



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/37616/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 13 August 2015**

**Determination Promulgated
On 15 September 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR WEI CHENG LI

Respondent

Representation:

For the Appellant: Mr P Nath, Senior Home Office Presenting Officer

For the Respondent: No attendance

DETERMINATION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.
2. The appellant (hereafter the Secretary of State) appeals against the decision of the First-tier Tribunal (Judge Lever) allowing the respondent's appeal against a decision taken on 10 September 2014 to cancel the respondent's leave to remain as a Tier 4 Student.

Introduction

3. The respondent came to the UK in September 2011 to study a three year course at Manchester University but transferred to St Peters College in London because the second year was too difficult. He obtained an NVQ level 6 certificate in business studies from St Peters College and then another NVQ level 6 certificate in business management from Central College in June 2014. He then returned to China and was stopped at the airport on his return in September 2014. Despite the cancellation of his leave, he was able to commence an NVQ level 7 marketing management degree course at the University of Southampton which was due to finish on 26 September 2015.
4. The Secretary of State cancelled the respondents leave on the basis that he fraudulently obtained an English language test certificate as part of the basis for his application for further leave to remain as a student which was made in November 2013. He had submitted an invalid English language test certificate provided by Educational Testing Service (ETS) following an English language test at St Peters College on 15 October 2013. The sponsor licence for Central College was revoked on 5 September 2014.

The Appeal

5. The respondent appealed to the First-tier Tribunal and attended an oral hearing at Manchester on 22 December 2014. He was represented by Miss Smith of Yingde Lawyers Ltd. The First-tier Tribunal found that the respondent had a good command of English and had little reason or motive for acting dishonestly in obtaining a test certificate. He had previously successfully obtained an international English language test certificate following a test at the British embassy in Beijing. The University of Southampton had carried out their own assessment of English language ability before issuing a CAS. The evidence submitted to prove that respondent had used a proxy was unsatisfactory, generic and in large part lacked any specific relevance. There was no evidence as to the reasons behind the cancellation of the result or what caused concern or who generated the cancellation.

The Appeal to the Upper Tribunal

6. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law in finding that the burden of proof had not been discharged. ETS identified the respondent after a systematic investigation and in order to be assessed as invalid there had been a rigorous analysis – a computer programme analysing speech and two independent voice analysts. All three were in agreement that a proxy had been used for the test. The judge had provided inadequate reasons for rejecting the evidence, the respondent's English language ability was not determinative and the judge had applied an elevated standard of proof.

7. Permission to appeal was granted by Designated First-Tier Tribunal Judge Murray on 24 February 2015. It was arguable that the judge had wrongly identified the main issue in the case and may well have misunderstood the core of the claim and used too high a standard of proof.
8. Thus, the appeal came before me

Discussion

9. Mr Nath submitted that the main issue is deception. The judge was wrong to make his own assessment of the respondent's English language ability. The Secretary of State only had to prove deception on a balance of probabilities. The judge has not set out what further evidence was required and the Secretary of State could not have done any more. The respondent has failed to attend and the decision should be remade today.
10. The judge referred to the respondent's English language ability at paragraphs 7, 16, 18, 21 and 25 of the decision. At paragraph 16 the judge stated that the respondent's level of English was the *central issue* in the case. I find that the judge erred in law by misidentifying the central issue in the case and allowing the appeal substantially on the basis that the respondent had variously demonstrated a good command of English. The actual issue in the case was whether the Secretary of State had proved on a balance of probability that the respondent used deception in his application for further leave to remain.
11. The judge considered the evidence from Peter Millington and Rebecca Collins at paragraph 27 of the decision. The judge found that the statements amount to no more than a general summary of the systems undertaken by ETS and the methodology provided little or no evidence insofar as any specific case is concerned. I find that the judge has given inadequate reasons for those findings – the witness statements are detailed and supported by evidence confirming that the test result for the respondent was invalid. The witness statements set out why the specific evidence in relation to the respondent shows that a proxy was used. The judge has not adequately engaged with the evidence or balanced the weight of that evidence against the respondent's assertion that he undertook the English language test himself. I find that is a further material error of law.
12. Thus, the First-tier Tribunal's decision to allow the respondent's appeal under the Immigration Rules involved the making of an error of law and its decision cannot stand.

Decision

13. Mr Nath invited me to allow the appeal and remake the decision by dismissing the respondent's appeal without hearing any further evidence. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I do not consider that an appropriate course of action. I find

that the errors of law infect the decision as a whole and therefore the re-hearing will be de novo with all issues to be considered again by the First-tier Tribunal.

14. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined de novo by a judge other than the previous First-tier judge.

Signed



Date 13 September 2015

Judge Archer
Deputy Judge of the Upper Tribunal