Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33863/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 November 2017	**On 27 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

UMESH BABU
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Secretary of State: Ms K Pal, Senior Home Office Presenting Officer
For the Respondent/ Claimant: Mr R Chohan, Counsel instructed by SZ Solicitors

DECISION AND REASONS

1. The Secretary of State appeals from the decision of the First-tier Tribunal (Judge V James sitting at Birmingham on 16 February 2017), allowing on human rights grounds (Article 8 ECHR) the claimant's appeal against the decision of the Secretary of State to revoke his ILR on the grounds that he had used deception to obtain his grant of ILR on 9 October 2014 and/or

that he had not lawfully accrued five years' residence as a Tier 2 migrant so as to qualify for ILR, claims which the First-tier Tribunal Judge found that the Secretary of State had failed to prove. The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is required for these proceedings in the Upper Tribunal.

Relevant Background

2. The claimant is a national of India, whose date of birth is 2 April 1978. He first came to the United Kingdom as a Tier 2 migrant (or equivalent thereof) in 2004, and was given leave to enter for 12 months. He was granted an extension of leave in this capacity, but left the UK in around 2006. He returned as a Tier 2 migrant in 2009, after spending a year in Australia. He was then given a succession of extensions of leave to remain.

3. Relevant to this appeal is some of evidence given by Rebecca Collings of the Home Office in her 'generic' witness statement of 23 June 2014, which is routinely deployed in ETS cases. She explains that demonstrating language ability is a requirement for those seeking entry clearance or leave to remain under *inter alia* Tier 2. The language testing policy started to be introduced in 2008, in recognition that the ability to speak good English was a clear indication of success for people coming to work here. Between 2008 and 2010, it was added to the requirements of all the routes to which it currently applies, including Tier 2. Applicants could take a test at one of 19 providers identified by the Home Office which offered English Language testing equivalent to a recognised European standard. The recognised list of providers included Educational Testing Services (ETS).

4. She explains that tests are and were available to be taken at different levels, depending on the immigration application type and the ability of the test-taker. Her table, which is at paragraph 11 of her witness statement, shows that the level of ability required for a Tier 2 (General) migrant was and is CEFR B1 or above, whereas for a Tier 1 (General) migrant, it was and is CEFR C1 or above.

5. On 28 March 2012, the claimant applied for further leave to remain as a Tier 2 (General) migrant. As evidence of his English Language proficiency, he relied upon a TOEIC certificate from ETS showing that he had undertaken a speaking and writing test at the New College of Finance on 28 March 2012, and had achieved a speaking score of 180, and a writing score of 150.

6. The First-tier Tribunal Judge found that the claimant was given a succession of extensions "*including an application made on 28 March 2013 [sic] which was granted.*" The Judge further found that later in 2013 the claimant applied for indefinite leave to remain, having spent 5 years as a Tier 2 migrant in the UK, and that the application was granted on 9 October 2014.

7. On 24 September 2015, the Secretary of State gave her reasons for deciding to revoke the claimant's ILR. His scores from the test taken on 28 March 2012 at the New College of Finance had now been cancelled by ETS. On the basis of information provided by ETS, the Secretary of State was satisfied that his certificate was fraudulently obtained and that he had used deception in his application of 28 March 2012 (sic). He had not lawfully gained further limited leave to remain, and therefore he had failed to accrue five years of lawful residence to qualify for the grant of ILR on 9 October 2014.

The Hearing Before, and the Decision of, the First-tier Tribunal

8. At the hearing before Judge Jones, the Presenting Officer relied *inter alia* on a supplementary bundle of documents which included an expert report from Professor French, and a Project Facade Criminal Enquiry report into abuse of TOEIC at New College of Finance.

9. The claimant relied *inter alia* on a letter and certificate from Elizabeth College dated 4 November 2013. This showed that he had achieved Level CEFR B1 in speaking, writing, reading and listening units in a test undertaken on 30 October 2013. In an accompanying letter, the Chief Administrator of the College said that the qualifications obtained by the claimant at Elizabeth College followed a course which was 60 hours in duration, with an attendance of 3 days per week.

10. In her subsequent decision, the Judge concluded at paragraph [26] that the claimant__had provided an innocent explanation and that the respondent had not discharged the legal of burden of showing that he employed deception in his ETS test. Part of her reasoning for this conclusion us to be found in paragraph [24]. Although the claimant gave evidence through an interpreter, she observed that he would often begin to answer the question before the interpreter had had an opportunity to translate it, and he sometimes used English in his answers: "*It was clear he understood English well."* The Judge noted that since 2012 the claimant had taken two further English Language tests, "*passing them with high scores"*. As the Trinity College test was taken over three years after the ETS test in question, she placed little weight on it: "*I do however attach some weight to the test with Elizabeth College, taken in October 2013, the validity of which has not been challenged."*

The Reasons for the Grant of Permission to Appeal

11. On 18 September 2017, Upper Tribunal Judge Gleeson granted the Secretary of State permission to appeal to the Upper Tribunal for the following reasons:

> The Secretary of State relies on **MA (Nigeria) -v- Secretary of State for the Home Department (ETS - TOEIC testing) [2016] UKUT 450 (IAC)** at 57, where the Tribunal held that there may be many reasons for cheating, not all of which are related to the claimant's English Language capability on the date of the test. It is arguable that evidence of the English Language

ability 18 months later is not probative either of English Language ability on the day, or of not having cheated.

The Hearing in the Upper Tribunal

12. At the hearing to determine whether an error of law was made out, Ms Pal developed the case that Upper Tribunal Judge Gleeson had specifically identified as being arguable. However, having reviewed the evidence that was before the First-tier Tribunal, and the other reasons given by the Judge for allowing the appeal, I was not persuaded that an error of law was made out. My detailed reasons for so finding are set out below.

Reasons for Finding No Error of Law

13. The way the case is put in the renewed application for permission to appeal to the Upper Tribunal (Judge Scott Baker having initially refused permission) is that "*it was not open*" to Judge Jones to place weight on the fact that the claimant had passed an English Language test some 18 months after the date of the ETS test.

14. The first reason given for asserting that the Judge should not have placed any weight on the later test is that it could not demonstrate the claimant's English Language capability at the date of the ETS test.

15. I accept that the result of the later test could not in itself prove that the claimant had a level of proficiency in speaking at Level B1 at the time when he purportedly sat for the ETS test. However, Judge Jones did not give decisive weight to the result of the later test. She merely gave "*some weight*" to the later test result. If the claimant had achieved a worse result 18 months later, despite having continued to operate in an English-speaking environment for a further 18 months - and despite having been given 60 hours' tuition in preparation for the later test - this would have seriously undermined his credibility with regard to his assertion that he genuinely obtained a speaking score of 180 in his ETS test in 2012. Conversely, the fact that he had obtained *"high scores"* (a finding not challenged as being unsustainable) in the test taken 18 months later was reasonably treated by the Judge as being more consistent with him telling the truth about genuinely sitting for the ETS test, than it was with him being dishonest.

16. The second reason given as to why it was not open to Judge Jones to place weight on the fact that the claimant had passed an English Language test 18 months after the date of the TOEIC test is that, even if the later test showed that his English was adequate, this did not prove that he did not cheat in the ETS test. Thus, it is said, the Judge failed to have regard to **MA (Nigeria)** which demonstrated that an applicant might choose to cheat for reasons other than that their English Language ability was not to the required standard.

17. In **MA (Nigeria)**, the Upper Tribunal ("UT") found that the claimant had not provided an innocent explanation, and that his case was a fabrication

in all material respects: see paragraph [55]. At paragraph [57], the UT acknowledged the suggestion that MA had no reason to engage in the deception which they had found proven. However, this had not deflected them in any way from reaching their main findings and conclusions: "*We are not required to make the further finding of* why *the appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discreet matter.*"

18. The UT found against MA because he did not give a credible account of actually sitting the disputed test. In contrast, Judge James found at paragraph [25] that this claimant had given a credible and detailed account of (a) how he had booked the test, (b) his journey to the test centre and (c) what happened when he got there. **MA** is authority for the proposition that it is not necessary for the respondent to prove motive in order to make out a case of deception. It is not authority for the proposition that, when evaluating whether an appellant has provided an innocent explanation, the Tribunal is debarred from taking into account the fact that there was no apparent need for the appellant to employ a proxy test-taker.

19. It is apparent from the Judge's line of reasoning that the evaluation of whether the claimant had provided an innocent explanation for his 2012 test results being declared invalid by ETS was not confined to the test result of 2013 and to him giving a credible and detailed account of sitting for the ETS test. The Judge also accepted his evidence that for a number of years he had been working in international elitist sport where the language of communication was English; that he was working in this industry and speaking English in India before coming to the UK, and that while in the UK and in Australia he had continued to work in the same field, speaking English. The Judge found the claimant to be a truthful witness, whose evidence was consistent in cross-examination, and who was at no time evasive.

20. In conclusion, bearing in mind that the error of law challenge is a very narrow one and other aspects of the Judge's reasoning are not challenged as being legally erroneous, I consider that the Judge has given adequate reasons for finding in the claimant's favour on the core issue, which was whether he had used deception to obtain a grant of further leave to remain as a Tier 2 migrant, and therefore whether in due course he had obtained indefinite leave to remain on a fraudulent basis.

Notice of Decision

The decision of the First-tier Tribunal allowing this appeal on human rights grounds did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Anonymity

I make no anonymity direction.

Signed Date 24 November 2017

Judge Monson

Deputy Upper Tribunal Judge