



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

Appeal Number: IA/30356/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 16<sup>th</sup> May 2016**

**Decision & Reasons  
Promulgated  
On 27<sup>th</sup> May 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**MR NARAYAN RASAILI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr S Kumar instructed by Capital Solicitors  
For the Respondent: Mr N Bramble, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals, with permission, against the decision of First-tier Tribunal Judge Kelly made on 25<sup>th</sup> September 2015, dismissing the appellant's appeal against the Secretary of State's decision of 11<sup>th</sup> July 2014 to refuse his application (dated 8<sup>th</sup> April 2014) for leave to remain on

the basis of his private and family life in the United Kingdom and to remove him to Nepal by way of directions under Section 10 of the Immigration and Asylum Act 1999.

2. The application was refused because it was alleged by the respondent that the appellant had submitted a fraudulent English language test certificate in support of his application. It was also said he did not meet the relevant requirements of Appendix FM or paragraph 276ADE of the Immigration Rules.
3. I cite the following paragraphs from Judge Kelly's decision:

*"14. In order to establish the alleged fraud, the respondent relies upon the witness statements of Michael Sartorius, Rebecca Collings and Peter Millington and a document entitled "Annex A - Evidence from ETS in respect of R1250022". These documents explain how the alleged fraud came to light in the wake of an investigation by the BBC's Panorama programme and how the appellant's case was one of many where voice verification software had suggested that his test was taken by a proxy. The test results in question had been cancelled as a result.*

*16. The aforementioned witness statements are generic in nature and do not specifically deal with the appellant's test. However, the witness statement of Mr Sartorius cross-references to the Annex A document which does specifically relate to the appellant's test results. Annex A is an excerpt from a spreadsheet which was provided to the Home Office by ETS. The appellant's test result is one of those categorised as "invalid", thereby indicating that it was one of the cases where ETS was certain that impersonation or proxy test taking had been relied upon.*

*19. While I recognise that the voice testing analysis relied on by the respondent is unlikely to be wholly infallible, I nevertheless attach significant weight to the fact that the appellant's test result was one of those where ETS was certain that deception had been deployed as opposed to being amongst the inconclusive results. Whilst the statements of Ms Collings and Mr Millington are open to legitimate criticism in some respects, as observed by McClosky J, I find that overall they are thorough and comprehensive and adequately explain how the appellant's test was one of those where the use of a proxy taker had been identified. However, I do not base my decision solely on this evidence. I find that there are also a number of other features of the evidence which support his conclusion.*

*20. The appellant failed to provide any satisfactory explanation as to why he would have chosen to travel all the way to Nottingham to take his English language test when there were many test*

centres in London far closer to his home. He initially suggested that he had been unable to book into a test in any one of the London test centres within a reasonable time frame. However, he later admitted that he had not in fact made any attempt to book in for a test at any one of the London centres. I do not find it credible that he would have chosen to expend the time and to incur the cost of travelling to Nottingham to take the test if he didn't have to.

21. *The appellant's claim to have travelled to Nottingham to take the English test was not supported by the evidence of the Sponsor. She believed that he had taken the test in London. She was asked whether she recalled the appellant travelling to any city outside of London in the last year or two. She said that he had not done so and that they had both remained in London throughout that period. Were it the case that the appellant had in fact travelled to Nottingham to take the test, which he said lasted all day, I would expect his wife to be aware of this.*
22. *Furthermore, although the appellant gave his oral evidence in English and did not wish to benefit from the assistance of an interpreter, there were many times throughout the hearing when I struggled to understand what he was saying due to his lack of fluency in English. Many of his answers had to be repeated or clarified due to my difficulty in following his evidence. I accept that this could have been the result of nervousness on his part giving the importance and the formality of the occasion. Nevertheless, even making allowance for his nerves, I find that the relatively poor standard of his spoken English lends further weight to the respondent's case.*
23. *The appellant seeks to rely on the fact that he passed an English Language Test in 2011. He suggests that his spoken English language skills were likely to be stronger still by 2013 when the test relevant to this appeal was taken and that he would therefore have had no need to rely on a proxy taker. However, in light of my findings in respect of this appeal, I cannot rule out the possibility that deception was also deployed in respect of the 2011 test.*
24. *When I consider the evidence as a whole, I find that the respondent has discharged the burden of proof upon her to establish that the English Language Test Certificate in question was indeed false and that the appellant did rely on a proxy to take the test on his behalf. I therefore find that the respondent was justified in refusing his application under S-LTR.2.2. of Appendix FM and seeking to remove him from the United Kingdom under Section 10 of the Immigration and Asylum Act 1999."*

4. As stated above the judge dismissed the appeal.
5. The challenge was made by the appellant on the following basis. At the start of the hearing it was clarified that the Presenting Officer was not relying on the statements of Michael Sartorius and Rebecca Collings and Peter Millington, the generic statements of the Secretary of State and therefore there was no need to provide a legible copy. The judge noted that the respondent relied upon that evidence and had given due weight to those statements at paragraph 16.
6. At paragraph 8 of the grounds the appellant did explain that he was unable to book the test as he did not have much time and his wife was unaware of the fact as she was at her father's house when he went for the test. While she was right in saying that she was unaware. I make it clear from the outset that I do not take this further explanation into account because this does not appear to be evidence before the First-tier Tribunal Judge.
7. At the hearing before me, Mr Kumar made the point that the judge assessed the appellant's English language fluency which was poor and still went ahead for the hearing without adjourning for an interpreter. This, he submitted, was not consistent with the fairness of the proceedings.
8. Further the judge made a baseless and irrelevant comment in relation to a previous language test and that the judge could not rule out the possibility but in 2011 the appellant deployed deception.
9. In conclusion, I took account of the submissions made by Mr Bramble and note that **SM & Kadir v Secretary of State for the Home Department (ETS - evidence - burden of proof) [2016] UKUT 00229 (IAC)** appears to indicate that the generic evidence does discharge the evidential burden of proving dishonesty on the part of the appellant but it also confirms that it is important to look at the factors in each case and each case is fact-sensitive. The head note of **SM & Kadir** reads:
  - (i) *The Secretary of State's generic evidence, combined with her evidence particular to these two appellants, sufficed to discharge the evidential burden of proving that their TOEIC certificates had been procured by dishonesty.*
  - (ii) *However, given the multiple frailties from which this generic evidence was considered to suffer and, in the light of the evidence adduced by the appellants, the Secretary of State failed to discharge the legal burden of proving dishonesty on their part."*
10. Mr Bramble indicated that there were a number of factors in this case which were taken into account, particularly that there was no further evidence from the appellant on the specific facts and that the appellant appeared to have changed his evidence. I have cited the evidence given

by the wife recorded in the Record of Proceedings and there is some variance between that and what is recorded in the decision of the judge at paragraph 21 cited above. The wife says she does not remember and states 'we' are not going out of London. She does not categorically state that her husband had not been out of London.

11. In the Record of Proceedings it is stated

*"What over cities has your husband visited in the last two years?*

*Just London.*

*Has he ever been outside London to another city?*

***I don't remember. We are not going out of London."***

12. It is also clear that the generic evidence served at the hearing, and indeed that evidence is marked by the judge as having been served at the hearing, omits paragraphs on each page. Unfortunately the judge has stated at paragraph 19 cited above that he attached *significant* weight to the appellant's test result and found the statements of Ms Collings and Mr Millington were open to legitimate criticism but overall they were thorough comprehensive and adequately explained. The evidence however served on the day of the hearing was incomplete and it is not clear to me that these statements would have been readily available to the appellant via other means (i.e. appended to a reported case).

13. As a final issue, the judge appeared to assess the appellant's English through his oral evidence but there is no indication that the judge was aware of the standard that was to be reached in the TOEIC examinations as compared with the standard of the appellant's oral evidence given in the hearing, and thus the conclusion of judge which was as follows "even making allowance for his nerves I find that the relatively poor standard of his spoken English lends further weight to the respondent's case" is an inadequate basis on which to proceed and therefore an irrelevant factor and unsafe.

14. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

15. The parties should serve on the opposing party and the Tribunal legible copies of any evidence upon which it is intended to rely at least 14 days prior to the substantive hearing.

No anonymity direction is made.

Signed

Date 27<sup>th</sup> May 2016

Deputy Upper Tribunal Judge Rimington