



IAC-FH-NL-V1

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

Appeal Number: IA/35633/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 4 January 2016**

**Decision & Reasons Promulgated
On 27 January 2016**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MS KONLAPAT BURAPAKDI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms Khyati Joshi, Legal Representative of A Bajwa & Co
Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Monaghan who sitting at Hatton Cross on 25 June 2015 and in a determination promulgated on 23 July 2015 allowed the appeal of the Respondent (hereinafter called the Claimant), a citizen of Thailand, born on 1 August 1983 against the decision of the Secretary of State dated 8 September 2014 to cancel the Claimant's leave to remain in the United Kingdom under paragraph 321A(2) on the basis that the Claimant had

used a fraudulently obtained English language certificate to obtain her leave as a Tier 4 Student.

2. The Secretary of State successfully sought permission to appeal that decision the grounds of which in summary contended that the First-tier Tribunal Judge failed to give adequate reasons for finding that the Secretary of State was required to produce a Document Examination Report (DER) or a Document Verification Report (DVR) when the Secretary of State's allegation was that the Claimant had fraudulently obtained the relevant documents not that the document itself was false. In that regard it was said that the First-tier Tribunal Judge failed to give adequate reasons for the finding at paragraph 34:

“Unless there is an admission from the (Claimant) that (she) used a false document then the Secretary of State must complete either a Document Examination Report (DER) or a Document Verification Report (DVR). Neither of these documents have been produced and for that reason and to that limited extent only I allow the appeal and remit the matter to the (Secretary of State) for a further decision to be made.”

3. In her grounds, the Secretary of State points out that the Judge was provided with a bundle of documents in support of the allegation in respect of paragraph 321A that included witness statements in particular from Mr Peter Millington and Ms Rebecca Collings, that clearly provided that tests were categorised as 'invalid' where ETS was certain that there was evidence of proxy test-taking or impersonation and inter alia, where a match had been identified, their approach was to invalidate the test result in that there was evidence of such invalidity in those cases.
4. It was clear that in order to be categorised as 'invalid' on the spreadsheet provided to the Home Office, the case had gone through a computer programme analysing speech and then to independent voice analysts. If all three were in agreement that a proxy had been used, then the test was categorised as 'invalid'.
5. In that regard a print-out of the relevant section of the ETS spreadsheet was attached to Annex D of the Secretary of State's Explanatory Statement before the Judge, that identified the Claimant by name and recorded that the test taken on 21 August 2012 was invalid. It was clear from the evidence that where ETS invalidated a test result as in the present case, it was because there was evidence of proxy test-taking or impersonation.
6. Notably, while the First-tier Tribunal Judge had accepted the Secretary of State's evidence above, he was unable to accept on the balance of probabilities, that the Claimant had sat the TOEIC test on 21 August 2012. It is thus contended that the First-tier Tribunal Judge materially erred in law by failing to give adequate reasons for holding that a DER or DVR needed to be produced. The allegation was one of a fraudulently obtained document, not a false one. It was therefore unclear as to what relevance the production of such reports would have.

7. Thus the appeal came before me on 4 January 2016, when my first task was to determine whether the determination of the First-tier Tribunal Judge disclosed an error or errors on a point of law such as may have materially affected the outcome of the appeal.
8. Mr Tufan in his submissions, relied on the grounds of challenge and pointed out that in the very last sentence of the Judge's determination and having previously made comprehensive and clear adverse findings open to him on the evidence, the Judge proceeded to mistakenly rely upon a misconceived matter and therefore and as described in the grounds, materially erred in law. Mr Tufan emphasised the Judge's adverse findings and invited me in such circumstances, to allow the Secretary of State's appeal.
9. Ms Joshi accepted that regrettably, there had been a failure on the part of the Claimant, to lodge any cross-appeal challenging the Judge's adverse factual findings. Instead, she relied on the premise that in this case it had "*not been proved that the document was fraudulently obtained but that it was a false representation*". She further relied on the decision in R (on the application of) Gazi v Secretary of State for the Home Department (ETS - judicial review) [2015] UKUT 327 and in particular where at paragraph 27 the Tribunal had *inter alia* this to say:

"The evidence must always prove to a high degree of probability 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."
10. In that regard Ms Joshi also relied upon the Home Office general grounds for refusal, Section 205 "Considering Entry Clearance" in which it was stated *inter alia* as follows:

"When you refuse an application under paragraph 320(7A) or 320(7B) you must fill in either a Document Examination Report (DER) or a Document Verification Report (DVR). This is because you must make sure there is a clear audit trail which shows how you have reached your decision ..."
11. It is however, apparent to me, that this was not a decision of the Secretary of State based on either paragraphs 320(7A) or 320(7B) but upon paragraph 321A(2) of the Immigration Rules that indeed the Judge made clear reference to in his determination and which states *inter alia*, that under paragraph 321A(2) the following grounds for the cancellation of a person's leave to enter or remain which is in force on his arrival in or whilst he is outside United Kingdom apply:
 2. False representations were made or false documents were submitted (whether or not material to the application and whether or not to the holder's knowledge) or material facts were not disclosed in relation to the application for leave; or in order to obtain documents from the Secretary of State or a third party required in support of the application."

12. It follows therefore that the premise of Ms Joshi's argument in that regard founders, because the guidance upon which she relied does not apply in the circumstances of the present case.

Assessment

13. There being no Rule 24 response served by the Claimant, I have taken account of the skeleton argument that was before the First-tier Tribunal Judge as requested by Ms Joshi before me in her submissions, in which reference is indeed made to the Secretary of State's guidance that I have dealt with above. Further, the Claimant's grounds refer to the decision in Gazi that further emphasises that each case is to be decided on its own facts. It was further submitted that Gazi held at paragraph 10, that the Secretary of State ought to have provided a DER but as I have earlier indicated (see paragraphs 11 and 12 above) that does not apply in the particular circumstances of this appeal.
14. Notably in his determination, the First-tier Tribunal Judge made a series of comprehensive, clear and unequivocal adverse findings as to the Claimant's credibility over paragraphs 29 to 33 of his decision and it would be as well for the sake of completeness were I to set those findings out below:
 - "29. On the day following her last IELTS test, it is said that the Appellant took her TOEIC test, her overall score for which was 885. This would be the equivalent to C1 on the CEF and therefore represents a very significant improvement on the test taken the day before. In particular, having scored 5.0 on the speaking component on 20/08/2012 where the highest possible score is 9.0, the following day the Appellant scored 200 marks out of a possible 200, thereby achieving 100%.
 30. I find it unlikely on the balance of probabilities that the Appellant would improve her performance to that extent on the speaking test in one day, particularly given that in her previous run of three IELTS tests she had scored much the same mark each time.
 31. I also found the Appellant less than credible when she said in her evidence that the interviewing officer only photocopied one of her IELTS test results when she produced all of them to her.
 32. Accordingly I find that on the balance of probabilities I am unable to accept the Appellant's evidence that she sat the TOEIC test on 21/08/2012.
 33. Although the Appellant casts doubt upon the Respondent's evidence in relying on what they say is an invalid test, I find that on balance, having considered the detailed witness statements supplied by the Respondent as to the methodology of the testing which was then subject to human verification I prefer to accept this evidence than the evidence of the Appellant for the reasons I have stated."

15. Notwithstanding these unequivocal findings such that it would be confidently expected that the Judge in consequence, would dismiss the appeal, he instead concluded at paragraph 34, that the appeal should be allowed to the limited extent that the matter be remitted back to the Secretary of State for a further decision to be made. This was explained as follows:

“34. However the Appellant’s representative has also drawn my attention to the Respondent’s own guidance when considering the general grounds for refusal. Unless there is an admission from the Appellant that they used a false document then the Respondent could complete either a document examination report (DER) or a document verification report (DVR). Neither of these documents have been produced and for that reason and to that limited extent only I allow the appeal and remit the matter to the Respondent for a further decision to be made.”

16. Regrettably the First-tier Tribunal Judge as I find, misdirected herself in a very significant way. She has criticised the Secretary of State for not following policies that are relevant in the case of a false document, for example a document that was forged, but there is nothing said to be wrong with the documents in this case. The Secretary of State’s contention was that the document had been obtained fraudulently and a careful reading of the determination, shows that the First-tier Tribunal Judge was satisfied that this was indeed the case and she should thus have dismissed the appeal. However she allowed herself to be distracted by what I consider to have been an irrelevant point.

17. In the circumstances I set aside the decision of the First-tier Tribunal and in accordance with the First-tier Tribunal Judge’s sustainable findings of fact, I substitute a decision allowing the Secretary of State’s appeal and dismissing the Claimant’s appeal against the Secretary of State’s decision.

Decision

18. The making of the previous decision involved the making of an error on a point of law and where it has been ordered that it shall not stand and has been set aside.

19. I re-make the decision in this appeal by dismissing the Claimant’s appeal against the Secretary of State’s decision.

20. No anonymity direction is made.

Signed

Date: 23 January 2016

Upper Tribunal Judge Goldstein