IAC-AH-VP-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/39152/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 8th May 2015** | **On 21st May 2015** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**MR FAWAZ LAFI M ALOTIBI**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr N Armstrong (Counsel)
For the Respondent: Mr C Avery (HOPO)

**DECISION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Lucas promulgated on 20th January 2015, following a hearing at Victory House on 7th January 2015. In the determination, the judge allowed the appeal of Fawaz Lafi M Alotibi. The Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

## The Appellant

2. The Appellant is a male, a citizen of Saudi Arabia, who was born on 23rd August 1971. He appealed against the decision of the Secretary of State dated 8th October 2014 cancelling his leave to remain in the UK on the basis that there was evidence from Educational Testing Services (ETS) that, in taking his English language test, the Appellant had used impersonation, resulting in the ETS subsequently cancelling the Appellant's test score certificate.

3. The Appellant maintains (see his witness statement of 17th December 2014) that he actually took a train from Birmingham to Bradford, changed trains in Manchester, before arriving at the hearing centre, and he describes the nature of his trip to the hearing centre, and what transpired there quite clearly, which has not been challenged by the authorities.

## The Judge's Findings

4. The judge observed how the Appellant's leave to remain in the UK was cancelled in the letter dated 8th October 2014 with a proper explanation as to why that leave was cancelled. This was that,

> "Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained. Your scores from the test taken on 6th March 2013 at Millburn College have now been cancelled by ETS. On the basis of the information provided to it by ETS, the Home Office is satisfied that there is substantial evidence to conclude that your certificate was fraudulently obtained …"

5. The judge also observed how there was a witness statement from Peter Millington and from Rebecca Collings upon which reliance was placed by the Respondent Secretary of State, as evidence from the ETS that some fraudulent activity had taken place in the taking of tests and that they had properly been able to identify who was involved in this activity. As the judge observed, however, "It was conceded, … that neither of these statements related to this Appellant and were instead, general or generic in nature …" (paragraph 12).

6. The judge also had regard to the established case law of **AA (Nigeria)** where the Court of Appeal had said that there is a high civil standard of proof applicable when dishonesty is asserted and that "bare assertions" are in themselves insufficient to discharge this burden of proof (see paragraph 15). The judge rejected the case for the Respondent Secretary of State. He held that the witness statements relied upon by the Respondent "does not deal at all with this Appellant's case and are generic in nature as they deal with the processes involved with ETS. There is no consideration of this Appellant's case at all" (paragraph 22).

7. The judge also held that the methodology adopted by ETS is the use of a spreadsheet and emails to confirm that the reasons for the invalidation of

the test score are proper. However, "The precise reasons or 'substantial evidence' in support of this conclusion are not disclosed" (paragraph 22).

8. The Appellant's appeal was allowed.

## Grounds of Application

9. The grounds of application state that insufficient reasons were given for rejecting the deception objection and that too higher standard of proof was imposed upon the Respondent.

10. On 9th March 2015, permission to appeal was granted. It was granted specifically on the basis that,

> "In ETS cases such as this, the Respondent habitually submits a generalised statement and a line from a bowdlerised Excel spreadsheet bearing the Appellant's name. This is commonly found not to demonstrate deception to the requisite standard. The Respondent considers that such an approach amounts to an error of law. This is a clear case in which the First-tier is in need of guidance from the Upper-tier or above …" (see paragraph 3).

## Submissions

11. At the hearing before me on 8th May 2015, Mr Avery, appearing on behalf of the Respondent Secretary of State, submitted that an application had been made yesterday to the Tribunal for an adjournment because the president of the Tribunal had only this week heard the case of **Gazi** which deals with the cogency of evidence required in a Section 10 appeal under the IAA 1999, which is an appeal arising following a removal to the country abroad. Given that the emphasis was on the degree of evidence that can form the basis of a decision, it was important to wait until the outcome of that appeal, such that proper guidance can be made available to all the Tribunals dealing with issues of evidence.

12. Mr Avery submitted that although such an application had been made yesterday, it had been refused by the Tribunal, a matter confirmed by Mr Armstrong, appearing on behalf of the Appellant. I had before me the written application for an adjournment by Mr Avery as well as a written response by Mr Nick Armstrong opposing such an application in properly structured paragraphs, which were easy to follow. Mr Avery submitted that although the application yesterday had been dismissed, he was instructed to renew the application before me today.

13. Mr Armstrong in reply submitted that he would oppose the application for the reasons set out in his written response. This response makes it clear that the application comes very late in the day, and is contrary to paragraph 9 of the 13th November 2014 Practice Direction.

14. After due consideration, and bearing in mind the "overriding principle" which requires cases to be dealt with expeditiously and justly, I have declined to grant an adjournment, and not least given that the application before me is not in accordance with the Practice Direction, and has

already been rejected once by the Tribunal yesterday. There was no evidence before me when the president was to promulgate his judgment in **Gazi** or what the precise relevance of that would be to the narrow questions before this Tribunal today.

15. Subject to this, the hearing commenced.

16. Since it was Mr Avery's appeal on behalf of the Respondent Secretary of State, he began by submitting that the judge was wrong to have attached little weight to the witness statements of Rebecca Collings and Peter Millington. These witness statements are significant for what they say at paragraphs 28 and 30 because they provide a background to how the decision in this instant case was made. The process is properly explained by Peter Millington in his witness statement. Criticism of the process is misconceived because the process is robust and reliable. The evidence that the Secretary of State used goes to the very process and the process would have been applied to the present applicant. Yet, the judge in this case gives short shrift to the evidence. He does not engage with the evidence. The evidence is that the ETS was satisfied that they had reason, on the basis of the investigations that they were carrying out, to invalidate the test (see paragraphs 21 to 23). One has to bear in mind that the threshold here was a civil standard of proof and this was clearly reached.

17. In reply, Mr Armstrong submitted that this was a straightforward case and that the refusal of the adjournment yesterday confirmed this to be the case, and it was only right that the appeal was indeed heard before this Tribunal today. The fundamental question was whether the judge was wrong to say that the evidence was not of sufficient cogency. Plainly he was not wrong. The key point here was that we did not know how reliable the ETS evidence is in relation to its processes. There is no statement anywhere that 80% or 90% of their decisions have been found to have been accurate and correct. This was important because what was being relied upon was a generic process. The Appellant had given evidence based on his witness statement before the judge. The judge had observed that, "There were brief questions from Miss Appaih but these did not take the case any further" (see paragraph 17). In these circumstances, it was plain that deception to the requisite standard under the law had not been proven by the Respondent Secretary of State. The Appellant had given an account in six lengthy paragraphs about his going to the Millburn College to undertake the test and this evidence had not been challenged or contested by Miss Appaih and was not found to be wanting by the judge. Accordingly, it simply would not do to rely upon generic evidence that was just as applicable to someone else as it was to this Appellant.

18. Mr Armstrong also drew my attention to the use of the spreadsheet system. The Appellant was in the earliest batch of consideration on 24th March 2014 and thereafter, there was haste in proceeding these cases not least because of the Panorama programme which had highlighted sharp practices at a number of colleges where fraudulent behaviour was practised by students. He submitted it was important to look at Peter

Millington's witness statement at paragraphs 1, 7, 26, 29, 31, 39, and paragraph 40. My attention was also drawn to paragraphs 42, 44 and 46.

19. If one considered the position against this background, submitted Mr Armstrong, it was clear that by June 2014, there was some 33,000 fraudulent cases that ETS was apparently concerned about and 80% of these were said to have been subject to human verification. Yet, given these enormously large numbers, it is important to know what the degree of accuracy was in such a large range of cases because the numbers were so huge that one had to allow for the possibility of error and if that was the case, one could not exclude that error in relation to this Appellant, when no specific mention had been made of him in any of the evidence submitted by ETS or its witnesses.

20. What this meant was that if ETS had taken the view that there was fraudulent activity, the Tribunal still had to look at additional evidence to corroborate the existence of a deception, as legally defined following the case of **AA (Nigeria)**, because in itself, the evidence of the ETS simply could not be said to be such as to enable the Respondent to discharge the burden of proof that was upon her, given that no specific mention was made of the Appellant in this evidence.

21. Finally, should there be a finding of an error of law, it was important that evidence was heard in the form of the expert report from Dr Harrison, who makes it quite clear that a reliance upon the processes of the ETS and its subsequent decisions is fraught with difficulty because of its generic nature. Dr Harrison's report was not before the original judge but it was before this Tribunal, and were an error of law to be found there was no reason why this evidence could not now be considered in remaking the decision.

22. In reply, Mr Avery submitted that it was not true that there was no challenge to the account given by the Appellant. The very basis of the challenge was that the Appellant's account that he had himself sat the English language test was implausible.

## Error of Law

23. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision (see Section 12(2) of TCEA 2007). I have come to this conclusion notwithstanding Mr Armstrong's valid efforts to persuade me otherwise. This appeal is based on a very narrow premise. Mr Armstrong's submissions, carefully well prepared and measured in their delivery as they are, remain for another place and at another time. The simple issue in this case is that the Appellant's ETS TOEIC certificate from ETS was invalidated by ETS themselves. With the test certificate invalidated the Secretary of State had no option but to terminate leave.

24. Second, it is arguable that if the Secretary of State has set up a system she can place reliance upon that system when she looks to it for evidence of compliance with, as the case is here, the English test certification. The ETS is after all a global organisation properly constituted and used by government bodies.

25. Third, if the ETS has got a decision wrong, as is argued in the case before this Tribunal, then the proper recourse is against the ETS itself. This may well be in the form of a judicial review challengeif it can be shown that it performs public functions or functions of a *quasi* public nature, but that would be a matter for an individual applicant as in this case. What all of this points to, however, is to the fact that if the certificate is withdrawn or invalidated by the ETS, there is simply no basis for the Secretary of State to grant leave. This is what has happened here. This must be the end of the matter.

26. Finally, I should also add that the judge below cannot be correct in stating, insofar as this is implied, that, "the precise reasons for all 'substantial evidence' in support of this conclusion are not disclosed" (paragraph 23) because it cannot be said that the reasons are not disclosed. The reasons are plainly known to the Appellant in this case, namely, that it is suggested he is not the person who sat the test. There can be no further obligation on the Secretary of State to disclose anymore information in this respect.

**Remaking the Decision**

27. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions I have heard today. I am dismissing this appeal for the reasons that I have set out above. This appeal cannot succeed because the English language test was invalidated by the Educational Testing Services (ETS). The reference given at paragraph 3 of the determination to the relevant part of the refusal letter of 8th October 2014 provides a complete answer to why this appeal cannot succeed.

**Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is dismissed.

No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 16th May 2015