Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42177/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 November 2015	**On 4 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABDULLAH ADEL A ALHARSHAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Staunton, Home Office Presenting Officer
For the Respondent: Mr N S Ahluwalia, Counsel, instructed by Laura Devine Solicitors

DECISION AND REASONS

1. The Claimant is a citizen of Saudi Arabia born on 13 January 1990. He appealed to the Tribunal against the decision by the Secretary of State for the Home Department to refuse an application for leave with respect to paragraph 321A of the Immigration Rules on the basis that he had made a false statement in relation to his application for leave to enter, namely

that he had sat a Test of English International Communication (the TOEIC) in February 2012 but in fact he had not sat it but had arranged for a proxy to sit it on his behalf.

2. The Claimant challenged that decision and his appeal was listed for hearing in Newport on 4 March 2015 before Judge of the First-tier Tribunal O'Rourke. There were a number of preliminary matters raised at the hearing, the first of those was that his representatives had previously applied to the First-tier Tribunal on 23 February 2015 for disclosure of information and documentation by the Respondent relating to the Educational Testing Services (ETS) because that was the basis upon which the Secretary of State had made her decision and copies of any voice recognition recording of the Claimant or any multilple test taker and the evidence upon which the ETS relied in asserting that there was no multiple test taker and evidence of the circumstances and chain of administration for the Claimant being included on the invalidated list were all requested.

3. At the hearing before Judge O'Rourke the Respondent's representative confirmed that the direction had not been complied with and the Respondent's position was that they did not hold this information because it is retained by ECS and indeed the Home Office Presenting Officer was unable to confirm whether or not any request had been made of ETS for such disclosure. The Judge was informed that the Claimant's representatives had also made a request directly to ETS but their response was that they were not a party to the proceedings and were not obliged to comply with the request, and despite a request for an adjournment in order for this information to be produced the judge decided to proceed with the appeal, and he then proceeded to allow the Claimant's appeal on the basis that the burden of proof was upon the Respondent to satisfy him on balance of probabilities that the Claimant had indeed made a false statement and he found that the Claimant had not discharged that burden.

4. His reasons, which are at paragraph 17 of his decision, are firstly, that a report by Dr Harrison which had been submitted by the Claimant and was unchallenged by the Respondent cast sufficient doubt upon the ETS process in order to render their conclusions as unreliable. Secondly the evidence the Respondent relied upon by Miss Collings and Mr Millington was in respect of the ETS cases generally and these were statements that were relied on in the decision in Mohamed [2014] JR 6299 UKUT, that these were generic and hearsay, they had no scientific background and they provided insufficient technical detail in their statements. Thirdly, the Respondent had had the opportunity to provide further evidence to the Claimant's representatives and/or Dr Harrison but for whatever reason chose not to or to require or request ETS to do so.

5. The Judge did not place weight on the evidence of ETS in respect of their assertion that the Claimant had taken the test in Portsmouth as the Claimant stated he had definitely taken it in London and given that ETA had wrongly recorded his nationality as being Indian whereas in fact he is from Saudi Arabia.

6. The Respondent sought permission to appeal to the Upper Tribunal and permission was granted in respect of one ground only, that ground being that the Judge held against the Respondent that she had failed to comply with directions i.e. the production of tape recordings of the English language test and voice analysis tapes and the Respondent was unable to obtain these tapes because they are not in her possession but in the hands of ETS who ran the test. It was also asserted that the production of such material in each and every ETS case would not be a resourceful uses of public funds and would possibly also prejudice future criminal proceedings against those involved in the ETS fraud.

7. On 6 August 2015 First-tier Tribunal Judge Gillespie granted permission to appeal in respect of that ground only stating

> *"It is arguable that the directions could not lawfully have been given against the Respondent at least not in the terms on which they were applied in the determination and that this led to procedural unfairness, or error of law in assessing the weight of evidence for the Respondent, which prejudiced the Respondent in its conduct of the case."*

8. At the hearing before me the Claimant was represented by Mr Ahluwalia of Counsel and the Secretary of State by Mr Staunton. I heard submissions from both parties and Mr Ahluwalia in addition produced a helpful Rule 24 response dated 20 November 2015.

9. In light of the submissions and the Rule 24 response I find that First-tier Tribunal Judge O'Rourke did not materially err of law for the reasons asserted by the Respondent in ground 3 of her grounds of appeal.

10. Firstly, it is open to the First-tier Tribunal under Rules 5 and 6 of Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 to issue directions and if a party has failed to respond with a direction, rule 6(2) specifically states that the First-tier Tribunal may take such action as it considers just, which may include (b) requiring the failure to be remedied or waiving the requirement. The Judge in this case, in fact, decided to proceed with the appeal in the absence of the evidence upon which the Tribunal had directed be produced. Consequently, he essentially waived the Respondent's non-compliance with the direction issued by the First-tier Tribunal.

11. Given that the burden was upon the Respondent to prove that the Claimant made a false statement it was incumbent upon her to discharge that burden of proof by way of evidence. Whilst there was evidence in the form of the witness statements of Miss Collings and Mr Millington which had been relied upon in the case of Mohamed there was no adequate specific evidence relating to this Appellant to discharge the burden of proving that his specific ETS test had been undertaken by a proxy. As Mr Ahluwalia submits and I accept, the Judge gave a number of reasons for being satisfied that the Respondent had not shifted the initial burden of proof in respect of whether or not the Claimant or a proxy sat the test and

in so doing, the issue as to the giving of directions and the effect of that on his decision was supplementary to his primary findings. These were firstly, that he preferred Dr Harrison's report which was not challenged by the Respondent and he noted that this report cast sufficient doubts upon the process whereby ETS had reached their conclusions, and secondly, that the evidence relied upon in the form of statements from Miss Collings and Mr Millington was genetic and hearsay; they were not witnesses with any scientific background and they provided insufficient technical details.

12. I further find that First-tier Tribunal Judge O'Rourke was clearly entitled to rely upon the fact that the Respondent had had the opportunity to provide further evidence to the Claimant's representatives and/or Dr Harrison and indeed to the First-tier Tribunal but did not do so and did not ensure that such evidence in relation to this specific Claimant had been obtained from ETS. Consequently, in the absence of such evidence, the Judge was entitled to find that the Respondent had not discharged the burden of proving that the requirements of paragraph 321A of the Immigration Rules were met.

Notice of Decision

13. For those reasons I uphold the decision of First-tier Tribunal Judge O'Rourke and dismiss the appeal by the Secretary of State for the Home Department.

Notice of Decision

The appeal by the Secretary of State for the Home Department is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Chapman