



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00080/2017

THE IMMIGRATION ACTS

Heard at Field House
On 29 June 2018

Decision & Reasons Promulgated
On 27 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

MR KHISTA REHMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Fripp, Counsel instructed by Duncan Lewis & Co Solicitors

For the Respondent: Mr I Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on 11 December 1989. He is appealing against the decision of Judge of the First-tier Tribunal Cameron dismissing his appeal against a decision of the Secretary of State dated 14 February 2017 refusing his application (made on 8 October 2013) for leave to remain in the UK as a Tier 4 (General) student migrant.
2. The reason given by the respondent for refusing the appellant's application was that the appellant had used deception when obtaining a TOEIC certificate. The Reasons

for Refusal Letter states that using voice verification software ETS concluded that the appellant had fraudulently obtained three certificates by use of a proxy test taker. The three tests were said to be taken on the following dates and locations:

- (a) On 16 May 2012 at New London College.
- (b) On 16 May 2012 at Thames Education Centre.
- (c) On 18 July 2012 at New London College.

Decision of the First-tier Tribunal

3. The appellant appealed against the decision of the respondent and his appeal was heard by Judge Cameron at Taylor House on 4 December 2017.
4. The judge directed himself that there was a three stage process to establish if fraud had taken place. The first stage was for the Secretary of State to produce sufficient evidence to raise the issue of fraud. Secondly, it was then for the appellant to raise an innocent explanation. Thirdly, it fell to the Secretary of State to establish on the balance of probabilities that the innocent explanation was rejected.
5. The judge stated at paragraph 38 that he accepted that:

[T]he generic evidence provided by the respondent together with specific evidence set out in the annex to the statement of Ms Shah together with the evidence that ETS had cancelled the appellant's test scores was sufficient to meet the evidential burden on the respondent.
6. The judge then found at paragraph 39 that the burden passed to the appellant to show on the balance of probabilities that he had not engaged in deception.
7. The judge noted at paragraph 40 that the appellant claimed not to have taken a language test at Thames Education Centre on 16 May 2012.
8. At paragraph 54, the judge found damaging to the appellant's credibility that he claimed to have taken the speaking and writing tests on different days when it had been confirmed at paragraph 9 of the High Court case *Abbas [2017] EWHC 78 (Admin)* that tests were normally carried out on the same day. The judge stated that "no explanation was given as to why the appellant would have this part of the evidence incorrect".
9. The judge also found damaging to the appellant that he stated that there were 20 or 30 other people taking the test when the test centre lookup tool confirmed that there were only 16.
10. The judge stated at paragraph 56 that he was not satisfied that the appellant gave credible and truthful evidence about taking the test himself.
11. The judge concluded at paragraph 58 that the respondent had discharged the burden and that the evidence of the appellant was not sufficient to raise an innocent explanation which satisfied the minimum level of plausibility.

Grounds of Appeal and Error of Law Submissions

12. The grounds of appeal argue that the judge failed to deal properly with the issue of whether the evidential burden had been met by the respondent as the decision contains no analysis of the “irreconcilable internal contradiction” arising from the appellant being said to have taken two tests at the same time in different locations.
13. The grounds also argue that the judge failed to address that the appellant appears to have taken a test on 18 July 2012 even though his scores from the test of 16 May 2012 indicate that he passed. The appellant’s account was that he was told by an administrator that he had failed and would have to pay to retake a test which he did on 18 July 2012. The grounds maintain that this series of events suggest that the appellant was defrauded by those responsible for the test in order to justify a second test fee and that this undermines the reliability of evidence that might have come from the test administrators.
14. A further argument made in the grounds is that the judge placed too high a burden on the appellant when considering the innocent explanation and in effect the judge placed the legal burden on the appellant rather than merely an evidential burden.
15. Mr Fripp elaborated on the arguments in the grounds. He highlighted the Upper Tribunal decision in *MA (ET - TOEIC testing) Nigeria* [2016] UKUT 450 (IAC) where criticisms were made of the respondent’s generic evidence. He submitted that the initial evidential burden on the Secretary of State was not met because of the irregularity in the evidence for which no explanation had been given.
16. Mr Melvin’s response was that the case law is clear that the Secretary of State can meet the initial evidential burden by relying on the generic evidence in relation to the widespread fraudulent activity combined with the print-out of the Secretary of State’s lookup tool showing that the appellant’s tests had been declared invalid by ETS. He argued that the judge made clear findings that were open to him on the appellant’s credibility and the conclusion was open to the judge.
17. I asked Mr Melvin if he had an explanation as to why the appellant has been said to have taken two tests on the same date at different institutions and he stated that he was unable to speculate on this but it did not change the overall analysis that the appellant’s tests had been found to be invalid and the proffered innocent explanation was inadequate.

Error of Law

18. It is well-established that in cases where it is alleged that a TOEIC certificate from ETS was obtained fraudulently by the use of a proxy test taker the legal burden of proving that the appellant used deception lies on the Secretary of State, albeit that there is a three-stage process. The Secretary of State first must adduce sufficient evidence to raise the issue of fraud. The appellant has then a burden of raising an innocent explanation which satisfies the minimum level of plausibility. If that

burden is discharged the Secretary of State must establish on a balance of probabilities that the innocent explanation is to be rejected.

19. The Secretary of State in this case adduced evidence from Peter Millington and Rebecca Collings both of whom are civil servants. He also adduced evidence from Professor Peter French who is an expert on speaker identification. This evidence, which is commonly referred to as the “generic evidence”, supports the view that there has been widespread fraudulent activity by use of proxy test takers and that the detection of fraud by ETS is broadly accurate. Professor French concluded that the overall number of ‘false positives’ was likely to be modest i.e. less than one per cent of the overall number of results.
20. The respondent also relied on a witness statement from Mona Shah who is employed by the Home Office and is a senior case worker dealing with First-tier Tribunal appeals. She stated that the appellant’s test results had been cancelled by ETS on the basis that the analysis indicated the tests had been obtained by the use of a proxy test taker. She then stated that the Home Office was notified by way of an entry on a spreadsheet and an excerpt from this spreadsheet was appended to her statement. The excerpt appended to her statement set out three entries for the appellant. The first concerned a test taken on 16 June 2012 at New London College which was declared to be invalid. The second entry concerned a test taken on 16 June 2012 (the same date) which was also declared to be invalid. The third entry concerned a test taken at New London College on 18 July 2012, which was also declared to be invalid.
21. There is a clear incongruity in the excerpt referred to above that was appended to Ms Shah’s statement in that two of the tests had the same date. Ms Shah’s statement does not address why this might be. Nor is there any other evidence from the Secretary of State to shed light on why the appellant has been identified as taking tests at two locations on the same day.
22. Mr Fripp argued that there was no plausible explanation as to why the appellant would engage proxies to take two tests on the same day at different locations. I agree. If the appellant engaged (and presumably paid for) a proxy to take a test for him I can think of no plausible reason (and none has been suggested to me by Mr Melvin) why he would engage two people at two different locations to take two different tests when it would only be necessary for him to have one proxy taking a test at one location. In the absence of a plausible (or indeed any) explanation for the appearance on the extract from the spreadsheet from ETS of two tests of the same date, there is a clear question as to whether the Secretary of State has adduced reliable evidence linking the widespread fraudulent activity to the appellant. The judge has not given this issue consideration, either when assessing whether the initial evidential burden of establishing fraud has been met or in considering whether the legal burden of proof has been discharged. In my view, this is a clear error of law which renders the decision unsafe.

Remade Decision

23. This is an appeal against a decision of the Secretary of State made on 14 February 2017 concerning an application made on 8 October 2013 for leave to remain in the UK as a Tier 4 (General) Student Migrant. The reason given for refusing the application was that the appellant was found to have committed fraud by use of a proxy test taker in obtaining three English language certificates from ETS. The frauds are said to have occurred in respect of two tests taken on 16 June 2012, one at New London College and the other at Thames Education Centre, and in a test taken on 18 July 2012 at New London College.
24. The legal burden to prove that the appellant used deception lies with the Secretary of State. However there is a three-stage process, the first stage being that the Secretary of State must adduce sufficient evidence to raise the issue of fraud. It is well-established that a combination of witness statements from Peter Millington and Rebecca Collings (as adduced in this case) along with expert evidence from Professor Peter French (which has also been adduced) is sufficient to satisfy the first of the three stages so long as the claimed deception can be linked to the appellant. In this case the linkage is provided by a statement by a civil servant, Mona Shah, who has appended an excerpt to a spreadsheet to her statement which contains three dates when the appellant is said to have taken a test which ETS has declared to be invalid.
25. There is a clear incongruity in the evidence as two of the tests are said to have been taken on the same date but at different locations. No explanation has been given in Ms Shah's statement, elsewhere in the evidence, or in submissions before either the First-tier Tribunal or the Upper Tribunal, as to why the appellant would engage a proxy at two different locations to take two different tests when he only needed to take a single test.
26. In light of the foregoing analysis, I am not satisfied that the initial evidential burden on the Secretary of State has been met. Whilst I accept that the "generic evidence" establishes that there has been widespread fraudulent activity by individuals taking ETS tests, I do not consider that the evidence which purports to link the appellant to this fraudulent activity is reliable. The Secretary of State has not put forward any explanation as to why the appellant would have engaged proxies to take different tests at two locations on the same day or given an alternative explanation for the extract of the spreadsheet listing two tests on the same day. In my view, it is not plausible that the appellant would have engaged in fraudulent activity at two locations on the same day when there was no reason for him to do so and in the absence of any alternative explanations from the Secretary of State the only conclusion I can draw is that the most likely reason for two tests being listed as having been taken by the appellant on the same day at different locations is that the extract appended to the statement of Ms Shah contains an error and is not reliable.
27. Since the only evidence linking the appellant to the fraudulent activity at ETS test centres is unreliable, the Secretary of State has not satisfied the initial evidential burden of adducing sufficient evidence to raise the issue of fraud. I therefore remake

the decision by allowing the appellant's appeal against the decision of the Secretary of State dated 14 February 2017.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and is set aside.

I remake the decision and allow the appellant's appeal.

No anonymity direction is made.

Signed

A handwritten signature in black ink, appearing to be 'S. Sheridan', followed by a horizontal line extending to the right.

Deputy Upper Tribunal Judge Sheridan

Dated: 20 July 2018