**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: IA/41961/2014**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 10th December 2015** | **On 4th February 2016** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE LEVER**

**Between**

**MRS GUNALETCHMY PALANIAPPAN**
(ANONYMITY NOT RETAINED)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Coleman of Counsel
For the Respondent: Miss Isherwood, Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. The Appellant born on 18th November 1977 is a citizen of Malaysia. The Appellant had entered the United Kingdom on a valid spouse visa such visa valid until 5th August 2014. On 27th March 2014 she had applied for leave to remain but that application was dismissed on 11th October 2014 on the basis that she had allegedly used deception in the provision of an educational testing service certificate on the basis that ETS confirmed the validity of the test result could not be authenticated. The Appellant appealed that decision and her appeal was heard by First-tier Tribunal

Judge Parker sitting at Taylor House on 26th March 2015. He dismissed the appeal. Application for permission to appeal was made and although refused at first instance was allowed by Upper Tribunal Judge Reeds. It was said that litigation relating to ETS had unfolded since the hearing before the First-tier Tribunal in March 2015 in particular the judgment in **Gazi [2015] UKUT 327** and the Court of Appeal case of **Mehmood and Ali [2015] EWCA Civ 744**. It was stated therefore that it was certainly arguable as to whether the evidence relied upon by the Respondent was sufficient to discharge the burden of proof in relation to this particular Appellant's case.

**Submissions on Behalf of the Appellant**

2. Mr Coleman relied upon the Grounds of Appeal in this case and submitted that there was an insufficiency of evidence upon which the judge could properly have found that the Respondent discharged the appropriate burden of proof.

**Submissions on Behalf of the Respondent**

3. It was submitted by Miss Isherwood that the Grounds of Appeal amounted to nothing more than a disagreement with the findings and that the case of **Gazi** was a judicial review case only and it was a matter of the Tribunal to make findings on fact and evidence.

4. At the conclusion of the hearing I reserved my decision to consider the documents and evidence submitted. I now provide that decision with my reasons.

**Decision and Reasons**

5. The case before the First-tier Tribunal Judge involved an assertion made by the Respondent that the Appellant had deployed deception in the taking of an English language test (TOIEC) administered by ETS, one of the few suppliers used by the Respondent as an out-sourced provider of such tests worldwide. As a consequence the Respondent had refused to vary leave to remain and also to issue directions for removal under Section 47 of the Immigration and Asylum Act 2006. The evidence produced by the Respondent in support of that assertion was

   (a) Witness statement Matthew Harold.

   (b) Witness statement Rebecca Collings.

   (c) Witness statement Peter Millington.

   (d) ETS look-up file single line extract relating to Appellant.

6. The Appellant had given evidence, on the face of it without the need for an interpreter. The judge had noted that she said she had taken the test, had taken a further test that was not in dispute, in November 2015 and had

passed that test. Her husband had also provided evidence confirming she had not cheated.

7. The judge had noted that he agreed with Appellant's Counsel's submissions that the burden of proof was on the Respondent (paragraph 12). He further stated that the burden on the Respondent was on a balance of probability (paragraph 12 and 17). The judge having set out the submissions and extracts from the witness statements of Rebecca Collings and Peter Millington reached his conclusions in a single paragraph (17) where he stated

> "I have to be satisfied on the balance of probability that deception has been used. Mr Singer said that it could be data entry error. I reject this argument. If a data entry error had been made you would not expect two independent verifiers to come to the same conclusion. I have to decide a case on the balance of probabilities. The fact that we have no evidence from the verifiers or any other employer of the ETS is not a bar for me to conclude that deception had been used in this case. The Appellant has not provided any evidence to persuade me otherwise. The fact that she has subsequently passed the test is not relevant. The fact that she achieved a pass could mean she has improved her English in between the two tests. It could be that she has made an error of judgment. Without further evidence from the Appellant I would believe that the Respondent has discharged the duty upon him and proven that deception has been used."

8. There are three concerns that this case raises, perhaps identifiable within that paragraph. They are concerns that relate not just to this case but this group of cases relating to ETS language testing. They are concerns discernible within the judgment of **Gazi**.

9. The case of **Gazi** was a judicial review decision and in terms of decision was focused on the questions as to whether the Appellant's improper purpose ground of challenge was established (decided not), and whether an out of country appeal provided an adequate remedy to a Respondent's refusal. However **Gazi** helpfully highlighted features of relevance to this class of case and the evidence available and the applicability to the decision of the First-tier Tribunal before me.

10. Firstly at paragraph 44 of **Gazi** the Upper Tribunal noted that the question of law for the First-tier Tribunal in this type of case was whether the concept engaged the **Doody** principles in particular whether the affected person was afforded an opportunity to make informed representations in advance of the impugned decision **Doody [1994] 1AC 531**. It referred to the need for the First-tier Tribunal to decide whether the recent decision in **Miah [2014] UKUT 515** applied.

11. In terms of procedural fairness the ETS cases, of which this is one, can perhaps usefully be looked at in terms of two other groups of cases that have troubled the Tribunal. It will be recalled that there were a large number of cases involving Sprakab language analysis that came before

the Tribunal where procedural/evidential fairness was challenged. Often the challenge was that the Sprakab language testers anonymised themselves, the quality/length of conversation upon which decisions were based were poor or short and the inability to challenge undisclosed source material. The Upper Tribunal dealt with those cases in a lead case that had the effect of significantly reducing such challenges. That case concluded there was nothing inherently wrong in language analysts anonymising themselves, not least because they provided a "pen picture" giving their language qualifications and experience, nationality and countries where they had lived and absorbed languages. The case further determined that procedural fairness indicated that the tapes and transcripts of such tests/conversations should be disclosed to allow that evidence to be seen by an Appellant and subject to their own expert scrutiny if so desired. Essentially the Upper Tribunal in that case was setting out basic guidance on procedural fairness expected in adversarial proceedings in a court or Tribunal.

12. In like manner the case of **Miah** concerned the class of cases where the Respondent asserted a "sham marriage" based wholly or partly on interviews conducted by the Respondent with an Appellant and his spouse. The Upper Tribunal noted that procedural fairness indicated disclosure of the interview records and any summary or note given by the interviewer to the decision maker.

13. It is noteworthy that both those classes of cases involved assertions being made by the Respondent that an Appellant had acted dishonestly or had used deception and where therefore, the burden of proof shifted to the Respondent. The traditions of procedural fairness and disclosure in proceedings in this country should perhaps have alerted the Respondent to act in a manner compatible with those principles but if in doubt those cases set out that which is expected in such cases and no doubt significantly reduced the levels of concern and appeals brought on such grounds within those classes of cases.

14. They are in my view useful parallels for this class of ETS case, particularly given the Sprakab cases involved the same element of language testing. In my view those cases underscore the nature of procedural fairness and disclosure and that should have been in the mind of a judge hearing an appeal in another class of case which involves the Respondent asserting that an Appellant has practised deception and the burden therefore falling upon the Respondent to prove such matters. The case of **Gazi** noted the need for the First-tier Tribunal to decide the applicability of **Miah** in terms of procedural fairness and one could add to that the Upper Tribunal case in the Sprakab language cases as referred to above.

15. In this case there had been no disclosure of the evidential material upon which the Respondent based assertions. The case of **Gazi** looked at the "generic evidence" available in the case before the Upper Tribunal that evidence being precisely the same evidence available to the judge in the case before me.

16. In **Gazi** the Upper Tribunal assessed the Respondent's generic evidence at paragraphs 6 to 15. Contained within those paragraphs are observations that demonstrate the concerns relating to that evidence. In particular I note at paragraph 14 the Upper Tribunal stated

> "One observes inevitably that this description of what actually occurred is lean in detail and further as noted above Mr Millington can lay claim to no relevant credentials or expertise in the field of voice recognition. The same observations apply to his ensuing averments that non-verified matches were confidently identified by Mr Millington and his colleagues. There is a discernible element of bombast in those claims."

17. The Upper Tribunal also noted the dichotomy of "invalid" and "irregularity" in his averments. The Upper Tribunal quoted Mr Millington's statement that

> "Where a match has not been identified and verified an individual's test result may still be invalidated on the basis of test administration irregularity including the fact that their test was taken at a UK testing centre where numerous other results have been invalidated on the basis of a match. In those cases the individual would normally be invited to take a free re-test ... no evidence of this distinction even if in redacted form is provided. Finally it is clear from the concluding averments in Mr Millington's witness statement that the Home Office invariably accepts the deception assessment provided by ETS without more."

18. At paragraphs 16 to 20 the Upper Tribunal then looked at the criticisms of the ETS system made by an expert Dr Harrison.

19. I appreciate that the First-tier Tribunal Judge did not have the case of **Gazi** before him and the reminder that that case perhaps provides in respect of procedural unfairness as noted above. However it could be said that the issue of procedural fairness is of longstanding as noted in **Goudey [1994]** and considered specifically by the Upper Tribunal in two similar types of circumstances in both the Sprakab cases and the sham marriage cases referred to in **Miah**. In my view therefore the issue of procedural unfairness in this case should have been in the judge's mind, albeit **Gazi** would no doubt have prompted that had that case been available.

20. Secondly however, even on the extremely limited evidence produced by the Respondent, **Gazi** highlights an inherent difficulty within the case before me. The witness statement of Mr Millington as noted at paragraph 15 of **Gazi** suggests that an "invalid" result may flow from factors other than deception i.e. test administration irregularity such as taking a test at a centre where there have been numerous other invalidated results. As well as potentially being a self-fulfilling prophecy that suggests a person may have his test invalidated for a number of factors including the suspicion that many others at that same centre have been suspected or found to have used deception without necessarily the term invalid

demonstrating that the specific individual had used deception. Therefore in terms of discharging the evidential burden of proof the generic evidence in the case before the First-tier Tribunal Judge would seem to have fallen far short of that which is required even leaving aside the criticism and potential weaknesses of the ETS system as later identified by Dr Harrison in the **Gazi** case. It is noteworthy that in this case the judge had a computer print-out that simply said "invalid" and nothing more and therefore on the face of it presented a situation that may not have disclosed deception but simply a "test administration irregularity."

21. Finally whilst the judge noted the burden of proof was upon the Respondent, paragraph 17 of the decision noted that whilst he had no evidence from the verifiers or ETS that was not a bar to him concluding deception had been used noting that the Appellant had not provided any evidence to persuade him otherwise. The Appellant had in fact produced evidence and whilst the judge was entitled to take a view on the later language test that she passed it was not the case that no evidence had been produced. Further, whilst it may not have been in the judge's mind, the terminology of paragraph 17 suggests the judge may have been requiring evidence from the Appellant rather than focussing upon the need for the Respondent to prove deception and thereby inadvertently shifting or diluting the burden of proof.

22. In summary I find a material error of law in this case. Firstly I find that there was a procedural unfairness in the scope and manner in which evidence was produced by the Respondent and a lack of disclosure to the Appellant and that procedural unfairness was left unrectified by the First-tier Tribunal Judge. Secondly I find that on the evidence available it was an error of law to have concluded that that evidence demonstrated that the Respondent had discharged the burden and standard of proof required and that finally there may have inadvertently been a dilution or shift as to where the burden and standard of proof lay in the mind of the judge.

## Decision

23. I find that an error of law was made by the judge in this case and I find that the decision needs to be re-made.

Anonymity not retained.

## TO THE RESPONDENT
## FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable

Signed Date

Deputy Upper Tribunal Judge Lever