



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/39856/2014

**THE IMMIGRATION ACTS**

Heard at Manchester Piccadilly  
On 20 November 2015

Decision and Reasons Promulgated  
On 27 November 2015

Before

**DEPUTY UPPER TRIBUNAL JUDGE BIRRELL**

Between

**KULWINDER SINGH**  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr M Hoare of H & S Legal Solicitors

For the Respondent: Mr G Harrison Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.
2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Foudy promulgated on 7 January 2015 which allowed the Appellant's appeal against a refusal dated 27 September 2014 of the Appellant's application for leave to remain

on the basis of his marriage to Derminder Kaur Gill who is a British citizen present and settled in the United Kingdom.

### **Background**

3. The Appellant was born on 6 September 1983 and is a national of India.
4. The Appellant has been in the United Kingdom since 2011 when he arrived as a student. The Appellant obtained an extension of that visa in January 2013 until 6 April 2014. Thereafter the Appellant met his future wife and made an application dated 31 January 2014 under Appendix FM for leave to remain as a spouse.
5. On 27 September 2014 the Secretary of State refused the Appellant's application. The refusal letter gave a number of reasons but the only one that remained in issue at the time of the hearing was the assertion by the Respondent that the Appellant had produced a false English Language test result in relation to his student application of January 2013.

### **The Judge's Decision**

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Foudy ("the Judge") allowed the appeal against the Respondent's decision. The Judge made the following findings:
  - (a) The Appellant was a credible witness.
  - (b) The burden of proving that the Appellant used dishonest conduct was on the Respondent.
  - (c) The test certificate produced by the Appellant in his application of January 2013 had been accepted at the time of his application but as a result of a Panorama expose in January 2014 the College where the Appellant took the test, Eden College, was investigated and it was asserted that the test certificate produced by the Appellant was false.
  - (d) Educational Testing Services (ETS) used voice recognition technology to try and identify fraud at Eden College.
  - (e) ETS's Office of Testing Integrity had a staff of only 60 worldwide and virtually all were required to investigate the British problem. The Judge expressed concern about their ability to produce reliable data given their limited number and the intense pressure to provide results (paragraph 9)
  - (f) The Judge was concerned about the conversion of the electronic voice files which had to be done twice before the recognition software could be applied (paragraph 10)
  - (g) The Judge raised a number of concerns about the human verification process after the software process given the scale of the task, the additional staff that had to be drafted in and the requirements and limits of their training and the limited supervision (paragraphs 11-13)

- (h) The only direct evidence against the Appellant was a one line computer printout that a Kulwinder Singh born 6.9.83 took a test at Edene College on 5 December 2012 which was invalid. The Appellant has asserted since January 2013 that he did not take a test on 5.12.2012 and the Judge found there was no evidence before her that he took such a test.
  - (i) The Appellant gave evidence that he took the tests on 14 and 17 December 2012.
  - (j) The Judge found that the test analysed by ETS was not that of Mr Singh, or was of another person with the same name or human error played a part but she did not find the evidence that this Appellant had used fraud was reliable.
  - (k) The presenting officer conceded that the Appellant otherwise met all of the requirements of Appendix FM.
7. Grounds of appeal were lodged essentially arguing that the Judge failed to give adequate reasons for her finding that the Respondent had not discharged the burden of proving the dishonest conduct and applied an elevated standard of proof.
8. On 31 May 2015 Upper Tribunal Judge McGeachy gave permission to appeal.
9. At the hearing I heard brief submissions from Mr Harrison on behalf of the Respondent that he relied on the grounds of appeal.
10. On behalf of the Appellant Mr Hoare submitted that he relied on the Rule 24 response and wished to emphasis in particular that there was no evidence before the Judge that this Appellant had ever taken a test on 5 December 2012.

### Legal Framework

11. The central issue in this case was whether the Judge had given adequate reasons for her decision that the Respondent had not met the evidential burden of establishing that the Appellant had used fraud to obtain his language certificate and whether she had applied too high a standard of proof.
12. As to the standard of proof I have taken into account Re B (Children) [2008] UKHL 35 where at paragraph 13 Lord Hoffman said *"I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not..."* At paragraph 15 Lord Hoffman added *".. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities"*.
13. In R (N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468 Richards LJ stated at paragraph 62 that *"Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be*

*proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities." At paragraph 27 of In Re D [2008] UKHL 33, [2008] 1 WLR 1499 Lord Carswell, who gave the lead judgement in the House of Lords, approved that passage from R (N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468) with the additional observation at paragraph 28 that there would be cases when a court or tribunal "has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard." Lord Carswell also added at paragraph 28 that "a different standard of proof or a specially cogent standard of evidence is not required but merely appropriately careful consideration by the Tribunal before it is satisfied of the matter which has to be established."...and at paragraph 29 "...the panel had to be satisfied on the balance of probabilities...but it did not follow that especially cogent evidence was required...)"*

### **Finding on Material Error**

14. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.
15. I am satisfied firstly that the Judge was clear as to the burden and standard of proof in this case as she set it out correctly at paragraph 3 of the decision and she concluded that what was placed before her was not reliable evidence that the Appellant obtained the certificate by fraud (paragraph 14).
16. I am satisfied that the Judge carried out a meticulous, detailed and well reasoned analysis of the evidence produced by the Respondent both as to the methodology utilised by ETS and then moved on to analyse the evidence as it pertained to this Appellant.
17. The Judge was entitled to consider by reference to the methodology used by ETS whether the evidence produced was reliable evidence of fraud. She was entitled on the basis of the evidence before her to identify concerns about the methodology which inevitably reflected on the reliability of the evidence as to circumstances in which ETS came to give their opinion: the limited number of staff they had available for the work; the requirement for conversion of the voice files twice before they could be assessed with the consequent risk of error at either stage of the conversion; the imperfection of the analysis technology requiring human verification; the concerns as to the training and indeed attrition rate of staff brought in to carry out the verification process and the levels of pressure in which this work was carried out.
18. The Judge however did not limit herself to an analysis of the methodology but also considered whether the Respondent had met the evidential burden of establishing that the Appellant before her had used fraud. The case before her was slightly unusual in that the Respondent had no concerns about the language certificates the Appellant had produced in respect of the most recent application under Appendix FM the subject of the appeal but asserted that he had used a fraudulent certificate dated 5 December 2012 in his student application in 2013. There was however no evidence before the Judge either in the form of the alleged certificate dated 5 December 2012 or a copy of the Appellant's student application suggesting that he relied on such a certificate. Given the Judges finding that the Appellant had made plain since January

2013 that he did not accept that he took a test on 5 December 2012 but rather on 14 and 17 December 2012 this matter was clearly in issue and documents could have been produced by the Respondent to address this point. The Judge was therefore entitled to conclude after looking at the documentary evidence and hearing oral evidence from the Appellant who she found to be a credible witness that she was not satisfied that the Appellant even took a test on 5 December 2012.

19. I remind myself of what was said in Shizad (sufficiency of reasons: set aside) Afghanistan [2013] UKUT 85 (IAC) about the requirement for sufficient reasons to be given in a decision in headnote (1): *“Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge.”*
20. I was therefore satisfied that the Judge’s determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning and the Respondent cannot be in any doubt about why the appeal was allowed.

## **CONCLUSION**

21. **I therefore found that no errors of law have been established and that the Judge’s determination should stand.**

## **DECISION**

22. **The appeal is dismissed.**

Signed

Date 24.11.2015

Deputy Upper Tribunal Judge Birrell