



IAC-FH-CK-V1

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

Appeal Number: IA/50629/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 11th November 2015**

**Decision & Reasons Promulgated
On 2nd December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**SAJJAD ALI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S Staunton, Home Office Presenting Officer

For the Respondent: Mr E Chaudhry, Eden Solicitors

DECISION AND REASONS

1. Although the Appellant in this case is the Secretary of State I refer to the parties as they were in the First-tier Tribunal.
2. The Appellant, a citizen of Pakistan, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 20th October 2014 to refuse him leave to remain on the basis of his marriage to a British citizen. Judge of the First-tier Tribunal Lodge allowed the appeal and the Secretary of State now appeals with permission to this Tribunal.

3. The background to this appeal is that the Appellant entered the UK on 22nd May 2011 on a Tier 4 Student visa valid until 30th September 2012. He submitted an application for leave to remain as a spouse on 25th September 2012 and was granted leave to remain until 14 August 2014. He submitted an application for leave to remain on human rights grounds on 24 July 2014. The Secretary of State refused that application on the basis that the Appellant did not meet S-LTR.2.2(a) of the suitability requirements of Appendix FM because the Educational Testing Services (ETS) confirmed that English language certificate obtained by the Appellant on the basis of an English speaking test taken on 29th August 2012 was obtained through deception.
4. At the hearing in the First-tier Tribunal the judge decided not to admit documents relating to the alleged deception submitted by the Home Office Presenting Officer on the morning of the hearing. However in the determination she went on to consider the matter as if she had admitted the documents. The judge found that the Appellant had not obtained his English language certificate by deception. She went on to conclude that the Secretary of State had not considered all of the other requirements of Appendix FM and decided that the appropriate course was to decide that the decision was not in accordance with the law and to remit the matter back to the Secretary of State so that the application could be considered properly within the Immigration Rules.
5. The Respondent contends in the Grounds of Appeal that the judge erred in three respects. It is firstly contended that the First-tier Tribunal Judge erred in refusing to admit the documents relating to the alleged deception due to their late submission. Mr Staunton submitted that the judge should have allowed the Secretary of State to submit the evidence in relation to the ETS English testing. I accept that the judge should have considered admitting these documents, particularly as she admitted documents submitted by the Appellant the day before the hearing. In any event I consider that this is not a material error because at paragraphs 15, 16 and 17 the judge considered these documents. She found that the evidence in relation to the ETS English test was all generic and do not refer to the Appellant specifically and that the only reference to the Appellant says that that his test was invalid without giving any further explanation.
6. The second Ground of Appeal, which is connected to the third, is that it is contended that the judge made a material misdirection of law and failed to give adequate reasons for findings on material matters. It is contended on behalf of the Secretary of State that the judge made a material error of law in that at paragraph 15 the judge said *"having said that even if the evidence were admitted I could not find that the Respondent has established to the high standard of proof required that the Appellant has obtained his test pass by deception"*. It is contended that this demonstrates that the judge applied a higher standard of proof than that required. It is contended that the burden is the civil standard of proof, the balance of probabilities, and that there is only one civil standard of proof which is that the fact in issue has more probably occurred than not. The

Secretary of State contends that the misapplication of the standard of proof by the First-tier Tribunal renders the decision unsustainable due to a material misdirection.

7. Mr Chaudhry contended in his skeleton argument and in his submissions that the judge did not err in relation to the standard of proof. He relied on the case of **Giri [2014] EWHC 1832 (Admin)**, and referred to paragraph 24 therein which discussed the *“heightened balance of probabilities standard”*. He referred also to the case of **AA (Nigeria) v SSHD [2010] EWCA Civ 773** where at paragraph 4.11 the court said that the standard of proof for matters of false representations and documents and other information is *“a higher balance of probabilities than normal”*. He also relied on the case of **Khawaja v Secretary of State for the Home Department [1983] UKHL 8** where the court said:

“With regard to the standard of proof, I agree with my noble and learned friend, Lord Scarman, that for the reasons explained by him, the appropriate standard is that which applies generally in civil proceedings, namely proof on a balance of probabilities, the degree of probability being proportionate to the nature and gravity of the issue. As cases such as those in the present appeals involve grave issues of personal liberty, the degree of probability required will be high.”

I accept, reading the determination as a whole, that, although the judge referred to the high standard of proof required, she was in fact referring to the higher balance of probabilities in relation to deception. I am satisfied that the judge weighed the evidence properly as at paragraph 15 she set out the evidence on the side of the Secretary of State, at paragraph 16 she set out the evidence put forward by the Appellant as to how and where he had set the test, and she concluded on the evidence that the Appellant had not obtained his English language test by deception. Looking at the way in which the judge weighed the evidence for both sides, I am satisfied that the judge applied the correct standard of proof in relation to this matter.

8. The third Ground of Appeal contends that the judge failed to give adequate reasons for rejecting the evidence put forward by the Secretary of State. However, I am satisfied that the judge put forward proper reasons at paragraphs 15 and 16 as to how she weighed the evidence from both sides and concluded that it had not been established that the Appellant obtained his English language test by deception.
9. I raised with the parties my concern as to the way in which the judge disposed of the case. Having found that the Appellant had not obtained his English language certificate by deception the judge did not go on to consider whether the appeal could be allowed within or outside the Rules. The judge said at paragraph 23 that she did not do so because neither the Appellant nor the Respondent had applied their minds to anything other than the issue of deception in relation to the English language certificate. She said that there was very little evidence before her in relation to the financial requirements. I also note that at paragraph 18 of the

determination the judge noted that Mr Chaudhry, who also appeared in the First-tier Tribunal for the Appellant, urged her to allow the appeal on the basis that the decision is not in accordance with the law and that it should be returned to the decision maker because, he submitted, the entire decision was infected with the suggestion that the Appellant had obtained his English test by deception. The judge therefore considered that the appropriate course was to allow the appeal as being not in accordance with the law so that it could be considered properly and fully within the Rules and outside the Rules by the Secretary of State. I raised with the parties whether the judge should have in fact gone on to determine the issue given that the reasons for refusal letter dealt with all of the aspects of Appendix FM. However, I note that the Secretary of State did not apply for permission to appeal on this basis and the Appellant had not cross-appealed on this basis and in fact Mr Chaudhry had asked the First-tier Tribunal Judge to deal with the appeal in this way. Neither party made submissions to be in relation to the disposal of the appeal. In these circumstances I did not consider it appropriate to interfere with the way in which the First-tier Tribunal Judge had disposed of the case.

10. In all of the circumstances I am satisfied that the First-tier Tribunal Judge made no material error of law in determining this appeal.

Notice of Decision

The Judge of the First-tier Tribunal did not make a material error of law in the determination of this appeal.

The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed

Date: 25th November 2015

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date: 25th November 2015

Deputy Upper Tribunal Judge Grimes