



**Upper Tribunal
IA/42120/2014
(Immigration and Asylum Chamber)**

Appeal:

THE IMMIGRATION ACTS

Heard at Field House

On 1 March 2016

**Decision &
Promulgated
On 8 April 2016**

Reasons

Before

THE HONOURABLE LORD BURNS

UPPER TRIBUNAL JUDGE WARR

Between

SECRETARY OF STATE

and

MD HAMIDUL HAQUE

(Anonymity Direction Not Made)

Appellant

Respondent

Representation:

For the Appellant: Mr S Whitwell, Home Office Presenting Officer
For the Respondent: Mr A Alam (Londinium Solicitors)

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State but we will refer to the original appellant, a citizen of Bangladesh, born on 20 February 1982, as the appellant herein.
2. The appellant studied in the United Kingdom from 2005 and successfully applied for a Tier 1 Entrepreneur Visa. On arrival in the United Kingdom on 9 August 2015 he presented his passport and the visa but his leave was suspended and on 13 October 2014 his leave to remain was cancelled on the basis that he had made false representations in that he had submitted a fraudulently obtained Test of English for International Communication (TOEIC) certificate from Educational Testing Services (ETS). The scores from the test the applicant had taken on 17 July 2012 at London College of Social Sciences were cancelled by ETS. The applicant, it was said, had obtained the test result by using a proxy test taker. The Secretary of State also considered the appellant's account of taking the test was vague and lacked detailed recollection.
3. The appellant appealed the decision and his appeal came before First-tier Judge Clarke on 4 June 2015. The appellant was represented but the Secretary of State was not.
4. The judge reminded himself that the burden of proof lay on the respondent to make good the allegation of deception, making reference to *AA (Nigeria)* [2010] EWCA Civ 773. The judge sets out the documentary evidence before him, referring to the Secretary of State's bundle which included witness statements from Rebecca Collings and Peter Millington both dated 23rd June 2014. The judge stated that he had taken all the evidence into account. He reminded himself of the widespread fraud that had been uncovered in the conduct of English language tests.
5. The judge noted that the Secretary of State had not sent a Presenting Officer to advance her case and neither of the border force officers who had interviewed the appellant had provided witness statements nor had they attended. No request had been made for the appeal to be adjourned and the Secretary of State was aware the appeal was being heard without representation.
6. The judge observed that the respondent had failed to produce the voice recording of the appellant's test and accordingly the primary evidence relied on by the Secretary of State was not before him. The failure to disclose the material was unfair and the witness statements Rebecca Collings and Peter Millington lacked specificity.
7. The judge ruled the Secretary of State had failed to discharge the burden of proof and that the appellant had not made a false representation in his application for leave to remain.

8. The judge went on to make further findings having had the benefit of hearing from the appellant. He noted the appellant had given details of the test and his evidence satisfied the judge that his account was credible. He rejected the claim that the applicant's account had been vague or lacking in detail.
9. He considered that the appellant had been speaking English for 7 or 8 years and on the balance of probabilities would not have needed to resort to having to take a test by proxy.
10. The judge also took into account the circumstances in which the appellant's interview had been conducted. He had had a 20 hour journey from Bangladesh with limited sleep and had been detained and the interview had been conducted after a wait of 10 hours. The judge found the appellant was "sleep deprived, hungry, nervous, upset at being accused of being a liar and was feeling unwell." He placed little weight on the interview in the circumstances.
11. Accordingly the judge concluded the Secretary of State had not made out her case and found the appellant had sat the English language test himself and had made no false representations. He allowed the appeal.
12. The Secretary of State applied for permission to appeal. Permission to appeal was refused by the First-tier Tribunal but the application was renewed and permission was granted by the Upper Tribunal on 15 January 2016. The representatives agreed that the second paragraph of the grant of permission did not relate to the case. The grant of permission appears to have been on the footing that the judge had given inadequate reasons for his findings.
13. Mr Whitwell relied on the Secretary of State's grounds and pointed out that a spreadsheet had been provided and the appellants test had been described as invalid rather than questionable. This showed that the appellant's voice recording was not the one tested. The tests were verified by two analysts. The determination was not satisfactorily reasoned and the appellant's account had been uncorroborated. There might be many reasons why a person who was able to speak English would nevertheless use a proxy candidate to undertake a test on his behalf. He argued that the Secretary of State had not been provided with voice recordings.
14. Mr Alam submitted that the First-tier Judge had applied the correct burden and standard of proof and had plainly had regard to the material supplied by the Secretary of State. The witness statements of Rebecca Collings and Peter Millington were of a generic nature. The judge was entitled to find that no deception had been proved. In reply Mr Whitwell

said the voice recordings were not the main part of the Secretary of State's case and relied on the evidence that had been lodged.

15. At the conclusion of the submissions we reserved our determination. We remind ourselves that we can only interfere with the decision of the judge if it was materially flawed in law.
16. The judge clearly considered the evidence lodged on behalf of the Secretary of State and reminded himself that the burden lay on her to prove her case. Plainly the judge considered that voice recordings should have been produced. In refusing permission to appeal the First-tier Judge commented that the Secretary of State had not taken issue in the grounds with the judge's finding that the Secretary of State had retained a copy of the appellant's voice recording. The renewed grounds did not take up the matter either.
17. It appears to us that the determination was properly reasoned and the judge came to conclusions on the facts that were open to him. The Secretary of State chose not to be represented at the hearing or produce witnesses in a case where the burden of proof lay on her. The judge heard oral evidence from the appellant and accepted that evidence.
18. The grounds do not disclose a material error of law and we dismiss the Secretary of State's appeal.

Appeal dismissed.

G Warr
Judge of the Upper Tribunal
2 March 2016

Fee Award
The judge made a fee award in favour of the appellant which stands.

Anonymity Order
No anonymity order was made and we make none.