



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

Appeal number: IA/40327/2014

THE IMMIGRATION ACTS

**Heard at Field House
On February 19, 2016**

**Decision & Reasons Promulgated
On February 24, 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

**MR RAJA AHTSHAM KIYANI
(NO ANONYMITY DIRECTION MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant

Mr Wells, Counsel, instructed by M & K Solicitors

Respondent

Mr Staunton (Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant, citizen of Pakistan applied to vary his leave to enter or remain as the partner of a person present and settled in the United Kingdom on May 21, 2014. On September 24, 2014 the respondent refused the application and issued directions for his removal pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006. The appellant appealed this decision on October 9, 2014 under section 82(1) of the Nationality, Immigration and Asylum Act 2002.
2. The appeal came before Judge of the First-tier Tribunal Camp on December 17, 2015 and he allowed the appellant's appeal under Appendix FM of the Immigration Rules on the basis the respondent had failed to

demonstrate any dishonesty on behalf of the appellant in respect of his English language test.

3. The respondent sought permission to appeal that decision and permission to appeal was granted by Deputy Upper Tribunal Judge Black on September 29, 2015. The matter initially came before me on December 23, 2015 and on that occasion I found there had been an error in law and I set aside the First-tier Tribunal's decision and I did not preserve any findings.
4. I found there had been an error because the First-tier Tribunal had demonstrated no engagement with either the bundle of documents or the original refusal letter and whilst the issue of dishonesty may have been central to Section S-LTR of Appendix FM there were other requirements to be met which the respondent had highlighted in her refusal letter.
5. The matter came back before me on the above date and I had the opportunity to hear oral evidence from both the appellant and his wife, Samiyah Akhtar.
6. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I see no reason to make an order now.

EVIDENCE

7. The appellant adopted his statement of December 2, 2014. He gave oral evidence in English and confirmed that he had been attending college in Ilford and an agent approached him and suggested he took his English test in Ilford, despite the fact he lived over an hour away in Hemel Hempstead. He described how he recalled taking his speaking/listening and reading/writing tests on one day. He stated there were up to 25 others in the room and the tests took around 90 minutes in total to complete. He explained that when he came to renew his visa he had to take a further tests and he took this one at Trinity College by Euston Station.
8. When challenged by Mr Staunton by the fact the test is taken over two days he responded that he recalled it being on the one day but he was not certain as it was over three years ago.
9. He confirmed that when he took this test he was not in a relationship with his wife and it was therefore unlikely that she could give any evidence about this issue.
10. The appellant's wife adopted her statement and was not questioned by either representative.
11. Both Mr Wells and Mr Staunton agreed on the following:
 - a. The only issue now to be decided in whether the Rules were met was whether the appellant met the suitability requirements.

- b. In the event he met those requirements then he would be entitled to remain under Appendix FM of the Immigration Rules as a partner as he met all the other requirements.
- c. In the event that I found he did not satisfy the suitability requirement (i.e. he cheated) then the appellant would not succeed under article 8 bearing in mind that Section 117B of the 2002 Act places great emphasis on the importance of immigration control and the appellants both had immediate family living in Pakistan.

SUBMISSIONS

- 12. Mr Staunton relied on the refusal letter and the two witness statements of Miss Collins and Mr Millington. He also referred me to the appellant's tests result and the fact the finding was the appellant's test results were invalid. In inviting me to refuse the appeal Mr Staunton asked me to have regard to the following points:
 - a. The test was arranged by an agent.
 - b. The test was taken in an area over an hour from where he lived.
 - c. The test was taken over two days and the appellant had clearly stated that he recalled doing them at the same time.
- 13. Mr Wells asked me to place little weight on the statements of Miss Collins and Mr Millington because their evidence was generic and did not address the appellant's specific test. The report was a screenshot of an excel printout and the respondent had provided no evidence of how fraudulent tests were detected and had little or no regard to the fact others were taking the test at the same time and people had different accents. He criticised the respondent's evidence and submitted the respondent had failed to satisfy the Tribunal, on balance, that the appellant had acted illegally. He invited me to have regard to the following points:
 - a. The appellant was able to speak English successfully and at a higher level when he took a second test in March 2014.
 - b. The appellant spoke good English at the hearing and therefore had no reason to cheat.
 - c. There was insufficient evidence to show that he cheated.
- 14. I reserved my decision.

DISCUSSION AND FINDING

- 15. The claimant had been granted entry clearance as a student and subsequently he was granted further leave to remain and part of the evidence which he had had to submit was an English language test certificate (ETS) for which he claimed to have undertaken a test at an ETS testing centre in Ilford.

16. Following a Panorama programme in which fraud was detected by many people undertaking this test the Home Office conducted tests on ETS service centres in general and following these tests a number amounting to many thousands of people were alleged to have taken the test by using a proxy.
17. In all of these cases generic evidence has been given which has consisted of witness statements given by two witnesses of the Home Office, Mr Millington and Miss Rebecca Collins, which set out how the forensic tests were conducted and the basis upon which the Home Office is able to say that in the particular cases in question it is much more likely than not that the tests relied on were among the ones which were fraudulent.
18. In a general case where an application for leave has been refused in this country an appellant will have an out of country right of appeal and there are many decisions affirming that the Home Office's position in refusing such an appellant an in country right of appeal is lawful. What Parliament has decreed in these cases is that an out of country right of appeal is an adequate remedy and the challenge to the decision will not give rise to an in-country right of appeal.
19. In this case, however, the decision was taken to refuse the claimant leave to enter and to cancel his leave when he tried to come back to the country and that decision does carry an in country right of appeal which is why the claimant in this case was able to appeal this decision without first leaving the country.
20. The law with regard to the way in which the evidence of the Home Office (or for technical reasons in this case the Immigration Officer) should be viewed by Tribunals has been clarified by the President of this Tribunal Mr Justice McCloskey in the judicial review case of R (on the application of Gazi) v Secretary of State for the Home Department (ETS - judicial review) IJR [2015] UKUT 00327 and the finding can be summarised very briefly.
21. Effectively so far as this Tribunal is concerned Mr Justice McCloskey found that the evidence produced on behalf of the Home Office in these cases is capable of establishing to the requisite degree of proof that a test was taken fraudulently but this test is not infallible and it is open to a Tribunal in any case considering the specific facts of that case to decide that that particular case was an exception to the general rule that such findings should be upheld.
22. In other words, although the generic evidence produced was sufficient to establish without contrary evidence that the English language certificate had been fraudulently obtained, it was open to a Tribunal in any individual case on the basis of findings on specific evidence adduced to say that that particular case was an exception to the general rule.
23. Based on the above approach I reject Mr Well's submission that the statements and printout are insufficient to prove that a proxy was used.

24. The issue for me to consider was whether this appellant's facts were an exception to the above rule.
25. I do not attach any weight to the fact he took the March 2013 test in Ilford. It was not disputed he attended college in that area and whilst there may have been a test centre closer to where he lived this did not mean it was unreasonable for him to take his test in Ilford.
26. The fact his English language abilities, in court, were good do not prove he did not cheat, as claimed by the respondent, in March 2013. I note he took a further test in March 2014 and he passed but he took the second test in March 2014 because he needed it for a further visa application.
27. The appellant claimed to have taken his test on March 6, 2013 but in giving his evidence he was stated on two occasions that he believed the test was taken in one go. Mr Staunton challenged and pointed out that the tests were taken separately and not at the same time.
28. The appellant was unsure and whilst I have regard to the fact the test was almost three years ago I do bear in mind when considering this that he appears to have only ever taken one test at the Ilford test centre. Whilst he was able to describe how many people took the test and where the centre itself was I do find it surprising that he was then unable to recall the test format. If he had taken loads of different tests there then I could understand possible confusion but that was not the case.
29. The court in R (on the application of Gazi) v Secretary of State for the Home Department (ETS - judicial review) IJR [2015] UKUT 00327 made it clear that the evidence presented on such tests was sufficient to prove fraudulent activity although it was open to an appellant to challenge the evidence presented through the facts of his or her case.
30. The appellant produced little evidence to challenge the approach in Gazi and effectively invited me to allow his appeal on the basis he had demonstrated an ability now to speak English well but this did not show that he did not take the test in March 2013.
31. I therefore find that the respondent demonstrated on balance there was evidence that a fraudulent test was taken and the appellant has failed to rebut that presumption on the balance of probabilities.
32. The appellant cannot therefore satisfy the suitability requirements of Appendix FM and his application under Appendix FM and EX.1 of Appendix FM fail.
33. Mr Wells conceded that if I found the appellant had "cheated" then it would be difficult for the appellant to succeed on article 8 grounds.
34. Whilst clearly the parties are in a genuine and subsisting relationship and all other aspects of Appendix FM were met (apart from suitability) I cannot overlook the fact that Section 117B requires weight to be placed on the

public interest in maintaining immigration control and I am satisfied that that outweighs the appellant's family/private life rights under article 8 and the fact he speaks now English and is not a burden on the public purse.

35. It would not be disproportionate to require the appellant to leave especially where, as in this appeal, both the appellant and his wife have ties to Pakistan although in carrying out an article 8 assessment I acknowledge the appellant's wife is a British citizen.

DECISION

36. There was a material error and I set aside the earlier decision. I dismiss the appeal under the Immigration Rules and under article 8 ECHR.

Signed:

Dated:



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed:

Dated:



Deputy Upper Tribunal Judge Alis