



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/44925/2014

THE IMMIGRATION ACTS

Heard at Taylor House (Field House)
On 9 October 2015
Prepared 9 October 2015

Decision & Reasons Promulgated
On 5 November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

**MR ATHUL PADMANABHAN SRIDHAR
(ANONYMITY ORDER NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Singer, Counsel,
For the Respondent: Miss Brocklesby Weller, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of India, date of birth 29 December 1989 appealed against the Respondent's decision, dated 17 November 2014, to cancel continuing leave to remain as a Tier 4 (General) worker on 18 November 2013. In addition removal directions were made.

2. The basis of the Respondent's decision was that the Appellant had provided a TOEIC certificate, issued on 28 February 2013, from the Educational Testing Service (ETS), which had been fraudulently obtained through false representations, in an application made for leave to remain as a Tier 4 (General) Student. The certificate provided by ETS related to tests carried out on 16 October 2012 at South Quay College. The matter came before First-tier Tribunal Judge CJE Nicholls (the judge) who on 29 January 2015 dismissed the appeal against the Respondent's decision. Permission to appeal that decision was given by First-tier Tribunal Judge Grant-Hutchison on 20 March 2015. On 12 August 2015 I decided that the judge had made a number of errors of law in the assessment of all the evidence and the considerations raised on behalf of the Appellant. I concluded that there was a material error of law in the lack of adequate and sufficient reasoning. Accordingly I directed that the Original Tribunal decision could not stand and the matter would have to be remade in the Upper Tribunal by me.
3. Directions were given for the Respondent to file evidence relating to the ETS decision, if advised, no later than six weeks from 12 August 2015 and any reply to be provided thereafter.
4. The Respondent did not lodge any information in compliance with directions and it was only today (9 October 2015) a copy of the tiny extract of the ETS SELT source data was provided. Eventually during the hearing Miss Brocklesby- Weller submitted a further witness statement, dated 9 October 2015, which was made by Darren Morley a senior caseworker.
5. When the Appellant was first approached about this matter; on seeking to enter the United Kingdom he cogently denied any involvement in any fraud and in particular claimed that he had undertaken the tests. In a screening interview and later interview the same position was maintained by him. The Respondent's position was :- First, the Respondent received notification from ETS that they had assessed the Appellant's speaking test using voice verification software. Secondly, the Appellant

had permitted someone to deal with that speaking test on his behalf, in other words by proxy.

6. No-one knows what documentation or information was actually provided to the Home Office by ETS other than now a single printout was provided which asserted that the outcome of the test was invalid. There was no explanation.
7. The Appellant has argued for a variety of reasons that there must be some mistake in the recorded outcomes by ETS insofar as it applied to him. The Appellant was adamant that he took and passed the reading, writing and listening tests as well as the speaking test.
8. The ETS printout provides no information as to the basis on which it was said that test was invalid. There is nothing to show on what basis the invalidity was correctly coded into and correlated with the Appellant's certificate number, name, date of birth, nationality, test centre, and test date or the speaking and writing scores.
9. There is also coded number which asserted a record number of 76910 but that does not tie in with any other number on any document. The certificate for the speaking and writing is number 0044202171018022. The certificate for the listening and reading number 741327 on its barcode and with an ID number of 4571473 did not assist in explaining or understanding the record number. The certificate for the speaking and writing score also contains a barcode 744319 but again that does not tie in with anything in the ETS printout.
10. It is to be noted although the Appellant had vigorously disputed any fraud by himself in taking the test there has been no further check of the records either to confirm that there is an absence of any coding error or alternatively to confirm on what basis it was said that a different person had undertaken the speaking part of the test.

11. Although some particulars are given in what is called "Project Facade Information" it was actually of really very limited value because I cannot tell what numbers of persons took the test or to what extent the tests identified as invalid or questionable, which total about 56,000, reflected upon the total number of tests carried out and to what extent tests were found to be valid. The Project Facade document therefore only gives very limited information concerning either invalid or questionable outcomes of the tests. The value of the evidence, such evidence in the First-tier, is really no more or less than a report by a Mr Milligan or a Miss Collings of the Home Office who essentially attend upon ETS. They essentially repeat the processes that ETS were said to follow. Ultimately I have no direct knowledge of the validity of the tests or the reliability of those who carry out the audio checks or data processing. Similarly the latest statement of Mr Morley simply repeated the sources of relating to the claimed fraud by the Appellant. Since the allegation was of fraud it is clear that the burden of proof was upon the Respondent to show with cogent evidence that on the balance of probabilities the likelihood was that the test was not undertaken by the Appellant.
12. Mr Singer advanced a number of arguments in short as follows;- First, what incentive did the Appellant have to make a false statement in his personal circumstances? Secondly, he had undertaken and obtained a third class degree in Business Studies at a UK recognised university. Thirdly, he had a satisfactory immigration history and there was no background basis for him to misrepresent his academic skills and achievements. Fourthly, at the time these matters were being raised it is not suggested that the Appellant was not able to understand or address issues raised. It was not therefore a case after the event of improvements made with the passage of time from the date or after the date of the Respondent's decision.
13. Fifthly, the Appellant had answered clearly and without equivocation questions about the conduct of the test, how matters were arranged and in those matters the Appellant was a confident and accurate witness. Sixthly, therefore the only evidence was one strip of printout which may or may not accurately reflect the circumstances

of the Appellant. No-one provided evidence to show the likelihood was that the coding in of the Appellant's name and particulars was correct.

14. I did not find that the additional information from Mr Morley assisted this matter. Essentially the evidence as provided by Mr Milligan and Miss Collings really does not get to grips with identifying the likelihood of the printout strip being accurate.
15. In the circumstances I was not satisfied that the evidence was sufficient, as indeed has been assessed in the Upper Tribunal, to show that there was fraud. On the face of it absent of some reliable evidence to support the possibility that the Appellant was involved in misrepresenting and allowing a proxy to take the test, I find the allegation has not been established on a prima facie basis let alone balance of probabilities.
16. I therefore find, absent any other information against the Appellant's credibility, the Respondent's decision was not in accordance with the law.
17. The original Tribunal's decision cannot stand. The following decision is substituted. The appeal of the Appellant is allowed.

ANONYMITY

No anonymity order is necessary or appropriate.

APPEAL AWARD

Given the absence of evidence and the opportunity of the Respondent over more than one year to properly investigate this matter and provide evidence to support the decision I find that a fee award, in the sum of £140 paid, should be made.

Signed

Date 2 November 2015

Deputy Upper Tribunal Judge Davey