Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/32088/2014**
IA/32091/2014
IA/32099/2014
IA/43792/2014
IA/43793/2014
IA/43794/3014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 December 2015	**On 4 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR TUSHAR KANTILAL PATEL
MRS KAUSHIKABAHEN TUSHAR PATEL
MASTER YUG TUSHARKUMAR PATEL
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr David Clarke, a Home Office Presenting Officer
For the Respondent: Ms R. Akhter of Counsel

DECISION AND REASONS

Introduction

1. This is an appeal by Secretary of State for the Home Department (the 'Secretary of State') against a decision of the First-tier Tribunal allowing the appeals of the claimants who had appealed against a decision taken on 16 October 2014 to refuse their applications for further leave to remain in the United Kingdom.

Background Facts

2. The first claimant was born on 12 May 1976. The second claimant is his wife born 22 July 1979. The third claimant is their son born on 27 April 2005. They are all citizens of India. On 20 October 2010 the first claimant was granted leave to enter the UK as a Tier 1 (General student) until 21 January 2013. On 18 November 2013 he was granted leave to remain as a Tier 4 (General) student until 7 April 2014.

3. On 7 April 2014 the first claimant made an application for leave to remain in the UK as a Tier 4 (General) Student Migrant under the Immigration Rules HC395 (as amended)(the 'Immigration Rules') and for a Biometric Residence permit. The second and third claimants made applications as the first claimant's dependants.

4. The first claimant's application was refused because the Secretary of State concluded, based on evidence obtained from Educational Testing Services ('ETS'), that the first claimant had obtained his Test of English for International Communication ('TOEIC') certificate fraudulently. As deception had been used in relation to the application, the application was refused under paragraph 322(1A) of the Immigration Rules.

The Appeal to the First-tier Tribunal

5. The claimants appealed to the First-tier Tribunal. In a determination promulgated on 8 May 2015, Judge Chamberlain allowed the claimants' appeals. The First-tier Tribunal found that the Secretary of State had not shown that the TOIEC certificate had been obtained by deception. The First-tier Tribunal judge accepted the first claimant's evidence that he had attended the test centre and had personally taken the test. On the basis that the first claimant should have been awarded the points for his Confirmation of Acceptance for Studies ('CAS') the judge found that the first claimant met the requirements of the Immigration Rules.

The Appeal to the Upper Tribunal

6. The Secretary of State sought permission to appeal to the Upper Tribunal. On 25 June 2015 designated First-tier Tribunal Judge Garratt refused permission to appeal. An application to the Upper Tribunal for

permission to appeal was granted by Upper Tribunal Judge Gleeson on 18 August 2015. Thus, the appeal came before me.

Summary of the Submissions

7. The grounds of appeal assert

Ground one: Making a material misdirection of law

- The First-tier Tribunal has made a material misdirection of law in applying an impermissibly high standard of proof in determining the deception issue. When considering the evidence the First-tier Tribunal applies a standard far more onerous than the balance of probabilities.

- At paragraphs 11 and 12 the First-tier Tribunal seems to require further documentation from the Secretary of State such as the "significant evidence" referred to in the refusal letter [paragraph 12, First-tier Tribunal determination]. In requiring further evidence, and failing to properly reason why the documentary evidence provided does not discharge the requisite standard of proof, the First-tier Tribunal has imposed an unacceptably high standard of proof.

- In applying an impermissibly high standard of proof the First-tier Tribunal has erred in the consideration of the case;

Ground two: Failing to provide adequate reasons for finding on a material matter

- The First-tier Tribunal has failed to provide adequate reasons for its finding that the evidence is inadequate in demonstrating that the appellant's English language certificate was obtained by deception;

- The Secretary of State provided at appeal a number of documents in support of the allegation including a witness statement from Mr Peter Millington, a witness statement from Ms Rebecca Collins (sic) and an ETS spreadsheet document. The ETS spreadsheet document indicates that the appellant's test has been categorised by ETS as "invalid". The witness statements from Mr Peter Millington and Ms Rebecca Collins (sic) clearly provide that the tests are categorised as "invalid" where ETS are certain that there is evidence of proxy test-taking or impersonation –

  (i) "ETS described that any tests categorised as cancelled (which later became known as invalid) had the same voice for multiple tests takes. On questioning they advised that

they were certain that there was evidence of proxy test-taking or impersonation in those cases"

[paragraph 28, witness statement of Ms Rebecca Collins (sic)]

(ii) *"…Following comprehensive investigations ETS provided the Home Office with lists of candidates whose test results show 'substantial evidence of invalidity'. The Home Office was provided with the background to the process used by ETS to reach that conclusion"*

[paragraph 6, witness statement of Mr Peter Millington]

(iii) *"…Where a match has been identified their approach is to invalidate the test result. As set out in the witness statement of Rebecca Collings, ETS has informed the Home Office that there was evidence of invalidity in those cases"*

[paragraph 46, witness statement of Mr Peter Millington]

- Taking into account of this evidence it is clear that in order to be categorised as "invalid" on the spreadsheet provided to the Home office that case has to have gone through a computer program analysing speech and then two independent voice analysts. If all three are in agreement that a proxy has been used then the test would be categorised as "invalid";

- In light of the evidence it is clear that the Secretary of State reasonably concluded that the appellant had used deception in their application and that the First-tier Tribunal has erred in finding that the evidence was inadequate in demonstrating deception.

8. Mr Clarke relied on the grounds of appeal. He submitted that the judge had applied a higher standard of proof than the appropriate standard which was the balance of probabilities. He also submitted that the judge failed to give adequate reasons why the evidence was insufficient to discharge the burden of proof. He referred me to paragraph 28 of R (on the application of Gazi) v Secretary of State for the Home Department (ETS – judicial review) IJR [2015] UKUT 00327 (IAC) ('Gazi'). He submitted that the argument advanced was that the Secretary of State had relied on evidence that was insufficient when taken in conjunction with the Secretary of State's Enforcement instructions and Guidance ('EIG') to satisfy to a high degree of probability the assessment that the appellant, in that case, had procured the TOEIC certificate by deception. The Upper Tribunal in Gazi was satisfied, at para 35, that the evidence was sufficient to warrant the assessment and was satisfied that the evidence was robust enough to a high degree of probability. The judge was not correct to say that there was no significant evidence because the

evidence in the form of the witness statements was held in Gazi to meet the test of high probability. There was evidence of what happened at New London College as it was set out in the witness statements what the processes were. Gazi shows that there is a high probability that fraud occurred where ETS record the test as invalid.

9. In Paragraphs 11 -13 of the First-tier Tribunal decision the judge sets out disdain for the evidence. The judge did not approach the evidence in the correct way. The judge viewed the evidence as being of such little weight that in effect she applied a higher standard of proof. At paragraph 13 the judge's approach was clearly at odds with what the President found to be evidence of sufficient weight. With regard to the judge's approach to the sheet annexed to the witness statement of Mr Sartorius Mr Clarke submitted that the judge by referring to the document as 'alleged' is clearly applying a higher standard. The sheet was supported by a witness statement of a senior caseworker. This was a signed statement with a statement of truth. Effectively the judge is asserting that the Secretary of State's witness is untruthful but no reasons are given for this. This underscores the submission that a higher standard of proof was being applied. Mr Clarke submitted that it is irrational for the judge to consider that if the same document were produced by ETS rather than the Home Office that would be more cogent evidence. The judge should have engaged with that evidence. At paragraph 12 of the decision the judge's critique doesn't engage with the evidence contained within the witness statements. The witness evidence of Mr Millington at paragraph 45 confirms that the approach mitigates against false positives. The judge found that the evidence was of such little quality that it does not discharge the burden of proof. What the Gazi case does require of the fact finding exercise is consideration of whether it is rebutted by other evidence. The evidence before the First-tier Tribunal in the witness statement at paragraphs 8-18 sets out the ETS test details etc. The judge ought to have engaged with that evidence and considered if it does rebut the other evidence. At paragraph 12 there is a reference to a picture having been taken. It would have been helpful for the claimant to approach ETS for confirmation of him going to the test centre. Mr Clarke submitted that the judge adopted an improper approach. There was not enough evidence to rebut the evidence of the Secretary of State.

10. A rule 24 response was served by the claimants. Essentially the response asserts that the judge considered fully the evidence submitted by the Secretary of State and concluded that the evidence was not sufficient – two witness statement relate to a different application and in one witness statement an annexe was alleged to be from ETS but as no confirmation was given of this by ETS. The judge applied the correct standard of proof. Reliance was placed on the case of Miah (Interviewers' comments: disclosure: Fairness) [2014] UKUT 515 (IAC) arguing that the

judge was correct to find that in the absence of evidence from ETS evidence from the Secretary of State was required specifically describing what ETS claims to have discovered about the particular candidate. It is asserted that the judge quite clearly set out the burden and standard of proof to be applied. The evidence of the judge was detailed as to why he did not consider the evidence was sufficient to prove that the appellant had submitted false documents. Reference is made to the report of Dr Harrison submitted in the case of Gazi and the conclusions reached by Dr Harrison.

11. Ms Akhter submitted that the Gazi case is not on all fours and does not assist on the facts of this case. She referred me to paragraph 14 of Gazi and the criticisms of the witness statement of Mr Millington who has no expertise. She submitted that the Tribunal can only interfere if the First-tier Tribunal's decision is plainly wrong. The First-tier Tribunal judge set out at paragraph 10 all the evidence provided. The judge heard oral evidence. The judge records at paragraph 12 that the claimant was cross examined and the judge preferred the evidence of the claimant. The Secretary of State had referred to significant evidence but the judge found that none of the evidence was significant – there were generic witness statement and one statement which purported to confirm the evidence from ETS. The Secretary of State could have obtained a statement from ETS about this particular claimant. The judge had the benefit of assessing the claimant at first hand. He was tested by cross examination.

Discussion

12. The First-tier Tribunal judge was particularly concerned that she did not have evidence from the Secretary of State in relation to this specific claimant. This theme occurs throughout her analysis of the evidence. At paragraph 10 she states, '*The first two of these were made in connection with a judicial review in the case of another applicant'.* At paragraph 12 she finds *'I have nothing to indicate that ETS discovered that on this day there were other people in the room…there is no evidence…describing what ETS claim to have discovered about what happened on 28th November 2012 at New London College. I would expect to see evidence relating to this particular candidate, this particular college and this particular date….I do not have anything specific'.* At paragraph 13 she found, '*I do not find that it is enough for the respondent to state that a proxy was used by the appellant …I find that the provision of two witness statements which relate to an entirely separate applicant …does not satisfy the burden of proof'.*

13. It is through this lens that the judge has considered the witness evidence. The First-tier Tribunal judge has ascribed very little weight to the evidence contained in those statements on this basis. It is clear that the generic witness statements provided by Ms Collings and Mr

Middleton describe the processes through which an individual will be identified by ETS. To that extent they do not need to be specific to the individual claimant. That lack of specific detail does not render them of little weight. As submitted by Mr Clarke, as set out in the case of Gazi the same generic evidence was considered sufficient to warrant an assessment that an applicant's TOIEC has been procured by deception. His submission was that the Upper Tribunal set out and considered the EIG which provided

> The evidence must always prove **to a high degree of probability** that deception had been used to gain the leave, whether or not an admission of deception is made. The onus – as always in such situations – is on the officer making the assertion to prove his case."

14. At paragraph 35 the Upper Tribunal held:

> '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 Applicant'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. And there may be sufficient material for a lively debate about its various ingredients. However, this Tribunal, as emphasised above, must evaluate and determine the Applicant's improper purpose challenge by reference to the material presumptively considered by or available to the decision maker when the impugned decision was made. I find no clear or logical basis for distinguishing between the first tranche of decisions and those made later. Furthermore, while the policy evidential requirements enshrined in the EIG are strict, they require neither absolute certainty nor infallibility. For the purpose of disposing of this ground of challenge and bearing in mind that the jurisdiction being exercised is one of supervisory review rather than merits appeal, its suffices for this Tribunal to be satisfied that the evidence upon which the impugned decision was made has the hallmarks of care, thoroughness, underlying expertise and sufficient reliability. The cornerstone of the Applicant's case is that the evidence was insufficient for this purpose. I reject this challenge.'

15. As Ms Akther submitted the background in Gazi was that the challenge was made by way of judicial review and was an improper purpose and procedural unfairness challenge. At paragraph 21 the court set out:

> The grant of permission expressly limited the Applicant's challenge to two grounds, which are reflected in the ultimate amended pleading:
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> > (i) The Secretary of State's most recent decision (see [3] supra) is vitiated by improper purpose, in that she knew or ought to have known that there was no or insufficient evidence that the Applicant had engaged in deception.

(ii) The impugned decision is further vitiated by procedural unfairness in that the Applicant was not afforded an opportunity to make representations before the original determination of 25 July 2014, he was not provided with the material upon which the decision was made and the case made by him in the context of these proceedings was not taken into account in the making of the more recent decision.

16. The background to the finding of the Upper Tribunal at paragraph 35 is that the applicants had a high hurdle to overcome to demonstrate improper purpose. The Upper Tribunal set out:

> 34. My conclusions in respect of the Applicant's first ground of challenge are, fundamentally, twofold. First, I consider that improper purpose has not been established. There is, of course, no primary evidence of this contaminant. Rather, the Applicant invites the Tribunal to infer this vitiating factor. This ground of challenge can succeed only if the Applicant establishes that the purpose for which the Secretary of State invoked the discretionary power under section 10 of the 1999 Act was motivated by a design other than furthering the policy and objects of the statute (the Padfield principle). The quest to establish improper motive in the context of this challenge engages, in my view, a relatively elevated threshold. Improper purpose, or motive, is not, as a general rule, easily proved. Furthermore, I consider that it is not to be lightly inferred. An inference on the part of any court or tribunal that a public law power has been misused in this way requires a solid and persuasive evidential foundation. In the present case, this directs attention to the evidence in existence at the time of the impugned decision, namely the decisions of the FtT allowing appeals and the Secretary of State's generic evidence. It is appropriate to highlight, in this context, that Dr Harrison's report postdated the impugned decision of the Secretary of State. Neither it nor anything comparable existed at the material time…
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> 38. Finally, mindful that "bad faith" is the terminology found in certain places in the Applicant's submissions, I add the following. In contemporary public law, bad faith and improper motive are sometimes interchangeable terms, or concepts. Fundamentally, both denote the misuse of power. See, generally, De Smith's Judicial Review (7th Edition), para 5 – 087. In SCA v Minister of Immigration [2002] FCAFC 397, bad faith is defined uncontroversially as "a lack of an honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision maker": see [19]. The authors of De Smith continue, at paragraph 5 – 089:
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> "Bad faith is a serious allegation which attracts a heavy burden of proof."
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> In practice, bad faith typically (though not invariably) denotes conduct on the part of a public official which is dishonest. It "always involves a grave charge": per Megaw LJ in Cannock Chase District Council v Kelly [1978] 1 WLR 1 at 6. Furthermore, this serious allegation requires, in every case, ample advance notice and detailed particularisation.

17. Mr Clarke's submissions suggested that the finding (at paragraph 35) in the Gazi case creates a rebuttable presumption that the evidence demonstrates that where an invalid result is communicated to the Secretary of State by ETS the test result was obtained by deception. His submission was that '*What the Gazi case does require of the fact finding exercise is consideration of whether it is rebutted by other evidence'.* As set out above the context of the finding at paragraph 35 in Gazi was an allegation of improper purpose. The sufficiency of the evidence relied on by the Secretary of State in that context is what the Upper Tribunal was considering. The task of the Upper Tribunal was not to determine if the generic witness evidence discharged the burden of proof that the applicants in that case had used deception to obtain their TOEICs. It is clear that the Upper Tribunal did not accept without question the evidence of Mr Millington and Ms Collings. At paragraph 37 the tribunal referred to several comments and questions it had raised, '*In my consideration of the evidence in Chapter II above I have, in several places, raised questions and made observations.'*

18. There is no rebuttable presumption. Having considered that the supervisory function of the judicial review process was not an appropriate forum the task of the First-tier Tribunal is, as set out in Gazi, to:

> 36. … I consider it appropriate to highlight what this judicial review hearing lacked: there was no examination in chief or cross examination of the Applicant or any witness on his behalf; nor was there any live evidence from any witness on behalf of the Secretary of State; and there was no examination in chief or cross examination of Dr Harrison or any other expert witness. All of these missing factors arise in a litigation context in which the bona fides and character of the Applicant are important issues. However, there was no opportunity to evaluate the Applicant's demeanour or to assess his performance under cross examination…
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> 40. …Secondly, the present case illustrates that every case belonging to this field will be unavoidably fact sensitive. Each litigant will put forward his or her individual disputed assertions, agreed facts, considerations and circumstances. These will be evaluated by a fact finding tribunal, to be contrasted with a court or tribunal of supervisory jurisdiction. This analysis is, in my view, amply confirmed by the growing number of FtT decisions in this sphere. Within these one finds emphasis on self-evidently important issues such as the appellant's evident English language ability, demeanour and previous life events. Furthermore, it is trite that the assessment of each appellant's demeanour and credibility will be carried out on a case by case basis.

19. In K Mehmood & Anor, R (On the Applications of) v Secretary of State for the Home Department [2015] EWCA Civ 744 the Court of Appeal confirmed at paragraph 22:

> This is not a case where there is no evidence whatsoever in support of the Secretary of State's decision. There is evidence in the form of the statements of Ms Collings and Mr Millington. The question of its adequacy was not considered by the Deputy Judge and is not properly before the court in these proceedings. It is noteworthy that in Gazi's case, where the evidence about the tests was largely the same as that in this case, with Ms Collings and Mr Millington's statements criticised by Dr Harrison, it was decided (see [2015] UKUT 00327 (IAC) at [6] and [36] – [37]) that it would be difficult to resolve the differences between them in judicial review proceedings which are not designed for live evidence and cross-examination.

20. I do not accept that there was any rebuttable presumption created by the finding in the Gazi case that the generic witness evidence of Ms Collings and Mr Millington is evidence that deception was used unless rebutted by other evidence.

21. It should also be noted that the First-tier Tribunal decided this case before the decision in Gazi was released.

22. I do consider, however, that the First-tier Tribunal judge in this case erred by failing to engage with or undertake any evaluation of that evidence, discarding the evidence seemingly solely on the basis that it was not specific to the claimant. The judge failed to give adequate reasons as to why, based on lack of specific reference to the claimant, that evidence was insufficient.

23. With regard to the witness statement of Mr Sartorius it is evident that the First-tier Tribunal judge doubts the veracity of the evidence. It cannot be said that the judge failed to engage with the evidence as she set out the essential contents of the witness statement in paragraph 11 of the decision. In evaluating the evidence at paragraph 11 the judge states, '*There is nothing on this document to indicate that it has come from a spreadsheet provided by ETS'* and at paragraph 12, '*All that the respondent has provided…is a line said to be taken form a spreadsheet…I do not have confirmation from ETS…'*At paragraph 13 the judge refers to the annex to Mr Sartorius's witness statements as '*alleged to be evidence from ETS'*.

24. Mr Sartorius is a senior case worker and has been employed by the Home Office since 2006. The witness statement contains a statement of truth and is signed by Mr Sartorius. He asserts that the Home Office were notified by way of an entry in a spreadsheet of cancelled test results by ETS. He exhibits an excerpt from the spreadsheet in respect of the claimant. Whilst more information could have been provided the judge has clearly doubted the evidence of Mr Sartorius but has not explained why he doubts that ETS have provided a spreadsheet and that the exhibit is an excerpt from that spreadsheet. The judge has erred by failing to provide sufficient reasons as to why the veracity of Mr Sartorius is to be doubted.

25. With regard to the submission that a higher standard of proof was applied I do not accept that the judge did impose a higher standard. When referring to significant evidence and substantial evidence the judge is making reference to the assertion of the Secretary of State that she had significant and substantial evidence. The judge simply did not accept that the evidence was substantial and significant. In requiring further evidence the judge is not necessarily imposing a higher standard of proof. As I have decided that the judge erred in failing to engage with and to evaluate the evidence this would not take the respondent any further in any event.

26. However, in this case I do not consider that the errors were material. The first claimant gave a very detailed account both in his witness statement and in oral evidence of his journey to the test centre, where he attended to take his test, specific details about what happened at the centre and how the test was conducted. The judge had the opportunity to consider his tested evidence at first hand. He was able to assess the first claimant's demeanour and credibility. It was accepted by Mr Clarke that there is a possibility of false positives in the ETS results and that the evidence is not necessarily conclusive. I therefore conclude that the First-tier Tribunal judge would not have arrived at a different conclusion even if he had engaged and appropriately evaluated the evidence of the respondent.

27. In the grant of permission reference is made to the case of Doody v Secretary of State for the Home Department [1994] 1 AC 531 and the principles from that case set out in the Gazi case. The Rule 24 response referred to the case of Miah (Interviewers' comments: disclosure: Fairness) [2014] UKUT 515 (IAC). No specific challenge to the procedural fairness of the Secretary of State's decision was made to the First-tier Tribunal. The First-tier Tribunal cannot be criticised for failing to take either the Doody principles of other aspects of fairness into consideration. In any event the scope of the appeal is limited to the grounds seeking permission as no other applications have been made by either party.

28. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction

Decision

29. There was no material errors of law such that the decision of the First-tier Tribunal should be set aside.

Signed P M Ramshaw Date 31 December 2015

Deputy Upper Tribunal Judge Ramshaw