Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/44335 /2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 December 2015	**On 4 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

MR KULWANT SINGH
(No anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr T Tabori of Counsel
For the respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India born on 27 June 1988. He appealed to the Upper Tribunal against the determination of First-tier Tribunal Judge Cohen of 1 May 2015 dismissing the appellant's appeal against the decision of the respondent dated 29 August 2014 curtailing his leave to remain in the United Kingdom pursuant to paragraph 321A of the Immigration Rules.

2. First-tier Tribunal Judge Lambert granted the appellant permission to appeal on 18 August 2015, stating that it is arguable that the Judge materially erred in law in not establishing a connection between the test taken by this appellant and the declared invalidity of the result by the ETS.

First-tier Tribunal Judge's findings

3. The First-tier Tribunal dismissed the appellant's appeal for the following reasons:

4. The appellant's immigration history is that he arrived in the UK with entry clearance as a Tier 4 (General) student 25 August 2009. The appellant's leave was subsequently curtailed and he was granted an out of country right of appeal only. The appellant however, raises human rights grounds so has an in country right of appeal. The notice of curtailment and removal states that during the review process and the educational testing service (ETS) routinely reviews testing irregularities and questions test results believed to be earned under abnormal or non-standard circumstances.

5. The ETS score cancellation policy states that ETS reserves the right to cancel scores and/or take other action deemed appropriate, when it is determined that the test centre was not following established guidelines set fall in the DoE the program. During an administrative review process, ETS confirmed that the appellant's test results were obtained to deception through the presence of a proxy test taker. Because of the above, his course from the test taken had been cancelled. As deception had been used in relation to the appellant's application the appellant's leave was curtailed and removal directions set for him.

6. In respect of the affidavit evidence, I find it compelling. I particularly note the contents of Rebecca Collings affidavit in respect of the judicial review proceedings. She indicates that in late March 2014, ETS advised that it had been able to identify impersonation proxy testing using voice recognition software and she refers to the processes used set out in the witness statement of Peter Millington at paragraph 35, 39 and 45. She indicated that ETS described that any tests categorised as cancelled which later become known as invalid, had the same voice for multiple test takers. On questioning they advised that they were certain there was evidence of proxy test taking of impersonation in those cases. Such a test score had been obtained by deception. It was indicated that the appellant was one of the candidates identified as having used such deception. His details were contained in an appendix. Peter Millington in his witness statement at paragraph 35, 39 and 45 indicates the technical processes utilised in order to identify the proxy test takers using voice biometric technology and flagging those matches and further testing the same using human verification.

7. In light of the evidence provided by the respondent, which I find to be compelling, I find that the respondent has destroyed the higher burden of proof based upon her in respect of an allegation of deception. I find that the respondent has indicated the basis on which the appellant's test results were considered to have been obtained utilising deception

and proxy test takers. I therefore find that the appellant's appeal fails to be refuse with reference to paragraph 322 (1A) of the Immigration Rules. In all the circumstances the respondent's curtailment of the appellant's leave to remain was correct.

8. I am un-persuaded by the generic expert report obtained by five months and submitted as part of the appellant's bundle which does not relate to the appellant's case specifically.

9. The appellant demonstrated a poor level of English before me and I find this to be further indicative of the fact that the appellant had motivated to rely on a proxy test taker.

Grounds of appeal

10. The grounds of appeal state the following which I summarise. Neither of the witnesses, Mr Peter Millington and Miss Rebecca Collings do not refer to the appellant specifically. The decision was taken without establishing the precedent fact of deception. Furthermore, the report on testing of samples undertaken by ETS, drafted on 5 February 2015 by Dr Philip Harrison states that "to assess the degree of reliability of the system and in his performance must be measured by conducting large numbers of comparisons of pairs of the same speaker in different speaker recordings where the ground to answer was known." The UKBA has not provided confirmation of the reliability of the performance of the automatic speaker recognition system used by the ETS. The Harrison report further states that "the very best performance for the state-of-the-art systems, expressed in equal error rate, is typically between 1% and 3%. There is no confirmation of the equal error rate of the ETS ASR system. Essentially the Harrison report provides many examples for why the ETS system is not reliable.

The hearing

11. At the hearing I heard submissions as to whether there is a material error of law in the determination.

Decision on error of law

12. The respondent did not in her rule 24 response and nor did the permission Judge take issue as to the appellant in country right of appeal. I accept the submissions made by the appellant's counsel who placed reliance on **CD (s 10 curtailment: right of appeal) India [2008] UKAIT 00055** which states that a decision under section 10 of the immigration and Asylum act 1999 that involves the invalidation of any leave to enter or remain is to be treated for the purposes of the 2000 and to act as a curtailment of that leave within section 8 (2) (e) with the result that a person may appeal against that decision whilst in the United Kingdom, whether or not he has made an asylum claim or a human rights claim. I find that the appellant has an in country right of appeal.

13. I have given anxious scrutiny to the determination of First-tier Tribunal Judge who dismissed the appellant's appeal against the respondent's decision cancelling his leave under paragraph 321A of the Immigration The Judge essentially found that the respondent, on whom the burden lies, had proved that the appellant's application was correctly refused under paragraph 321A of the Immigration Rules in respect of the evidence of proxy taking of the English language test and as such, the respondent had demonstrated that the appellant employed fraud.

14. The Judge correctly identified that the burden of proof is on the respondent and it is on a balance of probability. In fact, the Judge applied the higher end of the spectrum of balance of probability. The Judge took into account all the evidence provided by the respondent and gave appropriate weight to that evidence and came to a legally sustainable conclusion.

15. There was no dispute that the appellant's test results were amongst 10,000's test scores analysed and his test was deemed to be "invalid" i.e. that the ETS was certain there was evidence of proxy test taking or impersonation in her case. The respondent has the burden of proving the existence of the factors upon which reliance is placed to found the exercise of the power conferred by paragraph 321A of the Immigration Rules. The Judge found that the stringent civil standard applicable in cases of fraud has been achieved by the respondent's evidence.

16. The evidence provided by the respondent was a statement from Mrs Rebecca Collings who stated that "ETS described that any test characterised as cancelled (which later became known as invalid) had the same voice for multiple test takes. On questioning the respondent was advised that they were certain that there was evidence of proxy test taking or impersonation in those cases. The Judge did not give good reasons for why the witness statement of Mr Peter Millington could not be relied on in respect of this particular appellant. Mr Peter Millington stated, "it is clear that in order to be characterised as 'invalid' on the spreadsheet provided to the Home Office the case has to have gone through a computer program analysing speech and then two independent voice analysts. If all three are in agreement that a proxy has been used, then the test would be characterised as 'invalid'".

17. In respect of paragraph 321A(ii), the precedent fact on which the application of this provision depends is that the appellant produced a false English test result with his application, and the burden of establishing this fact lies on the respondent. The Judge was entitled to rely on the evidence provided by the respondent in the form of statements from two witnesses that there was evidence of fraud at the ETS test centres. It is evident that ETS informed the Home Office that they had been able to identify impersonation and proxy testing using voice recognition software. ETS sent the Home Office the results of

their analysis of the first batch of test centres on 24 and 28 March 2014. Ms Rebecca Collings in her statement stated that any test categorised by ETS as cancelled, which later became known as "invalid", had the same voice for multiple test takers. On questioning, ETS "advised that they were **certain** there was evidence of proxy test taking of impersonation in those cases". [Emphasis mine]

18. Although the Judge stated at paragraph 16 he is "un-persuaded" by the generic expert report of Mr Harrison, this is not a material error of law and nor can it be seen on the reading of the determination that he applied the wrong burden of proof. The Judge considered the Harrison report very carefully and it was a matter for the Judge to place the relevant weight on this evidence. For clear reasons given, the Judge found that it was a generic expert report and did not relate to the appellant's case specifically. He was entitled to so find and there is no material error of law in that finding. The Judge was entitled to place reliance on the respondent's case which he found met the relevant burden of proof.

19. The grounds of appeal argue that the Harrison report states that "the very best performance for the state-of-the-art systems, expressed in equal error rate, is typically between 1% and 3%. There is no confirmation of the equal error rate of the ETS ASR system. That is not accurate because in his statement Mr Millington stated in his statement that the technology used entailed over 70,000 pairings of non matching comparisons and that the matching samples produced values that were higher than values from the non-matching samples the majority of the time, with a **less than 2% error rate**. The Judge therefore was entitled not to place much weight on the Harrison report.

20. The Judge discharge his duty to enquire, and determine, whether there is sufficient evidence to justify the respondent's belief that appellant English language test was taken by proxy and therefore through deception. He had to consider the evidence against this specific appellant which he did and conducted this enquiry on the evidence applying a standard at the, he found that the respondent has established the precedent fact of the production of a false English test result. The burden therefore now shifts to the appellant to show that the respondent's decision to exercise her power under paragraph 321A is improper.

21. The appellant's case before the Judge was that he denies that he took a test by proxy. There was no other credible evidence provided by the appellant to challenge the respondent's case other than the generic expert by Mister Harrison which the Judge was entitled to place very little reliance as it was not specific to him. The Judge essentially found that the witness statements, when read in conjunction with one another, details extensively the investigation undertaken by ETS on this appellant's case, along with thousands of other applicants, and the process of identifying those tests found to be "invalid". It is clear from

the statements that ETS identified this appellant after a lengthy and systematic investigation with an error rate of only 3%.

22. The Judge also took into account that the appellant "demonstrated a poor level of English before me and I find this the further indicative of the fact that the appellant had intention to rely on a proxy test taker". Given that the English-language skills of the appellant are at the core of this appeal, the Judge was entitled to rely on the appellant's poor English language skills at the hearing as an indicator as to whether he would need a proxy to take his test for him.

23. The Judge's decision is bolstered by the fact that at the hearing Mr Kondala produced the appellant's English-language results which reflect that the appellant received 200 out of 200 for English-language speaking skills. These full marks for his English-language speaking skills, is at odds with the Judges observation that the appellant had poor English language skills at the hearing. A Judge is entitled to make such an observation on the quality of an appellant's language skills which he observes before him. Therefore, I find on the evidence, no differently constituted Tribunal would come to a different conclusion.

24. The Judge was entitled to find that that the appellant fraudulently, in an attempt to mislead the respondent, provided his English-language test results which he knew to be obtained by fraud and the respondent had discharged her burden of proof. The Judge found that the respondent has demonstrated on the requisite standard of proof that the appellant's appeal falls to be refused pursuant to paragraph 321A of the Immigration Rules and there is no material error of law in this finding which the Judge made taking into account the totality of the evidence before him.

25. I therefore uphold the decision of the First-tier Tribunal dismissing the appellant's appeal.

DECISION

I dismiss the appellant's appeal.

Signed by

Deputy Upper Tribunal Judge Chana Dated this 15th day of December 2015