



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

Appeal Number: IA/33841/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 27 March 2015**

**Determination
Promulgated
On 15 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**MR MAOHUA CHEN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Counsel instructed by Buckingham Legal Associates

For the Respondent: Mr I Jarvis, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing on the papers his appeal against the decision by the Secretary of State to cancel his leave to remain as a student on the ground that he had obtained fraudulently an English language test certificate dated 27 October 2012. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant should be accorded anonymity for these proceedings in the Upper Tribunal.

2. On 26 August 2014 the appellant was served with an IS.82C notice informing him that his existing leave to remain as a student had been cancelled. The reasoning of the Immigration Officer was that false representations were employed or material facts were not disclosed for the purpose of obtaining leave to remain as a student which was issued to the appellant on 19 February 2013 until 12 April 2015. This was because Home Office records indicated that the English language test certificate which he obtained on 27 October 2012 was obtained fraudulently. He was also being refused entry under paragraph 320(7B) of the Rules, and any future applications would automatically be refused under this provision until one year from the date that he left the United Kingdom.
3. It was noted that when interviewed again, the appellant admitted that he had booked two English tests but actually sat only one and that another person had sat the second test. He said he had never used the test result of the second test to gain admittance to university or to obtain leave to remain in the United Kingdom.
4. The appellant asked for his appeal to be determined on the papers. He submitted a letter dated 28 August 2014 which he signed in support of his appeal. The test which he had relied upon in order to obtain a place at the University of Buckingham, and subsequently to apply for leave to remain as a Tier 4 Student Migrant, was an IELTS test. He had not supported his visa application with an English language test supplied by ETS, which was currently under investigation by the Home Office due to being found to provide English language tests in a fraudulent manner. The tests provided by the ETS were TOEFL and TOEIC. These tests had been removed from the secure English language test lists and were no longer valid for Tier 4 visa purposes.
5. He possessed a TOEIC test result, in respect of a test dated 20 September 2012. But he had not used this TOEIC test result provided by ETS to obtain a place of study at his current university. He had come into possession of the TOEIC test while he was looking to transferring into another educational institution from the University of Manchester where he studied from September 2010 to June 2012. He used an agency by the name of Han Dynasty Education in Manchester to help him transfer from this university to a new university where his previous studies would be credited towards the new course. However they did not provide him with an honest and satisfactory service. It was Han Dynasty Education which had enrolled him to take the TOEIC test. Once this happened, he had terminated the contract with them and made his own arrangements.

Decision of the First-tier Tribunal

6. The appellant's appeal came before Judge Blair sitting in the First-tier Tribunal at Glasgow on 18 November 2014. At paragraph [12] of his decision, Judge Blair said:

Although the appellant set out an explanation of his position in that letter what was striking was that there was absolutely no attempt to engage with

the point made by the respondent in relation to his decision but at interview the appellant had admitted that he had booked two tests, that he only sat one and another person sat the second test. He maintained that he had taken the IELTS test to support his visa application and the respondent had confused this with another test from the ETS organisation.

7. The judge continued in paragraph [13]:

However, it seems to me the position of the respondent was quite clear. She makes specific reference to the IELTS qualification and this is the one the appellant maintains is genuine. Although the appellant said the genuine nature of his qualification could be verified on line it is not for this Tribunal to carry out such verification. It is for the appellant to provide evidence to support his position.

The Application for Permission to Appeal

8. The appellant applied for permission to appeal, advancing three grounds of appeal. Ground 1 was that the judge erred by ignoring his evidence showing that his IELTS test had been verified on line by the University of Buckingham, his educational institute. Ground 2 was the judge had failed to give reasons as to why the appellant would be required to disclose his booking of the TOEIC test with ETS, when he never used this test to support his visa application. Ground 3 was the judge failed to identify what evidence the respondent had provided to the Tribunal to prove that the IELTS test certificate of 27 October 2012 was obtained by the appellant fraudulently. The judge should have been slow to make a finding of deception/dishonesty without hearing evidence on the point from the appellant or the respondent. The judge had failed to identify what evidence had been provided by the respondent to discharge the burden of proof.

The Grant of Permission to Appeal

9. On 27 January 2015 First-tier Tribunal Judge Ransley granted permission to appeal as he was of the view that all three grounds disclosed arguable errors of law that might have made a material difference to the outcome of the appeal.

The Rule 24 Response

10. On 4 February 2015 John Parkinson of the Specialist Appeals Team settled a Rule 24 response opposing the appeal. The appellant claimed to have booked two tests but sat only one. The second test was taken by a proxy. The appellant further claimed the test using a proxy took place without his knowledge or consent. This explanation was simply ludicrous. If the appellant were to book a test he would naturally be expecting to attend. If the appellant did not attend, then his place would be vacant. It was absurd to suggest that in some way for no good reason the test centre would have had a proxy standing by ready and willing to impersonate the appellant. It was clear on any reasonable interpretation of the facts the appellant was a fully active party to deliberate deception. This deception

could not have been undertaken for any other purpose than to meet the requirements of having an English language competency of sufficient level as to meet the requirements of the Rule. The appellant had been a deliberate and knowing party to a major fraud in respect of English language testing for the purposes of meeting the Immigration Rules. This was a material fact which, if disclosed, would have materially changed the respondent's consideration of his application.

The Hearing in the Upper Tribunal

11. At the hearing before me, Mr Jarvis took a completely different line from that taken by his colleague Mr Parkinson. Not only did he readily concede that the decision of the First-tier Tribunal contained a material error of law, but he also invited me to re-make the decision in favour of the appellant. His reasoning was that any fraud that the appellant might have committed in respect of the TOEIC English language test result was irrelevant, as he had not relied on that TOEIC test result in support of his student visa application. He had relied instead on a valid IELTS certificate, in respect of which there were no fraud or validity concerns. In the light of the stance taken by Mr Jarvis, it is not necessary for me to call on Counsel for the appellant.

Reasons for Finding an Error of Law

12. The First-tier Tribunal judge erred in law as he did not clearly differentiate between the IELTS certificate and the TOEIC certificate. It was not part of the respondent's case that the IELTS certificate was fraudulent. But the implication of the judge's line of reasoning was that the burden of proof rested with the appellant to prove that the IELTS certificate was genuine, and he apparently dismissed the appeal on the ground that the appellant had failed to prove that the IELTS certificate was genuine.
13. As to the TOEIC certificate, it was open to the judge to find that the appellant had taken up an unsatisfactory position at the interview in terms of explaining how the TOEIC certificate came into existence when he admitted not actually having sat the test. But the judge failed to make a clear finding as to whether the appellant had thereby been guilty of deception within the ambit of paragraph 320(7B) or paragraph 321A.

The Re-Making of the Decision

14. Paragraph 321A sets out the grounds for the cancellation of a person's leave to enter or remain which is in force on his arrival in the United Kingdom. The grounds include:
 2. False representations were made or false documents were submitted (whether or not material to the application, and whether or not to the holder's knowledge), or material facts were not disclosed, in relation to the application for leave; or in order to obtain documents from the Secretary of State or a third party required in support of the application

...

15. Paragraph 320(7B) applies where the applicant has previously breached the UK's immigration laws by:
 - (d) Using deception in an application for entry clearance, leave to enter or remain, in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not) ...
16. Mr Jarvis agrees with the appellant that the respondent has not made out a case under 320(7B) and/or 321A because the TOEIC certificate was not relied on in support of the application for leave to remain. No false document was submitted by the appellant in relation to the application for leave.
17. However, Mr Jarvis's construction of the two potentially applicable Rules is arguably too narrow. In addition to a false document being submitted in relation to an application for leave, paragraph 321A contemplates another possibility, which is making false representations or the submission of false documents *in order to obtain documents from a third party which are required in support of the application*. The implication of the appellant's evidence is that Han Dynasty Education used a proxy (and so made a false representation) to obtain from a third party (ETS) a language test result which was required to support his application for leave to remain as a student, even if it was not in the event deployed by him for that purpose.
18. Accordingly, I find that I cannot re-make the decision in the appellant's favour on the basis that the alleged misconduct falls outside the ambit of the potentially applicable Rules.
19. Instead, I re-make it in the appellant's favour on another basis, which is that Mr Jarvis has not sought to maintain the respondent's case that the appellant procured the TOEIC certificate by fraud, or that he used deception in his application for leave to remain by failing to disclose his previous fraud in respect of the TOEIC certificate. The appellant was present at the hearing before me, and had put in further written evidence of an exculpatory nature. In essence, although he accepted another person must have sat the TOEIC test, this was not with his knowledge or approval. He was not a party to the fraud which had been perpetrated for his benefit by Han Dynasty Education. Mr Jarvis did not seek to cross-examine the appellant on this evidence, and so it stands unchallenged.

Notice of Decision

11. The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the appellant's appeal against the decision to cancel his existing leave to remain as a student is allowed under the Immigration Rules.

No anonymity direction is made.

Signed

Date **15 April 2015**

Deputy Upper Tribunal Judge Monson