Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32415/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 July 2014	**On 9 July 2014**

Before

Deputy Upper Tribunal Judge Pickup
Between

Atul Daulat Nikam
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr A Burrett
For the respondent: Mr S Kandola, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Atul Daulat Nikam, date of birth 14.6.84, is a citizen of India.

2. This is his appeal against the determination of First-tier Tribunal Judge Ross, who dismissed his appeal against the decision of the respondent to refuse his application made on 23.12.11 for leave to remain in the UK as a Tier 4 (General) Student under the Points Based System (PBS).

3. The Judge heard the appeal on 24.2.14.

4. First-tier Tribunal Judge Pirotta refused permission to appeal on 23.4.14. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Goldstein granted permission to appeal on 21.5.14.

5. Thus the matter came before me on 9.7.14. as an appeal in the Upper Tribunal.

Error of Law

6. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Ross should be set aside.
7. The relevant background to the appeal may be summarised as follows. On 22.1.10 the appellant was granted leave to enter the UK as a Tier 4 General Migrant until 26.12.11.
8. The application made in 2011 for leave to remain was refused on 17.2.12 on the mandatory refusal grounds under paragraph 322(1A) of the Immigration Rules, where false representations have been made or false documents have been submitted, whether or not material to the application, and whether or not to the applicant's knowledge. It was asserted that the appellant had submitted false TOEIC English language score reports. The Secretary of State's verification exercise revealed in an email from TOEIC dated 1.2.12 that it had no record of the appellant ever having taken such English language tests in the UK.
9. The appellant was unaware of this decision until 2013 when he received the subsequent refusal decision in relation to an application made for further leave to remain as a Tier 2 (General) Migrant. This second application was refused on 22.7.13 under paragraph 322(2) of the Immigration Rules, on the basis that he had made false representations for the purpose of seeking leave to remain as a Tier 4 (General) Migrant, by submitting false TOEIC certificates.
10. The appellant appealed against the earlier decision and it was that appeal which came before Judge Ross. It was accepted that the earlier decision had not been served on the appellant. The grounds of appeal were that the respondent had failed to prove that a false document had been submitted and that the decision was unfair.
11. At the outset of the appeal hearing before Judge Ross, the appellant's representative applied for an adjournment. She had only just received the TOEIC email relied on by the respondent and wanted to make further enquiries with TOEIC. Judge Ross refused the adjournment request, on the basis that it was clear since the refusal decision that TOEIC did not accept that the submitted TOEIC score report was genuine.
12. Judge Ross found that the appellant had been aware since receiving the second refusal decision in July 2013 that the TOEIC score reports were not genuine and had taken no steps to contact TOEIC about it. He had visited the college where the test was taken about a month earlier, but found that it had closed down. He maintained that he had taken the test. He did not in fact go on to study, because he wasn't granted a visa. Instead, he started working as a restaurant manager, hence his application for a Tier 2 migrant leave to remain.

13. Judge Ross was satisfied that false information had been provided and that the respondent had satisfied the burden of proof. The appeal was thus dismissed.
14. In granting permission to appeal, Judge Goldstein stated, "I am persuaded that it is arguable that the Judge's decision to refuse the appellant's adjournment request and proceed with the hearing, may have led to procedural unfairness in relation to this appeal. In the circumstances all the grounds may be argued."
15. The respondent's Rule 24 reply, dated 10.6.14, submits that there are no arguable errors of law and it was reasonable and open to the judge, having considered the merits of an application for an adjournment to refuse to exercise his discretion to adjourn on the basis that no benefit would have been derived from such an adjournment bearing in mind that the appellant could not meet the requirements of the Immigration Rules, because it had been clear from the outset that the genuineness of the TOEIC score was disputed, and in particular bearing in mind that the college has closed.
16. For the reasons set out herein, I am satisfied that there is no error of law in the making of the decision of the First-tier Tribunal sufficient to require the determination of Judge Ross to be set aside.
17. The application was refused on the basis that the test score was a false document submitted by the appellant. If the appellant did not sit any test, as the email from TOEIC suggests, it must follow that the certificate was dishonestly submitted.
18. I note from the email that the respondent sent all the details of from the submitted certificate and there has been no suggestion that those details were in any way inaccurate. The college at which the appellant allegedly sat the test was closed, so no assistance could have been forthcoming from the college. I agree with Judge Pirotta's refusal to grant permission in which she concluded that an adjournment would have been pointless. TOEIC was not going to alter its stance and there were no other parties who could have verified the certificates.
19. Mr Burrett told me that whilst he did not abandon the grounds in relation to the refusal to grant an adjournment, that was not his primary submission. He told me, after taking instructions, that the appellant had made enquiries following the First-tier Tribunal hearing but there was no further evidence to produce. It follows that, with hindsight, it can be seen that an adjournment would not have assisted the appellant and thus I can find no prejudice to the appellant by the refusal to grant an adjournment.
20. Even now the appellant has been unable to demonstrate that he did in fact take the test and that the results are genuine.
21. Mr Burrett's main submission was that the short determination by Judge Ross was entirely inadequate to deal with the issue. He suggested that there should have been further enquiries with TOEIC and that no weight could be attached to TOEIC simply checking their database. He also suggested that given the enquiry was made on 1.2.12 just over a month from the taking of the test, they should have checked the database again. However, even now the appellant cannot show that any further enquiries or checks would have resulted in any different information. If there is no record of the appellant having taken the test and the details from the

certificate were accurately forwarded to TOEIC, as it appears from the email and the certificate, I fail to see what else could have been said by TOEIC.

22. Mr Burrett submitted that the appellant discharged the burden on him to prove compliance with the English language requirement by production of the TOEIC test score. The burden was on the Secretary of State to demonstrate on the balance of probabilities that it was a forgery. Relying on the email from TOEIC, Judge Ross was satisfied that the burden on the respondent had been discharged. Mr Burrett suggested that the evidence comprising only the email was insufficient to discharge that burden. I disagree. TOEIC found that there was no record of the appellant ever having taken the test, let alone passed it. There is no ambiguity about that point and I see no merit in the argument that the respondent should have checked again or done something further.
23. In the circumstances, I find that the First-tier Tribunal Judge was entitled to rely on the clear evidence of the email, and no countervailing evidence other than the appellant's assertion to the contrary, that the appellant had not taken the TOEIC test and it follows that the submitted document must be false. The standard of proof is on the balance of probabilities. It also must follow that if the appellant never took the test that his submission of the test score was dishonest. It was open to the judge to find that evidence was sufficient to discharge the burden on the Secretary of State.
24. Mr Burrett sought to argue article private life under 8 ECHR. However, that was neither in the original grounds of appeal to the First-tier Tribunal nor in the grounds of application for permission to appeal and I refused permission to add it as a ground at this stage.
25. Mr Burrett also sought to argue fairness, relying on that having been raised as a ground of appeal to the First-tier Tribunal. It was submitted that the prejudice was the delay in notifying the appellant of the 2012 decision. Again, this was not in the grounds of application for permission to appeal to the First-tier Tribunal and I refused permission to add it at this stage. In any event, before there could be any merit in this ground the appellant would have to demonstrate that he had been prejudiced by the delay. Mr Burrett could only suggest that he would have been able to make enquiries with the college sooner. However, I note that the appellant was notified of the 2012 decision in July 2013 and thus had over 6 months to make such enquiries before the First-tier Tribunal appeal hearing but did nothing other than visit the college one month before the appeal hearing, only to find that it had closed down. In the circumstances, I am not satisfied that there was any prejudice to the appellant and I find that the appellant could succeed on this ground.
26. The grounds in relation to the discretionary grounds for refusal are misguided. Paragraph 322(IA) is a mandatory ground for refusal, not discretionary. Once the respondent had concluded that the submitted document was false, the application had to be refused.
27. It remains the case that the only evidence that the appellant met the English language requirement is the TOEIC certificate, which the respondent asserts not to be genuine. In the circumstances, his Tier 4 application was bound to fail, regardless as to whether the appellant sat

any form of the English language test, as it follows that he could not demonstrate that he met the English language test requirements.

Conclusions:

28. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a 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 dismissed.

Signed: Date: 9 July 2014

Deputy Upper Tribunal Judge Pickup

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 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: There is no error of law and the appeal remains dismissed.

Signed:  Date: 9 July 2014

Deputy Upper Tribunal Judge Pickup