



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

Appeal Number: IA/33712/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 9 September 2014**

**Determination
Promulgated
On 12 September 2014**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR GOHAR ALI
(No Anonymity Direction Made)**

Respondent

Representation:

For the Appellant: Mr T Wilding a Senior Home Office Presenting Officer

For the Respondent: the appellant did not attend and was not represented

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department ("the Secretary of State"). The respondent is a citizen of Pakistan who was born on 1 April 1989 ("the claimant"). The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge Herlihy ("the FTTJ") who allowed the claimant's appeal against the Secretary of State's decision to refuse

to vary his leave to remain in the UK as a Tier 4 (General) Student Migrant under the provisions of paragraph 245ZX of the Immigration Rules. The Secretary of State also made a decision to remove the claimant from the UK by way of directions under Section 47 of the Immigration and Asylum and Nationality Act 2006.

2. The claimant claimed 30 points for his Confirmation of Acceptance for Studies ("CAS"). The Secretary of State was not satisfied that the claimant had a valid CAS and found that no CAS reference number was submitted with the application. The application was refused under paragraph 245ZX(c). As the claimant had failed to provide a valid CAS the Secretary of State was unable to assess whether he met the requirements of Appendix C of the Immigration Rules and also refused the application under paragraph 245ZX(d).
3. The claimant appealed and the FTTJ heard the appeal on 3 June 2014. Both parties were represented and the claimant attended and gave evidence. The FTTJ set out the correct burden and standard of proof in paragraph 5.1: the burden of proof lay on the claimant and the standard was that of the balance of probabilities.
4. The claimant said that in December 2012, when he still had extant leave, he made an application for a Tier 1 Entrepreneurial visa but decided to withdraw that application and make the application which is the subject of the present appeal as a Tier 4 (General) Student Migrant. He submitted the application without his English language test certificate because it had not been returned to him by the Secretary of State, although he had asked for it to be returned. He had tried to take another English language test but was unable to do so because the Secretary of State had not returned his passport.
5. The Secretary of State said that her records showed that all the documents including the passport and English language test certificate had been returned to the claimant by recorded delivery post. The claimant said that although the passport had reached him the English language test certificate had not.
6. The FTTJ found that the claimant was not, in some respects, a credible witness. However, she concluded that it was possible that the English language test certificate had not been returned to him. He had provided a plausible account as to why he could not submit a valid CAS. He should be afforded the opportunity of submitting a fresh English language test certificate which could permit a College to issue him with a valid CAS. She allowed the appeal to the extent that the Secretary of State's decision was not in accordance with the law and that the application should be reconsidered.
7. The Secretary of State applied for and was granted permission to appeal submitting that the FTTJ erred in law in that she had failed to apply the correct standard of proof, made inconsistent findings that

the claimant was credible in some respects but not credible in others and failed to give clear reasons for her conclusions.

8. Since permission to appeal to the Upper Tribunal was granted the claimant has written to the Tribunal stating that he “would like to withdraw my application for appeal. I shall not be attending and I do not wish further action to be taken for this.” An Upper Tribunal Judge directed that the following response be given; “Thank you for your letter received today requesting that your application for appeal be withdrawn. However it is the Secretary of State’s application and appeal before the Upper Tribunal and not your application and accordingly consent cannot be given to a withdrawal pursuant to rule 17 (2) of The Tribunal Procedure (Upper Tribunal) Rules 2008. Should you not attend the hearing, the Upper Tribunal would consider submissions from the Secretary of State’s representatives and, in the event that those submissions are accepted, may well set aside the decision of the First-Tier Tribunal allowing your appeal and proceed to remake the decision in your absence.”
9. The claimant did not attend the hearing before me. I am satisfied that he has received the notice of hearing. Mr Wilding relied on the grounds of appeal, asked me to set aside the decision and remake it by dismissing the claimant’s original appeal.
10. I find that the FTTJ erred in law. In paragraph 5.1 she set out the correct burden and standard of proof. However, in paragraph 7.10 she failed to apply this in reaching the conclusion that; “it is possible that the original test certificate has been misled by the respondent”. She should have asked herself whether, on the balance of probabilities, the claimant had established that the original test certificate had been returned to him by the Secretary of State and if so whether he had received it.
11. This finding is the more surprising in the light of other conclusions reached by the FTTJ. She found that there were problems with the copy test certificate which the claimant had produced and submitted to the Secretary of State which was undated. There was no evidence from City and Guilds to confirm that the claimant had taken the test or that he had been awarded the certificate. This undermined the reliance which could be placed on it. The FTTJ found that the claimant’s explanation for not undertaking a fresh test was not credible. She did not address the inconsistency between the evidence of the Secretary of State that the claimant’s passport and test certificate had been returned to him in the same envelope with the claimant’s evidence that he had received the passport from the Secretary of State at the address to which it had been sent but not the test certificate.
12. In paragraph 7.10 the FTTJ said; “the original certificate may in any event not be valid for the reasons I have given”. She should have made a finding as to whether the claimant had established that

the original English language test certificate was valid and met the requirements of the Immigration Rules particularly where the reasons she had given pointed towards it not being valid.

13. I find that the FTTJ erred in law and I set aside the decision.
14. I find that the claimant has not established that at the date of his application he was in possession of a valid CAS. He accepts that he did not submit a CAS with his application. The reason he gave was that he was not able to obtain a CAS because the Secretary of State had not returned to him the English language test certificate submitted with his earlier application which he had withdrawn.
15. It is for the claimant to establish the facts on which he seeks to rely and that he meets the requirements of the Immigration Rules to the standard of the balance of probabilities. In short the burden of proof falls on him and the standard is that of the balance of probabilities. He accepts that he received his passport from the Secretary of State through the post on 23 June 2013. He failed to produce the accompanying letter. He denies that he received the English language test certificate which the Secretary of State said was sent to him at the same time as the passport. Even if the claimant's Royal Mail search does not show that the recorded delivery letter has been delivered the claimant's own evidence indicates that it has. I adopt the FTTJ's findings that the copy test certificate which the claimant submitted is suspect because it does not show the date on which it was awarded and there was no evidence from the issuing body, City and Guilds, to show that the claimant had taken the test and was awarded the certificate on any particular date. I also find that the claimant's explanation for not undertaking a fresh test is not credible. I find that the claimant has not established that he did not receive the original test certificate from the Secretary of State.
16. The claimant has failed to show that he met the requirements of the Immigration Rules.
17. I have not been asked to make an anonymity direction and can see no good reason to do so.
18. Having set aside the decision of the FTTJ I remake the decision. I allow the appeal of the Secretary of State to the Upper Tribunal and dismiss the original appeal by the claimant.

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Signed
Upper Tribunal Judge Moulden

Date 10 September 2014

