Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12158/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 July 2019	**On 23 July 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

RAJWANT KAUR
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Raza instructed by Charles Simmons Immigration Solicitors
For the Respondent: Ms Fijiwala Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge Grant promulgated on the 18 February 2019 in which the Judge dismissed the appellant's appeal on human rights grounds.

Background

2. The appellant is a female citizen of India born on 10 April 1986.
3. The Judge noted that the issue in the appeal was whether the appellant used a proxy test taker for an English language test required for an application for leave to remain as a student at a new college after the registration of the original college attended by the appellant was cancelled [6].
4. The Judge sets out the correct legal self-direction at [7] that the burden of proof is upon the respondent to establish that fraud has taken place whereupon the burden shifts to the appellant to give an innocent explanation.
5. The respondent's refusal contained the following reasoning:

> "In your application dated 1 June 2012 you submitted a TOEIC certificate from New London College. ETS has a record of your speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker. Your scores from the test taken on 19 May 2012 at New London College have now been counselled by ETS. On the basis of the information provided to her by ETS, the SSHD is satisfied that your certificate was fraudulently obtained and that you used deception in your application of 1 June 2012."

6. The Judge records at [12] that the appellant accepted in her evidence that her speaking test in fact took place on 19 June 2012. The appellant agreed in her oral evidence that she made the application for further leave as her college closed and could no longer sponsor her studies and that she did not know when her Visa expired. The application was made on 1 June 2012 with the speaking test that formed part of the application not being taken until after that date and the TOEIC certificate being submitted later [14].
7. The Judge finds at [26] what is described as an obvious error in the refusal letter which has mis-typed the date of the first test is 19th May as the appellant did not sit any test on 19 May but sat the test marked as questionable by ETS on 16 May 2012 with the rest of the test, the second test, after making her application to the respondent on 19 June 2012; which has been marked invalid by ETS. The test results received by the appellant, before the concerns regarding the validity of the same was discovered, resulted in a grant of leave on 24 August 2012.
8. The Judge had the benefit of considering evidence from Operation Façade which showed for the period covering the dates the appellant took her test 74% of the tests taken at New London College were invalid and 26% were questionable; none were valid. The College directors home addresses were searched on 17 June 2014 and documents seized showing candidates names and the name of a proxy taker referred to as a 'pilot'. It is now known that directors of the company together with invigilators and others were involved in fraud and have been convicted and sentenced to periods of imprisonment.

9. The Judge found there was cogent evidence before the Tribunal that neither of the tests allegedly taken by the appellant were taken by her.
10. The Judge considered the explanation provided by the appellant but found the appellant had not given a satisfactory explanation before the Tribunal. Accordingly the Judge upheld the respondents contention the appellant was not entitled to leave to remain as a spouse under Appendix FM because she could not meet the suitability criteria of the Immigration Rules.
11. Thereafter, the Judge considered paragraph 276ADE and article 8 ECHR outside the Rules. The Judge gives reasons why it was found the appellant was unable to succeed on either basis.
12. The appellant sought permission to appeal which was initially refused by another judge of the First-Tier Tribunal but renewed to the Upper Tribunal.
13. The appellant asserts the Judge failed to address the conflict in the evidence at [12] indicating the speaking test was sat on 19 June 2012 yet at [17] the Judge records the appellant's evidence that a speaking test was in fact sat on 19 May 2012, not 19 June 2012. The grounds assert the Judge was at least required to take that into account when assessing the actual date of the speaking test. The grounds also assert the Judge erred in interpreting the 'Look-up tool'. The grounds assert the only element of the TOEIC test being analysed is the speaking element therefore, as the test of May 2012 is marked as questionable it had been analysed as the speaking test. The grounds assert the Judge has erred in failing to note that the 'Look-up tool' has ETS's analysis of the speaking scores. The grounds assert it is not disputed the May 2012 test was marked as questionable which is the same test referred to in the respondent's refusal letter indicating there was no evidence before the Judge categorising the May 2012 test as invalid. It is also submitted the Judge failed to adequately reason why the test of 19 June 2012, that is marked as invalid, which was then taken was that of the appellant. The grounds assert this would mean the appellant had taken two different speaking tests which has never been the respondent's case. The grounds also assert the Judge has provided insufficient evidence for finding the appellant had not raised an innocent explanation and that the Judge's reasons for rejecting the explanation are inadequate. The grounds assert at [29] the Judge has unreasonably speculated and asserts the Judge appears to have placed a significantly higher burden upon the appellant. There are no adverse credibility findings made following cross-examination which coupled with the generic concerns in the respondent's evidence are said to be sufficient to surpass the minimum level of plausibility.
14. Permission to appeal was granted by a judge of the Upper Tribunal in the following terms:

> "The grounds seeking permission to appeal take issue with the First-Tier Tribunal decision paragraph 25. It is arguable that the First-Tier Tribunal Judge did not clarify or resolve whether the appellant had taken two tests or one test, either of which were the subject of investigation. In the context of the appellants evidence it is arguable this issue should have been resolved."

15. The respondent filed a Rule 24 response dated 21 June 2019 the relevant part of which is in the following terms:

> "3. The Judge of the first Tier was aware of the nature and ambit of the appeal and the respondent will submit that it is unfair to criticise the Judge for having any confusion in this regard. Looking at the determination holistically, it is respectfully submitted that these grounds do not disclose the material arguable error of law. There was simply no basis, on the evidence before the FTJ, which could or should have resulted in a materially different outcome to the Appellants appeal. The FTJ did make a clear finding on whether the Appellant had sat the second test as below.
>
> > *[26] There is an obvious error in the refusal letter which has mistyped the date of the first test as 19th May. The appellant did not sit any test on 19 May she sat the test marked as questionable by ETS on 16 May 2012. She sat the rest of the test the second test after making an application to the respondent, and this was taken on 19 June 2012 and has been marked invalid by ETS. She has confirmed. In evidence that she supplied the second test results to the respondent once she had received it from New London College. It resulted in a grant of leave on 24 August 2012.*
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> 4. The respondent will submit that there is no basis for interfering with the decision of the FTJ to dismiss the Appellant's appeal. It was properly open to the FTJ to conclude that the Appellant had failed to discharge the burden of proof to provide an innocent excuse regarding the allegation of fraud. The grounds in effect amount to no more than a disagreement with the decision which the Judge was entitled to make based upon the evidence no arguable errors of law capable of having a material impact upon the outcome of the appeal."

Error of law

16. The grant of permission refers to [25] which is in the following terms:

> "25. The look up tool extract shows the test taken on 16 May 2012 by the appellant has been marked as questionable by ETS. The test taken on 19 June 2012 has been marked invalid. It is common knowledge that all TOEIC testing exercises have four components namely listening and reading examined on the first test date and speaking and writing examined on the second test date. The appellant has stated in evidence that she did the tests over two separate days and this is reflected in the ETS look up tool record. ETS do not know the appellant and have no reason to single her out. The only interest ETS have is ensuring the integrity of the examination system for which ETS was responsible at the relevant time."

17. Mr Raza sought to rely upon the grounds of appeal. He submitted, inter alia, the Look-up tool indicated one set of results were questionable and the other invalid but fails to give sufficient clarity to ascertain which test was affected.
18. Mr Raza submitted that in [17] the Judge records the evidence given in re-examination in the following terms:

> "17. In re-examination Counsel for the appellant asked her if she had submitted a certificate for a speaking and writing test on 19 May which she confirmed. In response to a further question from Mr Raza she confirmed this was the only speaking test she did with ETS and that she did not sit any test on 19 June 2012 at New London College."

19. Mr Raza submitted the respondent did not say what date the test relied upon had taken place and that as the 19th May test was only marked as "questionable" this was the only speaking test taken, meaning the Judge erred in concluding that the test taken in May 2012 was not the speaking test.
20. Mr Raza submitted that findings by the Judge in the alternative are factually wrong and that the Judge found against the appellant on a different model as there was no evidence regarding the use of deception.
21. Mr Raza also raised the issue of lack of passport number being included in the Look-up tool results in support of his contention that there was no connection between the appellant and the invalid result. It was accepted the appellant had taken an English language test but claimed only one was taken and that the second test which was declared invalid is not that of the appellant. The respondent could not prove this was as there was no link to a passport in the Look-up tool.
22. It is clear that two tests were taken, one marked as questionable and one as invalid. Even though the appellant in re-examination in answer to a question from Mr Raza claimed she did not sit a test on 19 June at New London College the Judge was clearly satisfied on the basis of the evidence that the appellant had sat a second test on that date. Specific references made to the appellant's answer agreeing that her speaking test took place on 19 June 2012 at [12] where the Judge writes:

> "12. She explained the test was in two parts taken over two separate days and the speaking and writing tests were done later on. The appellant agreed that the speaking test took place on 19 June 2012."

and at [14] where the Judge writes:

> "14. The appellant has agreed in her oral evidence that she made this application because her college a closed and it could no longer sponsor her studies and she said in evidence that she did not know when her Visa expired. Nevertheless she made her application on 1 June 2012 and the speaking test part of the application was not taken until after that date and therefore the TOEIC certificate was submitted later."

23. Any conflict arising from the evidence appears to be as a result of the appellant giving contradictory answers; unless the answer to the question given in re-examination is specific confirmation the test of 19 June 2012 was not sat at New London College.
24. In any event, the Judge was required to resolve any conflict in the evidence and did so. The Judge makes a clear finding at [25 – 26] that the appellant sat the second test on 19 June 2012, which included the speaking element, which is that that has been found to be invalid by ETS.

25. Mr Raza's claim there would never be two tests sat by a candidate is not made out and no authority for such a proposition was provided. It is known ETS have three options when a person takes an English language test for which ETS are the body responsible for assessing whether that person has obtained the required minimum level and hence passed the test. The first option, if the required standard has been obtained and ETS are satisfied the person who took the test is the person entitled to the certificate, is that a pass mark is given, and the requisite certificate issued. This appears to be what happened in the appellant's case until later examination of the June 2012 speaking test resulted in the same being declared invalid.
26. A declaration a test score is invalid is the second option if the evidence before ETS shows substantial evidence of invalidity, such as the use a proxy test taker.
27. The third option is for the test result to be marked "questionable" as indicated in the Look-up tool results for the test taken in May 2012. This in that case the test is neither valid nor invalid and the respondent ordinarily approaches the test taker to seek further information or give them the opportunity to retake the test. In that scenario it is plausible that a person may take two speaking tests the first of which is declared questionable and the second assessed fresh without reference to the original test result. In such a scenario it is plausible that the appellant would have taken the speaking element both in the first test taken in May 2012 that was declared questionable and in the second test on the 19 June 2012, as found by the Judge, which was declared invalid.
28. It is not made out when assessing the merits and in finding the respondent had discharge the evidential burden and that the appellant had failed to provide a satisfactory explanation, that the Judge failed to take all relevant matters into account. There is clear reference in the decision to the appellant's claim to have only taken one test but also the weight of evidence available to the Judge, including the Operation Façade report, which supports the Judge's conclusion the respondent had discharged the evidential burden upon him and that the explanation provided by the appellant was not satisfactory. It was not disputed the Look-up Tool confirmed the second test is invalid.
29. Mr Raza's submission regarding the passport does not assist. The Judge finds the appellant took the second English language test on 19 June 2012 which she herself, in one part of the evidence, accepted she had. The Judge also specifically refers to a submission in identical terms having been made before the First-Tier Tribunal at [21] which was rejected by the Judge when considering the evidence in the round. There was no arguable doubt in the Judge's mind that the Look-up tool refers to tests taken by the appellant which has not been shown to be an irrational conclusion on the facts.
30. Before the Upper Tribunal Mr Raza was asked whether he had certificates with him as the Look- up tool clearly contains certificate numbers which might have enabled him to establish that the certificates numbers on the Look-up tool did not relate to those held by the appellant, but no such evidence was forthcoming. It was not irrational for the Judge to conclude that the Look-up tool relates to the tests taken by the appellant.

31. It must be remembered in this appeal that the Judge had the benefit of seeing and hearing oral evidence being given and formed a view of weigh to be given to the elements of that evidence. Such weight was a matter for the Judge and has not been shown to be irrational.
32. The only basis on which it would be arguably possible to find in the appellant's favour, on the basis of Mr Raza's submissions, is if sustainable findings made by the Judge are ignored in favour of an insufficiently supported assertion regarding the second test and that the answer in re-examination should be treated as determinative without considering the evidence as a whole.
33. This is a carefully considered determination in which the Judge was aware of the need to grapple with competing arguments. It is not made out the Judge's conclusions fall outside the range of those reasonably available to the Judge on the evidence. Whilst the appellant disagrees with the Judge's conclusions she fails to establish arguable legal error material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in this decision.

Decision

34. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

35. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 15 July 2019