Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/41304/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th October 2015	**On 04th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR. KHAJA SHOAIB AHMED
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Miss K Pal: Home Office Presenting Officer
For the Respondent: Mr M Iqbal of Counsel instructed by Immigration Chambers

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal Judge Grice promulgated on 13th May 2015 in which she allowed the appellant's appeal against the decision made by the Secretary of State on 29th October 2014 to refuse the appellant leave to enter the UK.

2. The appellant is the Secretary of State for the Home Department and the respondent to this appeal is Mr. Khaja Shoaib Ahmed. However for ease of

reference, in the course of this decision I shall adopt the parties' status as it was before the First-tier Tribunal. I shall in this decision, refer to Mr. Khaja Shoaib Ahmed as the appellant and the Secretary of State as the respondent.

Background

3. The appellant is an Indian national. The material chronology is set out at paragraphs [2] to [7] of the decision of the First-tier Tribunal. The appellant first entered the UK on 8th August 2009 with a visa to study for a degree in Business Management at E-Thames College. On 15th February 2011 he submitted a request to change sponsoring institution to Cromwell College of IT and Management, to study a Level 5 Diploma. This was granted on 17th June 2011. The appellant submitted a further application, and was granted leave to remain as a Tier 4 General Student Migrant on 3rd March 2013 until 20th October 2014.

4. On 23rd June 2014, the appellant submitted a further Tier 4 General Student application to study Health Care Management, Level 7, at Opal College. This was granted from 26th June 2014 to 27th March 2016, together with a biometric residence permit.

5. When the appellant arrived in the UK on 18th August 2014, he was interviewed by a Border Force Officer. The respondent's records indicated that the appellant had previously used a fraudulently obtained English language certificate in support of a previous leave application. The Officer suspended the appellant's leave, and required him to submit to a further examination. The appellant was granted temporary admission into the UK until 29th October 2014.

6. The appellant was interviewed on 29th October 2014 at Heathrow. Following that interview, the appellant's leave to remain was cancelled under paragraph 321A of the Immigration Rules (the Rules) on the basis that his test result with ETS was obtained through deception. A decision was taken to remove him from the UK.

7. The Notice of Refusal of Leave to Enter served upon the appellant states:

"Prior to your current grant of leave, you held leave to remain as a T4 General student issued on 03/03/2013 until 20/10/2014. The Home Office have now identified that you made false representations in that application for the purpose of obtaining that leave.

In your application, you submitted a TOEIC certificate from Educational Testing Service (ETS). ETS has 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 SSHD that there was a significant evidence to conclude that your certificate was fraudulently obtained. Therefore your scores from the test taken on 12/12/2012 at Queen way College have now been cancelled by the ETS.

On the basis of the information provided to it by ETS, the Home Office is satisfied that there is substantial evidence to conclude that your certificate was fraudulently obtained. In light of this information I am accordingly satisfied that you have previously utilised deception to gain leave to remain in the UK. Had the Home Office been aware of these facts when considering your application on 03/03/2013 you would not have been granted leave to remain as a T4 General student as you would have fallen to be refused under the general grounds for refusal, specifically paragraph 320(7B), of the Immigration Rules HC395 (as amended).

This amounts to a significant change in your circumstances and I therefore cancel your leave to remain under paragraph 321A(1) of the Immigration Rules HC395 (as amended)…"

The decision of First-tier Tribunal Judge Grice

8. Both parties were represented at the hearing before the First-tier Tribunal. The Judge records the appellant's case at paragraphs [11] to [16] of her decision, and the respondent's case at paragraphs [16] to [27] of her decision. Suffice it to say for the purposes of this decision that the Judge had before her, the evidence of the appellant that he sat the TOIEC test in person on 12th and 17th December 2012, with evidence of how each of the separate components, listening, reading, writing and speaking had been assessed. The Judge also had before her the evidence relied upon by the respondent, including an ETS printout showing that the appellant's test is invalid, together with the evidence set out in witness statements of Mark Harold, Peter Millington and Rebecca Collings. It is uncontroversial that save for the ETS printout showing the appellant's test to be invalid, the remaining

evidence relied upon by the respondent was generic in the sense that it was not specific to the appellant, but set out the background to decision making in such cases, and how ETS had identified and confirmed the identity of those language certificate holders who had sought to obtain an English language test certificate by deception.

9. As to the burden and standard of proof, the Judge states at paragraph [10] of her decision:

> *"The burden of proof is on the Respondent to satisfy me on a standard of probabilities that the Appellant was knowingly involved in deception when taking his test. An allegation of deception is a serious one and the evidence provided to satisfy me to this standard must be cogent."*

10. The findings of fact and credibility are set out at paragraphs [34] to [43] of the decision:

> *"34. I remind myself of the burden and standard of proof as set out in paragraph 10 above and in particular the seriousness of the allegation levelled at the Appellant.*
>
> *35. I have been assisted in my analysis of this matter by the two First Tier Tribunal decisions referred to in paragraph 34 above, and I thank Mr Chohan for bringing these to my attention.*
>
> *36. I note that the alleged deception is in relation to an earlier leave application and not the granting of leave was given on 26/6/14.*
>
> *37. The statements of Ms Collings, Mr Millington and Mr Harold are generic and do not specifically relate to this individual Appellant. In summary, the process which they describe in order to detect deception is presented as a foolproof one, with little if any room for mistake.*
>
> *38. I have been shown a spreadsheet which details the Appellant's name, date of birth, nationality and the test centre. The test is marked as invalid. There is no evidence before the Tribunal from ETS to say how and why it might have come to that conclusion in respect of this Appellant. The document itself is the product of other evidence which is not before the Tribunal.*
>
> *39. At the outset I should say that I am satisfied that the Appellant has come to the UK to genuinely pursue a variety of studies in order to further his development and career. He has undergone several English language tests in order to be able to do this. I am told, and having heard him I have no reason to doubt, that he has passed every other such test required of him at*

a level commensurate with the level of study he has chosen to undertake, including one subsequent to the test which is the subject matter of this appeal. He had already done three years of study in the English language prior to taking this particular test.

40. The Appellant's first language is not English, but having heard him give evidence, I am satisfied that his understanding of English is highly proficient. He was comfortable and competent in understanding questions and expressing himself. He had no need for an interpreter. I did not find his language proficiency surprising given his educational and cultural background.

41. Against this factual matrix I find that this Appellant had no motivation to use a proxy tester in December 2012. I found his description of the circumstances surrounding taking the test to be detailed and convincing. I find him credible on this point.

42. Looking at the Home Office evidence in the round as presented against this Appellant, I conclude that it is too generic in nature to allow the Tribunal to properly conclude to the requisite standard that the Appellant was one of those engaged in deception.

43. I do not therefore accept the Respondent's claims that the Appellant used a proxy tester or indeed any deception or dishonesty has been used by him in relation to an earlier application for leave."

The Grounds of Appeal

11. The respondent appeals on the ground that the Judge has failed entirely to provide adequate reasons for her finding at paragraph [42]. The respondent refers to the witness statements of Peter Millington and Rebecca Collings in particular, and she submits that the evidence establishes 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 Annex E of the explanatory statement. The spreadsheet identifies the appellant by name and records that the test taken on 12th December 2012, was invalid. The respondent contends that where ETS invalidates the test result, as in this case, that is because there is evidence of proxy test-taking or impersonation.

12. The respondent refers to the Judge's finding that the appellant is proficient in paragraph [40] of the decision. The respondent contends that there may be reasons why a person who is able to speak English to the required level would nonetheless cause or permit a proxy candidate to undertake an ETS test on their behalf, or otherwise seek to cheat. The respondent contends that the Judge erred in failing to give adequate reasons for holding that a person who clearly speaks English, would therefore have no reason to secure a test certificate by deception.

13. Permission to appeal was granted by First-tier Tribunal Judge Pirotta on 31st July 2015.

The hearing before me

14. At the outset of the hearing before me on 26th October 2015, Mr. Iqbal on behalf of the appellant stated that he had not seen the spreadsheet that is referred to in paragraph [19] of the Judge's decision. I showed him the copy held on the Tribunal file so that he could satisfy himself that the spreadsheet does in fact refer to the appellant.

15. On behalf of the respondent, Miss Pal adopted the grounds of appeal. She submitted that it is plain from the decision that the Judge had before her, evidence relied upon by the respondent in the form of witness statements and the spreadsheet confirming that ETS had invalidated the appellant's ETS test. She submitted that the Judge has failed to have proper regard to that evidence in reaching her conclusion at paragraph [42] that the respondent's evidence is too generic in nature, to allow the Tribunal to properly conclude to the requisite standard that the appellant was one of those engaged in deception. She submits that beyond the reference to the evidence being "too generic", the Judge has failed to give adequate reasons for rejecting the evidence relied upon the by the respondent, which whilst generic, properly set out the evidential basis upon which the decision was reached.

16. Miss Pal submitted that the Judge has substituted her own view as to whether or not the appellant is proficient in the English-language in a way that was not open to her. She submits that there can be many reasons why the appellant may have got someone to sit a test on his behalf, at the time of his application in 2012.

17. The appellant has filed a rule 24 response. The appellant submits that the witness statements relied upon by the respondent taken at their highest, establish that the TOEIC examinations system administered by ETS is highly abused not only because rogue colleges were at the forefront of administering those tests, but also in the way these tests are conducted, monitored and executed. The appellant submits that this arises because of a systemic failure, first on the part of the respondent and second, on the part of ETS. The appellant submits that in order to attract mandatory refusal under Part 9 of the Immigration Rules, the applicant must have deliberately practised 'deception', requiring dishonesty on the part of the applicant. It is submitted that the evidential threshold is particularly high when deception is alleged, and must establish dishonesty on the part of the applicant. The appellant submits that the evidence only tips the claim in favour of the UKBA to the extent that it presents a case for the appellant to answer. It is a "rebuttable charge and presumption" and "the moment the appellant shows that there were no reasonable incentive for him to commit such a deception or fraud, he would discharge the burden of proof laid on him".

18. The appellant refers to the decision of the Court of Appeal in **AA (Nigeria) [2010] EWCA Civ 773** and submits that for deception to arise, the false representations must have been made knowingly. The appellant also submits that insofar as a failure to give reasons in a decision is concerned, **Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 IAC** establishes that there does not have to be an elaborate reasoning. As long as the underlying reasons for a decision are discernible from the given reasons, that should suffice.

19. Finally, the appellant seeks to rely upon some unreported decisions which dealt with the TOEIC issue, and which the appellant submits, show the developing trend in the judicial interpretation of the evidence presented by the SSHD.

20. Before me, on behalf of the appellant Mr Iqbal submits that the grant of permission to appeal in this case is remarkable. He submitted that there was no evidence before the First-tier Tribunal of how the respondent had come to be in possession of the spreadsheet that was attached to a witness statement relied upon by the respondent. He submits that the spreadsheet is an unreliable one and is one that could be created by anyone. He submits that the respondent's witnesses did not attend the hearing before the First-tier Tribunal to submit to cross-examination, and that the evidence relied upon by the respondent is wholly generic and does not make specific reference to this appellant. Mr Iqbal submits that the allegation of deception is a very serious allegation to make, and the Judge was entitled to reach the conclusions that she did, for the reasons set out in the decision.

21. In reply, Miss Pal submits that whilst the witness statements relied upon by the respondent are generic, they describe the analysis undertaken before a decision is reached as to whether an ETS test is considered to be invalid. She submitted it would be wholly impractical for an individual statement to be prepared in each one of the appeals that is now before the First-tier Tribunal, where there is a challenge to the decision made by ETS to treat the test as invalid. She submits that the standard of proof is a balance of probabilities and that the procedures identified in the witness statements establish that the test was more likely than not, completed by a proxy. She submits that the respondent is entitled to rely upon the prima facie evidence of ETS, to treat the test as invalid. If the certificate is withdrawn by ETS, ETS is no longer able to stand by the test result.

Error of Law

22. I am satisfied that in allowing the appeal for the reasons given, the Judge made an error of law such that I should set aside the decision and remake the decision. In my judgement, there is some force in the submission made on behalf of the respondent that the Judge has failed entirely to provide adequate reasons for her finding at paragraph [42].

23. The Judge considered the respondent's evidence in the round and concluded that it is too generic in nature to allow the Tribunal to properly conclude to the requisite standard that the appellant was one of those engaged in deception. However, at paragraph [37] the Judge also notes that the statements of Ms Collings, Mr Millington and Mr Harold describe the process adopted in order to detect deception. The Judge states that in summary, the process described by the respondent's witnesses in order to detect deception is presented as a foolproof one, with little if any room for mistake. She noted at paragraph [38] that she had been shown a spreadsheet which details the appellant's name, date of birth, nationality and the test centre. The test is marked as invalid. In my judgement there was plainly an adequate foundation for the respondent's decision that required a fuller evaluation by the First-tier Tribunal of the evidence relied upon by the respondent.

24. The appellant has throughout been aware of the case against him. That is, the respondent asserts that the appellant is not the person that sat the test.

25. I do not in this decision recite all of the evidence relied upon by the respondent before the First-tier Tribunal. Broadly put, in his witness statement Peter Millington refers to the BBC Panorama broadcast in February 2014, which revealed widespread abuse within UK test centres that administered TOEIC including the use of proxies to undertake speaking and listening tests or behalf of candidates, and the provision of correct answers for those sitting written tests. The Home Office requested that ETS investigate the validity of results across UK

testing centres, as a consequence of which ETS provided a list of candidates whose test results showed substantial evidence of invalidity.

26. The process adopted by ETS is set out in the witness statement. ETS employs voice biometric technology to analyse test data which extracts biometric features from an individual's speech to generate a voice print which is run against samples to establish whether the sample is likely to be a recording of the same person who had generated the voice print, or a different person. The technology was used to flag comparisons where the result was suspicious but, because it was acknowledged that the technology used was imperfect, and samples could be incorrectly shown as false positives, each flagged match was subjected to a further human verification process. Two analysts working entirely separately would listen to the samples, and confirm whether in their opinion it was the same or a different person speaking. Only where both analysts independently concluded that samples were of the same person, would that case be treated as a match. It was ensured that at least one analyst was experienced. Over 33,000 possible matches by the system, 80% were confirmed after human verification. This process mitigated significantly against the risk of a false positive.

27. Peter Millington's evidence is that where a match had not been identified and verified, an individual's test result might still be invalidated on the basis of test administration irregularity, including the fact that their test was taken at a UK testing centre where numerous other results had been invalidated on the basis of a match. In those cases, the individual would usually be invited to take a free retest. Those cases were clearly distinguished by ETS in its spreadsheets provided to the Home Office, from tests where there was substantial evidence of invalidity.

28. The evidence of Rebecca Collings details the background to the decisions taken, where an invalid result had been identified, in relation to removals.

29. Whilst it is right that the evidence relied upon by the respondent is generic as the Judge noted, the statements relied upon by the respondent describe the process

adopted in order to detect deception. The Judge states that the evidence describing the process adopted in order to detect deception is presented as a foolproof one, with little if any room for mistake. In reaching her decision, beyond noting that the evidence relied upon by the respondent is generic, the Judge fails to provide any reasons whatsoever for rejecting the evidence relied upon by the respondent. The Judge fails to give any reasons as to why she rejects the evidence of the process adopted in order to detect deception, and why, prima facie deception having been detected, she should reject that evidence on a balance of probabilities.

30. In my judgment, the Judge has materially erred in her failure to evaluate or carry out any assessment of the competing evidence. The Judge had before her, the evidence in the form of ETS printout showing that the appellant's test is invalid. I reject the submission of Mr Iqbal that there was no evidence before the First-tier Tribunal of how the respondent had come to be in possession of the spreadsheet, and that the spreadsheet is an unreliable one and is one that could be created by anyone.

31. In his statement, Mathew Harold identifies the appellant as one of the individuals against whom action is being taken by the respondent following invalidations of an English language test certificate by ETS. The appellant's case has never been that ETS has not in fact invalidated his test. If that is his case, it would have been open to him to obtain evidence from ETS confirming his test has not been invalidated and that the spreadsheet relied upon by the respondent, is some sort of elaborate attempt by the respondent to seek to treat his test as having been invalidated, when in fact, it has not been. It has never been suggested that the spreadsheet relied upon by the respondent has emanated from anyone other than ETS.

32. In my judgment, the Judge also erred in the reliance that she placed upon her assessment of the appellant's proficiency in the English language, to determine whether the appellant made false representations in a previous application that

resulted in the grant of leave to remain between 3rd March 2013 and 20th October 2014. The Judge's assessment of the appellant's understanding of the English language is based upon his presentation at the hearing over two years after the impugned test. Her assessment is based upon her having heard him give evidence without the need for an interpreter. Whilst the appellant might be proficient in listening, and speaking, it is of course possible that an applicant might not be proficient in reading and writing to the required standard such that the use of proxy is tempting. I accept the submission of the respondent that there can be many reasons why the appellant may have got someone to sit a test on his behalf, at the time of his application in 2012 and the Judge failed to consider the possibility in her decision.

33. The Judge states at paragraph [35] that she has been assisted in her analysis of this matter by the two First Tier Tribunal decisions referred to in paragraph *[33].* The extent to which the Judge has been assisted in her analysis and the principles that she derives from those decisions is neither set out nor apparent from her decision. The Practice Direction of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal provides:

> 11.1 A determination of the Tribunal which has not been reported may not be cited in proceedings before the Tribunal unless:
>
> (a) the person who is or was the appellant before the First-tier Tribunal, or a member of that person's family, was a party to the proceedings in which the previous determination was issued; or
>
> (b) the Tribunal gives permission.
>
> ….
>
> 11.3 Permission under paragraph 11.1 will be given only where the Tribunal considers that it would be materially assisted by citation of the determination, as distinct from the adoption in argument of the reasoning to be found in the determination. Such instances are likely to be rare; in particular, in the case of determinations which were unreportable (see Practice Statement 11 (reporting of determinations)). It should be emphasised that the Tribunal will not exclude

good arguments from consideration but it will be rare for such an argument to be capable of being made only by reference to an unreported determination.

34. The appellant relies upon the same decisions of the First-tier Tribunal before me to demonstrate what is submitted to be the developing trend in the judicial interpretation of the evidence presented by the respondent. No application appears to have been made to the First-tier Tribunal for permission to rely upon the two decisions that the appellant relies upon. No application has been made to the Upper Tribunal for permission to rely upon those decisions before me. In my judgment, I cannot be materially assisted by the citation of the decisions, and I place no weight upon the decisions reached. I reach my decision as to whether or not the decision of First-tier Tribunal Judge Grice discloses a material error of law, by considering her decision and the reasons given alone.

35. In my judgment, the Judge erred in law and the decision of First-tier Tribunal Judge Grice is set aside.

Remaking the Decision

36. Directions were issued to the parties in advance of the hearing before me requiring the parties to prepare for the hearing on the basis that, if the Upper Tribunal decides to set aside the determination of the First-tier Tribunal, any further evidence, including supplementary oral evidence, that the Upper Tribunal may need to consider if it decides to re-make the decision, can be so considered at that hearing. No further evidence was relied upon by the appellant and there was no application made pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

37. At the hearing before me, both parties confirmed that they did not intend to rely upon any evidence beyond that which was before the First-tier Tribunal. I have remade the decision on the basis of the evidence before First-tier Tribunal Judge Grice and the submissions I have heard.

38. The appellant has maintained throughout that he rejects the allegation of deception that is made against him. His account of events is set out at paragraph [15] of the decision of First-tier Tribunal Judge Grice:

> "*The Appellant sat the TOIEC test in person on 12 and 17 December 2012. He had been advised by Cromwell college to do the TOEIC test. They arranged for it to be done online and he had paid £175.00. He had gone to Walthamstow Business Centre, on the second floor of a block near the station. The exam was completed over two days. His listening ability was assessed by listening to an audio cassette and he did a multiple choice questionnaire. His reading was assessed by reading a passage of information and completing multiple choice questions. His writing was assessed by completing essays of between 1500 and 2000 words. His speaking was assessed by an examiner. There were about 15 people in the room as well as an invigilator. They had not used computers.*"

39. If, as the appellant claims, his speaking was assessed by an examiner, the appellant has not sought to adduce any evidence from ETS or the test centre that he attended, confirming that he had himself attended the test centre, and been assessed in the way that he describes. It would have been open to the appellant, challenging the allegation made against him, to obtain evidence that he had genuinely taken the test as he claims.

40. I reject the submission made by Mr Iqbal that the spreadsheet relied upon by the appellant is one that could have been produced by anyone. The submission that there is some form of collusion between ETS and the respondent to allege deception where there has been no deception is without any foundation at all.

41. Whilst most of that which is set out on the witness statements of the respondent is generic, I am satisfied that the respondent has discharged the burden of proof upon her to show, on the balance of probabilities, with cogent evidence, that the appellant made false representations for the purposes of obtaining the leave to remain as a Tier 4 general student that was issued to him between 3rd March 2013

and 20th October 2014. It is uncontroversial that in support of that application, the appellant submitted a TOEIC certificate from Educational Testing Service.

42. The respondent is entitled to rely upon the evidence provided to her by ETS showing the appellant's ETS certificate to have been invalidated by ETS. Details of how that evidence has been obtained are in witness statements relied upon by the respondent. The evidence of Peter Millington establishes that the decision is reached with not only voice biometric technology being deployed, but also an independent check by two analysts, one of whom is experienced, working separately. The respondent is not obliged to provide the names of the centres concerned, the details of the equipment used, nor the qualifications of the analysts concerned. The standard of proof is a simple balance of probabilities and requires neither absolute certainty nor infallibility.

43. There is evidence from ETS that the appellant himself has been individually identified as having an invalid test result. The fact that he was not offered the chance of a re-test, indicates that the conclusion reached was on the basis of an analysis of his test rather, than the fact that he took a test at a centre where there was large scale abuse.

44. The respondent has set up a system for recognition of English language testing and she is entitled to place reliance upon that system when she makes decisions and when she looks to the system in place for evidence of compliance by applicant's. In this case, ETS has itself invalidated, following a thorough analysis, the appellants ETS test certificate. If the certificate is withdrawn or invalidated by ETS there is simply no basis for the respondent to simply disregard that withdrawal or invalidation.

45. Upon the appellant's arrival in the UK on 18th August 2014, there had been a change in circumstances. I am satisfied that the evidence relied upon by the respondent, including the spreadsheet, establishes that the appellant had not himself completed the English language tests in 2012 as claimed.

46. I re-make the decision in the appeal by dismissing the appeal.

Notice of Decision

47. The making of the decision in the First-tier Tribunal did involve an error of law and I set aside the decision of the First-tier Tribunal.

48. I re-make the decision in the appeal by dismissing it.

Signed Date

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

As I have dismissed the appeal, no fee award is appropriate.

Signed Date

Deputy Upper Tribunal Judge Mandalia