



IAC-FH-AR-V1

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

Appeal Number: IA/36557/2014

THE IMMIGRATION ACTS

**Heard at Field House
Oral determination given
following hearing on 20 August
2015**

**Decision & Reasons Promulgated
On 23 September 2015**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

IMMIGRATION OFFICER

Appellant

and

FORHAD MINAR

Respondent

Representation:

For the Appellant: Mr T Wilding, Home Office Presenting Officer

For the Respondent: Mr I Hossain, Solicitor, of Liberty Legal Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Immigration Officer against a decision of First-tier Tribunal Judge Bird who allowed Mr Minar's appeal against his decision not to grant him leave to enter the United Kingdom and cancelling his leave. For ease of reference I shall throughout this determination refer to the Immigration Officer who was the original respondent as "the Immigration Officer" and to Mr Minar who was the original appellant, as "the claimant".
2. The claimant is a national of Bangladesh who had been granted entry clearance as a student pursuant to which he first arrived in this country in

2011. Subsequently he was granted further leave to remain and part of the evidence which he had had to submit was an English language test certificate (ETS) for which he claimed to have undertaken a test at an ETS testing centre in Portsmouth. Following a Panorama programme in which fraud was detected by many people undertaking this test the Home Office conducted tests on ETS service centres in general and following these tests a number amounting to many thousands of people were alleged to have taken the test by using a proxy. That is that it is said that they did not take the test themselves but other people pretending to be them took the test on their behalf. As I have said, there are many thousands of cases where this is what is asserted by the Home Office or in this case for reasons I have given an Immigration Officer.

3. In all of these cases generic evidence has been given which has consisted of witness statements given by two witnesses of the Home Office, Mr Millington and Miss Rebecca Collins, which set out how the forensic tests were conducted and the basis upon which the Home Office is able to say that in the particular cases in question it is much more likely than not that the tests relied on were among the ones which were fraudulent.
4. In a general case where an application for leave has been refused in this country an appellant will have an out of country right of appeal and there are many decisions affirming that the Home Office's position in refusing such an appellant an in country right of appeal is lawful. What Parliament has decreed in these cases is that an out of country right of appeal is an adequate remedy and the challenge to the decision will not give rise to an in-country right of appeal. In this case, however, the decision was taken to refuse the claimant leave to enter and to cancel his leave when he tried to come back to the country and that decision does carry an in country right of appeal which is why the claimant in this case was able to appeal this decision without first leaving the country.
5. He appealed the decision and his appeal was heard before First-tier Tribunal Judge Bird sitting at Taylor House on 31 March 2015 and in a decision promulgated on 24 April 2015 Judge Bird allowed his appeal.
6. The law with regard to the way in which the evidence of the Home Office (or for technical reasons in this case the Immigration Officer) should be viewed by Tribunals has been clarified by the President of this Tribunal Mr Justice McCloskey in the judicial review case of *R (on the application of Gazi) v Secretary of State for the Home Department (ETS - judicial review)* IJR [2015] UKUT 00327 and the finding can be summarised very briefly.
7. Effectively so far as this Tribunal is concerned Mr Justice McCloskey found that the evidence produced on behalf of the Home Office in these cases is capable of establishing to the requisite degree of proof that a test was taken fraudulently but this test is not infallible and it is open to a Tribunal in any case considering the specific facts of that case to decide that that particular case was an exception to the general rule that such findings should be upheld. In other words, although the generic evidence produced

was sufficient to establish without contrary evidence that the English language certificate had been fraudulently obtained, it was open to a Tribunal in any individual case on the basis of findings on specific evidence adduced to say that that particular case was an exception to the general rule.

8. In this case Judge Bird allowed the claimant's appeal but did so not on the basis that she was persuaded by the evidence adduced on behalf of the claimant that this was an exception to the general rule, but because she considered that the generic evidence adduced on behalf of the Immigration Officer (rather than the Home Office which it would have been had this been a refusal of leave to remain) was insufficient to satisfy the burden of proof which the Immigration Officer had.
9. The basis of the Immigration Officer's appeal is that that is not a basis upon which in light of the decision of the President of this Tribunal in *Gazi*, it was properly open to the judge so to find.
10. In my judgement this submission is clearly correct. It would certainly have been open to the judge had she chosen to explain her decision in this way, to have found that she was persuaded by the claimant's evidence (and it appears the claimant gave his evidence in English and there were no problems with translation) that his was an exception to the general rule, but she did not do so.
11. Accordingly to the extent that she failed to do so she has failed to give sustainable reasons to justify the decision she made.
12. In these circumstances this decision must be set aside as containing a material error of law and I shall do so.
13. Both Mr Hossain on behalf of the claimant and Mr Wilding on behalf of the Immigration Officer submitted that the appropriate course I should follow would be to remit this case back to the First-tier Tribunal in order for the claimant's case to be determined in a fresh hearing before a judge other than Judge Bird. The basis on which it is said I should do so is that the judge's failure to give proper reasons for her decision was such that it cannot be said that this claimant has had a fair hearing. I agree with these submissions and will so order.

Notice of Decision

I set aside the decision of the First-tier Tribunal as containing a material error of law.

I order that this appeal be remitted for rehearing at Taylor House by any judge other than Judge Bird.

Signed:

A handwritten signature in black ink on a light blue background. The signature reads "Ken Craig" in a cursive script. The "K" is large and loops back, and the "C" in "Craig" is also large and loops back.

Upper Tribunal Judge Craig

Date: 18 September 2015