



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01238/2016
IA/01239/2016

THE IMMIGRATION ACTS

Heard at Birmingham
on 16 May 2018

Decision promulgated
on 20 June 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

XINYANG FENG
MEIQIONG LIANG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Barnfield instructed by Lin & Co Solicitors
For the Respondent: Mrs Aboni - Senior Home Office Presenting Officer

DECISION AND REASONS

1. In a decision dated 3 November 2017 the Upper Tribunal found a material error of law in the decision of the First-tier Tribunal promulgated on 29th of March 2017 which allowed the appellants appeal.
2. Case management directions were given following which there has been the release by ETS of the voice recording taken during the course of the English language test attributed to Mr Feng.
3. In accordance with directions, the appellant's solicitors confirmed in a letter dated 16 March 2018 that the voice on the recording was not that of Mr Feng.
4. The matter comes before the Upper Tribunal for a Resumed hearing after which this tribunal shall substitute a decision to either allow or dismiss the appeal.

Background

5. The appellants are a married couple, citizens of China. The second appellant is dependent upon the appeal of her husband Mr Feng. Mr Feng applied for indefinite leave to remain in the United Kingdom on 6 February 2014 under the Work Permit route but was refused pursuant to paragraphs 322(2) and (5), and paragraphs 134 (vi) and (vii) of the Immigration Rules. The sole issue between the parties before the First-tier Tribunal related to the ETS TOEIC certificate obtained by Mr Feng; the result of which has been declared invalid by ETS.
6. Mr Feng claims he took the disputed English language test at Darwin's College.
7. Mr Feng provided two witness statements, the first dated 8 March 2017 in which he claimed to be shocked by the allegation of the use of a proxy. Mr Feng refers to the fact he entered the United Kingdom on 19 February 2009 as a work permit holder with leave to remain to 12 February 2014 with his wife joining him as his dependent on 24 March 2010. Mr Feng confirms that he and his wife sat the tests themselves and there was no reason for them to cheat; as before coming to the United Kingdom both he and his wife already had a basic knowledge of English having studied English at school in China for six years.
8. Mr Feng states that since coming to the UK he has had to use English in his everyday life such as every time he goes to the shops, public transport, or on other occasions and that he can undertake simple tasks with no difficulty. Mr Feng states at the time he and his wife took the exams he had been living in the UK for four years and his wife had been living in the UK for three years and that they sat the test at a centre appearing on the Home Office approved list of test centres. Mr Feng states they paid ETS directly for the course. The fee included previous test exam papers to use as revision material and that both he and his wife studied the exam and used the practice papers to prepare and knew exactly what to expect from the test. Mr Feng claims that he and his wife sat the tests themselves and that if there was any cheating neither he nor his wife had anything to do with it.
9. Mr Feng stated they attended the test at Darwin College in Manchester in February 2013 to enrol onto the ETS TOEIC English course. On 22 May 2013 they attended Darwin's College to sit the speaking and writing exams. Mr Feng says staff at the test centre checked their passports for registration and that they entered the exam room together. There were members of staff in the exam room who showed him how to use the computer and then instructed him to start the exam. Mr Feng states there were five or six other people taking the exam at the same time and after completing the exam he was asked by a member of staff to take a photo, which he did and was then told that he could leave. Mr Feng states he took the listening and reading exams on 19 June 2013 which followed the same process. Mr Feng states he failed his speaking test and had to return on 7 August 2013 to re-sit the test and that in all the days at the college neither he nor his wife noticed anything suspicious.
10. Mr Feng states the marks obtained are a true reflection of his English language ability. Mr Feng states after submitting their leave applications they learned they were on hold due to the ETS test and so sat a further English language test. Mr Feng claims he passed the Edexcel ESOL Skills for Life Level Entry 3 English language test on 16 October 2014 and that his wife did her City and Guilds exams which she passed on 30 July 2014. Mr Feng states the fact he and his wife were

able to pass the English language test shows they could meet the requirements under the Immigration Rules.

11. Mr Feng speaks of his employment as a second chef that he has undertaken since 2009. Mr Feng refers to being called for interview by the Home Office on 24 November 2015. They assumed an interpreter will be provided and thought the Home Office were to ask them questions about their work and time of stay in the United Kingdom. Mr Feng states when the interview started he was totally shocked as he had not learned the English language since he passed the TOEIC in May 2013 and Edexcel in October 2014. Mr Feng claims two and a half years had passed since he learnt the test and that after passing the test he gave back all the educational material to the tutors. At the interview he could not put any English "into his brain" and was unable to deal with the language communication but claims he can still speak the language on a daily basis. Mr Feng states in the restaurant there is little English in practice although he can get by with basis phrases which enables him to order meat from suppliers etc.
12. In his witness statement dated the 12 April 2018 Mr Feng states he has no knowledge of what is behind the college and how they record his test and how they can replace his voice with another person's voice. Mr Feng repeats his employment history and his claim to have passed the Edexcel test in 2014.
13. Mr Feng states many the staff in the restaurant are from mainland China and that when he started to practice his English skills they would laugh at him which embarrassed him although his wife often helped him with the practice of English as she can speak better English than he can. Mr Feng repeated his claim not to have cheated or to have used a proxy to sit any of his tests and the fact a proxy was used was without his knowledge.
14. In his examination in chief Mr Feng was asked whether he understood the content of his witness statements, which are written in English, which he confirmed his solicitor has translated to him in Cantonese so he can understand them.
15. In answer to questions put in cross examination, Mr Feng confirmed the college where he took the tests in 2013 was based in Manchester and that at the time he was living in Newcastle. When asked why he undertook the course in Manchester he claimed it was because his wife had friends who live there and that they both looked up the school in the centre in Manchester. When asked whether there was not a centre in Newcastle Mr Feng stated at the time he was not sure if there was any test centre but they heard that there was one in Manchester so they decided to go there. The test was online so they could take it in Manchester as well.
16. When asked when he sat the test Mr Feng said it was 22 May in the afternoon. When asked how many other people sat the test with him Mr Feng stated he was not sure but thought it was around five or six people. When asked what happened when the Home Office said he had not genuinely taken the test Mr Feng stated he felt shocked as he had taken the test.
17. It was put to Mr Feng the Home Office view is that his level of English is poor and that he needed an interpreter at the hearing before the Upper Tribunal leading to him being asked how he could show his level of English was sufficient to show he had passed the test? Mr Feng stated he learned English when he was in China for six years and that if there was no interpreter he would be unsure as to some of the questions asked and that the level of learning prepared him for the

- test within a few months. Mr Feng stated he had six months to take the test as they had refused the certificate.
18. There was no re-examination.
 19. Mr Feng's wife, Mrs Lang, in her witness statement dated 8 March 2017 confirms she is the wife of Mr Feng and that they live together at the address given in Newcastle upon Tyne. Mrs Lang confirmed she came to the UK in 2010 to join her husband and her shock at the allegation the English language test had been obtained fraudulently.
 20. Mrs Lang states they took the ETS TOEIC test at an approved test centre. She and her husband attended the test centre on the same day and sat the tests themselves. Mrs Lang states identity checks were carried out at the test centre and their pictures are on the score report and that there was no reason for them to cheat. Mrs Lang stated they studied hard to try make an effort to pass the test after which they put away the textbooks and never needed to use them again. Mrs Lang states she and her husband could understand some English and were capable of passing the tests themselves. After they were informed their applications had been put on hold she sat a further English language test, the City and Guilds ESOL, Entry 3 test, which she passed and her husband passed a different test.
 21. Mrs Lang stated that she and her husband attended the test centre at Darwin College in Manchester in February 2013 paying £200 for a training fee, learning material, and exam fee, making use of the training course and learning materials and that they studied English using resources on the Internet and with the help of a friend who can speak English. They attended the Darwin College on 22 May 2013. Mrs Lang claims she and her husband entered the exam room at approximately 2 PM where she was shown how to use the computer by members of the staff after which she was told to start the exam. Mrs Lang states there were about four or five other people taking the exam at the same time and that after the exam she was asked by a member of staff to take a photo which she did and was then allowed to leave. Mrs Lang claims she and her husband have never acted dishonestly.
 22. In a recent witness statement dated 12 April 2018, Mrs Lang relies on her previous statement and pontificates about why people cheat or would use a proxy. Mrs Lang states at [9] "My husband knew he needs time to study and he took his test early, as early as May 2013, nearly a year before he is qualified for the settlement application. The reason is he is afraid he may fail. But he was told he passed."
 23. Mrs Lang stated that if her husband knew the college was corrupt and is a fraud they would have gone to another college to take the test as there was ample time but the college was recommended by the Home Office.
 24. In her oral evidence Mrs Lang confirmed she had looked through her witness statements and that they were true.
 25. In reply to questions put in cross examination Mrs Lang confirmed the disputed test was taken in Manchester. When asked why they would go to Manchester and not a college nearer home Mrs Lang stated she did not know about a lot of things at the time and that a friend recommended the college to them. When asked whether she had tried to find a college nearer to where she and her husband lived, Mrs Lang claimed they had tried to look up a college but she was unsure as it is a new test and that at the same time a friend suggested they attend that college.
 26. There was no re-examination.

27. The third witness was the first appellant's employer who has provided a statement confirming the role the first appellant plays as a chef in his business and providing a character reference for the first appellant. The contents of these statements have been taken into account. There was no cross examination or re-examination of this witness.

Submissions

28. In her submissions Mrs Aboni relied upon the refusal notice and evidence before the First-tier Tribunal from ETS. The application for indefinite leave to remain on the grounds of Work Permit employment was refused following ETS advising the Secretary of State that a proxy had been used to take the English language test relied upon by the appellant to satisfy the requirements of the immigration rules, which led to his obtaining a TOEIC certificate from Darwin College on 7 August 2013.
29. The refusal letter refers to an interview arranged with the Home Office on 24 November 2015 when it was said the first appellant was unable to comprehend or answer any of the Home Office interviewer's questions about the ETS test which was found to indicate that he did not attend the test in person but that a proxy attended on his behalf.
30. The copy interview record sheet provided by the Secretary of State refers to an interview with the appellant at 13:00 hours on 24 November 2015 in Liverpool Capital Building. A representative from Lin & Co is noted as being present. In relation to the questions put to Mr Feng in English and his answers the interview record discloses the following:

1. Introduce self. Thank you for attending the interview today. The reason for this interview is to ask you some questions about your application.
2. Can you hear me clearly/are you able to understand me? No response.
3. Please confirm the following:

Name: Xinyung Feng
Date of Birth: 03 12 1973
Nationality Chinese

4. Are you fit and well enough to be interviewed now? No response.
5. Which English language test did you take? No response (please see supplementary questions).

Supplementary questions:

1. Did you take the ETS TOEIC English test? October 2013
2. Are you confirming that you took the ETS TOEIC test? No response
3. Was the test you took ETS TOEIC/ No response
4. What English tests did you take in preparation for your currently the application to the Home Office? No response
5. Can you tell me how many English language test you took in your preparation for your current Home Office application? 20..... Months

31. The interviewing officer notes the appellant was unable to answer questions in basic English, did not answer in a fluent manner suggestive of the fact that they had not been coached in providing specific answers by rote and that the appellant

could not respond in English apart from confirming his name date of birth and nationality. The interviewing officer records that the answer to question five of the supplementary questions was “20 months” pointing towards the applicant being coached in reciting an answer whilst not clearly understand the question. The interviewing officer records that the appellant appeared to lack credibility as he could not interact in English or understand the questions asked regarding the ETS TOEIC test, and was not credible throughout the interview. The interviewing officer records that the appellant constantly looked at his representative when being asked a question. The section of the interview entitled “Recommendation Summary” reads:

“Applicant did not respond when I asked could he hear me clearly and was he fit and well to undertake the interview.

Applicant could not respond when I asked the first question which English language test did you take?

After consulting with SCW I asked supplementary questions (Listed 1 to 5 above).

When asking the second question I was interrupted by the applicant representative who claimed that he had confirmed he took the test, and that I was confusing the applicant. I put it to representatives that applicant had not confirmed whether he took the ETS TOEIC test, and that he had given a date in response.

At this point in the interview representative asked if I was testing applicant’s level of English, I responded by saying I wish to ask questions on the ETS TOEIC test applicant took. Representative then requested that she acted as interpreter for applicant as he was not to B1 level and could not answer my questions. I explained that this was not possible.

Taking further guidance from my SCW I asked two more questions (4,5 listed above)

I was then instructed to stop the interview by my SCW as applicant could not converse in English no confirm whether he had took the test or not.

After the interview ended, representative was trying to converse with applicant in English, he appeared not to understand representative and gave her no response. Representatives interaction in English with applicant did not seem credible.

Applicant was not credible during interview.

32. It was submitted that even a person who had a reasonable level of English may opt to use a proxy as a test taker but in this case the appellant had not demonstrated that he could speak English and so he used a proxy to take the test for him. It was submitted there was no proper explanation why the appellants chose to undertake the test in Manchester with no evidence of any attempt to research a test centre where he was living in Newcastle. It was submitted the appellant had not shown that the certificate was not obtained by deception and that the refusal by reference to 322(2) of the Immigration Rules was made out.
33. In relation to article 8 ECHR it was an application for further leave. The appellant’s immigration status has been on the basis of limited leave with no legitimate expectation he will be permitted to remain and no evidence of integration into the United Kingdom. Mrs Aboni argued it was shown the decision is proportionate.

34. On behalf of the appellant Mr Banfield argued that they had establish more than the minimum required explanation. There were two witness statements and evidence as to what happened when they were at the test centre. It was submitted that in light of the evidence that they attended the test centre and took the test the Tribunal would have to consider whether there has been administrative error which can happen. The low standard of proof did not require the appellant to specifically prove the same as it was a Home Office agent who could have caused the admin error in relation to the wrong voice recording. It was submitted it was plausible as the voice recording did not start with a name or details of the person giving the voice recording and it is known there is correspondence with the Home Office that the voice recording would not contain such information.

35. An email from Mr Kandola, a Senior Home Office presenting Officer with the lead for ETS cases within the Senior Presenting Officers unit, contains the following:

“My understanding is that ETS recordings of the test never contain any introduction or identification of the test taker in the recording itself. The remainder of your questions were addressed by the Upper Tribunal in the case of MA (ETS – TOEIC testing) Nigeria [2016] UKUT 450 (IAC) (16 September 2016).

If you require any specific answer on any matter in relation to these recordings you should address them to ETS or their agents (Jones Day) as they belong to ETS and not the Home Office.”

36. It is submitted on the appellant’s behalf the fact the recordings do not contain such information does not make it desirable for the same to be classed as good evidence of any link between the person whose voice is recorded on the tape and the appellant in these proceedings. Accordingly, the respondent’s submissions have less weight. It was confirmed the appellant’s solicitors asked Jones Day for the recordings that were provided. It was submitted that an administrative point could occur as there is no evidence of a link to the appellant from the Home Office or ETS explaining where the recording had come from or the process by which they say this is the correct recording. It was argued there was no evidence the recording was paired up with the appellant’s case which was relevant to the plausibility of the administrative issue and administrative errors. It was submitted that there was clear evidence of procedural error by the Home Office which is arguably plausible.

37. Mr Banfield submitted there was no evidence other than a Home Office allegation of deception by the first appellant or anything to show that the appellants are other than straightforward hard-working people. There was clear evidence from the employer which was relevant to the plausibility of an assessment of the appellants claim.

38. It is also asserted that the appellant had provided pre-decision evidence of language skills in the relevant language including evidence of the certificate in 2014 for both appellants. It was argued there was no need for the appellant to do anything other than take the test himself as in 2014 the knowledge of English was at the required level. It was argued there was no motivation for him to cheat.

39. Mr Barnfield argued on the appellants behalf that the respondent’s case is infected by the minimum plausibility of their reasoning in relation to the burden passing to the appellant and that consideration should be given to what the appellant

could provide. It was argued what had been provided was enough to show the appellant provided a plausible explanation. It was submitted that although the burden passed to the appellants that burden had been discharged as a reasonable explanation had been provided. The burden passed back to the respondent at which point it was argued the respondent struggled to prove that the appellant had acted dishonestly. It was argued that the tape should have less weight attributed than the Home Office wants for the reasons stated.

Discussion

40. The evidence available clearly discharged the evidential burden upon the Secretary of State which then passed to the appellant to provide a reasonable explanation. A number of facts are not disputed including the appellant's immigration and employment history and his status in the United Kingdom. It is also not disputed that the decision under challenge is the ETS TOEIC test taken at Darwin's College Manchester on 22 May 2013. It is not disputed that the tests taken by the appellant on that day have been declared invalid as a result of the discovery of use of a proxy. It is not disputed that the voice recording provided by ETS to the appellant's solicitors, purportedly being the voice recording taken during the course of the relevant test, is not the voice of the appellant.
41. The appellant has provided a number of further documents being a further speaking and listening test taken in August 2014 and October 2014 and those results are not disputed. These do not, however, prove the appellant's ability in English language on 22 May 2013 or establish that he did not use a proxy to take his test on this occasion per se. As recognised in the case law, individuals may have their own reasons for using a proxy including seeking certainty in relation to an ability to pass the English language test as the second appellant indicated was the position for her husband at this time.
42. It also cannot be disputed the level of understanding and use of English demonstrated by the appellant during his interview with the respondent's representative on 24 November 2015 was extremely poor and did not demonstrate that the first appellant possessed the required level of understanding and use of English to enable him to pass the requisite test. It is also the case that the appellant had the use of interpreter both before the First-tier Tribunal and Upper Tribunal again demonstrating an inability to communicate at even the most basic level in English.
43. As stated above, it is not disputed that the voice recording produced is not that of the first appellant indicating it is the voice recording of a third party. The appellants do not acknowledge of the use of a proxy which, in light of a claimed ability to demonstrate the required level of English at the relevant time, would require this tribunal to accept that this is a case involving a false positive; by a speaker comparison test result indicating although different speakers were used the voice is that of the same person, or that the appellants attended the test centre and took the test, but their voice recordings were substituted at a later stage by the third-party without their knowledge.
44. The appellants evidence is that they chose this college with great care, claiming to rely upon the recommendation of a friend rather than going to a college in or

- near to where they lived in Newcastle upon Tyne. They describe paying money, receiving papers, learning from past papers attending and taking the test.
45. It is possible the appellants did attend the test centre as claimed as their photographs do appear on the disputed test results but again, that is not the issue as a person can attend the test centre, have their photographs taken, but still employ the use of a proxy.
 46. The test results for the college in question on the ETS Look at the Tool show that on 22 May 2013 at Darwin's College of six tests taken four have been declared invalid and two questionable and that none were released as being either valid or not questionable, indicating possible comprehensive fraudulent practice on the day in question.
 47. The level of the understanding and use of the English language demonstrated in the disputed test results has not been shown to be a level of which the appellants were capable from the evidence at the dates the tests were taken. There also appears to be no comparative evidence to ascertain the relationship between the tests taken in 2014 and how they relate to the standard required in the disputed tests.
 48. In relation to the weight to be given to the voice recording, I find that although Mr Banfield asserts little weight should be given to the voice recording in light of the points raised, I find insufficient merit in such submissions to accede to his request.
 49. The question of a false positive for speaker comparison test results, indicating different speakers but a same person being identified, was an issue specifically considered by Professional French in his report of 20 April 2016 prepared for the purposes of ETS litigation. Professor French was of the view that voice recognition software used by ETS is likely to have produced some false positives but the number could not be estimated with any degree of precision, but which was not found to undermine the weight that could be given to ETS voice recordings. Professor French estimated that if the 2% error established in the TOEFL pilot recordings were to apply to the TOEIC recordings then he would estimate the rate of false positives to be very substantially less than 1% after the process of assessment by trained listeners had been applied.
 50. Professor French notes that in addition to the voice recording and automatic speech recognition software results trained listeners are employed who have available to them a much wider range of speech parameters. As stated, it was as a result of the employment of this system that the finding of the use of proxy was arrived at.
 51. It may be the case that when a voice recording is taken there is no initial introduction of the person making the voice recording at the beginning of the recording but it must be remembered that the recording facility is part of the structure of the test mechanism. If a person therefore logs onto the computer on which they take the test a voice recording taken as part of that test would not necessarily require a separate introduction. The data would then be reviewed within the individual test framework by the automatic voice recognition software that in this case, as with many others, has detected a voice that has been used on other recordings.
 52. I do not find it made out that it is unsafe in all the circumstances to place weight upon the conclusions relied upon by the Secretary State originating from ETS.

Detailed examination of the procedures employed have not led to a finding that no weight can be placed upon a voice recording which it is claimed originates from the test taken by an appellant and, indeed, the ETS look up tool and generic material has been accepted as sufficient to enable the Secretary State to discharge the burden of proof upon her to show the use of proxy/deception.

53. I do not find the submission made by Mr Banfield provides a satisfactory explanation. I do not find the appellant's attempt to explain a voice recording taken from an ETS test allegedly undertaken by him, which is not his voice, provides a satisfactory explanation. It is not made out that at the relevant time the appellant possessed the required level of understanding and use of English language to be able to pass the ETS test. It has not been made out that the appellant is an innocent victim of fraudulent practices within Darwin College such that although a proxy has been used he has established to the required standard that he is in no way culpable, and, that despite his attending to take the test lawfully the college used a proxy and substituted another person's voice for its own purposes without notice to the appellants.
54. In light of the Secretary of State establishing to the required standard the use of proxy and in light of the appellant failing to provide a reasonable explanation the burden does not pass back to the Secretary of State as submitted by Mr Barfield. I find Secretary of State has discharged the burden of proof upon her to the required standard to prove the use of deception in the taking of the 2013 English language test. No satisfactory explanation has been provided.
55. I do not dispute the evidence of the appellant's employer that the appellant is a very good employee. Indeed, on the brief occasions that the appellant attended the tribunal he came across as a very polite individual as did his wife. I do not doubt it may be their wish to settle in the United Kingdom and continued to make a contribution through their current sphere of employment. That is not the issue in this appeal. The appellants status has always been precarious and they have no legitimate expectation they will be allowed to remain in the United Kingdom unless able to satisfy a requirement of the immigration rules. The general grounds of refusal have been properly applied to this appeal meaning neither appellant can succeed under the Rules.
56. Pursuant to article 8 ECHR outside the rules, considering section 117 of the 2002 Act, family life enjoyed by the appellant's will continue as they shall be returned to China together meaning there will be no unwarranted interference with the same. The first appellant is clearly skilled and it has not been made out he will not be able to obtain employment on return to China. Little weight can be given to the private life he seeks to rely in light of his precarious status but also when weighing the proportionality in the public interest, including the use of deception in an attempt to secure leave to remain in the United Kingdom on a previous occasion, I find the Secretary of State has discharged the burden of proof upon her to the required standard to show the decision to refuse the applications and subsequent removal of the appellants is proportionate.

Decision

57. **I remake the decision as follows. This appeal is dismissed**

Anonymity.

58. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Hanson

Dated the 18 June 2018