



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

Appeal Number: IA/38803/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 25 September 2015**

**Decision & Reasons Promulgated
On 5 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MUHAMMAD REHMAN ASLAM
(NO ANONYMITY DIRECTION)**

Respondent

Representation

For the Appellant: Mr P. Nath, Senior Home Office Presenting Officer

For the Respondent: Ms F. Shan, Counsel instructed by Adam Bernard Solicitors

DECISION AND REASONS

1. The respondent (hereinafter “the claimant”) is a national of Pakistan born on 21 March 1985. He arrived in the UK in September 2011 on a Tier 4 (General) Student visa valid until 2 February 2013. Thereafter leave to remain was granted until 15 October 2016.
2. On 8 October 2014 the appellant (hereinafter “the Secretary of State”) notified the claimant that his continuing leave was cancelled under Paragraph 321A of the Immigration Rules on the ground that he had obtained an English Language Test Certificate, that was used to apply for

leave to remain, through deception. On this basis, a decision was made to remove him from the UK under section 10(1)(b) of the Immigration and Asylum Act 1999.

3. The claimant appealed and his appeal was heard by First-tier Tribunal Judge Lingam (“the judge”) who, in a decision promulgated on 10 March 2015, allowed the appeal under both the Immigration Rules and Article 8 of the ECHR.
4. The Secretary of State’s case was based on witness statements of Peter Millington, an assistant director at the Home Office, and Rebecca Collins, a Civil Servant at the Home Office (hereinafter “the Statements”). The Statements describe the way in which Educational Testing Services (ETS) has investigated the validity of English language test results in light of widespread abuse. The Statements are not specific to the case against the claimant and have been used by the Secretary of State in many appeals. They were given careful consideration recently by the Upper Tribunal in *R (on the application of Gazi) v Secretary of State for the Home Department (ETS – judicial review)* IJR [2015] UKUT 327 (IAC).

First-tier Tribunal Decision

5. The judge found that the Secretary of State had failed to establish that the claimant had used deception. The reasons she gave for this finding were:
 - a. Having heard the claimant give oral evidence, she was satisfied he was able to give a detailed account of taking the test.
 - b. The methodology used by ETS could have resulted in errors. The judge identified references in the Statements to there being imperfections in the methodology used by ETS and which indicate there is room for error.
 - c. The spreadsheet included within the Secretary of State’s bundle purportedly identifying the claimant as a person identified as using deception was not legible. She noted that the Presenting Officer handed her a document purporting to show the claimant’s results were invalid but she found this to be a re-typed document that did not indicate who had re-typed it and that in any event it did not include any analysis to explain the findings.
6. With respect to Article 8 of the ECHR, the judge followed the well established Razgar approach. She was satisfied the claimant has an established private life in the UK and that interference with it engages Article 8. With respect to proportionality, having found that the claimant spoke English, was financially self sufficient, had pursued lawful activities in the UK, had made satisfactory progress in his studies and desired to successfully complete his education, the judge concluded that the claimant had made out his Article 8 claim “for the reasons set out in *CDS*.”
7. The grounds of appeal submit that the judge erred by failing to properly take into account the Secretary of State’s evidence showing deception had

been used. The ETS invalidation of the test results was because of evidence of proxy test taking and judge has failed to provide adequate reasons for finding to the contrary.

8. With regard to Article 8, the grounds submit that the judge has misdirected herself as to the scope and effect of *CDS Brazil*, and that the finding with regard to Article 8 was not sustainable.

Submissions

9. Mr Nath relied on the grounds of appeal, which he said clearly set out the Secretary of State's position.
10. Ms Shan argued that the judge's reasoning shows that she gave proper consideration to whether the Secretary of State's evidence, in the form of the Statements, supports a finding that the claimant used deception. The judge noted the acknowledged imperfections in the technology and that there was 'room for error'. Ms Shan highlighted that the judge had found a crucial piece of evidence, which purportedly identified the claimant, to not be legible. Having considered the evidence, the judge was entitled to reach the conclusion she did.
11. With regard to Article 8, Ms Shan argued that the judge had correctly identified and weighed relevant factors in considering proportionality and reached a decision that was open to her.

Consideration

12. The judge states at paragraph 27 of her decision that the spreadsheet purportedly identifying the claimant as a person whose test was invalidated was not legible. She explains that the Presenting Officer handed her a re-typed document but that she found this to not be a satisfactory replacement of the actual spreadsheet because it did not indicate who had retyped it and was not supported by any analysis.
13. This spreadsheet, described by the judge as a "crucial document" is what linked the claimant to the group of individuals identified as having used deception and whose tests were invalidated. In the absence of this spreadsheet or any equivalent evidence before her, the judge was entitled to conclude, as she did at paragraph 28, that the Secretary of State's evidence did not stand up to scrutiny. However strong ETS's methodology might have been in uncovering test takers who cheated, in light of the spreadsheet not being legible, it was open to the judge to find that the evidence before her was not sufficient to show that the claimant was amongst them.
14. The Secretary of State's grounds focus on whether the judge gave proper weight to the Statements, and it is arguable that the judge's approach to them reveals an excessive focus on shortcomings in the ETS methodology without reasons for this being given. However, in considered the judge's approach, I keep in mind that the evidence in the Statements must be

considered in the specific context of this particular appeal where the judge had the opportunity to hear evidence from the claimant, and observe him being cross-examined. The judge was therefore in a strong position to form a view on the claimant's credibility and the likelihood he would have cheated on the test. Given that ETS's methodology, as acknowledged in the Statements, and as highlighted by the judge, is not infallible, these are important factors to be weighed when determining whether this particular claimant cheated.

15. As stated in *Gazi* [2015] UKUT 00372 (IAC) at paragraph 40:

"Each litigant will put forward his or her individual disputed assertions, agreed facts, considerations and circumstances. These will be evaluated by a fact finding tribunal, to be contrasted with a court or tribunal of supervisory jurisdiction. This analysis is, in my view, amply confirmed by the growing number of FtT decisions in this sphere. Within these one finds emphasis on self-evidently important issues such as the appellant's evident English language ability, demeanour and previous life events. Furthermore, it is trite that the assessment of each appellant's demeanour and credibility will be carried out on a case by case basis."

16. It is clear from the judge's decision that she had regard to the claimant's English language ability, demeanour and previous life events, factors described in *Gazi* as "*self evidently important*", as well as his recollection of sitting the test, which the judge found credible having heard cross-examination of the claimant.

17. Accordingly, it was open to the judge, for the reasons she gave, to find that the Secretary of State's evidence was insufficient to show the claimant used deception.

18. Having allowed the claimant's appeal under the Immigration Rules, the judge proceeded to consider Article 8 and found that the appeal should be allowed for the reasons set out in *CDS (PBS "available Article 8) Brazil* [2010] UKUT 305 (IAC).

19. In *CDS* the following was stated:

"Article 8 does not give an Immigration Judge a free-standing liberty to depart from the Immigration Rules, and it is unlikely that a person will be able to show an Article 8 right by coming to the UK for temporary purposes. But a person who is admitted to follow a course that has not yet ended may build up a private life that deserves respect, and the public interest in removal before the end of the course may be reduced where there are ample financial resources available."

20. Whilst on its face it appears that the claimant's factual circumstances, as described by the judge, fall within the category of students who may benefit from Article 8 as set out in *CDS*, more recent case law - none of which is referred to by the judge - sheds some doubt on this. In *Nasim and others (Article 8)* [2014] UKUT 25 (IAC) the above quoted paragraph was

described as “obiter remarks” and at paragraph 26 of *Nasim* the Tribunal states:

“It cannot rationally be contended that their Article 8 rights have been made stronger merely because, during their time in this country, they have not sought public funds, have refrained from committing criminal offences and have paid the fees required in order to undertake their courses. Similarly, a desire to undertake paid employment in the United Kingdom is not, as such, a matter that can enhance a person’s right to remain here in reliance on Article 8.

21. *Patel and others* [2013] UKSC 72 at [57] states that

“the opportunity for a promising student to complete his course in this country, however desirable in the general terms, is not in itself a right protected under Article 8.”

22. In considering the judge’s approach to Article 8, I remind myself that the issue before me is whether the judge made an error of law and not whether I, or a differently constituted Tribunal, might have reached a different conclusion based on the same facts.

23. Although the judge has not taken into account case law which qualifies and limits *CDS*, her assessment of Article 8, although brief, includes an appropriate consideration of the public interest and it is clear she has had regard to Sections 117A-D of the Nationality, Immigration and Asylum Act 2002. Under 117B(1) regard must be given to “the maintenance of effective immigration controls”. In this case, as the claimant is lawfully in the UK and his removal would not be in accordance with the law or Immigration Rules, this consideration does not weigh in favour of removing the claimant from the UK. It was open to the judge to find that the claimant’s appeal should be allowed under Article 8 as well as under the Immigration Rules.

Decision

24. The appeal is dismissed.

25. The decision of the First-tier Tribunal did not involve the making of a material error of law and shall stand.

26. No anonymity order is made.

Signed
Deputy Upper Tribunal Judge Sheridan

Dated