



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/40686/2014

THE IMMIGRATION ACTS

Heard at Field House  
On 11 February 2016

Decision & Reasons Promulgated  
On 4 March 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE APPEYARD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Appellant

MR SHAID NAZIR  
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer  
For the Respondent: Mr G Lee, Counsel

DECISION AND REASONS

1. The appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were known before the First-tier Tribunal, with the Secretary of State referred to as “the respondent” and Mr Nazir as “the appellant”.

2. The appellant is a citizen of Pakistan. He appealed against a decision to refuse leave to enter and a cancellation of continuing leave under the Immigration Act 1971 and the Nationality, Immigration and Asylum Act 2002. The notice of decision was undated but according to the explanatory notice it was issued on 26 October 2014.

3. The nub of the respondent's decision can be summarised as follows:-

"Refusal/Cancellation

On 08.10.2013 you were given leave to remain as a Spouse/Partner which conferred leave by means of a Biometric Residence Permit valid until 08.04.2106, but I am satisfied that either false representations were employed or material facts were not disclosed for the purpose of obtaining the permit, or a change of circumstances since it was issued has removed the basis of your claim to admission. The UK Biometric Residence Permit is not, therefore, effective. This is because:-

On 15.10.2012 you submitted a TOEIC from Educational Testing Service ("ETS") to the Home Office in order to obtain further leave to remain as a student to study CIMA at Lea Valley College. You then submitted the same TOEIC certificate on 23.09.2013 to the Home Office in order to obtain further leave to remain in the United Kingdom as a Spouse/Partner.

ETS has a record of your speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of your test and confirmed to the Home Office that there was significant evidence to conclude that your certificate was fraudulently obtained. Your scores from the test taken on 26.09.2012 at New College of Finance have been cancelled by ETS.

I am satisfied that you falsely represented yourself in obtaining your current leave (by producing to the Home Office a fraudulently obtained TOEIC test certificate). In these circumstances I hereby cancel your continuing leave.

You have not sought entry under any other provision of the immigration rules."

4. The appellant appealed that decision. Following a hearing at Taylor House Judge of the First-tier Tribunal R G Walters, in a decision promulgated on 24 August 2015, concluded that the decision of the respondent was not in accordance with the law and the applicable Immigration Rules and accordingly allowed the appeal under the Immigration Rules.

5. The respondent sought permission to appeal and in a decision dated 18 December 2015 Judge of the First-tier Tribunal J M Holmes gave his reasons for granting permission. They are:-

"1. In a Decision promulgated on 24 August 2015 Judge Walters allowed under the Immigration Rules the Appellant's appeal against the decision to refuse leave to enter and to cancel his leave.

2. The application is in time.
3. It is arguable that the Judge fell into error in his approach to the decision by ETS to withdraw the language test certificate that ETS had issued to the Appellant, and upon which he had relied when seeking leave to remain. Arguably the Judge treated the Respondent as having the burden of proof in establishing deception on the part of the Appellant in undertaking the language test that led to the issue of that certificate. Even if he was correct to do so, he was arguably wrong to dismiss the Respondent's evidence in the way that he did [9] & [18]. Whilst the Judge purported to apply the guidance to be found in Gazi he arguably failed to identify that the same evidence that was then described by McCloskey J as being "sufficient to warrant the assessment that the Appellant's TOEIC had been procured by deception and thus provided an adequate foundation for the decision made under s10" [35] was before him. Thus arguably any decision by the Judge that the Respondent's evidence was not sufficient to discharge any burden of proof that lay upon the Respondent was either flawed, or, disclosed a departure on his part from the applicable civil standard of proof of the balance of probabilities; Re B."
6. Thus the appeal came before me.
7. Mr Duffy argued that the judge had materially erred in two particular ways. Firstly by failing to give adequate reasons for a finding on a material matter and secondly by making a material misdirection of law.
8. So far as the first ground is concerned he said that the judge failed entirely to provide adequate reasons for his finding that the respondent had not proved the appellant's TOEIC certificate was fraudulently obtained. The Immigration Officer had provided at the appeal a bundle of documents in support of this allegation (in respect of paragraph 321A of the Immigration Rules) including witness statements from a Mr Peter Millington and Ms Rebecca Collings and an e-mail document from ETS Task Force dated 10 September 2014. The witness statements from Mr Peter Millington and Ms Rebecca Collings clearly provide that tests are categorised as "invalid" where ETS are certain that there is evidence of proxy test taking or impersonation. He relied on the grounds which go on to state:-

"ETS described that any tests categorised as cancelled (which later became known as invalid) had the same voice for multiple test takes. On questioning they advised that they were certain there was evidence of proxy test-taking or impersonation in those cases" [paragraph 28, witness statement of Ms Rebecca Collings],

"... Following comprehensive investigations ETS provided the Home Office with lists of candidates whose test results show 'substantial evidence of invalidity'. The Home Office was provided with the background to the process used by ETS to reach that conclusion." [paragraph 6, witness statement of Mr Peter Millington], and

“... Where a match has been identified their approach is to invalidate the test results. As set out in the witness statement of Ms Rebecca Collings, ETS has informed the Home Office that there was evidence of invalidity in those areas” [paragraph 46, witness statement of Mr Peter Millington];”

9. Beyond that he said that taking into account this evidence it is clear that in order to be categorised as “invalid” on the spreadsheet provided to the Home Office the case has to have gone through a computer programme analysing speech and then two independent voice analysts. If all three are in agreement that a proxy has been used then the test would be categorised as “invalid”. A printout of the relevant section of the ETS spreadsheet was attached at Appendix E of the explanatory statement. The spreadsheet identifies this appellant by name and records that the test that was taken on 25 September 2012 was invalid. It identifies him as having exercised deception and therefore it is clear that the judge has erred in his findings. Had he properly taken into account the evidence he would have found that the documents point to the invalidity. The judge failed to provide adequate reasons for his findings to the contrary.
10. He also misdirected himself in law in applying an impermissibly high standard of proof in determining the deception issue.
11. Mr Duffy did not accept the judge’s finding that the respondent had failed to discharge the burden on her. He asserted the burden of proof was on the respondent to show fraud to the required standard and this is what she did.
12. Mr Lee argued that the judge was “perfectly entitled” to come to the conclusions that he did. He had analysed the evidence and detailed its weaknesses. He had considered it all and it was a matter for him as to what weight he attached to the different strands of evidence that fell to be considered. He suggested that the authority of **R (on the application of Gazi) v SSHD (ETS judicial review) IJR [2015] UKUT 00327 (IAC)** was not particularly helpful to the instant appeal. It dealt with an out-of-country appeal with particular reference to the issue of “improper purpose” at paragraph 22. The test before the Immigration Judge in this instant appeal was different to that to which the President of the Upper Tribunal was looking when dealing with the judicial review decision in **Gazi**.
13. This is an appeal where the appellant submitted a TOEIC from the Educational Testing Service to the Home Office to obtain further leave to remain as a student on two occasions. Firstly on 15 October 2012 to obtain further leave to remain and secondly on 23 September 2013 to obtain further leave to remain but this time as a spouse/partner. ETS had a record of the appellant’s speaking test and using voice verification software ETS was able to detect when a single person is undertaking multiple tests. ETS undertook a check on the appellant’s tests and confirmed to the Home Office that there was significant evidence to conclude that his certificate was fraudulently obtained. This satisfied the Immigration Officer that the appellant had falsely represented himself in obtaining his current leave and led to the cancellation of his continuing leave.

14. That coupled with the balance of the respondent's evidence should have attracted sufficient weight to satisfy the requisite burden and standard of proof (balance of probabilities) to show that the appellant had falsely represented himself to secure his leave. In short by the use of a fraudulently obtained TOEIC test certificate.
15. There was evidence from the respondent in the form of witness statements from Mr Peter Millington and Ms Rebecca Collings showing that tests are categorised as "invalid" where ETS are certain that there is evidence of proxy test taking or impersonation. The appellant's test was considered to be "invalid" on the spreadsheet provided to the Home Office by reason of it having gone through a computer programme analysing speech and then two independent voice analysts. The spreadsheet identified the appellant by name and records that the test he took on 25 September 2012 was invalid.
16. The judge has plainly not taken this evidence into account and attached to it the necessary weight. Had he done so the appeal could not have succeeded. The judge has failed to provide adequate reasons for the findings that he made resulting in this appeal being allowed.

### **Conclusions**

17. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
18. I set aside the decision.
19. I remake the decision in the appeal by dismissing it.
20. No anonymity direction is made.

Signed

Date 16 February 2016.

Deputy Upper Tribunal Judge Appleyard