



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

Appeal Number: IA/39858/2014

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgated**

**On Wednesday 30 September
2015**

On Monday 5 October 2015

Before

UPPER TRIBUNAL JUDGE SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS SAJIA FARAH

(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer

For the Respondent: Ms M Malhotra, Counsel

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State for the Home Department. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal.
2. The Appellant is a national of Bangladesh. She initially came to the UK in 2009 as a Tier 4 student with leave to remain until 30 June 2011. She was granted further leave from 19 July 2012 to 24 September 2013. She returned to Bangladesh in January 2013 and returned to the UK on 28 August 2014 with leave valid from 15 August 2014 to 30 January 2016. On 16 October 2014, on arrival in the UK, she was stopped at the port by the Respondent on suspicion of using deception in her entry clearance application. She was interviewed and released pending further investigation. Following a further interview, on 16 October 2014, the Respondent cancelled the Appellant's leave to enter under paragraph 321A(1) of the Immigration Rules.
3. The basis for the cancellation was that the Appellant had used false representations because she had relied on an English language test certificate which had been fraudulently obtained when she had obtained her leave in 2012. This is one of the so-called Educational Testing Service ("ETS") cases where it is said by the Respondent that an ETS certificate has been obtained using a proxy test taker. The Respondent relies in that regard on the generic evidence produced in all such cases namely witness statements given by two Home Office witnesses, Mr Peter Millington and Miss Rebecca Collins ("the Witness Statements"). The Respondent also relied on the extract of a spreadsheet showing that the Appellant's was a case where ETS had decided that the ETS results were invalid and on the content of the interviews with the Appellant.
4. The Appellant's appeal was allowed by First-Tier Tribunal Judge Farmer in a decision promulgated on 29 April 2015 ("the Decision"). The Appellant gave evidence at the appeal hearing and the Judge found, for reasons set out at [6] to [7] of the Decision, that she was credible. That finding is not challenged. Permission to appeal was granted by First-Tier Tribunal Judge Cox on the basis that the Decision was arguably inadequately reasoned and arguably failed to engage with the evidence for the Respondent. The matter comes before me to determine whether the Decision did involve the making of an error of law.

Submissions

5. Mr Jarvis submitted that the Decision was very brief and had not engaged with the Respondent's explanatory statement, the Witness Statements or the record of interviews. The Judge disposed of that evidence solely on the basis that it was generic. Not only was it incumbent on the Judge to engage with the Witness Statements but also the Judge had failed to make findings on part of the Respondent's case

that the Appellant had not been able to remember the name of the test centre. I pointed out that the Appellant had taken the test in 2012 so it was perhaps not unnatural for her not to remember the name of the centre after three years. Mr Jarvis accepted that this may be so but submitted that it was still incumbent on the Judge to make a finding in that regard.

6. Mr Jarvis also submitted that it was not open to the Judge to deal with the matter as she had at [11] of the Decision. Having referred to the Respondent's evidence as generic at [8] and directed herself in relation to the burden of proof under Part 9 of the rules at [9] in accordance with PR (proof of forgery) Nigeria [2006] UKAIT_00086, the Judge went on to say as follows:-

“I find that the respondent has failed, in this case, to satisfy the burden. I put into the balance the fact that I have accepted the evidence of the appellant and I have made a positive assessment of her credibility.”

Mr Jarvis submitted that either the Judge had to accept the evidence as establishing deception in which case the assessment of the Appellant's evidence became irrelevant or had to reject it as not establishing deception in which case the Judge needed to give reasons for rejecting what was cogent evidence. The Judge was entitled to find based on the Respondent's evidence that this was a case where there was a “false positive” result but that was not the finding. The Judge had impermissibly considered the Appellant's evidence in this case in a vacuum. The bringing in of the Appellant's evidence when considering whether the Respondent had discharged the burden of proof was a confused approach at best.

7. Ms Malhotra submitted that the Judge had not ignored the Respondent's evidence. It was taken into account at [9] to [12]. However, the Judge was entitled to consider also the Appellant's evidence and to make findings whether the Appellant was credible as she had found at [6] to [7]. Those findings were not challenged by the Respondent. The Decision gave no indication that the Judge had rejected the Respondent's evidence but had found the evidence to be generic which, in relation to the Witness Statements at least was the position. Based on the case of Gazi v Secretary of State for the Home Department (ETS - judicial review) IJR [2015] UKUT 00327 (IAC), she submitted that it was for the Judge to make findings of fact. The Judge was entitled, as part of that exercise, to take account of the Appellant's evidence. She accepted that the Decision was succinct but submitted that the Judge had provided adequate reasons for allowing the appeal.

Error of law decision and reasons

8. The case of Gazi was a judicial review and for that reason does not make findings on the Witness Statements. It does however provide a useful review of the Witness Statements and it is not therefore necessary for me to set out at length the content of those statements (see [6] to [15])

of Gazi). In summary, Mr Justice McCloskey found that the Witness Statements were capable of establishing to the requisite degree of proof that a test was taken fraudulently but the test is not infallible and it is open to a Tribunal in any case considering the specific facts of and evidence in that case to decide that the particular appeal should be allowed [35].

9. Mr Justice McCloskey at [25] to [27] of Gazi reviews the outcome of three appeal decisions from the First-Tier Tribunal where appeals had been allowed for different reasons. I accept that this case does not fall neatly within any of those three outcomes in terms of the Judge's reasoning. It is not said in terms for example that the Appellant's case is an exception on the basis that her's is one of the "false positive" cases which ETS accepts may emerge from their process (see in particular [30] to [33] of the Millington statement). However, neither does the Judge say that she does not accept the Respondent's evidence. Although that might be said to be the inference from the reference to cases on the burden and standard of proof at [10], the finding on the evidence is at [12] and does not say that the evidence is rejected. Instead, the Judge finds that this evidence is "not sufficiently particular to this appellant". Alone, that finding may suggest that the Judge has failed to engage with the content of the Witness Statements. However, it cannot be criticised as a description of the Witness Statements.
10. The Decision may be criticised on the basis that it is brief and is limited in its reasons for finding that the deception is not made out. However, when read as a whole, paragraphs [6] to [12] give adequate reasons for the allowing of the appeal. The Judge has taken into account the Witness Statements and has not rejected them (in which case she would have needed to give reasons for so doing). Instead, she notes that they are generic (as they are) and therefore considers the factors and evidence individual to the Appellant's case on both sides in order to reach a view whether the Respondent has discharged the burden on her to prove deception. I am reinforced in that view by the reference to "in this case" [11] when considering whether the Respondent has discharged the burden. If the Judge considered that the "generic" evidence i.e. the Witness Statements could not on any view overcome the burden, she would have said so. The approach is not an erroneous one based on what is said in Gazi and is not inconsistent with the authorities related to deception. The fact that a party may bear the burden of proof does not mean that in order to consider whether that burden is discharged the evidence on the other side has to be left out of account.
11. I have also considered Mr Jarvis' submission that the Judge has failed to consider the individual evidence relied upon by the Respondent by failing to make a finding about the Appellant's failure to recall the name of the test centre. Ms Mahotra did not seek to suggest that the Judge had made a finding on this. However, the lack of any finding has to be considered against the background of the Respondent's case which is

summarised at [4] of the Decision. There is no reference there to this point. Although this issue is raised in the grounds of appeal at [10], this relies on what is said in the interview record. There is no mention of it in the Respondent's decision as being something on which the Respondent relied as assisting her case or undermining the Appellant's. Mr Jarvis relied on the Respondent's explanatory statement. However, although there is mention of this in that statement under the heading of Interview, there is no mention of this failure specifically in the reasons given for the decision at [17] of that statement. It was not therefore a matter relied upon by the Respondent and there is no error of law by the Judge in failing to make a finding on that issue. The Judge took into account the issue which was relied upon as emerging from the interview namely the choice of test centre and made a finding on that at [6].

12. For the above reasons, I am not satisfied that the First-tier Tribunal Decision involved the making of an error of law.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law.

I do not set aside the decision

Signed



Date 2 October 2015

Upper Tribunal Judge Smith