



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

Appeal Number: HU/00032/2017

THE IMMIGRATION ACTS

Heard at Manchester CJC

Determination

On 4 December 2018

Promulgated

On 6 December 2018

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PRAKASH RAMALINGAM

Respondent

Representation:

For the Appellant: Mr Bates, Senior Home Office Presenting Officer

For the Respondent: Mr Wood, IAS (Manchester)

DECISION AND REASONS

1. The Respondent ('Mr Ramalingam') is a citizen of India. He entered the UK as a student in 2011. On 3 January 2013 he relied upon an English language test certificate ('the certificate') from Educational Testing Service ('ETS') he received after sitting an ETS test at South Quay College ('SCQ') on 28 November 2012, as part of a successful application to extend his leave as a student. Thereafter he was granted leave to remain in the UK on the basis of his family life. His most

recent application to remain on the basis of his relationship with his spouse dated 27 October 2016 was refused by the Appellant ('the SSHD') in a decision dated 13 December 2016. The SSHD was satisfied that the certificate was fraudulently obtained and as such he did not meet the 'suitability' requirements of the Immigration Rules. The SSHD said this in the decision letter:

"ETS has a record of your speaking test. Using voice recognition 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 significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker."

Appeal proceedings

2. The SSHD has appealed against a decision of the First-Tier Tribunal ('FTT') dated 7 February 2018, allowing Mr Ramalingam's appeal on human rights grounds. After hearing evidence from Mr Ramalingam, the FTT accepted his evidence as entirely credible. The FTT expressly accepted that he genuinely took an English language test at SQC on 28 November 2012.
3. The SSHD applied for permission to appeal the FTT's decision and relied upon three grounds of appeal:
 - (1) The FTT erred in law in concluding that the evidence relied upon by the SSHD was insufficient to meet his initial legal burden, in light of the relevant authorities.
 - (2) When addressing Mr Ramalingam's innocent explanation, the FTT failed to take into account relevant matters: (i) mere presence at the centre must be viewed in the context of the known practice of applicants using proxy takers whilst present at the test centre, and (ii) even those who speak English adequately have other reasons for using a proxy.
 - (3) The FTT failed to identify compelling circumstances to support a breach of Article 8 of the ECHR.
4. Permission to appeal was granted by UTJ McGeachy in a decision dated 29 June 2018. He observed that the FTT did not address the fact that there could be many reasons why a person would use a proxy test taker.

Submissions

5. At the beginning of the hearing both representatives agreed that there are three stages to be followed when determining whether deception was employed in a case such as this - see Majumder & Qadir v SSHD [2016] EWCA Civ 1167: (i) has the SSHD met the burden of identifying

evidence that the certificate was obtained by deception?; (ii) has Mr Ramalingam satisfied the evidential burden of raising an innocent explanation?; (iii) if so, has the SSHD met the legal burden of showing that deception in fact took place?

6. Mr Bates submitted that there was clear and cogent evidence of a generic and specific nature to support the SSHD's submission that he met the burden of establishing prima facie deception and the FTT misunderstood or mischaracterised the nature of the SSHD's evidence, in finding otherwise. Mr Bates invited me to find that ground 1 was therefore made out and this error in approach infected the FTT's findings relevant to ground 2. Mr Bates did not place any reliance on ground 3 in the light of the SSHD's concession before the FTT (recorded at [6] and [27] of the decision) that if it was found that Mr Ramalingam had not used deception, he met the requirements of the Immigration Rules and his appeal should be allowed on human rights grounds.
7. Mr Wood candidly acknowledged that he was in a difficult position regarding ground 1. This is because the FTT did not engage with the more up to date authorities in support of the proposition that where the ETS Look Up Tool identified an applicant's specific test result as invalid, this together with the updated generic evidence was sufficient for the SSHD to establish prima facie deception with the result that it was then for the applicant to provide an innocent explanation - see SSH D v Shehzad [2016] EWCA Civ 615. Mr Wood however submitted that in this particular case the specific Look Up Tool result was defective. This is because whilst all other details personal to Mr Ramalingam were correct, his nationality was incorrectly recorded as UK. Mr Wood submitted that in these circumstances the FTT was entitled to find the generic evidence insufficient and to entirely accept the evidence given by Mr Ramalingam.
8. After hearing from both representatives I reserved my decision.

Discussion

9. There was clearly detailed generic and specific evidence available to the FTT to support prima facie deception on the part of Mr Ramalingam's test results at SQC on 28 November 2012. The SSHD adduced generic evidence that explained in detail the methodology used by ETS to determine whether a test result was invalid, questionable or genuine. The SSHD also relied upon the ETS Look Up Tool which concluded that Mr Ramalingam's test result was invalid. That clearly includes the wrong nationality. Mr Wood invited me to find that if the wrong nationality was selected, other mistakes might have been made by ETS. The difficulty with this submission is that there are other perhaps more significant ways in which the Look Up Tool identifies the test result as being linked to Mr Ramalingam: certificate number, date of birth and passport number. Moreover, although the

FTT made passing reference to the wrong nationality at [44], this was not the articulated reason for not finding prima facie deception justifying an explanation. This is based upon the overall frailties within the generic evidence and the unreliability of ETS processes – see [40] and [42] of the decision. As Mr Wood accepted, these are inadequate reasons in the light of the more up to date authorities as set out in the SSHD grounds of appeal. I therefore find that the SSHD has established a material error of law for the reasons explained in ground 1.

10. I entirely accept that the consideration of the appellant's explanation, for the purposes of ground 2, is intrinsically fact-sensitive - see MA (ETS - TOEIC testing) [2016] UKUT 00450 (IAC)) and was for the FTT to determine having considered all the relevant evidence in the round. The FTT was of course entitled to make the factual findings it did but only after having acknowledged that there was evidence of prima facie deception. The FTT was obliged to make its credibility findings in context: there was prima facie evidence that the certificate is invalid because it relies upon a voice recording that is not that of Mr Ramalingam. As Mr Bates submitted, the FTT failed to acknowledge this and therefore proceeded to make its factual findings from the wrong starting point. The FTT did not squarely deal with Mr Ramalingam's concerning evidence at [24] that notwithstanding the invalid test result he did not want to contact ETS for an explanation, even though this was a course open to him as explained in Arsan v SSHD [2017] EWCA Civ 2009. The FTT did not engage with the submission that mere presence at the test centre was inconclusive given the evidence of Rebecca Collins to the effect that this could well involve attending the test centre as a registered candidate but allowing another, a 'fake sitter', to take the test on his behalf. The FTT also failed to take into account the possible alternative reasons for the use of a proxy. As pointed out in MA (ETS) at [57] there is a range of reasons why those proficient in English may engage in fraud.
11. It follows that the FTT decision contains material errors of law for the reasons advanced by the SSHD in grounds 1 and 2.

Disposal

12. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and I have decided that this is an appropriate case to remit to the FTT. This is because the FTT's findings of fact are tainted by a fundamental error in approach to the SSHD's evidence and completely fresh findings of fact are necessary.

Decision

- (1) I allow the SSHD's appeal and set aside the FTT decision.

(2) It is remitted to the FTT (judge other than Judge Austin) where it shall be remade on a de novo basis.

Signed
Upper Tribunal Judge Plimmer

Dated: 4 December 2018