



IAC-FH-NL-V1

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

Appeal Number: IA/40048/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 7 September 2015**

**Decision & Reasons Promulgated
On 12 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

**TAKMAL UDDIN PALASH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Appellant in person

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Bangladesh born on 10 October 1988 and he appeals against a decision of the respondent to refuse him leave to enter and remain in the UK in a decision dated 25 December 2014. The appellant had been given leave to remain in the UK as a Tier 4 student on 6 March 2014 but, when considering the cancellation of his leave to enter, an Immigration Officer was satisfied that false

representations were employed or material facts were not disclosed for the purpose of obtaining leave in a previous application. The appellant's leave to remain was cancelled in accordance with paragraph 321A of HC 395 of the Immigration Rules, as amended and he was refused leave to enter the UK under paragraph 320(7B) of HC 395 (as amended).

2. The history is that the appellant arrived at Gatwick North on 10 October 2014 from Dhaka. His passport contained a UK Tier 4 (General) Student entry clearance issued in Dhaka on 13 October 2009 valid until 31 October 2012. In October 2012 the appellant submitted documents in support of a further application to remain and leave was granted valid from 18th February 2013 to 1st March 2014. He was again granted leave valid from 6th March 2014 to 30th October 2015. It was for the application dated 31st October 2012 that the appellant had submitted a test certificate from an ETS language test.
3. Home Office records showed that the appellant had taken part in an educational testing services, ETS English language test, at a test centre which was later suspended.
4. In a decision dated 17 October 2014 it was stated that the appellant was given notice of leave to remain in the United Kingdom as a student on 6 March 2014 but the Secretary of State was satisfied that false representations were employed or material facts not disclosed and his leave was cancelled. It was the appellant's claim that he took the test on 5 September 2012 at what he stated to be North London College. He was granted further leave in the UK in 2013 and used the TOEIC English language course which was an ETS establishment to take the course.
5. Home Office records show that the appellant had taken part in a ETS English language test and that from February 2014 any student visa or entry clearance application supported by evidence of English ability issued by ETS was placed on hold. ETS undertook analysis of the speaking test and those results were split into two, those which were invalid and those which were questionable.
6. The appellant appealed that decision of cancellation. He stated that he had successfully completed an English course awarded by EDI UK, HND in Business from EdExcel and BSc in Business Management from the University of Wales and was currently a student of the Masters of Business Administration at Cardiff Metropolitan University and achieved these through his studies in English language. The appellant maintained that he did not use deception to obtain the English language certificate in September 2012 and he should not be personally liable for the conduct of the language test. It was submitted the respondent was therefore required to provide clear, cogent and consistent evidence to show that the appellant submitted false documents.
7. In the event First-tier Tribunal Judge Andonian allowed the appellant's appeal on the following basis:

- “5. I am concerned about this matter because none of the witness statements or anything that the Home Office had produced proved that this appellant was a party to a scam. It may very well be the case that other persons were involved in a scam in relation to taking this English Language test on the day that it was taken 5.9.2012 at that test centre, but this did not certainly mean that this appellant was also a party to a scam. There was no evidence against him personally. The appellant had successfully completed his English language course and was awarded by the EDI, UK his HND in business from EdExcel, BSc (Hons) in Business management from the University of Wales and currently he was a student of the Master of Business Administration at Cardiff Metropolitan University and he has paid a tuition fee of £5,450. All this he had achieved through his studies and all his exams were in the English language. Before me he appeared and gave evidence and his English was fluent. As he said when he took the test on 5.9.2012, he was fluent in the language and there was no need for him to employ deception or to use someone else to provide the test for him. He had never made a false representation in his application by submitting a false English Language test certificate and I believe that this is the case as the respondent has not proved otherwise. The appellant had submitted that the respondent is completely wrong by holding that he had made a false representation in his application by submitting a false English language test.
6. The appellant also stated that he had never used deception to obtain an English Language test, he said before me that he genuinely sat the exam and successfully completed the assessment and obtained the certificate. He was asked when he had taken the test, where he was living at that time and he said he was living at Bow Road, East London E3. He said that it took about 40 minutes to go from Bow Road to the Queens College where he took the test on 5.9.2012. He said that he took bus number 205 to Liverpool Street and then he took the train to Walthamstow. He was asked why he did not take a test at a centre which was nearer and he said that he could not get a place to take the test earlier than he wanted to, and therefore the centre that he took the test at on 5.9.2012 was the earliest that he could take the test at as other centres had a longer waiting list.
7. The appellant appeared to be a very credible individual; he asserted that he had never committed any criminal offence and had not submitted any false documentation. I believe that the cancellation of this continued leave to remain on such grounds had been absolutely without any basis and such cancellation is fundamentally flawed.”
8. An application for permission to appeal was made by the Secretary of State in the following terms. The Immigration Officer provided a bundle of documents in support of the allegation together with a further witness statement from Matthew Harold with an extract from the ETS spreadsheet which was provided at the hearing. The witness statements from Mr Peter Millington and Miss Rebecca Collins clearly provided that the tests were categorised as “invalid” but ETS were certain that there is evidence of proxy test taking or impersonation.
9. In order to be categorised as invalid on the spreadsheet provided to the Home Office the case must be gone through a computer programme analysing speech and then two independent voice analysts. If all three were in agreement that a proxy had been used then the test would be categorised as invalid.
10. In the light of the evidence it was clear that the Secretary of State reasonably concluded that the appellant had used deception in his application and that the judge had erred in its finding at paragraph 9 that the respondent had failed to discharge the burden of proof incumbent upon her on the civil standard.

11. First-tier Tribunal Judge Pirotta granted permission on the basis that the judge disregarded the evidence in statement form from the Secretary of State and there was arguably a material error of law.
12. At the hearing Mr Palash attended and confirmed that he made his application for further leave to remain on 31 October 2012 and for that he used a TOEIC for which he sat a test on 5 September 2012 at Queensway Test Centre, E17.
13. He stated that the Home Office Presenting Officer had cross-examined him at the hearing before the First-tier Tribunal and the judge had decided that his English was good. The appellant had conducted his HND in English and gone on to undertake a Business Management degree and had recently finished a masters.
14. Mr Tufan submitted that the appellant's grasp of English now was not the same as it might have been previously and there may be many reasons for him taking an exam which used a proxy.
15. In conclusion, despite the fact that the judge had referred to the statement from Matthew Harold employed by the Home Office and he stated that the test results had been obtained via the use of a proxy tester, (paragraph 3 of the judge's decision) the judge made no attempt to analyse that statement. The judge stated at paragraph 5, "*I am concerned about this matter because none of the witness statements or anything that the Home Office had produced prove that this appellant was a party to a scam*" but the evidence of Matthew Harold specifically referred to Takmal Uddin Palash' the appellant' and the judge failed to acknowledge this.
16. I also note that although at paragraph 9 the judge referred to the burden of proof as resting with the respondent and that it was the civil standard, the judge also referred to the "*higher standard of proof incumbent upon the respondent to discharge that he had been a party to a scam*".
17. As such I found an error of law which is material. **NA & Others (Cambridge College of Learning) Pakistan** [2009] UKAIT 00031 confirms that the standard of proof to be applied in these cases is the civil standard, albeit that good evidence may be required.
18. The appellant had his leave to remain cancelled by the respondent on the basis that he had made false representations in a previous leave to remain application. The appellant accepted that he had attended Queensway College on 5 September 2012 and in the spreadsheet attached to the statement that Mr Tufan supplied it is quite clear that this individual appellant's date of birth of 10 October 1988 from Bangladesh had attended Queensway College for testing, and that his certificate number was 0044201925 and the test records 34427 and 34428 associated with the appellant's certificate number (tests taken on 05/09/2012) were classified as invalid.
19. The case of **R (on the application of) Gazi v Secretary of State for the Home Department (ETS - Judicial review) IJR** [2015] UKUT 00327 (IAC) addresses whether the statements of Miss Collings and Mr Millington constitute generic

evidence and goes through analysis of the detection of fraudulent testing at some length and the approach taken. Various criticisms were made of the process undertaken by the Home Office in Gazi and it is stated at [9]

“At this juncture, it is appropriate to highlight the single piece of documentary evidence relating to the decision in the Applicant’s case which has been produced by the Secretary of State. It consists of a photocopied excerpt from a spreadsheet taking the form of a horizontal line containing six pieces of information: the “ETS Registration ID”, the Applicant’s first and last names, the test date, the Applicant’s date of birth and the name of the test centre. Neither the word “invalid” or “cancellation” or any derivative of either appears”.

And at [15] with respect to the conclusions of the analyses made of the tests,

‘The dichotomy of “invalidity” and “irregularity” is identifiable in the immediately ensuing averments:

“Where a match has not been identified and verified, an individual’s test result may still be invalidated on the basis of test administration irregularity including the fact that their test was taken at a UK testing centre where numerous other results have been invalidated on the basis of a ‘match’. In those cases the individual would usually be invited to take a free re-test. These cases are clearly distinguished by ETS in its spreadsheets provided to the Home Office from tests where there is substantial evidence of invalidity.”

No exhibited illustration of this distinction, even in redacted form, is provided. Finally, it is clear from the concluding averments in Mr Millington’s witness statement that the Home Office invariably accepts the deception assessment provided by ETS, without more”.

20. However, the Tribunal considered that each case would be assessed on its merits and, at [35], Mr Justice McCloskey in Gazi states:

“In my view, taking into account chapter 50 of the EIG, the respondent’s evidence, summarised in chapter 2 above, was sufficient to warrant the assessment that the applicant’s TOEIC had been procured by deception and, thus, provided an adequate foundation for the decision made under Section 10 of the 1990 Act”.

21. On the basis of the evidence put before me there was a definite reference to two test records and as to whether they were classified as invalid or questionable and both tests were recorded as ‘invalid’. I accept that the evidence has demonstrated that the test was cancelled because of invalidity and further to paragraph 8 of Matthew Harold’s statement the test was invalidated because the same individual had taken an English language test in place of numerous candidates. As paragraph 8 states, “as in this case, ETS then informed the Home Office that there was evidence of invalidity in those case and where applicable that it had cancelled the test result”.

22. It was made clear in Gazi that

‘the bona fides and character of the Applicant are important issues. However, there was no opportunity to evaluate the Applicant’s demeanour or to assess his performance under cross examination’

23. The English of the appellant at the date of the hearing before me and any subsequent courses he has taken are not an indicator of the English of the appellant when he took the test over three years ago. I am not persuaded that the lack of a criminal record on the part of the appellant is a good indicator that the appellant did not take participate

in an invalid test. I would not conclude, as the First tier Tribunal Judge did, that the appellant's speaking English was fluent even at the date of the hearing. I therefore, on the balance of probabilities with the supporting evidence find that the respondent had established a condition precedent and subsequently discharged the burden of proof required and the appellant's appeal is dismissed.

Notice of Decision

The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007 and dismiss the appeal of Mr Palash.

Signed

Date 9th October 2015

Deputy Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 9th October 2015

Deputy Upper Tribunal Judge Rimington