



IAC-AH-DN-V1

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

Appeal Number: IA/38960/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 25th February 2016**

**Decision &
Promulgated
On 24th March 2016**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MEER WAIS ISLAM
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr S Shah of 786 Law Associates

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against the decision of Judge Malone of the First-tier Tribunal (the FTT) promulgated on 12th August 2015.

2. The Respondent before the Upper Tribunal was the Claimant before the FTT and I will refer to him as the Claimant.
3. The Claimant is a citizen of Afghanistan born 1st January 1967.
4. The Claimant applied for and was granted a Tier 1 (Entrepreneur) visa valid until 5th March 2016. He first entered the United Kingdom pursuant to that visa on 19th January 2013.
5. On 25th September 2014 the Claimant was re-entering the United Kingdom at London Heathrow when he was interviewed. He was given twenty days temporary admission, and interviewed again on 2nd October 2014.
6. On 2nd October 2014 the Secretary of State refused the Claimant leave to enter the United Kingdom. This was because it was contended that he had with his application for the Tier 1 (Entrepreneur) visa, submitted a TOEIC certificate from Educational Testing Service (ETS) and the Secretary of State believed that the certificate was fraudulently obtained. The Secretary of State relied upon paragraph 321A(2) being satisfied that the Claimant had used false documents in order to obtain leave to enter, and paragraph 321A(1) on the basis of employment of deception amounting to a significant change in circumstances. For those reasons the Claimant was refused leave to enter the United Kingdom, and his existing leave was cancelled.
7. The Claimant's appeal was heard by the FTT on 29th June 2015. After hearing evidence from the Claimant and his brother, the FTT found that the Secretary of State had failed to justify the cancellation of the leave to enter, and described the evidence relied upon by the Secretary of State, both specific and generic, as being "woefully inadequate." The appeal was allowed. The Secretary of State applied for permission to appeal to the Upper Tribunal relying upon two grounds which may be summarised as follows.
8. Firstly it was contended that the FTT failed to have regard to relevant and material evidence. The Secretary of State had relied upon specific evidence, that being an invalidation notice issued by ETS, confirming that the English language tests taken by the Claimant were invalid. There was no reference to this evidence in the FTT decision. It was contended that the FTT had regarded the interview with the Claimant as the only specific evidence.
9. Secondly it was contended that the FTT had erred in relation to paragraph 321A(1) on the basis that even if deception was not found, the Claimant's English language test had been invalidated, and therefore he did not have an English language qualification. This amounted to a change of circumstances and the FTT should have so found.
10. Permission to appeal was granted by Judge Nicholson of the FTT in the following terms;

2. The Appellant's leave was cancelled on the grounds that he had submitted a false ETS English language certificate.
3. Ground 1 contends that the judge erred in failing to properly consider the Respondent's evidence – in particular the ETS printout confirmation that the tests taken were invalid.
4. The judge stated at paragraph 23 that the Respondent had concluded that the certificate was false, based on both generic and specific evidence. The judge did not identify the actual specific evidence but at paragraph 24 the judge referred to the Respondent's generic evidence from Rebecca Collings and Peter Millington. At paragraph 25 the judge pointed out that this evidence had been considered in R (on the application of Gazi) v SSHD (ETS – judicial review) IJR [2015] UKUT 00327 by Mr Justice McCloskey. The judge then added that Mr Justice McCloskey “found it thoroughly inadequate to justify a finding of deceit against the individual in possession of what he claimed was a valid TOEIC certificate.”
5. In fact at paragraph 35 of R (on the application of Gazi) Mr Justice McCloskey found that the evidence had the hallmarks of care, thoroughness, underlying expertise and sufficient reliability such as to warrant an assessment that an applicant's TOEIC had been procured by deception.
6. Whilst Mr Justice McCloskey did not suggest that the generic evidence was determinative and, at paragraph 14, he stated that all cases involving ETS certificates would be “unavoidably fact sensitive”, it is arguable that the judge erred in relation to the Respondent's evidence by rejecting it for the reasons given at paragraph 25 and by paying no heed to the specific document from ETS.
7. Permission is therefore granted on this ground. I do not refuse permission on the other grounds.

11. Directions were subsequently issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FTT had erred in law such that the decision must be set aside.

The Upper Tribunal Hearing

Preliminary Issues

12. Mr Shah confirmed that no response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 had been submitted, but the Claimant's position was that the FTT had not erred, and reliance would be placed upon a skeleton argument contained at pages 2-9 of the Claimant's bundle comprising 28 pages which the Tribunal had received on 18th February 2016.
13. I observed that reliance was placed upon two unreported Upper Tribunal decisions and that Practice Direction 11 which deals with citation of unreported determinations did not appear to have been complied with. I asked Mr Shah whether he needed some time to consider Practice Direction 11, but he advised that he did not, and that he did not seek to rely upon unreported Tribunal decisions.

The Secretary of State's Submissions

14. Mr Duffy relied upon the grounds contained within the application for permission to appeal. I was asked to find that the FTT had not referred to the specific evidence relied upon by the Secretary of State, and the relevance of that evidence was explained in the generic witness statements made by M Harold, R Collings and P Millington.
15. In addition the FTT had erred by misinterpreting the decision in Gazi.
16. Moreover, leaving aside the issue of deception, it was clear that ETS had cancelled the Claimant's English language certificate, and therefore he no longer held the required qualification, which amounted to a change of circumstances. The FTT had erred by not recognising this.

The Claimant's Submissions

17. Mr Shah relied upon his skeleton argument, with the exception of reference to unreported Tribunal decisions. Mr Shah pointed out that the generic evidence, in the form of the witness statements made by R Collings and P Millington did not relate to the Appellant at all.
18. In relation to specific evidence, Mr Shah referred to the copy TOEIC certificates, the speaking and writing certificate which was issued on 15 May 2012, and the listening and reading certificate issued on 10th April 2012, pointing out that it was endorsed on the certificates that "TOEIC scores more than two years old cannot be reported or validated." Mr Shah therefore argued that as ETS had confirmed that the scores could not be validated after two years, and more than two years had elapsed between the Claimant taking the tests, and being interviewed by the Secretary of State in September and October 2014, it followed that it was not possible for the test scores to be invalidated.
19. In relation to the printout issued by ETS, which it was contended the FTT had ignored, Mr Shah submitted that this evidence was unreliable, as the printout was not signed or stamped, and the Claimant did not accept that his English language tests had been invalidated.

The Secretary of State's Response

20. Mr Duffy submitted that the fact that a TOEIC result could not be validated after two years did not mean that it could not be invalidated. The generic statements explained how the investigations had been undertaken, and the printout issued by ETS confirmed that the Appellant was one of those individuals whose English language tests had been invalidated because of deception. The FTT had erred by not considering the printout evidence.

21. At the conclusion of oral submissions I reserved my decision.

My Findings and Conclusions

22. I find that the FTT materially erred in law by failing to consider specific evidence relied upon by the Secretary of State, that being the printout issued by ETS confirming that the English language test undertaken by the Claimant had been declared invalid.

23. The evidence relied upon by the Secretary of State was in my view the generic evidence in the form of the witness statements by M Harold, R Collings and P Millington, together with the printout which needed to be considered together with that generic evidence, and the Claimant's interview record.

24. The error made by the FTT was to fail to make any reference or findings upon the printout. If no weight is to be attached to any evidence, there must still be an analysis of the evidence and reasons given for attaching no weight to it, or finding that it is not probative. There was no such analysis in this case, there was simply no reference to the printout whatsoever.

25. In addition I find that the FTT dismissed the generic evidence by misinterpreting the conclusions reached in Gazi. It is apparent from paragraph 25 of the FTT decision, that it was thought that McCloskey J had found the evidence of R Collings and P Millington thoroughly inadequate to justify a finding of deceit against an individual in possession of what he claimed was a valid TOEIC certificate. As pointed out by the judge granting permission to appeal, if Gazi had been considered in its entirety, there was reference by McCloskey J in paragraph 35 to the following;

"It suffices for this Tribunal to be satisfied that the evidence upon which the impugned decision was made has the hallmarks of care, thoroughness, underlying expertise and sufficient reliability."

26. The failure to have regard to the evidence, and the misinterpretation of Gazi, amount to material errors of law. I find that those errors have infected the findings made by the FTT, and conclude that the decision of the FTT is unsafe and cannot stand.

27. The decision of the FTT is therefore set aside. Accordingly it is not necessary to go on to consider the second ground advanced by the Secretary of State as to error of law.

28. When I announced at the hearing that I was reserving my decision, Mr Shah submitted that if a material error of law was found, it would be appropriate to remit the appeal back to the FTT. Mr Richards had no submissions to make on that issue.

29. I have considered paragraph 7 of the Senior President's Practice Statements and find that it is appropriate to remit the appeal back to the FTT because of the nature and extent of judicial fact-finding that will be necessary in order for this decision to be remade.
30. The appeal will be heard at the Taylor House Hearing Centre and the parties will be advised of the time and date in due course. The appeal is to be heard by an FTT Judge other than Judge Malone.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the First-tier Tribunal with no findings of fact preserved.

Anonymity

The FTT made no anonymity direction. There has been no request for anonymity made to the Upper Tribunal and I see no need to make an anonymity order.

Signed

Date 29th February 2016

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The issue of any fee award will need to be considered by the First-tier Tribunal when the appeal is heard again.

Signed

Date 29th February 2016

Deputy Upper Tribunal Judge M A Hall