Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01587/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 June 2019	**On 11 July 2019**

Before

UPPER TRIBUNAL JUDGE FINCH
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR PINKESHKUMAR MAHENDRABHAI PATEL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T. Melvin, Home Office Presenting Officer
For the Respondent: Mr Hiran Patel, Hiren Patel Solicitors

DECISION AND REASONS

1. This is the appeal of the Secretary of State, but for convenience we will refer to the appellant below as the appellant in these proceedings.

2. The appellant is Pinkeshkumar Mahendrabhai Patel, a citizen of India, born 14 March 1990. The Secretary of State appeals against a decision of First-tier Tribunal Judge Blake promulgated on 9 April 2019 allowing the appellant's appeal against a decision of the respondent dated 7 March 2016 to refuse his application for leave to remain

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under the points-based system as a Tier 2 (General) Migrant submitted on 13 January 2015.

3. This matter has a relatively complex procedural history. It originally came before First-tier Tribunal Judge Herbert who, in a decision and reasons promulgated on 7 February 2018, allowed the appellant's appeal. The Secretary of State appealed against that decision. Deputy Upper Tribunal Judge Davey allowed the appeal and remitted it back to the First-tier Tribunal for a rehearing. It was in those circumstances that the matter was listed before Judge Blake. Following the decision of Judge Blake to allow the appeal, the Secretary of State appealed to this tribunal with the permission of First-tier Tribunal Judge Grimmett, on a basis we set out below.

Factual background

4. The appellant entered the United Kingdom with leave as a student on 9 November 2009, valid until 31 January 2013. Following a successful appeal, the appellant's leave to remain was extended until 17 February 2014, and was later extended again, until 30 November 2015. All these grants of leave were under the Tier 4 student regime. On 13 January 2015, the appellant applied for leave as a Tier 2 (General) Migrant. That application was refused, and it is that refusal decision which is under consideration in these proceedings.

5. The Secretary of State refused the appellant's January 2015 application for leave to remain on two bases. First, the appellant was said to have used a proxy test taker to sit an English language test at Colwell College, Leicester, on 19 September 2012. As a result, the Secretary of State concluded that the appellant's conduct made it undesirable to allow him to remain in the United Kingdom and refused his application for further leave to remain under paragraph 322(5) of the Immigration Rules.

6. The Secretary of State gave another reason for refusing the application. The appellant had provided a "certificate of sponsorship" in support of his application under the points-based system. The refusal letter said this:

> "Your Certificate of Sponsorship (COS) does not provide sufficient information to show that this job is a genuine vacancy. On this occasion, as we are refusing your application on additional grounds, we have not sought further information about the employment stated on the COS. We are therefore unable to award points for sponsorship. Should a further application be made for this specific employment, that meets all other Tier 2 criteria; [sic] additional information would be sought if the COS did not provide sufficient information to show that the position was a genuine vacancy…"

7. Judge Blake allowed the appeal on the basis that the appellant had satisfied him that he had attended an English language test at a satellite college of Colwell College, the College of Advanced Studies, near Aldgate East in London. Before Judge Herbert in the first appeal, as before Judge Blake, the appellant had maintained that he attended

a test at this test centre, in his own capacity, and that he had not used a proxy. The appellant had not provided any other information demonstrating the existence of this satellite college, which the Secretary of State contended did not exist, and was a fictional creation of the appellant. Judge Blake did not deal in substantive terms with the issue of the COS.

Permission to appeal

8. Judge Grimmett granted permission to appeal on the basis that it was arguable that the judge erred in accepting that the appellant took his English language test at a satellite college in circumstances where there was no evidence to support such a claim, given the respondent's own records suggested that the appellant sat the test at Colwell College in Leicester. Judge Grimmett said it was arguable that Judge Blake had overlooked the COS issue.

Submissions

9. The Secretary of State's submissions are essentially a rationality-based challenge to the judge's approach to the appellant's evidence. The Secretary of State contends that there was no rational basis upon which the judge was able to accept the appellant's evidence that he had taken his English language test at a hitherto unknown satellite college of Colwell College. The respondent highlights the complete dearth of any evidence supporting that contention, noting that there was no reference to the existence of a satellite college in any of the supporting documentation submitted with the appeal, on behalf of the Secretary of State, or on behalf of the appellant. Taken at its highest, contends the presenting officer, the judge accepted a bald, unsubstantiated assertion made by the appellant, in the absence of any of the supporting documentary evidence which would ordinarily be expected, and which would be readily available, were it the case that a satellite college existed.

10. The appellant had not sought to obtain or provide the audio recordings of the test itself which, pursuant to Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009 at [33], makes the allegation that he cheated "hard to resist".

11. The presenting officer also submitted that the judge erred in law by failing to make any findings concerning the COS issue.

12. For the appellant, Mr Patel highlighted the approach taken in earlier authorities such as SM and Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 229, which highlighted the need for those accused of English language testing fraud to provide an "innocent explanation", satisfying a minimum level of plausibility. The explanation provided by the appellant that he sat the test in a satellite court was an explanation he had provided before Judge Herbert, on the first occasion the matter was before the First-tier Tribunal. Having secured a re-hearing of the case at first instance, the Secretary of State did not procure further evidence stating that no satellite courts existed. The Secretary of State was on notice that that would be the appellant's "innocent explanation" and did not secure evidence to rebut it. The judge below took account of the entirety of the appellant's evidence, including the

travel arrangements he made to attend the college in East London. The appellant had explained that he attempted to attend the college where he sat the test, but it had closed down. That was why he had not provided the voice recording. Ultimately, Mr Patel contends that the judge's findings were open to him on the evidence he heard. There was no irrationality or other material error of law which infected the judge's findings of fact.

Legal framework

13. This is an appeal against an "immigration decision" brought under section 82 of the Nationality, Immigration and Asylum Act 2002 in the form it existed prior to being amended by the Immigration Act 2014.

14. The basis upon which the challenge was advanced before Judge Blake was that the Secretary of State had erred in his application of paragraph 322(2) of the Immigration Rules. That paragraph provides that the following conduct amounts to a ground for refusal:

> "(2) the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave or in order to obtain documents from the Secretary of State or a third party required in support of the application for leave to enter or a previous variation of leave."

15. Where the Secretary of State alleges deception, he bears the burden of proving it. There is an evidential burden on the Secretary of State in the first instance; if he provides evidence demonstrating there are reasonable grounds to conclude that the appellant used deception, the burden shifts onto the appellant to provide a plausible innocent explanation. If the appellant does so, the burden "shifts back" to the Secretary of State to demonstrate how, in light of that explanation, the allegation of deception is made out, to the balance of probabilities standard. Such an assessment is always an inherently fact-sensitive task, even in cases where the evidence may otherwise seem incontrovertible. See [33] of Ahsan:

> "Where the impugned test was taken at an established fraud factory such as Elizabeth College, and also where the voice-file does not record the applicant's voice (or no attempt has been made to obtain it), the case that he or she cheated will be hard to resist… However, I am not prepared to accept – and I do not in fact understand Ms Giovannetti to have been contending – that even in such specially strong cases the observations in the earlier case-law to the effect that a decision whether the applicant or appellant has cheated is fact-specific are no longer applicable or that there is no prospect of their oral evidence affecting the outcome."

16. Paragraph 245HD of the Immigration Rules establishes the highly prescriptive requirements of the Points Based System for leave to remain as a Tier 2 (General) Migrant. Significantly for present purposes, paragraph 245HD(f) provides that an applicant must be awarded 50 points under paragraphs 76 to 79D of Appendix A to

the rules. Appendix A, paragraph 77H(a) requires a job recorded by the COS Checking Service to be a "genuine vacancy".

Analysis

Paragraph 322(2)

17. The Secretary of State does not challenge the Judge's approach to the legal framework governing establishing allegations of deception, specifically allegations made in the context of impugned English language tests. Rather, the main thrust of the Secretary of State's submissions focuses on the rationality or otherwise of the acceptance by the judge of the appellant's contention that he sat his English language test at an otherwise unknown satellite court. We accept that there is a significant degree of superficial force in the position of the Secretary of State. On the face of it, a finding that a satellite college exists, in circumstances when the respondent has no record of it, and in which the appellant himself has been unable to provide any supporting evidence of its existence, may be difficult to sustain. The existence of a language testing centre is a matter which one would ordinarily expect there to be a wealth of independent supporting evidence. The judge seemingly accepted the appellant's assertion, in the absence of such evidence, that such an alternative college existed. On one view, such a finding could, in principle, be capable of being categorised as perverse or irrational.

18. Properly understood, we do not consider Judge Blake to have fallen into error. We do not consider his findings of fact to be that there was a genuine test centre satellite college in East London. Rather, the judge accepted the appellant's explanation that he attended premises in East London which purported to be a test centre of some form, and that he took his test there.

19. Pausing for a moment to examine the overall case advanced by the Secretary of State, it is plainly the case that there was widespread fraud, corruption and other irregularities at the heart of the English language testing system administered by ETS. Project Façade, the criminal investigation into Colwell College, revealed that of 2901 tests taken between October 2011 and January 2013, over half (53%) were categorised as "invalid", that is 1559. 1342 tests were categorised as "questionable". There were no results which featured no evidence of invalidity. The report categorises the conduct at Colwell College as "organised and widespread abuse". Voice analysis demonstrated that cheating at the college was widespread. Educational Testing Services auditors were excluded from the test rooms during the preparation and identification phases of the tests. The college was corrupt to its core. See *Project Façade – criminal inquiry into the abuse of the TOEIC*, provided by the Secretary of State, dated 15 May 2015.

20. Against that background of widespread fraud and abuse, we consider that it is entirely plausible that the college could have facilitated the establishment of "pop-up" colleges in other parts of the country by other corrupt individuals. Bearing in mind the corruption which characterised so much of what took place at the college, it is entirely plausible that the appellant did in fact attend something which he thought

was a genuine test centre, but in fact was not. It does not matter whether the satellite test centre was genuine or not. Again, given the widespread fraud and abuse, it is entirely plausible that Colwell College permitted such satellite test centres to run fictitious results through its own books as part of a "package" made available to those seeking English language certificates.

21. We do not consider Judge Blake's findings to have been premised on the erroneous assumption that a fictitious college did, in fact, exist. Rather, the judge correctly analysed the appellant's evidence that he attended a test centre, took a test, and was issued with a certificate from a centre which the respondent has now discovered to be a fraud factory. The "college" was no longer there, and the appellant had not been able to obtain a copy of the recording from it.

22. In our view, this was an "innocent explanation" that the judge was entitled to accept.

23. The judge reached those findings in light of the appellant's "very good command" of English, as demonstrated during his oral evidence (see [66]). The judge also noted the qualifications the appellant had already obtained prior to taking his test. At [68], the judge noted that the appellant's application which relied upon the impugned English language certificate had been submitted at a time when the appellant still had a long period of time until the expiry of his then extant visa. These were factors that the judge was entitled to take into account. Of course, those who cheat in English language tests may have a variety of motives for doing so, even if they would, in principle, be able to take the test themselves. However, the judge considered the entirety of the evidence, in the round, approaching the core elements of the appellant's case on a basis which we find to be sustainable.

24. If, as is the Secretary of State's general case in these matters, Colwell College was characterised by corruption to its core, it is entirely consistent with the case advanced by the appellant that a proxy could have been used on his behalf by the college, without his knowledge, even if he took a test of sorts elsewhere.

25. It may well be that other judges would not have adopted such a generous approach towards the appellant – but that is not the threshold for this tribunal to interfere with his findings. Despite the superficial attractiveness of the Secretary of State's submissions, we do not consider this judged to have acted perversely, irrationally or otherwise unlawfully when reaching his findings of fact.

26. For those reasons, we do not consider the judge to have erred when accepting the appellant's evidence that he did not knowingly participate in the fraud against the respondent. The appellant had provided a so-called "innocent explanation", which had the effect of swinging the evidential burden pendulum back to the Secretary of State. The Secretary of State, despite being on notice that this was the appellant's likely evidence, had not provided any evidence to refute that assertion, other than highlighting the absence of evidence (something which the judge had already rejected, by virtue of accepting this strand of the appellant's case). As such, we agree with Judge Blake that the Secretary of State has not discharged the burden of

demonstrating that the appellant made false representations. This ground of appeal is dismissed.

Certificate of Sponsorship

27. In relation to the COS, we accept that the judge erred by not considering it. However, we do not consider this to be a material error, due to the inadequacy of reasoning in the refusal letter.

28. The letter states that the COS provided by the appellant did not demonstrate that the appellant's proposed role related to a genuine vacancy. We pressed the presenting officer at the hearing as to how this deficiency manifested itself; the refusal letter suggested that the COS *itself* was deficient. The presenting officer accepted that a COS does not contain details which pertain to the genuineness or otherwise of the proposed occupation. The refusal letter relied on paragraph 77H of Appendix FM which clearly requires the Secretary of State to have reasonable grounds to believe that a vacancy is not genuine, notwithstanding the fact that the remaining evidential requirements of the application were met.

29. The requirement in paragraph 77H is for the Secretary of State to have "reasonable grounds to believe" that the vacancy is not genuine. Nowhere in the refusal letter does the Secretary of State specify what those reasonable grounds are. The onus in paragraph 77H is on the Secretary of State to provide reasonable grounds, to which an applicant may be expected to respond. By contrast, the approach taken by the Secretary of State in the present matter suggests that he expected the appellant to demonstrate why the vacancy was genuine, despite having met all other criteria. So much is clear from the letter itself: "Your [COS] does not provide sufficient information to show that your job is a genuine vacancy…" No reference is made to the required "reasonable grounds" the Secretary of State must have under the rules to reach that conclusion.

30. We consider the Secretary of State to have misapplied paragraph 77H. Rather than the Secretary of State providing the grounds to call into question the genuineness of the certificate, the Secretary of State reversed the burden of proof and imposed a requirement on the appellant to demonstrate that the certificate was genuine, in the absence of reasonable grounds to demonstrate otherwise. Moreover, there is not a shred of evidence in the refusal letter demonstrating how the Secretary of State reached that conclusion. Indeed, the letter states that the Secretary of State has deliberately not sought additional information from the appellant, as the application was being refused on other grounds.

31. The operative reason given by the refusal letter for awarding no points under this heading related to the deficiencies of the COS. As demonstrated above, that document featured no deficiencies which merited that conclusion. Rather, the Secretary of State had concerns about the application which were not set out in the refusal letter, nor were they expressed in accordance with the process established by the Immigration Rules in order to deal with precisely this issue.

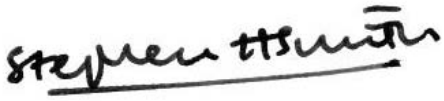
32. In our view, that is not a sustainable conclusion. It follows, therefore, that Judge Blake's failure to deal with the COS issue was not material to the outcome of the appeal. There was only one conclusion which the judge could have reached, had he addressed that issue, namely that the respondent Secretary of State had not demonstrated that the appellant's proposed employment was not genuine.

Conclusion

33. For the reasons given above, we dismiss the Secretary of State's appeal.

Notice of Decision

This appeal is dismissed under the Immigration Rules. The decision of Judge Blake is upheld.

Signed  Date 5 July 2019

Upper Tribunal Judge Stephen Smith