



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

**Appeal Number:
IA/37622/2014**

THE IMMIGRATION ACTS

**Heard at Field House
Reasons Promulgated
On 11 December 2015
December 2015**

**Decision and
On 23**

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

**MR MOHAMMAD ABDUL MOTIN MIA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

AN IMMIGRATION OFFICER

Respondent

Representation:

For the Appellant: Mr M Biggs, counsel instructed by Universal Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision, promulgated on 23 February 2015, of First-tier Tribunal Judge NMK Lawrence (hereinafter referred to as the FTTJ).

Background

2. The appellant was last granted leave to remain in the United Kingdom as a Tier 4 (General) student on 17 March 2014. Following his return to the United Kingdom on 4 August 2014 he was refused entry and granted temporary admission. Following an interview at the port of entry, the appellant's leave to remain was cancelled. The date of the Immigration Officer's decision was 30 September 2014. The reason for that decision is that an immigration officer considered that the appellant had obtained his last grant of leave to remain in the United Kingdom by deception. Reference was made to a TOEIC certificate from Educational Testing Service (ETS) submitted by the appellant in support of his previous Tier 4 application following a test taken at Queensway College on 20 November 2012. This information was said to amount to a significant change of circumstances and the decision to cancel leave was therefore made under 321A(1) of HC 395 (as amended). Additionally, the respondent considered that the appellant had breached the conditions of his leave to remain by working in the United Kingdom and therefore cancelled his leave for this reason as well.
3. At the hearing before the FTTJ, only the appellant gave evidence. In dismissing the appeal, the FTTJ noted that, "*the experts listened to the audio recordings including the recording made when the appellant claims he took the test himself.*" He concluded that the respondent had discharged the evidential burden of proof to the "*required statement (sic).*" The FTTJ commented that the appellant had not requested independent analysis of the audio recordings or contacted ETS but instead relied on his personal assertion that he took the test himself, which the FTTJ found did not displace the respondent's "*cogent*" evidence. The FTTJ concluded that the appellant "*has not discharged the legal burden of proof that he took the test himself.*" The appeal was also dismissed on Article 8 grounds.
4. In the grounds seeking permission, it was argued that the FTTJ's decision was not one which could be rationally arrived upon on the evidence before him; that the FTTJ had reversed the burden of proof by placing it on the appellant to prove his innocence and lastly, that the FTTJ discounted relevant evidence of the appellant's capability in the English language evidenced by his IELTS results from 2009 and that he had completed a BA from the University of Central Lancashire in December 2013. Complaint was also made regarding the FTTJ's treatment of the appellant's private life claim.
5. Upper Tribunal Judge Kopieczek granted permission to appeal, finding that the FTTJ arguably erred in concluding that the respondent had discharged the burden of proof in view of the limited evidence before him, which consisted solely of two witness statements. The grounds in relation to Article 8 ECHR were said to have little or no merit but were not ruled out.
6. The respondent's Rule 24 response opposed the appellant's appeal, stated that the FTTJ properly directed himself and that the grounds amounted to no more than a disagreement with the negative outcome of his appeal.
7. At the hearing before me, Mr Biggs relied on JC (Part 9 HC 395 – burden of proof) China [2007] 00027 and Wanjiku v SSHD [2011] EWCA Civ 264. There were two grounds of appeal. Firstly, that the FTTJ had wrongly approached the issue of

burden of proof and secondly, that there was insufficient evidence before the FTTJ for him to conclude that the Secretary of State had discharged the burden of proof. He expanded on these grounds with reference to what he described as the FTTJ's somewhat confused self-direction as well as the absence of any evidence which linked the appellant's English test result to the matters referred to in the respondent's generic witness statements.

8. Mr Walker conceded the force of Mr Biggs argument regarding the first ground and accepted that the FTTJ erred materially in his application of the burden of proof. With regard to ground 2, he advised me that there was no specific evidence relating to the appellant from the Secretary of State. However, he asked me to have regard to the fact that the FTTJ had not consider the working in breach of conditions point, regarding which the respondent had not cross appealed.
9. In reply, Mr Biggs stressed that the central plank of the appellant's case was the allegation of cheating. He invited me to allow the appellant's appeal and remake it in favour of the appellant.

Decision on error of law

10. The FTTJ's self-direction as to the burden of proof was erroneous. Mr Walker did not shy away from conceding this issue. At [5] the FTTJ said; "*The appellant bears the legal burden of proof from start to finish...*" At[6] he stated that the respondent bore "*the evidential, as opposed to the legal, burden of proof*" and also that "*the legal burden of proof does not lie with the respondent at any stage.*" The FTTJ's analysis of the burden of proof fails to acknowledge that the legal burden is on the Secretary of State and does not shift to the appellant. Indeed, the headnote of *JC* states as follows; "*In relation to all the general grounds contained in part 9, including paragraph 320(15), the burden of proof rests on the decision maker to establish any contested precedent fact.*"
11. There was also no specific evidence before the FTTJ, which linked the appellant to the TOEIC fraud referred to in the two generic witness statements which were before the FTTJ. Indeed, neither representative had previously had sight of the respondent's bundle, which was served on the Tribunal on the day of the hearing or shortly before but does not appear to have made its way to the appellant's case file in time for the hearing. In these circumstances, it is difficult to understand how the FTTJ considered the material before him to amount to "*cogent*" evidence of deception.
12. Owing to the above-mentioned errors, I set aside the decision of the FTTJ.
13. After hearing from the representatives, I accepted that it was appropriate for me to proceed to re-make the decision. There was some discussion as to the working in breach issue, which had not been pursued before the FTTJ, according to the latter's record of proceedings. Mr Biggs argued that it was inappropriate to pursue it now. He also objected to the re-making including consideration of the contents of the respondent's bundle, which he had yet to consider.
14. Ultimately, I decided that in order to remake the decision, I wished to consider the respondent's evidence, which while not served in accordance with directions, was in the possession of the First-tier Tribunal by the date of the hearing before

- it. I therefore afforded the parties time to consider the material. Thereafter both parties agreed that there was no evidence of substance in the respondent's bundle, which related to either the deception allegation or that of working in breach of conditions and I was invited to simply re-make the decision by allowing the appellant's appeal.
15. The burden of proving facts relied on in this case, in respect of the allegations of deception or breach of conditions rests with the respondent. In respect of all other matters the burden lies with the appellant. The standard of proof in all matters is that of a balance of probabilities.
 16. I have considered the witness statement of Peter Millington which indicates, at [47] that a test result could be invalidated owing to having been taken at a test centre where numerous other results have been invalidated. While his statement indicates that such cases are clearly identified, an examination of the print-out of the appellant's details gives no indication of the reason for the invalidation of his test result.
 17. The immigration officer who refused the appellant leave to enter alleges that his test certificate was fraudulently obtained. While the appellant's test result has been invalidated, there is no evidence showing that the reason for this action was as a result of fraud or dishonesty. An unsupported allegation is not sufficient for a finding of deception to be reached; RP(proof of forgery) Nigeria [2006] UKAIT 00086 applies.
 18. The generic evidence contained in the statements of Peter Millington and Rebecca Collings was described in Gazi as being "*lean in detail*" and produced by witnesses who "*can lay claim to no relevant credentials or expertise in the filed of voice recognition*" and were "*self-serving*."
 19. There was ample independent evidence before me, which supported the appellant's claim to be a high level speaker of English. He was awarded a 2:2 by the University of Central Lancashire in his degree in business administration around a year after he sat his TOEIC test and a year prior to taking his TOEIC test, the appellant attained a Higher National Diploma in travel and tourism management. He previously took an IELTS test, prior to coming to the United Kingdom and obtained a satisfactory result. Therefore not only is there no evidence of the appellant having obtained a fraudulent test result, there is ample evidence before me which tends to show that he would have had no need nor motivation to take such a step.
 20. Considering all the evidence before me, even where not expressly referred to in this decision, I conclude that it supports the appellant's account of personally taking the English language test in question and there is no support for the claim that a proxy was used. The Secretary of State has not discharged the burden of proving deception in this case.
 21. There is also the matter of the working in breach allegation. The appellant strongly denies having done so, stating that he stopped working in January 2012. He says that any pay received after that day was holiday pay, owed by his former employer. The respondent has provided no documentary evidence to show that the appellant was working when he was not permitted to do so. Nor has the appellant's account, as set out in his witness statement, been challenged by the respondent.

22. I find that the respondent has failed to discharge the burden of proving that the appellant worked in breach of the conditions of his grant of leave.
23. It follows that I do not accept that there has been a change of circumstances which merits the cancellation of the appellant's leave to remain in the United Kingdom.
24. The appeal is allowed.
25. No anonymity direction was made by the FTTJ and I can see no reason for making one now.

Conclusions

The decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I re-make the decision by allowing the appeal under the Immigration Rules.

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a full award owing to the fact that the evidence before me was sufficient for me to allow the appeal.

Signed

Date: 13 December 2015

Deputy Upper Tribunal Judge Kamara