



IAC-FH-NL-V1

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

Appeal Numbers: IA/40724/2014
IA/40719/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 8 March 2016**

**Decision & Reasons Promulgated
On 4 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

**SAEED ABDULLAH S ALDAWSARI
MUNIRAH MOHAMMAD M ALDAWSARI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondents

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondents: Mr R Toal, Counsel, instructed by Wilson Solicitors LLP

DECISION AND REASONS

1. For the purposes of my decision I shall refer to the parties as they were before the First-tier Tribunal. Thus the Secretary of State is the Respondent and Mr and Mrs

Aldawsari are once more the Appellants. Given that the second Appellant is a dependent upon the first, I shall simply refer to the latter as “the Appellant”.

2. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge Thomas (the judge), promulgated on 29 September 2015, in which she allowed the Appellants’ appeals. The appeals to the First-tier Tribunal had been against the Respondent’s decision of 16 October 2014, cancelling their leave to remain and thereby refusing leave to enter the United Kingdom. The basis of the Respondent’s decision was an assertion that the Appellant had obtained a false English test certificate and had dishonestly used this certificate when applying for further leave.
3. This is one of a number of cases involving the English language test provider ETS.

Proceedings in the First-tier Tribunal

4. The appeals first came before First-tier Tribunal Judge Clarke on 13 January 2015. The Respondent produced new evidence on the day. The Appellants therefore sought and were granted an adjournment. Further directions were issued by Judge Clarke on that day requiring the Respondent to use her “best endeavours” to provide further evidence relating to the allegation made against the first Appellant.
5. The appeals came before the judge on 18 September 2015. The directions made previously had not been complied with. The evidence from the Respondent relating to the assertion of the use of the false certificate was as follows: witness statements from Ms R Collings, Mr P Millington, and Mr M Lister (none of whom appeared before the judge), and a source data printout naming the Appellant.
6. Having set out the basis of the respective parties’ submissions and the relevant provisions of the Immigration Rules, namely paragraphs 321A and 321(7A), the judge directed herself that in this case the burden of proof rested with the Respondent and the standard of proof was that of a balance of probabilities. It was for the Respondent to prove that the Appellant or someone acting on his behalf had been dishonest in the use of what was said by the Respondent to be a false English language certificate.
7. Passages from the witness statements of Ms Collings and Mr Millington are set out at paragraphs 19 and 20, and at paragraph 21 the judge cites the source data print-out and states that:

“...significantly there is no evidence from the person who produced this printout and no details of the information upon which the decision was taken to invalidate the tests”.
8. In paragraph 22 the judge repeats the Respondent’s assertion that the Appellant had employed a proxy test taker in respect of the English language test. The judge then states:

“There is however no evidence at all from ETS to substantiate this or to show how this conclusion was reached. There is no evidence of any voice verification results, electronic file or analysis of files relating to this Appellant and his test. It is not sufficient to simply make such a serious statement and not substantiate it with any real and cogent evidence.”

9. At paragraph 23 the judge refers to the Appellant’s inability to give detailed answers in an interview but comments that it remained for the Respondent to discharge the burden of proof in the appeal before her. She concludes that that burden had not been discharged and goes on to say:

“...there is simply no reliable evidence linking this Appellant to the investigation detailed by the witnesses Ms Collings and Mr Millington and explained by Mr Lister”.

10. The appeals were therefore allowed under the Immigration Rules.

The grounds of appeal and grant of permission

11. The Respondent’s grounds of appeal assert that the judge failed to give adequate reasons for her findings on a material matter. Passages from the statements of Ms Collings and Mr Millington are set out and then at paragraph 3 of the grounds it is stated:

“It is clear that in order to be categorised as invalid on the spreadsheet provided to the Home Office the case has to have gone through a computer programme analysing speech and then two independent voice analysts. ...The spreadsheet identifies the Appellant as having exercised deception. It links him with the evidence of the witness statements.”

12. Paragraph 5 asserts that “had the First-tier Tribunal properly taken the evidence into account the First-tier Tribunal would have found that this is exactly what the documents assert and evidence”.
13. The second ground of challenge relates to what is said to be the application by the judge of an “impermissibly high standard of proof”, a standard which was “far more onerous” than the balance of probabilities.
14. Paragraph 8 asserts that in the present case the burden of proof was “clearly discharged”.
15. In granting permission Designated First-tier Tribunal Judge Manuell commented that the reasoning of the judge appeared to be “thin”, and that the Appellant had not appeared to have tried to substantiate his own case. The grant of permission is dated 2 February 2016.

The hearing before me

16. Ms Isherwood relied on the grounds and asserted that this was indeed a reasons challenge. She sought to rely on paragraph 20 in the case of Gazi [2015] UKUT 327 (IAC) where the expert Dr Harrison had, as she put it, agreed with the methodology of the ETS processes. She relied on the source data sheet and submitted that there was insufficient reasoning by the judge in respect of paragraphs 20 to 23 of her decision.
17. Mr Toal acknowledged the Appellant's answers in his interview but emphasised that the burden in this case was on the Respondent to prove her case. The grounds of appeal relied on the generic evidence from the three witnesses and the spreadsheet evidence only: no reliance had been placed upon the Appellant's interview answers to justify the challenge to the judge's decision. It was of note, Mr Toal submitted, that passages referred to in the grounds of appeal had also in part been referred to by the judge herself in the decision at paragraphs 18 and 19. The judge clearly had relevant evidence in mind when making her decision. The judge had not found that the generic evidence was in itself unreliable, but she had found that it was not sufficient to show that this Appellant had been dishonest and had used a proxy test taker. The Respondent had been given an opportunity to adduce the electronic files and analyst's voice recognition reports but had failed to do so. The only response from the Respondent following the directions of the First-tier Tribunal was contained in paragraph 10 of the Respondent's letter dated 16 September 2015. There was no evidence whatsoever as to any endeavours made by the Respondent in respect of the ETS evidence. The judge was, Mr Toal submitted, fully entitled to reach the conclusions she did in paragraphs 20 to 23. Mr Toal read out paragraph 20 of Gazi in its entirety and asked me to carefully consider that passage as a whole.
18. In reply Ms Isherwood reconfirmed that her challenge was a reasons challenge and not one of perversity.

Decision on error of law

19. At the hearing I announced my decision that in my view there were no material errors of law in the judge's decision. I now give my reasons for that conclusion.
20. First, the judge correctly directed herself in law as to the location of the burden of proof, the relevant standard, and the need to show dishonesty (paragraph 17).
21. Second, she clearly had in mind all of the evidence from the Respondent, such as it was.
22. Third, the judge was entitled to find at paragraph 21 that there was no evidence to support the production of the source data printout or the information upon which this information was based. It is a simple fact that there was no such evidence before

her relating to *the Appellant* (as opposed to the generic position asserted in the untested witness statements).

23. Fourth, the judge was fully entitled to find in paragraph 22 that there was no evidence at all from ETS to substantiate the serious allegation that the language test has been taken by a proxy sitter. The judge was clearly entitled to take into account the undisputed fact that there were no voice verification results, no electronic files or analyst's report relating to this particular Appellant, despite the Respondent having had the opportunity (through the previous directions) to adduce such evidence. The reference by Ms Isherwood to paragraph 20 of Gazi is in fact rather unhelpful to her case. Whilst Dr Harrison acknowledges that the ETS methodology constituted a "reasonable approach" in principle, he raises a number of important caveats to this initial comments, none of which were addressed by evidence in the present case.
24. Fifth, it follows from what I have said above that the judge was fully entitled to conclude that it was simply not sufficient for the Respondent to make serious allegations without backing this up with any "real and cogent evidence". She was not expressly rejecting the generic evidence, as far as that evidence went. What she was doing in my view is simply looking at the case before her and reaching a sustainable finding that the evidence was not sufficient to make out the Respondent's case.
25. Sixth, in paragraph 23 the judge acknowledges the Appellant's interview answers but immediately goes on to correctly point out that the burden rested with the Respondent, and it was not for the Appellant to prove or disprove any of the core issues in the appeal. In stating that there was no reliable evidence linking this Appellant with the ETS investigation as detailed in the generic statements of Ms Collings and Mr Millington and as explained by Mr Lister, the judge was simply restating her view that the evidence as a whole was not sufficient to discharge the burden of proof.
26. Seventh, there is no merit in the challenge as regards the appropriate standard of proof. As I have said already, the judge directed herself correctly at paragraph 17 and the reference to "real and cogent evidence" was nothing more than a recognition that whilst the standard of proof was just that of a balance of probabilities the quality of the evidence produced by the Respondent was relevant given the seriousness of the allegation against the Appellant.
27. So whilst Ms Isherwood has stated that this was a reasons challenge, in my view the judge has given perfectly adequate reasons based upon the limited evidence before her.
28. I would add this comment. Having looked at the grounds of appeal they appear to me more of a thinly veiled perversity challenge than a reasons challenge given the recitation of passages from the generic witness statements of Ms Collings and Mr Millington and the assertion in the grounds, particularly at paragraphs 5, 6 and 8, to

the effect that if the judge had taken the view urged by the Respondent then she would have been *bound* to dismiss the Appellant's case. In my view, in cases where allegations of dishonesty are made, the Respondent adduces generic evidence only and has not taken steps to produce the best possible evidence that might have been available to her, or has failed to give any explanation as to why the best endeavours to obtain better evidence have failed, it is likely that a judge will be entitled to conclude that the Respondent has not made out her case.

29. In light of the above the Respondent's appeal fails and the decision of the First-tier Tribunal stands.

Notice of Decision

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

The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed
Deputy Upper Tribunal Judge Norton-Taylor

Date: 23 March 2016

TO THE RESPONDENT
FEE AWARD

The fee award of £140.00 made by the First-tier Tribunal stands.

Wasted Costs Order

The application made before the First-tier Tribunal has not been renewed before me.

Signed

Date: 23 March 2016

Deputy Upper Tribunal Judge Norton-Taylor