



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

Appeal Number: IA/38399/2014

THE IMMIGRATION ACTS

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

**Decision & Reasons Promulgated
On 24 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**MR. PONNI VALAVAN SWAMINATHAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms. A. Benfield, counsel instructed by CK Law, Solicitors
For the Respondent: Mr. E. Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of India, born on 20 January 1980. He was give leave to remain in the United Kingdom as a Tier 4 (General) Migrant on 8 February 2013. On 4 October 2014, the Respondent made a decision refusing him leave to enter on the basis that she was satisfied that false representations had been employed for the purpose of obtaining leave to remain, in that the TOEIC certificate from ETS Eden College was based on a test taken on 3 October 2012 which had been cancelled because, on the basis of information provided to ETS, the Home Office was satisfied that there is substantial evidence to conclude that the certificate was fraudulently obtained and thus

that the Appellant had utilized deception to obtain leave to remain in the United Kingdom.

2. The Appellant appealed against this decision and his appeal came before Judge of the First-tier Tribunal Abebrese for hearing on 30 June 2014. There was no Presenting Officer at the appeal hearing so whilst the Appellant gave evidence, he was not subject to cross-examination. The Judge at [8] made reference to a Respondent's bundle but it is unclear what exactly he is referring to given that it is now clear that there is no Respondent's bundle in this case. At [5] of the decision the Judge had reference to the witness statements of Home Office officials Peter Millington and Rebecca Collings. In a decision promulgated on 3 August 2015, the First-tier Tribunal Judge dismissed the appeal, holding at [10] that the respondent had discharged their burden in respect of the allegation of fraud/deception; that the findings of the Home Office officials are credible and that the Appellant has not provided sufficient evidence to rebut the allegation. The Judge also proceeded to dismiss the appeal with reference to Article 8 of ECHR.

3. An application for permission to appeal to the Upper Tribunal was made on 12 August 2015. The grounds of appeal in support of the application asserted that the witness statements of Home Office officials Peter Millington and Rebecca Collings "*were not served on the Appellant or his representatives and the Appellant is still not aware of the contents of these documents.*" A statement from the Appellant's solicitor was attached by way of confirmation. A copy of the skeleton argument before the First-Tier Tribunal Judge was also submitted in which it was asserted at [13] that: "*the Respondent had not provided any of the evidence to the court.*" The grounds of appeal further assert that at the appeal hearing the Respondent was unrepresented and the Appellant had submitted that there was no evidence before the Tribunal to show that the Appellant did in fact use a proxy test take yet the Judge at no point sought the position of the Appellant in relation to the documents referred to in his decision.

4. Permission to appeal was granted by Judge of the First-tier Tribunal McDade on 30 November 2015, on the basis that there is an arguable error of law in that the Appellant has arguably not had the opportunity to consider the case against him in advance of the hearing.

Hearing

5. At the hearing before me, I clarified with both parties as to whether they had a Respondent's bundle as there was no Respondent's bundle on the Court file. Both parties confirmed that they did not have a Respondent's bundle. Mr Tufan helpfully indicated that it appeared that there had been procedural unfairness and invited me to find that First-tier Tribunal Judge Abebrese had made a material error of law for this reason. He submitted that the case should be remitted with a direction that the Home Office issue and serve a Respondent's bundle prior to the remitted hearing. Ms Benfield, for the Appellant was content with that course of action.

Decision

6. In light of the parties' agreement that the decision of First-tier Tribunal Judge Abebrese is fundamentally flawed by reason of procedural unfairness, as the Appellant's representatives were neither in possession of nor served with material documentation in the possession of the Judge and there being no Respondent's bundle to date in this case, I find that the First-tier Tribunal Judge did materially err in law and his decision cannot stand. I allow the appeal by the Appellant and remit the appeal for a hearing *de novo* before the First-tier Tribunal, not to be listed before First-tier Tribunal Judge Abebrese.

Directions

7. I direct that, if the Respondent wishes to rely upon the evidence that was before the First-tier Tribunal Judge or any other evidence in support of her contention that false representations had been employed by the Appellant for the purpose of obtaining leave to remain, that this evidence be produced in the form of a Respondent's bundle and served on the First-tier Tribunal and the Appellant's representatives, CK Law Solicitors, at least 21 days prior to the hearing of the remitted appeal.

Deputy Upper Tribunal Judge Chapman

4 February 2016