



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

Appeal Number: IA/48681/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 19 January 2016**

**Decision and Reasons
Promulgated
On 11 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M I

(ANONYMITY HAS BEEN DIRECTED)

Respondent

Representation:

For the Appellant: Ms Fijiwala, Home Office Presenting Officer

For the Respondent: Mr Hossain, on behalf of A1 Law Chambers, London

DECISION AND REASONS

1. The Appellant in these proceedings is the Secretary of State, however for convenience I shall now refer to the parties as they were before the First Tier Tribunal
2. The Appellant is a citizen of Bangladesh born on 2 October 1986. He appealed against the Respondent's decision of 1 December 2014 refusing him leave to enter the United Kingdom and cancelling his entry clearance

under Paragraph 320B of HC395 as amended. His appeal was heard by Judge of the First Tier Tribunal Flynn. He allowed the appeal under the Immigration Rules in a Decision promulgated on 27 July 2015.

3. An application for permission to appeal was lodged and permission was granted by Judge of the First Tier Tribunal Foudi on 31 October 2015. The appeal concerned the investigation by ATS into alleged bogus test results at various sites holding TOEIC tests on behalf of ETS. It was alleged that the Appellant relied on one such bogus test. The Judge found that the evidence relied on by the Respondent did not meet the high test required to establish that a fraud had been committed by the Appellant but the Respondent states that the Judge failed to explain why he discounted the witness statements relied on by the Respondent and that this lack of reasoning is an arguable error of law.
4. There is no Rule 24 response.
5. The Presenting Officer submitted that she is relying on the grounds of application. She submitted that the Respondent provided proper evidence to show the Appellant's deception. She referred to the witness statements from Peter Millington and Rebecca Collings and an e-mail document from ETS Taskforce dated 10 September 2014. She submitted that based on the evidence provided by the witnesses and the e-mail document there is evidence of proxy test taking or impersonation.
6. I was referred to Paragraphs 22 and 23 of the First Tier Judge's decision and the Presenting Officer submitted that the Judge has taken a biased view of the statements by Rebecca Collings and Peter Millington. She submitted that the grounds make it clear exactly how the tests are identified and validated and that in this case there was substantial invalidity relating to the test.
7. I was referred to Paragraph 24 of the decision which states there is no evidence to show the reason ETS invalidated the Appellant's test. The Presenting Officer submitted that the Judge had no engagement with the Respondent's evidence. The Judge gave no reason for rejecting the Respondent's evidence. The Presenting Officer submitted that the Appellant may have taken a test later which he passed but that does not mean that the test in question was not taken by proxy.
8. I was referred to Paragraph 27 of the decision which states that the print-out from ETS states that the Appellant took the test on 26 September 2012 whereas the extract from the Home Office records (F1), states that the test was taken on 21 and 26 September 2012 and the Appellant has consistently stated that he took the test over two days so his evidence is supported by the Home Office's record. There was discussion about this. Only one test was invalidated and this test was taken on 26 September 2012.
9. The Presenting Officer submitted that the Judge did not consider the methodology in the witness statements provided by the Respondent. She submitted that the burden of proof was discharged by the Respondent.

10. Mr Hossain for the Appellant submitted that the permission states that the Judge found that the evidence relied on by the Respondent did not meet the high test required to establish that a fraud had been committed by the Appellant. He submitted that the Judge followed the case of **AA Nigeria (2010) EWCA Civ773**.
11. I was referred to Paragraph 28 of the decision which states the Respondent has failed to demonstrate, on the balance of probabilities that the Appellant used deception or provided a false certificate. This is a lower standard of proof than the standard of proof the Respondent had to satisfy. The Appellant's representative submitted that at Paragraph 21 the Judge states that the Respondent relied on a computer print-out from ETS and two witnesses. The report from ETS states that the Appellant took the test at Colwell College which the Appellant denies. The representative pointed out that there is no other evidence to confirm the location of the test, for example a copy of the test certificate or identity evidence, including photographs, which the Appellant said were taken when he sat the test. The representative submitted that the Judge considered everything that was before him and his reasoning is clear.
12. The representative submitted that the Judge carefully considered the witness statements. Rebecca Collings refers to ETS confirming the definition of "questionable" which is where an individual's test result is cancelled on the basis of test administration irregularity, including the fact that the test was taken at a UK testing centre where numerous other results have been invalidated on the basis of a match. In Mr Millington's statement the Judge refers to the Appellant's test being "invalid" not "questionable". He submitted that the Judge highlighted the two statements. He submitted that if Ms Collings' statement is correct then a new test should have been offered as she states that the Appellant's test was "questionable" not "invalid". He referred to the differences in the two witness statements. He submitted that it appears that this Appellant's test was invalidated only because it was taken at a test centre where numerous other results had been invalidated on the basis of a match. He submitted that the witnesses' statements are not directly linked to this particular appeal, they are purely an explanation of how the tests are run.
13. The representative submitted that the Judge considered the evidence and considered credibility. The Judge noted that the Appellant had a B2 result before, in an English test in 2013. He referred to the Presenting Officer's submission that the Appellant may have passed tests after this test but that is not the case. He passed tests at the correct level long before he sat this particular test.
14. I was referred to the Appellant's bundle which shows that in 2009 the Appellant passed a speaking test equivalent to B2 level and in 2011 he passed another test in English speaking at B2 level. He submitted that there would be no reason for the Appellant to use a proxy test in 2012 as he can speak English, as was clear from the Hearing.

15. I was referred to the Respondent's bundle and the interview with the Appellant, in which the Immigration Officer found the Appellant to be credible.
16. The representative submitted that in the decision, the First Tier Judge also found the Appellant to be credible.
17. He submitted that each case has to be decided on its own facts and the Judge has done this and has done this correctly and given proper explanations of why he has come to the decision he has.
18. The Presenting Officer submitted that the statements of Ms Collings and Mr Millington are clear. It is only when tests are found to be "questionable" that a re-test is offered. She submitted that this Appellant's test was found to be "invalid" so no re-test was offered. She submitted that no reasons were given by the Judge for rejecting the Respondent's evidence.

Decision

19. I have to decide if there is a material error of law in the First Tier Judge's decision. The Judge has carefully considered the evidence put forward by the Respondent but is not satisfied that this evidence meets the standard of proof required to establish that a fraud has been committed by the Appellant.
20. The Judge sets out the statements of Ms Collings and Mr Millington pointing out differences in their statements and he refers to the computer print-out from ETS which states that the Appellant took the test at Colwell College which the Appellant denies. No evidence was provided by the Respondent to support this. The Appellant states that he took the test at the College of Advanced Studies. The Judge has noted that the Appellant previously gained a B2 result when he was tested at the University of Ulster and a certificate for that was produced.
21. It is clear that the Judge found the Appellant to be credible (Paragraph 26). The Judge noted that the Immigration Officer who interviewed him on 18 August 2014 also found him to be credible and he spoke English at the First Tier Hearing. At Paragraph 26 the Judge states that he is satisfied that the Appellant achieved level B2 in a test he took before his 2013 application.
22. The Judge has clearly considered all the evidence in the round. The Judge has given reasons for finding that the standard of proof was not achieved by the Respondent relating to the accusation of fraud.

Notice of Decision

23. I find that there is no material error of law in the Judge's decision. His decision, promulgated on 27 July 2015, allowing the appeal, must stand.
24. Anonymity has been directed.

Signed

Date

Deputy Upper Tribunal Judge Murray