. At paragraph 63 of the decision the President identified the shortcomings in their testimony as follows:

"1. Neither witness has any qualifications or expertise, vocational or otherwise, in the scientific subject matter of these appeals, namely voice recognition technology and techniques.

2. In making its decisions in individual cases, the Home Office was entirely dependent on the information provided by ETS. At a later stage viz from around June 2014 this dependency extended to what was reported by its delegation which went to the United States.

3. ETS was the sole arbiter of the information disclosed and assertions made to the delegation. For its part, the delegation – unsurprisingly, given its lack of expertise – and indeed, the entirety of the Secretary of State's officials and decision makers accepted uncritically everything reported by ETS.

4. The Home Office has at no time had advice or input from a suitable expert.

5. There was no evidence from any ETS witness – this notwithstanding the elaborate critique of Dr Harrison compiled over one year ago.

6. The test results of the 33,000 suspect TOEIC scores, coupled with the information disclosed and assertions made to the Secretary of State's delegation during a one day meeting, constitute the totality of the material provided by ETS.

7. Almost remarkably, ETS provided no evidence, directly or indirectly, to this Tribunal. Its refusal to provide the voice recordings of these two Appellants in particular is mildly astonishing.

8. While the judgment of this Tribunal in Gazi, promulgated in May 2015, raised significant questions about the witness statements of Ms Collings and Mr Millington, these were not addressed, much less answered, in their evidence at the hearing. See in particular Gazi at [9]-[15].

9. Once certain documentary evidence, highlighted in [15] above, might have fortified the Secretary of State's case, none was produced.

10. Similarly, although requested, none of the voice recording files pertaining to the Appellants was provided for analysis and consideration by Dr Harrison."

21. I also note that at one point of his evidence before the President Mr Millington had been obliged to accept and did not challenge or dissent from any aspect of Dr Harrison's detailed critique. He agreed that the automatic testing system employed by ETS could generate false positive results in up to 22.5% of cases. He further agreed that this could be as high as 30% in human verification analysis process.

22. Dr Harrison, an expert relied upon by the Appellants in those proceedings, gave evidence recorded at paragraph 30 of the President's decision that in respect of language analysis systems he suggested that if a system of this kind is performing well the generally recognised range of error will be two to ten per cent. For the best systems the error rate is typically between one and three per cent. In non ideal conditions error rates could be as high as 30%. Dr Harrison's evidence recorded at the end of paragraph 33 of the decision in **SM** states as follows:

> "In this context Dr Harrison also referred to the international workshop evidence noted in [11] above which contains, *inter alia*, the results of the analysis of human voice files by seven different systems. Of these, the best performing system had some 24% false negative results and 28% false positive results. The average false negative rate was 36%. Dr Harrison testified that this data amply supported the opinion expressed in his report."

23. I make no further reference to the findings in **SW & Qadir** but conclude the presentr decision by recognising that the Appellant gave oral evidence before the judge which was only at times with the use of an interpreter, gave an explanation as to her circumstances and how she took the tests. The judge recognised the limitations of the evidence relied upon by the Respondent, those limitations being recognised in the earlier case of **Gazi**. Again, if it were necessary for me to re-decide this case I would take into account the case of **SM & Qadir** in which those limitations are further investigated and are recognised as being even more significant than had been suggested in the **Gazi** case.

24. I am satisfied that there is no material error of law in the judge's decision in this case.

Notice of Decision

The Respondent's appeal is dismissed.
The First-tier decision is upheld.

No anonymity direction is made.

Signed Date 6.7.16

Deputy Upper Tribunal Judge O'Ryan