



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

Appeal Numbers: IA/49165/2014
IA/49182/2014
IA/49188/2014

THE IMMIGRATION ACTS

**Heard at Birmingham
Employment Centre
On 8 March 2016**

**Decision & Reasons
Promulgated
On 1 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**[M R] (1)
[F H] (2)
[S Z] (3)**

Respondents

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Mr I Hussain, of Immigration and Work Permit UK

DECISION AND REASONS

1. [MR] is the principal respondent. [FH] is his wife and [SZ] their daughter. The status of the second and third respondents in the UK is dependent on that of [MR]. For this reason this decision discusses only the issues arising in relation to [MR].
2. The appellant Secretary of State appeals against the decision and reasons statement of First-tier Tribunal Judge Somal that was promulgated on 23

June 2015. Judge Somal allowed the appeal, finding that the Home Office's allegation that [MR] had submitted a false document with his tier 4 (general) student application of 1 July 2014 was not made out and directing that the Home Office should make a decision regarding the substance of the tier 4 application which it had failed to do.

3. The grounds of appeal are that the judge erred in law by failing to consider the specific evidence that identified [MR] as a person who had obtained a TOEIC certificate via ETS by using a proxy test taker. The Home Office relied on evidence from ETS that confirmed the certificate was invalid and argued that the judge had failed to appreciate that this was a case where the declaration of invalidity was evidence of the use of a proxy test taker having been employed as explained by the witness statements of two senior Home Office officials, Ms Collings and Mr Millington.
4. Mr Mills amplified the grounds and established by reference to paragraphs 8 and 9 of Judge Somal's decision that she had before her the two witness statements and the extract from the ETS spreadsheet. He explained that in this appeal he was not arguing generalities about the ETS system but that the judge failed to engage with the evidence. As a result her findings were not sound because they were superficial and not drawn from a fair assessment of the evidence presented. Mr Mills added that he was not arguing that the judge's findings were irrational and again steered me to considering whether the judge had examined the relevant evidence when making her decision.
5. Mr Hussain argued that the Home Office's argument was based on irrationality even if Mr Mills said it was not. Mr Hussain pointed me to the judge's findings at paragraph 11 were sufficient. In that paragraph the judge found that [MR] was generally credible and therefore the Home Office allegation was not made out.
6. In answer to my own enquiries, both Mr Mills and Mr Hussain were satisfied that the judge had failed to make findings as to the substance of the [MR]'s tier 4 application and that remained outstanding.
7. Having not made my decision at the hearing, I make it now.
8. Although I find there are difficulties with the judge's decision and reasons, looked at in the round I am satisfied that the Home Office argument, regarding the finding that the allegation of submitting a false document was not made out, is not correct for the following reason.
9. There is a problem with the judge's comment at the start of paragraph 8. She states that it was "not apparent from the Respondents file as to where these allegations have arisen." As I have already indicated, the evidence before the judge included an extract from an ETS spreadsheet and the witness statements from the two Home Office officials. Together these showed why the allegation arose. There was a *prima facie* case in that the statements show that a number of foreign students and others had obtained English test certificates fraudulently by employing a proxy test taker. On the face of it, the invalidation of the appellant's test certificate brought him within this profile.

10. However, this is the only problem I find with the decision. It was open to the judge to find that neither statement from the Home Office officials went beyond this prima facie position. In paragraphs 8 and 9 the judge examines each statement and identifies that neither relates specifically to [MR]. This means that the statements are evidence of the possibility that he was a person who might have employed a proxy test taker but did not establish that it was more likely than not that he was such a person.
11. In paragraphs 10 and 11 the judge examined the other evidence before her which included evidence that [MR] would have had no reason to employ a proxy test taker. He did not fit the profile of a person whose English language skills were such as to require him to do so because there was unchallenged evidence that he had the necessary English language skills and had completed studies in the UK.
12. At the end of paragraph 11 the judge identified that the Home Office had not provided any evidence specific to [MR] to show that ETS had identified him as using a proxy test taker. It is obvious that a test certificate might be invalidated for reasons unrelated to a person using a proxy test taker and therefore the mere fact that the Home Office provides evidence that ETS has invalidated a certificate is not enough to establish fraud.
13. The Home Office, however, pursued a second line of argument in its appeal to the Upper Tribunal. It said that the judge should not have allowed the appeal to the limited extent that the Home Office should make a decision on the substantive aspect because it is trite law that the First-tier Tribunal has jurisdiction to make such a decision itself unless the matter involves the exercise of discretion. In this case Mr Mills submitted there had been no need to remit the appeal since there was sufficient evidence before the judge to deal with it outright.
14. I find there is merit in this argument and that the judge erred in law by not addressing the substance of the appeal. Mr Hussain agreed. Because of this consent, I find that the judge erred in law by not determining the substance. This matter remains outstanding not before the Secretary of State but the First-tier Tribunal and it is to that chamber that I remit the matter.
15. I add three points. First, the findings of Judge Somal that the Home Office has not made good its allegation that [MR] submitted a false document is upheld and this point cannot be argued further.
16. Secondly, [MR] may wish to consider whether he should pursue the matter because on the available evidence he did not supply a valid English language certificate with his application because the one on which he relied has been invalidated by ETS. That is a matter that will no doubt have to be considered at the next hearing and on one I make no findings because [MR] may have an answer to that situation.
17. The First-tier Tribunal will also have to make findings in relation to the second and third appellant when deciding the remitted appeals.
18. To sum up, I find that the decision and reasons statement contains an error on a point of law for the reasons I have given and remit the

remaining matter to be determined by a judge other than Judge Somal. The hearing can be in Nottingham, Stoke or Birmingham.

Decision

The decision and reasons statement of Judge Somal contains an error on a point of law and is set aside.

The appeals are remitted to the First-tier Tribunal and the remitted hearing is subject to the directions and observations set out in paragraphs 13 to 15 above.

Signed

Date

Judge McCarthy
Deputy Judge of the Upper Tribunal