



IAC-FH-NL-V1

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

Appeal Number: IA/39619/2014

THE IMMIGRATION ACTS

Heard at Stoke

On 18 March 2016

**Decision &
Promulgated**

On 11 May 2016

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**UMER RIAZ
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr. M. A. Bilal, Rana & Co Solicitors

For the Respondent: Mr. A. McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge McDade, promulgated on 30 July 2015, in which he allowed Mr. Riaz's appeal against the Secretary of State's decision to refuse to grant further leave to remain in the United Kingdom.

2. For the purposes of this decision I refer to Mr. Riaz as the Appellant and to the Secretary of State as the Respondent reflecting their positions as they were before the First-tier Tribunal.

3. Permission to appeal was granted as follows:

“It is arguable that the judge has given inadequate reasons for finding that the evidence produced by the Respondent is insufficient to discharge the burden of proof [4].”

4. The Appellant attended the hearing. I heard oral submissions from both representatives, following which I announced that I found that the decision involved the making of an error of law. I set out my reasons in full below.

Error of law

5. Paragraph [4] of the decision states:

“Apart from the very generic evidence about the way in which the Home Office have borne down upon those they suspect of dishonesty in the sitting of these tests for example by using proxy or by having someone else give them the answers, there was no cogent evidence in relation to this Appellant as to what precisely he was alleged to have done. I adjourned one hearing for a period of six weeks in order to give the Home Office an opportunity to produce any evidence they had in respect of this. However no evidence was forthcoming. The burden is clearly and strongly upon the Respondent to prove the case where there has been an allegation of dishonesty. In this, as in many similar cases, the Respondent has palpably failed to do so. As such this appeal must be allowed.”

6. The judge fails give any further reasons or to examine in any detail the evidence produced by the Respondent. This consisted of the witness statements from Peter Millington and Rebecca Collings, as well as a further document entitled ETS SELT SOURCE DATA.

7. I find that in the absence of giving any consideration at all to the evidence which had been provided, the judge has failed to give adequate reasons for why the Respondent has not discharged the burden of proof. I find that the decision involves the making of a material error of law, and I set the decision aside to be remade.

Submissions

8. Mr. Bilal submitted that the Respondent had been given the chance to produce further evidence but none had been forthcoming. The judge had not accepted the Respondent’s evidence. He submitted that the spreadsheet from ETS was not evidence of deception. It was an undated document and the Respondent had not provided any evidence to show who had invalidated the Appellant’s results or when they had been

invalidated. There was no evidence of the basis on which the allegation of deception was made out. There was no indication of who had issued the document. Nobody was identifiable from this document and it was not evidence of deception.

9. He submitted in relation to ETS that they had previously been declared not credible yet the Respondent was now relying on information from them. He submitted that the Respondent had not discharged the burden of proof.
10. He submitted that the Appellant had a family life in the United Kingdom and his child had medical issues. He provided a copy of the Appellant's child birth certificate, and some correspondence from the hospital relating to the Appellant's child. He submitted that the Appellant had now passed an English language test at level 7, which was above the level required.
11. Mr. McVeety submitted that the Respondent had provided witness statements from Peter Millington, Rebecca Collings and a printout from ETS. The Respondent had nothing to do with ETS and it was ETS who had invalidated the certificate because of fraud.

Remaking

12. I have carefully considered the evidence provided by the Respondent. I have also considered the case of R (Gazi) v SSHD (ETS – judicial review) [2015] UKUT 00327 (IAC).

13. The Appellant applied for leave to remain as a spouse. The Respondent refused his application on the basis that he did not meet the suitability requirements. The Respondent stated in paragraph [8] of the reasons for refusal letter:

“During an administrative review process, ETS have confirmed that your client's test obtained was through deception. Because the validity of your client's test results could not be authenticated, your client's scores from the test stated 28 November 2012 have been cancelled. Your client is specifically considered a person who has sought to leave to remain in the United Kingdom by deception following information provided to us by Educational Testing Service (ETS), that an anomaly with your client's speaking test indicated the presence of a proxy test taker.”

14. As evidence to show this, the Respondent provided two witnesses statements. The first is from Peter Millington, an Assistant Director at the Home Office, dated 23 June 2014. The second, also dated 23 June 2014, is from Rebecca Collings, a Grade 6 civil servant at the Home Office. These witness statements are now familiar to judges in the First-tier and Upper Tribunals. They set out what was done by ETS together with the Respondent following the Panorama programme which exposed problems with ETS testing. The witness statements were prepared in connection

with another case, and there is no reference in either of them to the Appellant.

15. The only other evidence provided by the Respondent is a document which takes the form of two lines of data in table form. It is headed "ETS SELT SOURCE DATA", but there is nothing to confirm where this document has come from, nor where the data contained in it has come from. There is no statement from ETS setting out that they have provided this information to the Respondent, or from the Respondent setting out how they have obtained this information. Without more, the heading alone is not enough to confirm that ETS have provided this document. This document records that the certificate number ending 0061, relating to an Umer Riaz, date of birth 17 January 1989, relating to tests taken on the 28 November 2012 is invalid. The same information is produced in both lines of the table, the only difference being the record number in the first column.
16. The reasons for refusal letter stated that the anomaly with the speaking test "indicated the presence of a proxy test taker". The reasons for refusal letter appears to be clear that the reason that the Appellant's test result was invalidated was because the speaking test was conducted by a proxy test taker. However, even if I attach weight to the document headed "ETS SELT SOURCE DATA", it does not corroborate the claim in the reasons for refusal letter. It merely indicates that the test result has been declared invalid. It is clear from Peter Millington's witness statement that "an individual's test result may 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 have been invalidated on the basis of a "match"." There is no evidence before me as to what happened on 28 November 2012 at South Quay College and whether numerous other results from the centre for that date were invalidated. I have no specific evidence relating to the Appellant's test beyond the unidentified document which indicates that the Appellant's test result is invalid. The reason that it was declared invalid is not clear from this document alone. I find that this document in and of itself is not evidence that the Appellant has practised deception. Neither is it evidence of deception when read in conjunction with the generic witness statements, which have themselves been held insufficient to discharge the legal burden of proof owing to multiple shortcomings.
17. The Respondent provided only the generic witness statements and an unidentified document purporting to indicate that the Appellant's test result was invalid. The Respondent provided no further details relating specifically to this Appellant, to the centre where he took his test or the date on which he took the test, despite stating in the reasons for refusal letter that the speaking test indicated the presence of a proxy test taker. In the absence of any reliable evidence specific to the Appellant, or to the tests conducted at South Quay College on 28 November 2012, I find that the Respondent has failed to show that the application should have been

refused under the suitability requirements. Accordingly I find that the Appellant met the suitability requirements of the immigration rules.

18. The Respondent considered that, were it not for the fact that the Appellant did not meet the suitability requirements, he would have met the eligibility requirements as a partner. The Respondent considered paragraph EX.1 in relation to the Appellant's relationship with his partner, but considered that he did not meet the requirements of paragraph EX.1. This was because the Respondent did not consider that there were "insurmountable obstacles" to the Appellant continuing his relationship with his partner overseas.
19. However, in paragraph [3] of the decision, it states:

"Although that letter contains a number of objections it is now accepted by the Respondent that the only impediment that remains is that it was not accepted that the Appellant had himself sat the English language test that resulted in his obtaining the necessary certificate to satisfy the Immigration Rules."
20. This part of the decision has not been challenged. It appears from this that the Respondent accepted that the Appellant met the requirements for leave to remain as a partner save for the suitability requirements. Mr. McVeety did not raise any issue in relation to this concession. Accordingly, given that I have found that the application should not have been refused for failure to meet the suitability requirements, I find on the balance of probabilities that the Appellant meets the requirements of the immigration rules.
21. I have not made an anonymity direction.

Notice of Decision

22. The decision involves the making of a material error of law and I set it aside.
23. I remake the decision allowing the appeal under the immigration rules.

Signed

Date 6 May 2016

Deputy Upper Tribunal Judge Chamberlain