Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34587/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 January 2018	**On 6 February 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VIKASH BISSESSUR

Respondent

Representation:
For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Mr M Murphy, Counsel

DECISION AND REASONS

1. The appellant in these proceedings is the Secretary of State. However, it is convenient to continue to refer to the parties as they were before the First-tier Tribunal ("FtT").

2. The appellant arrived in the UK on 30 December 2003 as a visitor. He was granted subsequent periods of leave until on 8 July 2013 his leave was curtailed, to expire on 3 November 2013.

3. On 30 October 2013 he made a further application for leave to remain which was withdrawn on 22 March 2015. On 4 December 2013 he made another application for leave to remain, outside the Immigration Rules, but that application was rejected in a decision on 7 March 2014. Then, on 27 March 2014, the appellant made the application for leave to remain on the grounds of long residence with reference to paragraph 276B of the Rules. That application was rejected in the decision dated 3 September 2015 and which is the subject matter of this appeal.

4. The appellant's appeal to the First-tier Tribunal was heard by First-tier Tribunal Judge Flynn ("the FtJ") on 23 January 2017. Following that hearing she allowed the appeal.

5. The respondent had refused the application for leave to remain on the grounds of long residence on the basis that she was not satisfied that the appellant met the requirements of para 276B(ii) (public interest considerations) because she was satisfied that there was significant evidence to conclude that an English language test certificate which the appellant used in an application for leave to remain on 29 February 2012 was fraudulently obtained. The respondent also refused the application with reference to para 322(2) (false representations/failure to disclose any material fact in relation to obtaining leave).

6. The respondent's grounds of appeal in relation to the decision of the FtJ criticises the FtJ's conclusion that the methodology of assessment of the English language tests at the particular college, Westlink College, was open to doubt. It is argued that the FtJ applied too high a standard of proof (presumably the reference to "burden of proof" in the grounds is a mistake). It is argued that the appellant's evidence did not address the fact that no tests from that college could be verified as having been genuinely obtained and the result of the appellant's test was regarded as "questionable" in the analysis. It is argued that on the balance of probabilities the appellant's test was carried out by a proxy test taker.

7. It is accepted in the respondent's grounds that the ETS verification system is not infallible, but it is argued that it is adequately robust and rigorous. Furthermore, given that the appellant's English language certificate was withdrawn, and the validity of the information provided in relation to the English language test was no longer vouched for by ETS, that was sufficient for the respondent to refuse the application.

8. The submissions on behalf of the respondent before me were to like effect. I was referred to the respondent's bundle that was before the FtJ, which included the 'look-up' tool' in relation to the appellant's test. The appellant's test was stated as being "invalid". There were witness statements from Rebecca Collings and Peter Millington which explained the term 'questionable'. The evidence was that in relation to Westlink College 87% of the tests were found to be invalid and only 13% questionable.

9. The FtJ had not referred to the evidence of Professor French, also in the respondent's supplementary bundle, to the effect that the chance of a false positive result (of invalidity) was less than 1%. There was both human and digital assessment.

10. It was submitted that the FtJ had misunderstood what the term 'questionable' meant, and that materially undermined her conclusions.

11. Having heard submissions on behalf of the respondent, I did not feel it necessary to hear any submissions on behalf of the appellant. I announced at the end of the hearing that I was not satisfied that there was any error of law in the decision of the FtJ. I now give my reasons.

12. At [15] the FtJ commenced her summary of the appellant's oral evidence. She referred to the appellant giving evidence before her in English, and submitting his original certificates which were examined. She referred to tests he had taken after the questioned test in December 2011.

13. She recorded that the appellant was cross-examined in detail about his taking of the test in 2011, with many specific and precise details being recorded. He gave evidence about times, how he got there, and answered detailed questions in cross-examination about the details of the test. There were some matters that he was unable to remember.

14. The person who is said to have given the appellant a lift in his car to the test centre, his friend/cousin, also gave evidence. He was not cross-examined.

15. The FtJ summarised the submissions made on behalf of the respondent, those submissions including reference to the witness statements of Rebecca Collings, Peter Millington and Professor French. Those submissions also referred to the Project Façade report relied on by the respondent.

16. The FtJ in her conclusions set out the legal framework within which her decision needed to be made, and referred to relevant authority.

17. At [39] she referred to the respondent having produced the witness statements of Ms Collings and Mr Millington, as well as the Project Façade report, which she described as a criminal enquiry into abuse of the TOEIC for Westlink College in Essex. She stated that the report indicated that between 18 October 2011 and 18 April 2012, Westlink College administered 815 TOEIC speaking and writing tests, of which 661 (72%) were invalid. She referred to the look-up tool in relation to the appellant's test, found to be invalid.

18. In the light of that evidence she concluded that the respondent had discharged the evidential burden of establishing dishonesty on the part of the appellant.

19. At [43] she stated that she had listened carefully to the evidence of the appellant, and she found him to be a credible witness, as was the witness called on his behalf. She stated that he had provided evidence of his studies in the UK, including a level 6

advanced diploma in business management, which he completed around three months before he took the TOEIC examination.

20. In the next paragraph she said that she considered it significant that the appellant had successfully undertaken studies in the UK for almost eight years before the TOEIC examination in December 2011.

21. At [45] she said that she accepted the submissions on behalf of the respondent to the effect that the appellant's evidence was vague in many respects. She stated however, that she could not overlook the lapse of more than five years since the test was taken. She stated that she agreed with the submissions made on behalf of the appellant, namely that it was "entirely clear" that the appellant had not rehearsed what took place on the day of the examination. She added that in fact it appeared that he had not thought about that day for a considerable time.

22. She stated that in line with the decision in *SM and Qadir (ETS - Evidence - Burden of Proof)* [2016] UKUT 229 (IAC), she attached little weight to the fact that the Appellant had difficulty in recalling precisely what took place during the test or even what results he achieved. She disagreed with the contention on behalf of the respondent that the appellant's forgetfulness meant that he was not a credible witness.

23. She also found merit in the submission on behalf of the appellant in relation to the appellant having taken subsequent tests, albeit two years after the TOEIC test, and reached level 3 after only one week's additional study. She said that she considered that those were an indication that he could communicate well in English.

24. At [48], reminding herself of the guidance given by the Upper Tribunal in other cases, she said that the appellant had no trouble understanding any of the questions put to him and did not need to have any of them repeated or rephrased. More significantly, she said that there was nothing to suggest that he had any difficulty with English during his studies before the TOEIC test.

25. It is really the next paragraph in particular that the respondent takes issue with. There the FtJ said that it was clear that a significant minority of results from Westlink College (including more than a dozen on the same date that the appellant took his test) were not invalidated but were treated as "questionable". She stated that she found that this result "raises doubts about the methodology employed, particularly as the only evidence specific to the appellant is the extract from the computer record".

26. In the following paragraph however, she said that she could not overlook the fact that the Project Façade report states that an audit was conducted on 15 May 2012, following which the tests carried out on that date were invalidated, but it appeared that Westlink College was not suspended until 2014. The appellant had submitted evidence that the college was being monitored by the review team, but it did not appear that the respondent notified anyone who had provided test results undertaken at the College or required them to undertake new tests. She agreed with

the submissions on behalf of the appellant that that delay made it more difficult for the appellant to provide evidence that he had not used any deception.

27. Finally, on the question of deception, at [51] she concluded that the appellant had provided sufficient evidence to demonstrate on a balance of probabilities that he did not use deception, nor provide a false document with his 2012 application. Thus, she found that the respondent was not justified in refusing the application under paragraph 322.

28. The definition of "questionable" as explained at [29] of Ms Collings' statement, where she refers to Mr Millington's statement, is where an individual's test result was still cancelled on the basis of test administration irregularity, including the fact that the test was taken at a UK testing centre when numerous other results had been invalidated, and by which point ETS had analysed over 10,000 test scores, of which the majority were cancelled as invalid, the remainder being cancelled as questionable.

29. It is evident from the FtJ's decision that she was fully aware of the evidence provided on behalf of the respondent in support of the contention that the appellant's test was obtained fraudulently. She specifically referred to that evidence and some aspects of it. It is, however, apparent that she was impressed by the evidence that the appellant gave in relation to the test that he says he took and she had the opportunity of making an assessment of the appellant as a witness, as well as the evidence of his supporting witness. It is apparent that the appellant's evidence made a significant impression on the FtJ.

30. It is true that the FtJ could have referred to other aspects of the evidence provided by the respondent in relation to the testing process, for example the report of Professor French. However, in order for the respondent to make good the complaint in the grounds about the FtJ's assessment of the evidence, it would have to be demonstrated that the FtJ failed to appreciate the import of the evidence, or failed to take it into account. I cannot see that this is demonstrated in the circumstances of this case.

31. It may be that the FtJ ought to have explained why she concluded that the treatment of some of the test results as "questionable" raised doubt about the methodology of the testing process. However, and in any event, that was but one part of the FtJ's assessment of the evidence. Furthermore, I do not see in the FtJ's decision any sense in which that aspect of her conclusions was decisive or of more potency than other aspects of the evidence which she considered.

32. Even if I was to conclude that the FtJ was in error in her understanding of the process of investigation in relation to the tests at Westlink College, I would not have concluded that that error was such as to amount to an error of law in her overall assessment.

33. I am satisfied that the FtJ's conclusion that the appellant had not used deception in the test taken in 2011 was a conclusion that was open to her on the evidence.

34. It was accepted on behalf of the respondent before me that if that matter was lawfully resolved in favour of the appellant, no other issue arose in terms of the appellant's ability to meet the requirements of para 276B of the Rules. As Mr Jarvis fairly pointed out at the hearing, not only was no other matter raised in the respondent's decision, the only other possible question arises in relation to para 276B(iv) (life and language in the UK), but the appellant's evidence in his witness statement is to the effect that he had taken and passed that test, with details having been provided. Furthermore, I note that at page 37 of the appellant's bundle there is confirmation of the appellant having taken and passed the relevant test.

35. In the circumstances, I am not satisfied that there is any error of law in the decision of the FtJ and her decision to allow the appeal must stand.

36. By way of postscript, I note that the FtJ said that the respondent's decision was not in accordance with the law and that she allowed the appeal under the Immigration Rules. However, it was not open to the FtJ to conclude that the decision was not in accordance with the law, or to allow the appeal under the Immigration Rules, under the new appeals regime. However, that is an error of form, not of substance.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to allow the appeal therefore stands.

Upper Tribunal Judge Kopieczek 5/02/18