



**Upper Tribunal
Immigration and Asylum Chamber**

Appeal Number: IA/30193/2014

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgated**

On: 18 September 2015

On: 21 September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

BETWEEN

AN IMMIGRATION OFFICER

Appellant

And

**MR RAJIB DEV NATH
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr D Clarke, Home Office Presenting Officer

For the Respondent: Mr A Sayem, legal representative, Uzma Law Ltd

DETERMINATION AND REASONS

1. This is an appeal against the decision, promulgated on 6 March 2015, of First-tier Tribunal Judge Monro (hereinafter referred to as the FTTJ).

Background

2. The respondent to this appeal was last granted leave to remain in the

United Kingdom as a Tier 4 (General) migrant until 30 August 2015. He returned to the United Kingdom on 22 July 2014, was refused entry on that date and his leave to remain cancelled. That earlier decision was supplemented by a decision dated 20 December 2014, which took place following a second interview with the respondent. The reason for the latter decision is that an immigration officer considered that the respondent had obtained his previous grant of leave to remain in the United Kingdom as a Tier 4 migrant by deception. Reference was made to a test taken at Synergy Business College on 17 July 2012.

3. At the hearing before the FTTJ, the respondent gave evidence, maintaining that he sat the test in person and that he had not needed to use a proxy. With regard to his initial inability to recall the name of the test centre and the date of the test, the respondent explained that he was tired when interviewed following 18 hours of travel. The FTTJ concluded that the spreadsheet provided did not indicate the basis on which the respondent's test result was invalidated; that there was no direct evidence to support an allegation of dishonesty and that he had provided a credible response to the said allegations.
4. The grounds of application submit that the FTTJ failed to give adequate reasons for findings on a material matter, namely her finding that there was "*no direct evidence*" to support a finding of deception. Reference was made to the witness statements of Home Office employees and an email from ETS Taskforce dated 10 September 2014. It was argued that in order to be recognised as invalid, "*the case*" has to have been analysed by a computer programme and two "*independent*" voice analysts. It was further argued that had the FTTJ "*properly*" taken the evidence into account, she would have found that the burden of proof had been discharged. It was also said that the FTTJ inadequately explained why no weight was attached to the appellant's initial failure to provide the date and venue of his English language test.
5. FTTJ PJM Hollingworth granted permission on the following basis; "*An arguable error of law has arisen in relation to the degree of weight to be attached to the evidence adduced by the (appellant before me) appertaining to the concept of invalidity.* "
6. Those representing the respondent lodged a Rule 24 response, which was received on 6 July 2015. Essentially, it was argued that there was no error of law; that matters of weight were for the individual judge and in the absence of perversity, cannot be set aside. It was said that the FTTJ had carried out a comprehensive assessment of the evidence and had provided valid reasons for rejecting the Secretary of State's evidence.
7. At the hearing before me, Mr Clarke relied on the application for permission to appeal, describing the grounds as comprehensive. He

conceded that he was relying on hearsay evidence but stressed that there was an item of evidence from ETS, in the form of a spreadsheet, which stated that the TOEIC certificate was invalid. He submitted that the hearsay evidence ought to carry some weight and it corroborated the evidence directly from ETS. Mr Clarke argued that there was a robust procedure in invalidating certificates consisting of computer analysis and two independent voice analysts and only if all three were in agreement was a test considered to be invalid.

8. Mr Clarke identified mistakes of fact at [16] of the FTTJ's decision in that she was wrong to state that the respondent was interviewed 4 years after taking the test and that he had attained 2 degrees prior to taking the tests. The MSc was from a university in Bangladesh and there was no NARIC certification regarding the course being taught in English. Indeed, if the course were so taught, the respondent would not need a TOEIC certificate. Mr Clarke added that the appellant had not completed his ACCA course and his leave to remain was curtailed for reasons of non-attendance. He conceded that the respondent had a post-graduate diploma in business management but stressed that it was wrong for the FTTJ to say that he would not need a proxy. Mr Clarke was of the view that the 20 per cent error rate referred to by the FTTJ at [14] indicated that 80% of the tests were correctly categorised as invalid. He argued that the FTTJ's assessment was flawed. Mr Clarke could not help me as to why ETS had decided that the respondent's test was invalid, given Mr Millington's evidence that tests could be invalidated owing to irregularities at the test centre and he argued that this was a matter for the respondent to bring up with ETS.
9. In reply, Mr Sayem argued that the grant of leave was solely regarding the degree of weight attached to the Home Office evidence. The FTTJ had provided sufficient reasons, in particular at [16] in support of her decision to place no weight on the respondent's inability to recall the details of the test centre venue at his first port interview. He placed reliance on headnote (1) of Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085. Furthermore, Mr Sayem referred me to the evidence before the FTTJ, which included the respondent's first degree in physics, which was taught in both English and Bengali and his Master's degree, which was taught solely in English. He asked me to note that the appellant attained an MBA from a United Kingdom university approximately a year after the TOEIC test. He also referred to aspects of the evidence before the Upper Tribunal in R (oao Gazi) v SSHD (ETS - judicial review) IJR UKUT 00327 (IAC), with particular reference to the report of Dr Harrison. Mr Sayem submitted that even an error rate of one per cent did not indicate that deception was proved in this case on the balance of probabilities. With regard to the FTTJ's error as to the lapse of time between the test and his port interview, Mr Sayem relied upon the stressful situation the respondent was in, as stated by the FTTJ in her decision. He also asked me to note that the Home Office witnesses were not

available for cross-examination at the hearing before the FTTJ.

10. Mr Clarke only added that there was no reason to suggest that Peter Millington and Rebecca Collings, as professionals were not truthful in their witness statements.
11. At [19] of the decision and reasons the FTTJ says, *“The respondent relies on information provided to her by ETS to prove that the appellant did not sit the test himself but there is no direct evidence to support this allegation apart from the spreadsheet.”* While this is a strongly worded finding, I take this to mean that the FTTJ found that the evidence from the Secretary of State, in the form of the generic statements, did not directly relate to the respondent’s particular test results. It is apparent from the aforementioned quote from the decision that the FTTJ recognised in her decision that there was evidence, in the form of a spreadsheet, which related to the respondent. But that was all the evidence before her, which related to the respondent’s test results. There was no evidence as to why it was concluded that the respondent’s name was on the list of invalid tests.
12. I have taken into consideration what Mr Clarke said about the 20 per cent margin of error, however I have also taken into consideration the findings in Gazi regarding the limitations of the generic evidence and the methods used to conclude that applicants have used a proxy test taker.
13. I find that the FTTJ assessed the weight to be given to the respondent’s evidence and that she clearly attached weight to the inclusion of the respondent’s name on a spreadsheet. Between [5-11] the FTTJ assesses all the evidence before her and at [12-19] sets out her conclusions. She preferred the evidence of the respondent, which included his oral evidence, the fact that he had been taught in English at a high level in Bangladesh and the fact that he achieved an MBA following the disputed test results. Furthermore, the FTTJ considered the point made by the Immigration Officer in the explanatory statement, that is that the respondent was unable to remember the date and venue of the test at his first interview. At [1] the FTTJ correctly sets out the chronology, however at [16] she erroneously states that there had been a period of four years rather than two between the test and the port interview. Notwithstanding this error, I consider the reasons provided by the FTTJ for placing no weight on the respondent’s ability to recall the said details, namely that a long time had elapsed, that there was no reason for him to instantly recall the details and that he had just had a long and tiring journey, stand regardless of the error. I find that the FTTJ was entitled to reach the conclusions she did.
14. While the findings of the FTTJ were concise, the losing party was left in no doubt as to why it had lost. Ultimately, the burden of proving deception rests with the appellant in these proceedings. Owing to the

lack of evidence of the respondent having used a proxy, the FTTJ concluded that the burden had not been discharged. It is a matter for the FTTJ what weight she decides to attach to the evidence before her, absent perversity, which has not been argued in this case. I find that the appellant's arguments in this case amount to little more than a disagreement with the FTTJ's view of the generic evidence and her ultimate conclusion in this case.

15. The FTTJ did not make an anonymity direction and I can see no basis for making one now.

Conclusions

- (1) The decision of the First-tier Tribunal did not involve the making of an error on a point of law.
- (2) I uphold the decision of the FTTJ.

Signed:

Date: 19 September 2015

Deputy Upper Tribunal Judge Kamara