



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

Appeal Number: IA/40199/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 10 August 2015**

**Decision & Reasons Promulgated
On 20 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**JEWEL CHAKRABORTY
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation

For the Appellant: Mr T. Melvin, Senior Home Office Presenting Officer

For the Respondent: Mr T. Shah, Solicitor, Taj Solicitors

DECISION AND REASONS

1. I was not asked and saw no reason to make an anonymity direction.

The Respondent

2. The respondent (hereinafter “the claimant”) is a citizen of Bangladesh born on 2 August 1979. The First-tier Tribunal allowed his appeal against the Secretary of State’s decision to refuse him leave to remain as a spouse of a settled person and to remove him on the ground he had used deception in seeking leave to remain in the UK.

3. The claimant entered the UK as a student in February 2010 with entry clearance valid until 30 November 2013. He married his wife in October 2011. On 29 October 2013 he applied for leave to remain as a Tier 4 General Student which was granted until 21 October 2014.
4. The claimant's wife was granted indefinite leave to remain on 18 June 2014. On 18 August 2014 the claimant applied for leave to remain as the spouse of a settled person. In a decision dated 15 September 2014, the Secretary of State refused the application on the basis that the claimant did not meet the suitability requirement under S-LTR2.2(a) of Appendix FM of the Immigration Rules. S-LTR2.2(a) stipulates that an applicant will normally be refused leave to remain on grounds of suitability if
 "... whether or not to the applicant's knowledge, false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application."
5. The Secretary of State's decision refers to a review carried out by Educational Testing Service (ETS) which found that the claimant's test scores from a test taken on 29 August 2012 could not be authenticated and that an anomaly with his speaking test indicated the presence of a proxy test taker. The Notice of Liability to Removal states that the claimant is "specifically considered a person who has sought leave to remain in the United Kingdom by deception".

The First-tier Tribunal Decision

6. The claimant appealed and the appeal was heard by First-tier Tribunal Judge D.A. Pears ("the judge") on 17th April 2015. The Secretary of State relied on three witness statements ("the Statements") which the judge described at paragraph 10 as being from "civil servants dealing with ETS and the process and procedure ETS has used to assist [the Secretary of State] in response to widespread deception by applicants applying to remain in the UK". The judge set out at paragraph 11 that:
 "I asked the Secretary of State's representative to provide evidence that related to the appellant specifically. He was not able to do so and whilst there may be such material I have not seen it, nor was it produced in the Respondent's bundle, nor in accordance with directions nor in the material filed on the day."
7. The judge found that the Secretary of State's evidence was insufficient to establish that the appellant had personally carried out deception. Although not stated explicitly, it is apparent from his decision that the judge did not think it likely the claimant would have had need to use deception. At paragraphs 5 and 6 he describes the claimant's educational background including English language tests he had taken and at paragraph 7 comments that the claimant gave evidence without an interpreter and fluently. The judge then states that the claimant "confirmed he had not used deception and said in effect, why would he need to, as his English proficiency was clear and had been tested." There

is nothing in the decision to suggest the judge did not believe the claimant or had any questions or concerns about his credibility.

8. The grounds of appeal submit that the judge failed to engage properly with the Statements or the relevant material within them; or recognise that they detail extensively the investigation undertaken by ETS and the process which identified the claimant as someone who had used deception. Permission to appeal was granted by First-tier Tribunal Judge Page.

Submissions

9. I heard submissions from Mr Melvin, on behalf of the Secretary of State, and Mr Shah, on behalf of the claimant.
10. Mr Melvin relied on the grounds seeking permission to appeal and argued that due consideration had not been given to the Statements. In addition, he argued that, contrary to the judge's findings, there was in fact evidence that pertained to the claimant specifically and drew attention to Annex A of Mr Sartorius's statement, which shows an excerpt from a spreadsheet that was provided by ETS to the Secretary of State. The excerpt shows a row on a spreadsheet with a record number, the wording "invalid", a certificate number and then the claimant's name, address and date of birth, along with his nationality, the date and centre at which he took the test and his speaking and written scores.
11. Mr Shah argued that the judge dealt adequately with the evidence. He noted that the decision refers to specific paragraphs in the Statements, indicating that the judge had engaged with them. He submitted that there was nothing in the Statements to show why or how the claimant, personally, had used deception and that it would simply not have made sense for the claimant, with his advanced level of English, to have carried out the deception of which he was accused.

Consideration

12. The judge appears to have given the Statements only cursory consideration. The Statements contain a detailed explanation of ETS's methodology and how individuals, such as the claimant, were identified as having used a proxy test taker. There is merit in the argument made by Mr Melvin that the judge did not sufficiently engage with, and give appropriate consideration to, the evidence in the witness statements, which points to the claimant being one of the people who cheated on the test. However, this 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 that ETS's methodology, as set out in the Statements, is not infallible, these

are important factors to be weighed when determining whether this particular claimant cheated.

13. 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.”

14. It is clear from the judge's decision that he took into account the claimant's English language ability, demeanour and previous life events, factors described in *Gazi* as “*self evidently important*”. Although the judge did not make an explicit finding about the claimant's credibility, it is apparent from the decision that he found him to be credible, as well as able to give evidence (and be cross examined) fluently in English. Having heard evidence from the claimant, and considered him to be credible, fluent in English and unlikely to have needed to use deception, it was open to the judge to find that the Secretary of State's evidence was insufficient to show the claimant used deception in seeking leave to remain.

NOTICE OF DECISION

15. The Secretary of State's appeal is dismissed.

16. The decision of the First-tier Tribunal did not contain a material error of law and its decision allowing the claimant's appeal shall stand.

17. No anonymity direction is made.

Signed
Deputy Upper Tribunal Judge Sheridan

Dated