Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/41059/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 24 August 2015	**On 28 September 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR IJAZ AHMAD

Respondent

Representation:

For the Appellant: Mr Stephen Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr C Talacchi, Counsel, instructed by New Era Immigration Ltd

DETERMINATION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellant (hereafter the Secretary of State) appeals against the decision of the First-tier Tribunal (Judge) allowing the respondent's appeal against a decision taken on 26 September 2014 to refuse him leave to remain in the UK as the spouse of a person present and settled in the UK..

Introduction

3. The respondent entered the UK on 18 March 2011 with entry clearance as a Tier 4 student valid until 15 October 2012. His leave to remain as a student was subsequently extended until 11 October 2014. He then applied for leave to remain on 9 July 2014 on the basis that he had married Mrs Nazia Iqbal ("the sponsor") on 2 November 2013 and they had been living together since then.

4. The Secretary of State decided that the respondent could not meet the suitability requirements of Appendix FM because he had obtained his previous leave by deception as he had utilised a proxy test taker at an English language test on 22 August 2012. The respondent did not meet the requirements of paragraph 276ADE of the Immigration Rules ("the Rules") and there were no other exceptional circumstances that warranted further leave to remain.

The Appeal

5. The respondent appealed to the First-tier Tribunal and attended an oral hearing at Taylor House on 16 March 2015. He was represented by Mr Talacchi. The First-tier Tribunal found that the burden of proving dishonesty fell on the Secretary of State and the evidence submitted was insufficient. There was no direct evidence of a fake test sitter being seen on the day of the test. There was no evidence from either of the analysists who it is implied listened to the relevant voice files and there was nothing in the spreadsheet submitted by the Secretary of State which indicates whether the test result was declared invalid as a result of a match being found or because of test administration irregularities at the test centre. It was important that the full nature of the evidence was produced to prove the allegation. The judge was therefore not satisfied that the appellant did not meet the suitability requirements of Appendix FM.

The Appeal to the Upper Tribunal

6. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law in finding that the Secretary of State had failed to prove that the appellant had used deception. The witness statements detail extensively the investigation undertaken by ETS in the appellant's case, along with thousands of other applicants and the process of identifying those tests found to be invalid. The appellant was identified after a long and systematic investigation. The judge gave inadequate reasons for rejecting the evidence.

7. Permission to appeal was granted by First-tier Tribunal Judge Cooper on 2 July 2015. It was arguable that the judge erred in law by finding that the Secretary of State's evidence as sufficient at the very least to provide a

case for the appellant to answer and absent any innocent explanation to find that the dishonesty allegation was proved.

8. Thus, the appeal came before me

Discussion

9. Mr Whitwell submitted that there were two witness statements and a spreadsheet before the judge. The language test provider clearly states that the test was invalid.

10. Mr Talacchi submitted that each ETS case will depend on the evidence before the First-tier Tribunal. There was insufficient evidence to show that a false test sitter was used in this case. The judge made sound findings of fact and the Secretary of State is just seeking to reargue the matter already dealt with by the First-tier Tribunal. It was conceded by the witness Mr Millington that the test may be invalidated by administrative irregularity or a match identified and verified. The respondent made his case clear at paragraph 31 of the decision – the allegations have been successfully rebutted. There are no findings of fact about the respondent's evidence because the judge just found at paragraph 35 that the burden of proof was upon the respondent and it was not made out.

11. Mr Whitwell submitted in response that it is clear that this is a case where the test was invalid – this is not a case of administrative irregularity. I accept Mr Whitwell's submission that it is clear from the evidence that the Secretary of State's case in respect of this respondent is that the test was invalid. That is clear from the spreadsheet and therefore there is no issue of confusion with administrative irregularity. The judge therefore erred in law in giving weight to an immaterial matter, namely lack of clarity as to whether the Secretary of State relied upon invalidity or test administration irregularities.

12. However, the burden of proof in relation to proving that the respondent had submitted a false document in his previous application for further leave to remain was on the Secretary of State and must be discharged by cogent evidence on balance of probabilities. The real issues in this appeal are whether the judge gave adequate reasons for rejecting the evidence submitted by the Secretary of State and whether the judge was entitled to reject the evidence submitted by the Secretary of State without making any findings in relation to the evidence of the respondent.

13. The evidence submitted by the Secretary of State in this case is effectively identical in terms of weight to that submitted in R (on the application of Gazi) v SSHD (ETS – judicial review) [2015] UKUT 327. In that appeal, expert evidence from Dr Harrison was submitted on behalf of the applicant. The generic evidence from Mr Millington and Ms Collings was identical to that submitted in this case and is helpfully summarised at paragraphs 6-15 of the decision. At paragraph 35 of the decision, Mr Justice McCloskey said this,

"In my view, taking into account Chapter 50 of the EIG, the Respondent's evidence, summarised in Chapter II above, was sufficient to warrant the assessment that the Appellant's TOEIC had been procured by deception and thus, provided an adequate foundation for the decision made under section 10 of the 1999 Act. True it is that, at this remove and with the benefit of Dr Harrison's report, there may be grounds for contending that said evidence is not infallible"

Gazi was subsequently approved by the Court of Appeal in Mehmood and Ali [2015] EWCA Civ 744. Both authorities relate to judicial review applications but I am satisfied that the analysis and conclusions of Mr Justice McCloskey are of general application to all ETS appeals where the Secretary of State relies upon the generic witness statements and an individual spreadsheet relating to a particular appellant. The reasons given by the judge at paragraphs 33-35 of the First-tier decision are not strong and are partly based upon the misunderstanding of the evidence set out at paragraph 11 above. I find that the judge has given inadequate reasons for rejecting the evidence and that is a further material error of law.

14. It is common ground in this case that the judge did not make any findings in relation to the respondent's credibility. The respondent did not have the benefit of any supporting expert evidence and so his only route to rebut the evidence of the Secretary of State was his own evidence. The failure of the judge to make any findings in relation to that evidence is a further material error of law.

15. Thus, the First-tier Tribunal's decision to allow the respondent's appeal under the Immigration Rules involved the making of an error of law and its decision cannot stand.

Decision

16. Both representatives invited me to order a rehearing in the First-tier Tribunal if I set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. I find that the errors of law infect the decision as a whole and therefore the re-hearing will be de novo with all issues to be considered again by the First-tier Tribunal.

17. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined de novo by a judge other than the previous First-tier judge.

Signed  Date 25 September 2015

Judge Archer

Deputy Judge of the Upper Tribunal