



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

Appeal Number: IA/26554/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 21<sup>st</sup> December 2015**

**Decision & Reasons  
Promulgated  
On 18<sup>th</sup> January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON**

**Between**

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

Appellant

**and**

**MR MUHAMMAD SATTAR  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Miss E Savage, Senior Home Office Presenting Officer  
For the Respondent: Mr A Rahman, Legal Representative

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of Mr Muhammad Sattar, a citizen of Pakistan, born on 2<sup>nd</sup> January 1980. For the purposes of this decision I refer to the parties as they were in the First-tier Tribunal.
2. The Respondent by notice of decision and letter dated 12<sup>th</sup> June 2014 considered the Appellant's claim as a human rights claim and made a decision to refuse that claim. The Respondent had considered the Appellant liable to removal pursuant to Section 10(1)(b) as a person who

had used deception in seeking leave to remain. His in-time application under Appendix FM was therefore treated by the Respondent as a human rights claim and his appeal against that decision to remove (a human rights claim having been refused).

3. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) I do not make an anonymity order. No order was made by the First-tier Tribunal and there were no issues before me that might require such an order.

## **Background**

4. On 17<sup>th</sup> June 2011 the Appellant entered the UK as a Tier 4 (General) Student Migrant with a visit valid until 23<sup>rd</sup> September 2014. On 30<sup>th</sup> May 2013 he married Mrs Waheeda Sattar who is a British citizen born in the UK on 2<sup>nd</sup> July 1976. In October 2013 when the Appellant had leave to remain, he made an application to be granted leave to remain on the basis of his marriage. That application was refused because the Appellant did not enclose the required English language certificate. This is indicated on page 8 of the FLR(M) form submitted by the Appellant subsequently on 17<sup>th</sup> February 2014, a second in time application for leave to remain on the basis of marriage. There was no indication that the Appellant's leave to remain had been curtailed or that his application on 17<sup>th</sup> February 2014 was anything other than in time.
5. The Appellant applied for leave to remain on the basis of the five year route under Appendix FM as he had valid leave to remain which had been granted for more than six months. The Appellant provided details of income and submitted various documents to show cohabitation. In respect of the English language requirement the Appellant stated that he had passed an English language test provided by an approved provider and enclosed an original certificate. In respect of the English language requirement the Appellant stated that he had passed an English language test provided by an approved provider and enclosed an original certificate.
6. This original certificate is a TOEIC Certificate issued by ETS. There are two certificates. The first is for speaking and writing in which the Appellant scored 180 out of 200 for both tests giving him a proficiency level of 8. The second certificate is for listening and reading. The certificates indicate that the speaking and writing test was taken on 27<sup>th</sup> November 2013 and the listening and reading test taken on 29<sup>th</sup> November 2013.
7. In March 2014 the Respondent sent the Appellant a letter stating that ETS TOEIC qualifications were under investigation. As a result the Appellant sat the Trinity College London grade 2 GESE qualification at the London Pioneer College (an SSELT centre). He was awarded an A1 certificate with distinction and a certificate was issued on 2<sup>nd</sup> May 2014. This was then submitted to the Home Office prior to the decision.
8. The Respondent's letter dated 12<sup>th</sup> June 2014 refused the application, concluding that the Appellant does not meet the suitability requirement at S-LTR.2.1 of Appendix FM which provides that an applicant will normally be

refused on grounds of suitability where it was considered that the Appellant was a person who had sought leave to remain in the UK by deception. The Respondent asserted that the validity of the Appellant's tests taken on 27<sup>th</sup> November 2013 could not be authenticated and his scores had been cancelled.

9. The Respondent went on to consider the remaining issues under the Immigration Rules but considered that the Appellant did not meet the requirements.
10. The appeals came before Judge of the First-tier Tribunal Davies on 18<sup>th</sup> May 2015. The judge, in a decision promulgated on 5<sup>th</sup> June 2015 concluded that the Respondent had failed to show that the Appellant had used deception in an attempt to stay in the UK. The judge therefore concluded that the Appellant did meet the suitability criteria under S-LTR.2.2(a). It was accepted by the First-tier Tribunal Judge that the Appellant met the eligibility criteria and did not therefore need to rely on EX.1. The judge allowed the appeal under the Immigration Rules.
11. Permission to appeal to the Upper Tribunal was sought on two grounds. The first was that the judge had made a material misdirection of law in applying an impermissibly high standard of proof in determining this deception issue. Whilst it was acknowledged that the judge identified the requisite burden and standard of proof correctly at paragraph 43 of the determination, when considering the evidence it was submitted that the judge applied a more onerous test. The second ground was that the judge had failed to provide adequate reasons for a finding on a material matter and it was submitted that the judge had before the Tribunal witness statements and an extract from a spreadsheet. These documents evidence the Respondent's case that the Appellant employed deception in obtaining his English language certificate. The spreadsheet extract indicates that the Appellant's test had been categorised by ETS as "invalid". The witness statements from Mr Peter Millington and Mrs Rebecca Collings indicate that tests are categorised as invalid when ETS are certain that there is evidence of proxy tests taking place or impersonation.
12. Permission to appeal to the Upper Tribunal was granted and the appeal came before me.
13. Miss Savage at the appeal before me initially made an application for an adjournment of the error of law hearing. This was on the basis that it was Miss Savage's understanding that there was to be a reported case on the same issue. In light of the lack of any adequate information that might suggest that this case was on all fours with any subsequent reported case I did not consider that an adjournment was appropriate. I considered the relevant Tribunal Procedure (Upper Tribunal) Rules 2008 including the overriding objective to deal with cases fairly and justly. Miss Savage did not pursue her adjournment request with any great force and I was not satisfied that any unfairness would ensue from proceeding with the case.

## **Ground 1**

14. Miss Savage referred me to paragraph [43] of the judge's determination which did correctly state the burden and standard of proof. However, she submitted that this was incorrectly applied. In particular at [46] it was Miss Savage's contention that the judge was requiring further evidence, or at least attached weight to the lack of additional evidence from ETS. At [45] the judge also noted the lack of provision of any further documents. It was Miss Savage's view that this improperly elevated the standard of proof beyond the balance of probabilities. It was Miss Savage's submission that there was witness statement evidence which did provide detail in relation to the ETS consideration.
15. Mr Rahman in reply submitted that the judge was right to conclude that he could not make a safe finding that deception had been used in this case. Mr Rahman referred me to the judicial review of **R (on the application of) Gazi v Secretary of State for the Home Department (ETS judicial review) [2015] UKUT 00327 (IAC)** in which Mr Rahman submitted the President confirmed that the First-tier Tribunal is best suited to fact finding cases such as these.
16. I am satisfied, reading the decision in its entirety, that the judge properly directed himself, both in form and in substance, as to the burden and standard of proof. Whilst the judge set out at paragraphs [45], [46] and [47] what information the judge believed was not provided by the Respondent, this was part of a rounded consideration. This included, at [47] a consideration of paragraph 47 of Peter Millington's witness statement. The judge came to the view that there was no entry in the spreadsheet line provided by the Respondent which provides the information Mr Millington referred to. The judge was therefore not satisfied that the Appellant's test had been treated as invalid because an imposter took the test, or merely because he took his test at a UK testing centre when numerous other results have been invalidated.
17. Although Miss Savage submitted in reply that this was not her understanding of the statements from Mr Millington and that if a test was indicated as invalid this meant that deception had been used, I am satisfied that the findings reached by the judge were ones that were open to him. Ms Savage was unable to point to anything inherently wrong in his analysis of the evidence produced by the Respondent. Even if the judge erred in his analysis of paragraph 47 of Peter Millington's witness statement, in the alternative I am satisfied that such is not material as it is clear that the judge carefully considered all the evidence, including the generic witness statement evidence before him and was not satisfied that there was adequate specific evidence to conclude that this appellant had used a proxy test taker.
18. I am not satisfied that in either noting the failure of the Respondent to provide certain items that the judge was applying a higher test, or that the judge in criticising the evidence from the Respondent failed to give adequate reasons for so doing.

19. I am satisfied that the judge applied the appropriate standard of proof and properly balanced the generic evidence against the Appellant's evidence.

## **Ground 2**

20. I am satisfied that the judge carefully evaluated all of the evidence. Miss Savage argued that there were inadequate reasons given by the judge, in particular Miss Savage stated that [45] referred to no documentary evidence of the administrative review process. However Miss Savage indicated that there was documentary evidence of the administrative review process in terms of the witness statements before the judge, including of Rebecca Collings. Miss Savage also referred to [46] which indicated that all that had been provided was a one line printout from a spreadsheet. She submitted that this was further evidence that the judge had failed to consider the detailed witness statements from Peter Millington and Rebecca Collings and that these had not been taken into account.
21. Miss Savage referred to the fact that the judge, at [51] records the difficulties of the Appellant giving evidence in English and the fact that he had obtained a very high result of 180 out of 200 in his TOEIC score report. The judge noted that this was a very high level and was difficult to reconcile with the oral evidence from the Appellant. In light of this it was Miss Savage's view that the judge had provided inadequate reasons.
22. I do not share that conclusion; Judge Davies gave detailed reasons and examined all the evidence before him thoroughly, both from the Respondent and from the Appellant. The judge carefully considered and weighed his concerns, at [51] and [52] in relation to his difficulty in reconciling the Appellant's oral evidence and his scores and was entitled to reach the conclusion that he did that on balance the respondent had not discharged the burden of proof.
23. In relation to the witness statements from, Michael Sartorius, Peter Millington and Rebecca Collings, the judge set out details from these statements including at [29], [30], [45], [46] and [47] of his decision. The judge notes that these were 'generic statements setting out in some detail the history of the ETS investigations'. It is clear that the judge considered the generic evidence of the review process. There was no error in the judge finding that there was nothing specific in these witness statements relating to the Appellant, other than the Appellant's name and date of birth and certificate number in Annex A.
24. In finding that deception had not been established the judge also took into consideration that the Appellant provided a further English language test referred to at [49] of the decision. The judge noted that there was no reference to the Respondent considering the results of this test despite the fact that the Appellant had passed A1 level. The judge considered this a relevant factor to take into account when deciding whether or not to conclude the ETS test was obtained by deception. This again was a finding properly open to him, on consideration of all the evidence. At [49] the

judge pointed out that there was a real possibility that ETS can make mistakes in its verification process and relied on the witness statement of Mr Millington in this regard. The judge was of the view that the Respondent's decision was not in accordance with the law as it failed to appear to have given consideration to the possibility of mistakes, particularly in the context of an Appellant who subsequently passed a further test about which there were no concerns raised, rendered the Respondent's decision not in accordance with the law.

25. I am satisfied that in preferring the evidence of the appellant, the judge reached a conclusion open to him on the evidence and gave detailed and adequate reasons for his findings. I do not find merit in either of these grounds which amount to little more than a disagreement with the judge's conclusions.

### **Notice of Decision**

26. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and shall stand.

Signed

Date: 15 January 2016

Deputy Upper Tribunal Judge Hutchinson

