



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: OA/00231/2015

THE IMMIGRATION ACTS

Heard at Birmingham

On 3 March 2016

**Decision &
Promulgated**

On 18 May 2016

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

**PANKAJKUMAR JAGISHBHAI PATEL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Chohan instructed by Citadel Immigration Ltd

For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of India born on 10 November 1985. On 24 October 2014 the Respondent served on him a notice of removal under section 10 of the Immigration and Asylum Act 1999. The Respondent concluded that he was a person who had sought leave to remain in the United Kingdom by deception. The Respondent stated in the notice that the

Appellant had submitted a certificate from Educational Testing Service (“ETS”) to his sponsor in order for them to provide him with a Confirmation of Acceptance for Studies. The Respondent stated that ETS had a record of his speaking test. ETS undertook a check of his test and confirmed to the Respondent that there was significant evidence to conclude that his certificate was fraudulently obtained by the use of a proxy test taker. His scores from the test taken on 24 April 2012 at Synergy Business College of London had been cancelled by ETS. The Respondent was satisfied that there was substantial evidence to conclude that his certificate had been fraudulently obtained.

2. The Appellant appealed against this decision under s82 of the Nationality, Immigration and Asylum Act 2002. His appeal was heard and dismissed by First-tier Tribunal Judge Hindson in a decision promulgated on 24 June 2015. The Appellant sought permission to appeal against that decision and permission was granted by First-tier Tribunal Judge Grimmett on the basis that it was arguable that the Judge erred in purporting to take into account oral evidence when there was none while making no reference to the Appellant’s seven page witness statement.

The Grounds

3. The Appellant argues that the Judge failed to consider material evidence. He stated at [4] and [6] of the decision that he heard oral testimony and made a record of the oral evidence. However, the Appellant did not attend the hearing as he was in India having left the UK voluntarily at his own expense following the Respondent’s decision. He had submitted a 7 page witness statement addressing the issues raised by the Respondent in the decision to cancel his leave to remain. It is asserted that the Judge did not engage with the Appellant’s evidence properly in his assessment of the veracity of the case put forward by the Respondent.
4. It is also asserted that the Judge made an irrational finding and failed to give adequate reasons. The Appellant argues that the sole issue before the Judge was whether the he had relied on a false document, an English language test certificate. The Judge stated that the statements relied on by the Respondent were not specific to any individual appellant but described the situation discovered by Panorama and the steps taken by ETS to identify those tests that were taken by an imposter. The Judge concluded, having noted that the statements were not specific to the Appellant, that he was satisfied that their evidence showed a robust checking system that could be relied upon. It is asserted that the Judge failed to give adequate reasons for his conclusions in this respect. The evidence relied upon by the Respondent was generic in nature and the Judge had failed to consider the evidence, resolve disputed issues of fact and make findings accordingly. The Judge had the benefit of a detailed witness statement that he should have considered in his assessment of the case before reaching his conclusion. The Judge had given no rational basis for his findings and had failed to

explain who the generic evidence was sufficient to meet the required standard of proof and prove that the Appellant used deception.

The Respondent's Rule 24 Response

5. The Respondent argues that the First-tier Tribunal recorded at paragraph 2 of the decision that there were no witnesses and the hearing proceeded on the basis of submissions only. The fact that reference was made to oral evidence at paragraphs 4-6 was immaterial as the reference was clearly generic, a mistake, and did not refer to any specific evidence that was erroneously taken into account. It was submitted the First-tier Tribunal was clearly mindful of the Appellant's witness statement at paragraph 3. It is asserted that the First-tier Tribunal identified the main points in the Respondent's evidence and found that the checking system was robust and could be relied on. It is asserted that the Appellant's complaint amounts to nothing more than a disagreement with the First-tier Tribunal's findings.

The Appellant's Rule 25 Response

6. The Appellant maintained that the First-tier Tribunal made material errors of law and the Respondent's evidence was generic in nature. The Respondent had failed to provide cogent and direct evidence that the Appellant had obtained his English language qualification by deception. The First-tier Tribunal, properly directed, would not conclude that the Respondent had discharged the burden of proof.

The Hearing

7. Mr Chohan relied on the grounds of appeal. He submitted that the determination was extremely brief. It did not deal with the Appellant's evidence. His evidence was very detailed and he said his English was good. That evidence was not detailed in the decision. The Judge did not deal with the Appellant's academic ability. There were ongoing appeals. He did not deal with the Appellant's report by Dr Harrison. The Respondent was arguing that it knew that the fraud happened but it did not identify that the Appellant took the test. He had appealed from abroad. On the substance of the appeal itself, whether the Appellant was a party to the fraud, the Judge had not referred to the documentary evidence. The Appellant also said that the university had had to make arrangements for him to study a Masters in India. His education was in English in India and he did this test because he was required to do so. The Respondent had never produced evidence relating to an individual. On cases where an appellant was out of the country the best he could do was produce a witness statement. The evidence did not meet the standard.
8. Mr Mills said that it was suggested that there was nothing before him to tie the conclusion to the Appellant but there was the spreadsheet print-out. It

might not have been great evidence, but it was what was provided. Once they had gone through the check twice it was invalidated. That was what the Respondent said was sufficient checking to show that the test was taken by an imposter. The test case was being heard but absent authority, this Judge was entitled to find that it was sufficient. It was clear from paragraph 3 that he was conscious of what the Appellant argued and submitted. It was unfortunate that paragraphs 3 to 7 had crept in. He had forgotten or had misunderstood. He drew the conclusion that the Respondent had discharged the burden of proof and he got the burden and standard right in [13]. Until a higher court said the evidence was not good enough it was open to a Judge to find that it is. He asked me to uphold the decision.

9. Mr Chohan accepted that there was no current authority. The Appellant would not pursue this appeal if he had committed fraud. He was at a mainstream education provider and they were satisfied with his ability to do the course. The University examinations required a higher level of English than TOEIC. The Respondent's witness statements were generic. ETS was authorised by the Respondent and interestingly the Respondent had not asked them for evidence to use for each candidate. ETS had closed its door on individual applicants. We were getting computer generated data without an individual being involved. The Judge's finding was inadequately reasoned.
10. In relation to disposal Mr Mills submitted that if the Respondent's evidence could not meet the burden then the appeal should be allowed but if the decision was inadequately reasoned then I should consider then remittal. Mr Chohan agreed.

Discussion and Findings

11. It is evident that the decision of the First-tier Tribunal contains careless errors. The First-tier Tribunal Judge recorded that he heard oral testimony through the medium of an interpreter when he did not and that he made a record of the oral evidence which he could not have done as there was none. In **ML(Nigeria) v SSHD 2013 EWCA Civ 844**, where the Tribunal had referred to skeleton arguments where there were none and referred to a Sri Lankan in a Nigerian appeal it was held that the essential question was whether the appellant had had the fair hearing to which he was entitled before adverse findings of credibility were found. In that case the carelessness showed that he could not have carefully and conscientiously considered the arguments both for and against the appellant.
12. The First-tier Tribunal in this case notes at paragraph 3 the evidence submitted by both parties. I conclude, having perused the evidence that was before the First-tier Tribunal, that that summary was accurate. In the circumstances I am satisfied that the First-tier Tribunal carelessly failed to delete standard paragraphs from his decision but did demonstrate that he was aware of the evidence before him.

13. However, I find that the decision contained material errors of law for the following reasons. The findings were brief and made at paragraphs 12 to 14 of the decision:

“12. The witness statements of Millington and Collings are not specific to any individual appellant but describe the situation discovered by Panorama and the steps taken by the ETS to identify those tests that were taken by an imposter. They describe the safeguards built into the audit to minimise the risk of false positives.

13. Having considered this evidence carefully, and noting that the statements are not specific to the appellant, I am satisfied, on balance, that the respondent’s case is made out and that the decision that the appellant has relied on a deception to remain in the UK. I am satisfied that their evidence shows a robust checking system that can be relied upon.

14. In making this finding I acknowledge that the appellant has been in the UK for some eight years and is undertaking an MSc at Bradford University. I also note his evidence that he spent a considerable amount in tuition fees. He has also told me that the university has facilitated his completing the course in India.”

14. The First-tier Tribunal did not have the benefit hearing submissions on the case **R (on the application of Gazi) v Secretary of State for the Home Department (ETS - judicial review)** ILJ [2015] UKUT 00327 (IAC). That judgment was delivered on 27 May 2015 after he heard but before he promulgated the decision. However the Appellant relied on a 107 page bundle which contained the report of Dr Phillip Harrison which challenged the evidence in Mr Millington’s and Ms Colling’s witness statement. Dr Harrison is critical of the level of detail provided in the generic witness statements of Ms Collings and Mr Millington. He describes it as insufficient. He criticises the lack of information concerning the initial testing and highlights that there is a dearth of information concerning the comparability of the test samples with the TOEIC samples.
15. The First-tier Tribunal did not engage with this evidence. In **Shen (Paper Appeals: Proving Dishonesty)** [2014] UKUT 236 (IAC), following a long line of authority, the Upper Tribunal held that where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue. There is then an evidential burden on the Appellant to raise an innocent explanation. Where an innocent explanation has been provided burden then rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's *prima facie* innocent explanation is to be rejected.
16. Whilst the First-tier Tribunal made reference to some of the points in the Appellant’s witness statement he did not give reasons why the innocent explanation provided by the Appellant should be rejected. He did not consider the evidence of Dr Harrison in considering whether the Appellant

had discharged the evidential burden of raising an innocent explanation or in assessing the quality and cogency of the Respondent's generic evidence. He therefore failed to engage with material evidence. He also failed to take a number of relevant matters set out in the Appellant's witness statement into account. He did not engage with the Appellant's evidence that he had prior to the cancelled test and in order to gain admission to the UK completed the IELTS English language test and that no issue had been taken with his English language ability nor did he take account of the evidence of his academic ability.

17. In the circumstances I find that the First-tier Tribunal both failed to take into account material evidence and failed to give adequate reasons for its conclusions.
18. In the light of these findings and in the light also of the fact-finding required I find that this appeal should be remitted to the First-tier Tribunal for re-hearing with no findings preserved.
19. No application was made for anonymity and none is appropriate on the facts.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set the decision aside. In the light of the fact-finding required the matter is remitted to the First-tier Tribunal.

No anonymity direction is made.

Signed

Date 18 May 2016

Deputy Upper Tribunal Judge L J Murray