Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30883/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 28 April 2015	**On 30 April 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Affan Rasheed
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr V Jagadeshum, instructed by Farani Javid Taylor Solicitors
For the respondent: Mr G Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Affan Rasheed, date of birth 2.9.83, is a citizen of Pakistan.

2. This is his appeal against the determination of First-tier Tribunal Judge Lambert promulgated 1.10.14, dismissing his appeal against the decision of the respondent, dated 19.7.14, to refuse leave to enter the United Kingdom and to cancel his leave under paragraph 321A(2) of the Immigration Rules. The Judge heard the appeal on 24.9.14.

3. First-tier Tribunal Judge Kelly granted permission to appeal on 14.11.14.

4. Thus the matter came before me on 2.3.15 as an appeal in the Upper Tribunal.

5. For the reasons set out in my error of law decision, I found that there were errors of law in the making of the decision of the First-tier Tribunal such that it should be set aside and remade.

6. In particular, I found that there was insufficient evidence before the First-tier Tribunal to discharge the burden on the Secretary of State to demonstrate on the balance of probabilities and with cogent evidence that deception/dishonesty had been used in the previous application for leave. The issue was not the use of the witness statements, explaining the process of examination of suspected test results, common to most of the similar appeals, but rather the absence of cogent evidence directly linking this appellant to the invalidity conclusion.

7. In particular, I noted that the actual test certificate submitted by the appellant had not been produced by the Secretary of State; the one in the bundle was an earlier certificate, taken in 2011. There was only a two-sided sheet, on which the appellant's name is misspelt and inverted, and which asserts that it was a 'clip' from a larger file and matched to the appellant by his passport identity. The Secretary of State relied on "information sent to us by ETS," and was thus second-hand. As I stated at §15 and §16 of the error of law decision, "Without the test certificate, neither the certificate number, nor the test centre, nor the test date, nor the test results can be confirmed. The only matter that can be confirmed is the date of birth. The appellant was uncertain in his interview which test centre he had used. The test certificate produced in the appellant's bundle is irrelevant as it is not the one used in the application for leave. The respondent's bundle does not include either the application or the test certificate. Bearing in mind the very significant effect for the appellant of the cancellation of leave decision has, both for his present claim to study and any future application for entry clearance, the evidence which was available to the Tribunal was woefully inadequate to demonstrate deception by this appellant."

8. Having found an error of law I adjourned the remaking of the decision to a further hearing before myself in the Upper Tribunal, which this is. I gave leave for either party to adduce further evidence from ETS or elsewhere to demonstrate that the invalidated test result related to this appellant. No such evidence has been produced. The Tribunal is thus left in the same position as at the error of law hearing. Mr McVeety maintained the Secretary of State's position that the evidence adduced was sufficient, but in the light of my error of law findings and the absence of any further evidence I do not accept that submission.

9. In the circumstances, for the reasons stated the appeal must be allowed.

10. There was some confusion during the hearing caused by the grounds of appeal to the First-tier Tribunal which complain about a removal decision made under section 10 of the 1999 Act. If there was such a decision, there is no in-country right of appeal. However, even after time taken to check the Home Office files, Mr McVeety was

unable to confirm that there had been any section 10 decision. It follows that the decision did entitled the appellant to an in-country right of appeal pursuant to section 82 of the 2002 Act.

Conclusion and Decision:

11. For the reasons set out above, I find that the Secretary of State has failed to discharge the burden of proof to show by cogent evidence and on the balance of probabilities that deception/dishonesty was used in the previous application for leave in relation to an English language test certificate so as to justify the mandatory ground for refusal of entry and cancellation of existing leave under paragraph 321A(2) of the Immigration Rules.

12. The appeal is allowed on immigration grounds.

Signed: Date: 28 April 2015

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 a full fee award.

Reasons: The appeal has been allowed.

Signed:  Date: 28 April 2015

Deputy Upper Tribunal Judge Pickup