



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

Appeal Number: IA/39212/2014

THE IMMIGRATION ACTS

**Heard at Birmingham Employment
Tribunal
On 18 February 2016**

Promulgated

**Decision & Reasons
On 29 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

And

Appellant

**YUNSHAN PEI
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr D Mills (Home Office Presenting Officer)

For the Respondent: Ms A Bhachu (counsel instructed by Malik Law Chambers)

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal allowing the original appeal of Yunshan Pei, a citizen of China born 6 March 1960, against the decision to revoke his indefinite leave to remain on 8 October 2014 and to set removal directions against him.

2. The basis for the Secretary of State's decision was information that had come to light since Mr Pei had been granted settlement (having completed the relevant residence period as a work permit holder to qualify for indefinite leave to remain) which established that he had used false representations in support of his work permit grant of 20 August 2012: he had put forward evidence of his English language proficiency by way of a certificate from the Educational Testing Service Limited (ETS), but as part of their ongoing survey into the integrity of their testing processes that organisation had now told the Home Office that they believed that his result had been fraudulently obtained.
3. Mr Pei's case as summarised by the First-tier Tribunal against that decision was that removal to China would contravene his family's collective Article 8 rights given the connections they had built up in this country, and would be unduly harsh because of the "one child" policy in force there: having had more children than that law allowed, he would face administrative penalties that would limit his employability in China at the seniority at which he presently worked.
4. Having directed itself that the burden of proof lay upon the Home Office to make good their allegation of dishonesty, the First-tier Tribunal found that the witness statements from Peter Millington and Rebecca Collings doubtless provided a factually accurate account of the matters described therein, but were in no way specific to Mr Pei's case. The database described as the "ETS Lookup Tool" to which the explanatory statement in this appeal referred might well equate to the output of the spreadsheets referenced in their statements. The only evidence that was specific to the Appellant's case was the printout apparently dated 20 June 2014, which identified the impugned test results as those from 29 February 2012, taken at the European College for Higher Education. The only available material to ground the Home Office's case as to Mr Pei's dishonesty was the bare statement of invalidity from ETS combined with the explanation from the witness statements that took the case a step further by way of generally describing the investigative process.
5. Evaluating the witness statements, the First-tier Tribunal noted that the investigative process admitted the possibility of false positives being identified at the stage at which software was used to search out possible proxy test subjects, which was the reason for the subsequent employment of a human verification process. There was no evidence put forward as to who had conducted the verification, what analytical techniques they applied, or what findings ensued, in this particular case.
6. The First-tier Tribunal went on to examine the interview record relied upon by the Home Office, finding that it was readily apparent that the interviewer and Mr Pei were at cross purposes, the former asking questions about the English language test and the latter answering them as if they involved his Life in the UK test. It concluded that the Secretary of State had not established that deception had been used in when Mr Pei had previously been granted leave to remain.

7. Grounds of appeal contended that the First-tier Tribunal had overlooked the fact that the witness statement evidence from the Secretary of State clearly described the verification process, and that the ETS Lookup Tool was specific to the Appellant. Accordingly inadequate reasons had been given for the decision. Judge Clayton granted permission to appeal for the First-tier Tribunal on 3 March 2015 on the basis that those grounds were viable, and because the evidence submitted by the Respondent did address the conduct, result and techniques of the investigative process.
8. Before me Mr Mills submitted that the First-tier Tribunal was wrong to state that there was no evidence backing up the detail of the human verification process. Peter Millington's statement set out that two experienced analysts, who had benefited from guidance and information-sharing that consistently sought to hone their skills as the process developed, looked at each sample, entering their opinions on a spreadsheet, and only where both agreed would the test result be impugned; some of the examples of positive matches suggesting proxy testing were played to the Home Office delegation, who concluded that it was very clear that it was the output of the same person speaking. Pressed from the bench as to whether his submission was essentially that no reasonable judge could ever depart from the *ipse dixit* of ETS, he maintained that that was the Secretary of State's essential submission, and that any decision to the contrary would inevitably be flawed for failure to apply the appropriate standard of proof, which was not the criminal standard but merely the balance of probabilities.
9. Ms Bhachu submitted that there was no evidence in this case that the two analysts had agreed on the appropriate response to this enquiry. Human verification was critical in almost 20% of cases given the 80% figure given and its individual application to this case had not been explained.
10. The cancellation of the Appellant's leave was done pursuant to Rule 321A(1) of the Immigration Rules:

“Grounds on which leave to enter or remain which is in force is to be cancelled at port or while the holder is outside the United Kingdom

321A. The following grounds for the cancellation of a person's leave to enter or remain which is in force on his arrival in, or whilst he is outside, the United Kingdom apply;

(1) there has been such a change in the circumstances of that person's case since the leave was given, that it should be cancelled; or

(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 ...”

11. The Upper Tribunal cites expert evidence deployed by a litigant seeking to cast doubt upon the validity testing process used by ETS in *Gazi* (IJR) [2015] UKUT 327 (IAC):

“Dr Harrison also examines, with accompanying critique and commentary, the discrete issues of factors affecting performance; the typical performance of human verification; the definition of thresholds; the explicit acknowledgement of human errors; the lack of testing of the performance of analysts; the dubious touchstone of “confidence” (see Mr Millington’s witness statement); the dearth of information about the actual analysis methodology; the lack of detail about the experience and knowledge of both the recruited analysts and their supervisors; the indication that any training of the newly recruited analysts was hurried; the shortcomings in Mr Millington’s speech recognition averments; and the clear acknowledgement on the part of ETS that false identifications (viz false positive results) have occurred. One passage relating to the human verification process is especially noteworthy:

“... although the analysts only verified matches where they had no doubt about their validity – ie where they were certain about their judgments – this should not be taken as a reliable indicator of the accuracy of those judgments. This approach does not remove the risk of false positive results.”

Dr Harrison also highlights that both the automatic system and the human analysts are capable of false positive errors. The Secretary of State’s evidence does not disclose either the percentage or the volume of such errors.”

12. No findings were made on that evidence in *Gazi*. However, it is notable that the reasoning of the First-tier Tribunal in this appeal was in line with those observations of Dr Harrison. It is clear that there is a two-stage verification process used by ETS, with test records that are electronically flagged as raising the possibility of the presence of a proxy tester being put forward for testing via human verification. It is clear that those methods are not necessarily guaranteed to avoid the occasional false positive whereby an innocent student is wrongly identified as having cheated in their test.
13. It would be perfectly open to the Secretary of State to put forward further evidence of the methods used by ETS in order to answer the critique of Dr Harrison, but if she does not do so she runs the risk that fact-finders will employ similar reasoning, where the Appellant before them is considered to be generally credible, such that the mere conclusion of the ETS checks is found not to undermine their evidence of having been honest in all their dealings with the Home Office. Whilst it is true that the generic witness statements give some details of the processes, in this appeal no specific evidence was put forwards as to the identity and expertise of the particular testers, in order to show that the possible problems with the process identified by Dr Harrison were absent from the way in which Mr Pei's case had been approached. The

First-tier Tribunal was clearly alive to the fact that the generic statements identified the processes at a general level, but its concern was with the absence of information specific to the testing in this particular case.

14. I cannot accept the submission made by Mr Mills that it is impossible for the First-tier Tribunal to rationally find against the Secretary of State in any case where ETS have identified test results as invalid. That appears fundamentally at odds with the judicial role of weighing the evidence before it as a whole and coming to its own conclusions on the merits of an appeal.
15. I conclude that the First-tier Tribunal did not overlook material evidence or take account of irrelevant considerations, and gave an adequately reasoned decision that lawfully disposed of the issues before it.

Decision:

The decision of the First-tier Tribunal was a lawful one.
The appeal is dismissed.

A handwritten signature in black ink, appearing to read 'MAS', with a long, sweeping underline that extends to the left and then curves back towards the right.

Signed:
Deputy Upper Tribunal Judge Symes

Date: 18 February 2016