



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/00207/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Manchester

On 3 July 2017

**Decision
Promulgated
On 7 July 2017**

& Reason

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Waheed Ahmad

[No anonymity direction made]

Claimant

Representation:

For the claimant: Mr C Timson, instructed by Mayfair Solicitors
For the appellant: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Davies promulgated 14.11.16, allowing the claimant's appeal against the decision of the Secretary of State, 21.12.15, to refuse his application for LTR as a Tier 4 Student Migrant. The Judge heard the appeal on 1.11.16.
2. First-tier Tribunal Judge Keane granted permission to appeal on 31.5.17.
3. Thus the matter came before me on 3.7.17 as an appeal in the Upper Tribunal.

Error of Law

4. In the first instance I have to determine whether or not there was an error

of law in the making of the decision of the First-tier Tribunal such that it should be set aside.

5. The claimant's application was refused because, allegedly, in his previous application made in August 2012 he submitted an ETS English language certificate to the Home Office, and his sponsor in order to obtain a CAS. ETS had identified that the test had been taken by a proxy and thus the Secretary of State was satisfied that it had been obtained fraudulently and thus refused the application under paragraph 322(2) of the Immigration Rules.
6. The application was additionally refused because when the register was checked on 21.12.15, the college that had provided the CAS for the claimant's August 2014 application, the application which is the subject of this appeal, the college was no longer listed. He thus failed to qualify for the necessary points under Appendix A.
7. At the First-tier Tribunal appeal hearing, Judge Davies heard and accepted the claimant's account that he had never in fact submitted the ETS certificate as he had never been issued with one, having failed the test taken on 16.5.12. The submitted CAS had been valid when the application was made.
8. The claimant's account is that having failed the ETS test, he went on to take a further test, which he passed, and it was this later test that was relied on in his application.
9. There is some confusion in the decision of the First-tier Tribunal, as it refers to the application having been made on 15.8.15, when it appears it was made on 15.8.14.
10. Judge Davies pointed out that the Home Office had not produced the certificate which the claimant is alleged to have obtained fraudulently, which the judge considered fatal to the Secretary of State's case.
11. Permission was granted on the basis that the judge misdirected himself as to the applicable burden and standard of proof at [4] of the decision, stating that the burden was on the Secretary of State to demonstrate that the TOEIC certificate from ETS was fraudulently obtained, pursuant to paragraph 322(2) of the Immigration Rules. Complaint is made that the judge failed to follow SM and Qadir (ETS - evidence - burden of proof) [2016] UKUT 00229 (IAC), in distinguishing the evidential and legal burdens.
12. However, even if the judge had set out that the evidential burden was on the Secretary of State, which could be discharged by the generic and specific evidence as to the test taken, so that the burden shifted to the claimant to demonstrate an innocent explanation, on the findings of the First-tier Tribunal the evidential burden could not have been discharged without producing the certificate which it was said was obtained by fraud and submitted with his application. The Home Office bundle includes the generic evidence explaining the process of determining whether a proxy

test taker had been used, together with the look up tool spreadsheet identifying the claimant and linking him to the questioned test. However, it was the claimant's case that he submitted a different test, one taken later, as the first test would have been of no use to him, he having failed the test. It follows that the Secretary of State failed to discharge both the evidential and legal burdens of proof.

13. Judge Davies went on to consider that as the CAS was valid at date of application but the college was no longer on the list of approved educational sponsors by the date of the Secretary of State's decision, in fairness the claimant should have been granted an opportunity of 60 days' grace to obtain an alternative college and CAS. On that basis the appeal was allowed.
14. At the hearing before me, the claimant pointed to the fact that he failed the ETS test taken in May 2012, but passed the subsequent ESOL University of Cambridge test, taken on 30.6.12. The 2012 leave application was made in August 2012, relying the second test and not the first failed test.
15. It appears that the Home Office argument at the First-tier Tribunal was that it mattered not which test certificate was relied on for the 2012 application, and whether or not he passed, because he used deception in using a proxy to take the first test. However, paragraph 322(2) requires the false representation to be made to the Secretary of State or third parties "in order to obtain documents from the Secretary of State or a third party required in support of... a previous variation of leave." There has to be a causal link between the false representation and the making of an application. There is no such link, as it was the subsequent test, taken on 30.6.12, that was used in the application made in August 2012.
16. It would make little sense for the claimant to rely on a test that he conspicuously failed, as he would not have been able to obtain a CAS and his application could not have succeeded. It seems pretty clear that whatever the truth relating to the first test it was not relied on and thus paragraph 322(2) cannot be made out. In any event, Judge Davies accepted that the appellant had not used a proxy test taker in the earlier ETS English language test and found that the Home Office failed to produce the certificate they claim he obtained fraudulently, failing to discharge the burden of proof. However the burden and standard of proof is addressed, on the facts of this case as found by the First-tier Tribunal, the basis for refusal of the application was not and cannot be made out.
17. There is one caveat that would have required some further evidence from the Home Office to establish. That is that in the Home Office bundle, the CAS assigned to the claimant on 7.8.12 refers to evidence of English language qualification having been demonstrated by an ETS test with scores that appear to correspond to the impugned and invalidated ETS test. The claimant's case was and is that he never submitted the ETS test taken in May 2012, but rather the later test referred to above. However, as far as I can see, the CAS submitted cites the ETS test. The Tribunal was

not shown an ETS test certificate showing a failed score. This was not addressed in the submissions before me, and at the First-tier Tribunal the judge accepted the claimant's account that he did not submit that earlier test. On the basis of the documentation, that claim may be doubted, but not on the limited evidence before the Tribunal, in which the Home Office failed to produce the certificate. However, it may be a matter which the Secretary of State will pursue in further investigation.

Conclusions:

18. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision. The appeal remains allowed.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

31 August 2017

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order. Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I make no fee award.

Reasons: The claimant's appeal remains allowed.

A handwritten signature in black ink, appearing to be 'James L. Pickup', written in a cursive style.

Signed

Deputy Upper Tribunal Judge Pickup