



IAC-FH-NL-V1

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

Appeal Number: IA/39558/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 24 February 2016**

**Decision &  
Promulgated  
On 14 March 2016**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HILL QC**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**and**

**MR MD TANIME HOSSAIN  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondent

**Representation:**

For the Appellant: Mr S Staunton, Home Office Presenting Officer  
For the Respondent: Not present or represented

**DECISION AND REASONS**

1. This is an appeal brought by the Secretary of State in relation to a decision of First-tier Tribunal Judge Rodger promulgated on 13 August 2015. The issue which had to be determined by the First-tier Tribunal Judge was whether an English language test conducted had been obtained fraudulently and in particular whether the individual concerned had made use of a proxy. The judge was critical of the lack of original evidence in

relation to the test and in particular the audio recordings themselves. The judge was of the view that the original recordings should be provided and, in paragraph 30, was critical of the reference to 'infallible' software and the absence of robust evidence to rule out 'false positives'.

2. The judge appeared dismissive of what was styled (paragraph 26) "generic witness statements" from Rebecca Collings, from Peter Millington and from Matthew Harold setting out the practice adopted by ETS. The judge considered this unpersuasive in determining whether the alleged fraud could be proved.
3. I consider those criticisms of the Secretary of State's evidence to be misplaced. The evidence very fully dealt with the manner in which recordings were tested and compared and it led to a clear conclusion in this specific case a proxy had been used. The judge seemed to give undue weight to her view that there would have been no need for the individual to use a proxy since in her assessment, albeit at a later point in time, the fluency of his oral English was adequate.
3. The first ground of appeal advanced by the Secretary of State is the failure to give reasons and I am satisfied that this is made out. There is no clear or sufficient reason given for the view expressed by the judge that the individual would have had no reason to secure a certificate by neither deception nor are there reasons given for the wholesale rejection of the substantial body of evidence relied on by the Secretary of State.
4. The second ground pursued alleges a material misdirection of law this too is made out. The requisite standard which must be applied is the balance of probabilities, albeit the exercise must take into account the seriousness of the allegations which are being made. Although in paragraph 14 the judge refers, correctly, to the standard being the balance of probabilities, it would appear from later references, such as paragraph 25, and reading the analysis holistically that in reality the judge applied a somewhat higher standard. Requiring filing of the digital recordings, for example, as the judge suggests in paragraph 26 or direct evidence from an expert who has listened to the recordings (paragraph 27) seeks to impose an impermissibly high standard on the Secretary of State.
5. The Secretary of State having succeeded on both grounds, this appeal must be allowed. Mr Staunton, for the Secretary of State, properly concedes that there is a substantive issue on credibility which needs to be determined and the only proper course is for the case to be remitted to the First-tier Tribunal for a re-hearing.

### **Notice of Decision**

The appeal is allowed.

Matter remitted to First-tier Tribunal for rehearing.

No anonymity direction is made.

Signed *Mark Hill*

Date 3 March 2016

Deputy Upper Tribunal Judge Hill QC