



IAC-AH-SC-V1

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

Appeal Number: IA/48966/2014

**THE IMMIGRATION ACTS**

**Heard at Bradford**

**On 30<sup>th</sup> March 2016**

**Determination & Reasons  
Promulgated**

**On 14<sup>th</sup> April 2016**

**Before**

**UPPER TRIBUNAL JUDGE HEMINGWAY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR WAQAR JAVID  
(ANONYMITY DIRECTION NOT MET)**

Respondent

**Representation:**

For the Appellant: Mr M Diwnycz (Senior Home Office Presenting Officer)

For the Respondent: Mr R Rashid (Counsel)

**DETERMINATION AND REASONS**

1. I shall refer to the Appellant before the Upper Tribunal as “the Secretary of State”. I shall refer to the Respondent before the Upper Tribunal as “the Claimant”. This is the Secretary of State’s appeal to the Upper Tribunal, brought with permission, against a decision of the First-tier Tribunal (Judge

Shimmin hereinafter 'the judge') allowing the Claimant's appeal against the Secretary of State's decision of 19<sup>th</sup> November 2014 to remove him from the UK.

2. By way of background, the Claimant was born on 26<sup>th</sup> April 1988 and is a national of Pakistan. He entered the UK on 17<sup>th</sup> April 2011, lawfully, as a Tier 4 Student Migrant. On 22<sup>nd</sup> April 2013 his leave was curtailed because of revocation of his sponsoring educational establishment's licence. However, he made a fresh Tier 4 application and leave was granted until 7<sup>th</sup> September 2014. On 12<sup>th</sup> May 2014 he married a British citizen and, on 3<sup>rd</sup> September 2014, and therefore within the currency of his existing leave, he applied for leave to remain as a spouse. It was that application which, in due course, led to the decision of 19<sup>th</sup> November 2014 to remove him from the UK.
3. The basis for the Secretary of State's removal decision was her belief that the Claimant had used a proxy when taking an English language test on 17<sup>th</sup> July 2012 in relation to an earlier application for leave (so not the current application). This had the consequence, said the Secretary of State, that he did not meet the "suitability requirements" which are contained in the Immigration Rules. The Secretary of State also refused the application on the basis that the Claimant had failed to show that he had been in a genuine and subsisting relationship with his partner for at least two years.
4. The Appellant appealed and that led to a hearing before Judge Shimmin. At the outset of the hearing, both parties were represented but the Home Office Presenting Officer sought to withdraw the decision under appeal and when the judge refused to accept that withdrawal, he withdrew from the hearing. The hearing, therefore, proceeded in his absence.
5. The judge received oral submissions from the Claimant's representative. He had before him witness statements of one Peter Millington and one Rebecca Collings which related to aspects of the mechanics of English language testing and the manner in which fraud might be detected. Those statements have been produced in a number of cases before the First-tier Tribunal and the Upper Tribunal and, indeed, in judicial review proceedings such that their content is by now, I am sure, familiar to many judges. There was an additional statement, in this case, by Mr Sam Spence, which made reference to the content of the statements of Mr Millington and Ms Collings. The judge found, with respect to the substance of the Claimant's relationship, that it was a genuine and subsisting one and correctly pointed out that the applicable Immigration Rules did not, in fact, require the relationship to have been so for a two year period. The Secretary of State had, said the judge, conflated two different Rules. The judge's finding as to that has not been the subject of any further challenge.
6. As to the question of the Claimant's alleged deception by using a proxy test taker, the judge, in a lengthy and thoughtful passage, said this;

- “22. The first issue related to the alleged deception by the Appellant in an English language test in 2012.
23. The Appellant submitted that the Respondent had not met the burden upon her that the Appellant had personally used deception.
24. In the alternative, I have considered whether, even if the Respondent established deception, that enables the application to be refused. Appendix FM S-LTR.2.2 refers to, *‘whether or not to the applicant’s knowledge ... false ... documents have been submitted in relation to the application ...’* (my emphasis). The language certificate in question was submitted for the Appellant’s application for leave to remain as a Tier 4 (General) Student. The Appellant then made another application for leave to remain as a spouse and relied on a later language document and there is no dispute as to its genuineness.
25. I find that the Secretary of State’s evidence is generic and produced in relation to other legal proceedings. This is patent from the headings on the witness statements of Peter Millington and Rebecca Collings. Those witness statements are incorporated into this appeal by the witness statement of Mr Sam Spence. I find that this evidence does not show the exact reason why ETS has invalidated the certificate of the Appellant in particular and provides no evidence relating to the Appellant’s personal circumstances.
26. To draw an analogy. If an ECO asserted that a false birth certificate had been produced because its forensic department had said that the certificate was not genuine this would require a verification report from that forensic department to explain in clear terms the basis of such a conclusion. Therefore, the Secretary of State cannot hide behind an un-evidenced allegation by ETS to discharge the burden of proof upon her.
27. In the witness statement of Peter Millington it is stated that ETS is protecting itself by a confidentiality clause but this is no reason to change the burden of proof although the standard of proof required in the circumstances of the alleged deception.
28. Furthermore, in the witness statement of Peter Millington, ETS confirms that there are multiple reasons for invalidation of test certificate, some of which may not involve fraud or deception. The Respondent has not made the Appellant aware of the precise reason why his certificate has been invalidated.
29. Similarly, in the witness statements of Peter Millington (paragraph 12) and Rebecca Collings (paragraph 11) they confirmed there can be reasons for invalidation other than the use of proxy test takers. They state that a person’s certificate could be invalidated simply because of the presence of a proxy test taker during the same sitting or because of other procedural unspecified irregularities with the particular examination taken by the Appellant. Neither possibility would be enough to show that the Appellant knowingly used a proxy test taker or committed some other dishonesty during the examination to make out the allegation of deception by the Appellant.

30. Rebecca Collings notes that the Secretary of State is acting on the basis that if a test score is open “cancelled” this, and of itself, purportedly justifies the inference of “deception” (paragraph 32). I find that this is irrational since ETS “cancelled” test results even where no individual fraud was shown but where there was some evidence that a particular test centre had an irregularity (paragraph 29).
31. There is no detailed evidence to show a link between the Appellant’s audio recordings and any alleged proxy taker.
32. At paragraph 47 Peter Millington confirms that the test score may also be “invalidated” by ETS even where it is not shown to have been identified by the voice recognition but simply based on another irregularity in the test centre running the programme. Peter Millington says that these are identified in ETS spreadsheets provided but there is no evidence of how this is indicated on the spreadsheets or whether it has been done in this Appellant’s particular case. In the Appellant’s refusal letter (paragraph 8) it is said that, ‘... the validity ... (of these) test results could not be authenticated, ... (the) scores from the tests taken on 17<sup>th</sup> July 2012 have been cancelled.’ Thus the cancellation of the results can be viewed as an unspecified irregularity relating to the specific hearing centre and not in relation to anything the Appellant has done.
33. There is no evidence that the general operation, as described in Peter Millington’s statement, has been correctly implemented by ETS or that the test result has been invalidated due to a proxy test taker. Peter Millington and Rebecca Collings are not experts in voice recognition. At best Peter Millington has been provided with assurances by ETS and his evidence is only hearsay.
34. I find there are several reasons to be sceptical about the evidence provided by ETS and this does not meet the ‘... critical, anxious and heightened scrutiny’ required by the standard of proof (**NA and Others (Cambridge College of Learning) Pakistan [2009] UKAIT 00031**).
35. ETS were one of six successful providers being given a Home Office licence to provide English language tests was a big commercial gain for them. This gave them access to hundreds of thousands of potential customers.
36. The bid that ETS made would have been on the basis that it would be capable of meeting all Home Office anti-fraud measures (Rebecca Collings paragraph 16). There was a BBC Panorama programme broadcast on 10<sup>th</sup> February 2014 which showed that ETS had fundamental flaws in its system. This was clearly commercially damaging and could tarnish its claimed reputation as a ‘world leader in fraud prevention’ (Rebecca Collings paragraph 10).
37. ETS, in an effort not to lose its licence and to please the Home Office, implemented voice recognition software (VRS). This software was only in the process of being tested and developed prior to the broadcast of the Panorama programme. As a consequence of the programme ETS

implemented the unspecified VRS to retrospectively test all UK tests going back to 2011.

38. I find the limitations of the VRS are evident from the witness statement of Peter Millington (paragraph 28). ETS have not provided the statistical models showing that it could accommodate the complexity of the task. I have simply been given Peter Millington's untested hearsay evidence of what ETS have assured him.
  39. ETS will not tell the Home Office what software they are using because of a confidentiality agreement and I find that this must be given little weight as it is not possible to know the accuracy of the assurances given by ETS. Peter Millington acknowledges that he has no expert experience in this area (paragraph 29). Even ETS accepts that VRS is 'currently imperfect' (Peter Millington paragraph 32).
  40. The problem tests that VRS identified had to be verified and the ETS did so by using previously untrained individuals with no expertise in voice recognition, some of whom had to be redeployed because they did not have the aptitude for the task (Peter Millington paragraph 40).
  41. The evidence of Peter Millington, Rebecca Collings and Sam Spence is by witness statement only. It cannot be tested by cross-examination and therefore I find its eventual weight is limited.
  42. Against the evidence of the Respondent I note that the Appellant passed his two unchallenged tests, when he entered the UK as a student.
  43. Taking into account all the evidence and bearing in mind the standard of proof when deception is alleged I find that the Respondent has failed to meet the burden upon her."
7. The judge then went on to identify an alternative basis for allowing the appeal in connection with the English language issue which was to the effect that Immigration Rule S.LTR.2.2 requires false information or representations to have been submitted in relation to the refused application (rather than an earlier separate application) before that can be used as a basis for refusal.
  8. The Secretary of State sought permission to appeal to the Upper Tribunal contending that the judge's reasoning as to why she had not discharged the burden of proof in demonstrating that the Appellant had used deception was "entirely inadequate". It was said, in effect, that the witness statements relied upon contained extensive detail and should have been accorded significant weight. As to the second basis for allowing the appeal the Secretary of State simply said that she "maintains that the Appellant does not meet the suitability requirements of paragraph S-LTR.2.2(a) of Appendix FM of the Immigration Rules".
  9. Permission to appeal was granted, on 19<sup>th</sup> November 2015, by a Judge of the First-tier Tribunal who took the view that there was "plainly cogent evidence of the use of deception by the Appellant before the Tribunal".

10. Permission having been granted there was a hearing before the Upper Tribunal (before me) so that the matter of whether the judge's determination contained an error of law could be considered. Representation at that hearing was as stated above. Mr Diwnycz, for the Secretary of State, relied upon the grounds as drafted. He recognised that the attack was directed at the adequacy of the judge's reasoning. He submitted that the witness statements demonstrated that a decision to cancel test results would not be taken lightly though he acknowledged he could not argue that the judge was obliged to accept the evidence in the statements. He also acknowledged that the grounds "barely touched" on the judge's second reason for allowing the appeal with respect to the English language issue. I did not find it necessary to hear from Mr Rashid.
11. I have decided that the judge's decision did not involve the making of an error of law and that, in consequence, that decision shall stand. I set out my reasoning below.
12. It seems to me that, contrary to the suggestion in the grounds, the judge gave extensive and thorough reasons as to why he was concluding that the Secretary of State had failed to demonstrate that the Claimant had used deception. Indeed, I have set out those extensive reasons above. The judge cogently explained why he did not consider the evidence in the form of the witness statements to be persuasive on the facts of the case. He drew attention to a number of shortcomings in that evidence and, in particular, pointed out that it did not actually relate to the specific Claimant before him. He also pointed out that the Claimant had, in fact, passed two unchallenged English tests in the past, the implication being that he did not have the need of a proxy test taker. In short, it seems to me that the judge was perfectly entitled to take the view he did about the quality and relevance of the evidence presented on behalf of the Respondent and that he reached conclusions very clearly open to him on the evidence. Those conclusions were, as a minimum, adequately explained. It also seems to me to be significant that Mr Diwnycz expressly acknowledged he could not go so far as to suggest that the judge was obliged to accept that the evidence supplied on behalf of the Secretary of State was sufficiently persuasive to mean that the Claimant's appeal to the judge had to be dismissed. As a "reasons challenge", therefore, which is what this was, the Secretary of State's argument lacked merit.
13. Additionally, and in any event, it seems to me that the grounds did not make any serious attempt to challenge the judge's alternative basis for allowing the appeal in relation to the English language issue as Mr Diwnycz freely acknowledged.
14. I conclude, therefore, that the judge did not err in law in his consideration of the fraud issue. Further, and as a separate matter, I conclude that the Secretary of State did not substantially challenge the judge's alternative findings such that, even if I were to be wrong on the first issue, any error that the judge might have made was not a material one.

15. In the above circumstances the Secretary of State's appeal to the Upper Tribunal is dismissed.

**Notice of Decision**

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

**Anonymity**

I make no anonymity direction.

Signed

Date

Upper Tribunal Judge Hemingway

**TO THE RESPONDENT  
FEE AWARD**

I make no fee award.

Signed

Date

Upper Tribunal Judge Hemingway