



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

Appeal Numbers: IA/33479/2015
IA/33480/2015
& IA/33482/2015

THE IMMIGRATION ACTS

Heard at Manchester

On 8 November 2017

**Decision & Reasons
Promulgated**

On 9 November 2017

Before

Deputy Upper Tribunal Judge Pickup

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**JAMSHED [A]
SAIMA [R]
[M J]**

[No anonymity direction made]

Claimants

Representation:

For the claimants: Mr R Ahmed, instructed by Raims Law Solicitors

For the appellant: Mr J Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Davies promulgated 7.12.16, allowing the appellants' linked appeals against the decisions of the Secretary of State, dated 12.10.15, to refuse LTR as a Tier 1 Migrant with dependant family members, on the

basis of the submission of a fraudulently obtained ETS English language certificate. The Judge heard the appeal on 28.11.16.

2. First-tier Tribunal Judge O'Garro refused permission to appeal on 19.5.17. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Hanson granted permission on 29.8.17.
3. Thus the matter came before me on 8.11.17 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons set out below, I am not satisfied that there was any material error of law in the making of the decision of the First-tier Tribunal such as to require the decision to be set aside.
5. The first claimant arrived in the UK in 2004, with leave as a student, accompanied by his wife. Their child was born in the UK on [] 2004. They were subsequently granted FLR as a Tier 1 General Migrant and dependants. On 29.1.14 they applied for ILR on the same basis. The first claimant submitted an ETS TOEIC English language certificate, obtained on 15.11.13. The certificate was subsequently invalidated due to the suspected use of a proxy test taker and the scores cancelled. The Secretary of State was satisfied that the certificate had been obtained by fraud.
6. The issue in the appeal was thus whether the first claimant had obtained a TOEIC ETS English language certificate fraudulently, the legal burden being on the Secretary of State.
7. According to the decision, the evidence relied on by the Secretary of State and presented to the Tribunal comprised only what has been referred to as the 'generic' evidence. The judge queried with the Secretary of State's representative what specific evidence relating to the claimant was relied on and allowed a short adjournment for the representative to obtain instructions from a senior case worker. Despite suggestions that further evidence would be submitted, namely the lookup tool, none was presented to the Tribunal.
8. At [18] of the decision Judge Davies concluded that in the absence of any specific evidence relating to the first claimant, despite every opportunity to produce such evidence, the Secretary of State could not discharge the burden of proof. At [19] the judge recorded that the first claimant was found to be an entirely credible witness and that he had taken and passed the test, and that there was no evidence that it had been fraudulently obtained by him. In the circumstances, Judge Davies found that the evidential burden had not been discharged and thus the Secretary of State failed to establish that fraud had been used.
9. The grounds of application for permission to appeal submit that the First-

tier Tribunal failed to provide adequate reasons for finding that the Secretary of State had not discharged the burden of proving the appellant acted dishonestly. Reliance is placed on the 'generic' evidence of Peter Millington and Rebecca Collings, as well as the assertion in the RFR that the first claimant's test had been categorised as 'invalid,' because ETS was certain that there was evidence of a proxy test-taker or impersonation. "It is respectfully submitted that the First-tier Tribunal has provided inadequate reasons for finding the (first claimant) to be credible at paragraph 18 and 19 of the determination."

10. In granting permission to appeal, Judge Hanson noted that the Secretary of State does not challenge that no more than the 'generic' witness statements had been provided. It has been established that in appeals of this nature the evidential burden of proving deception rests on the Secretary of State and if that burden has been discharged, it passes to the applicant, who, if he or she provides a satisfactory explanation, the burden will pass back to the Secretary of State. "In this appeal it appears no additional material was provided to support the statement in the refusal letter from ETS sufficient to enable the respondent to discharge the evidential burden per se. It is not known why documents such as the ETS lookup tool were not provided to the First-tier specifically relating to the this appellant, from ETS."
11. However, in granting permission Judge Hanson noted that the bundle contained the 'credibility interview' conducted with the first claimant on 25.8.15, addressing the circumstances of the taking of the test, and considered that Judge Davies had given inadequate reasons for finding that the Secretary of State acted unfairly in conducting the interview.
12. At [21] Judge Davies noted that the first claimant was able to answer questions put to him in English and did so in a fluent manner, suggesting that he had not been coached. Judge Davies found the conclusion that he was not credible to be "grossly unfair," as there were no points in the interview where he appeared to lack credibility. This observation ignores the opinion of the interviewer that there were indeed points where he appeared to lack credibility, in that he "wasn't sure of what he did in the test. He didn't explain very well, and was sure there (were) only two elements to this test." Judge Davies also found it "grossly unfair" that the allegations that a proxy had been used to take the test had not been put to him.
13. In granting permission, Judge Hanson considered that Judge Davies "appears to have misrepresented the conclusion in the interview record sheet relating to whether there are any points in the interview that gave rise to adverse credibility points being taken. This is arguably a material misdirection and material error of fact."
14. Judge Hanson also suggested an arguable issue that the use of the term 'invalid,' now that the term is more fully understood as a result of the case

law in the Upper Tribunal and Court of Appeal, carries greater weight than initially understood in relation to establishing the use of a proxy in the taking of an English language test.

15. I accept that Judge Davies may have misdirected himself at [9] in suggesting that the evidence suggested that the Secretary of State had concluded that the first claimant belonged to a “third category of persons” who had taken tests in test centres where there were a lot of highly suspect results, and where the Secretary of State advised the persons in this third category to retake the test, which it is said the first claimant did and passed. That was not the assertion of the Secretary of State in the present case, where the result was invalidated and it said that the ETS was certain that a proxy test taker or impersonator had been used. This was not a questioned result, but an invalidated result. However, I am not satisfied that this misdirection was material to the outcome of the appeal, as the principal reason for allowing the appeal remains the finding that the Secretary of State failed to discharge the evidential burden.
16. I also reject the submission in the grounds that the First-tier Tribunal failed to provide adequate reasons for finding that the evidential and legal burdens had not been discharged. It is quite clear from the decision that the judge concluded that there was no specific evidence relating to this appellant emanating from ETS, only the ‘generic’ evidence explaining the process of analysis. Mr Harrison confirmed that even now he was unable to produce any specific evidence such as the lookup tool. In SM & Qadir [2016] EWCA Civ 1167, it is the combination of the ‘generic’ and specific evidence, notably the look up tool, which is generally sufficient to discharge the evidential burden, but may not be enough alone to discharge the legal burden. Clearly, if the evidential burden was not discharged in this case, as the judge found, the legal burden could not be discharged.
17. In that light, the issue of the judge’s alleged misrepresentation in relation to the ‘credibility interview,’ an issue not raised in the grounds of application for permission to appeal, is largely immaterial to the outcome of the appeal. Whilst the conclusions of the interviewer may well go to credibility, and whilst the judge may have misread or misunderstood those conclusions set out in the report, that interview was not sufficient even with the other evidence to discharge the evidential burden, the failure in respect of which was fatal to the Secretary of State’s case on appeal.
18. Mr Harrison was unable to point to any other basis on which the decision could or should be set aside. The grounds fail to address the issue of the evidential and legal burden, other than suggesting that the judge failed to give reasons for the conclusion that the evidential burden is not met. With respect to the Secretary of State and that submission, it is abundantly clear why the judge reached that conclusion. There was and remains no evidence before the Tribunal to link the first claimant to the invalidated test result.

Conclusions:

19. The making of the decision of the First-tier Tribunal did not involve the making of an error on a material point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains allowed for the principle reason set out in the decision.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. Given the circumstances, I make no anonymity order.



Signed

Deputy Upper Tribunal Judge Pickup

Dated