Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31895/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th August 2017	**On 23rd August 2017**

Before

Upper Tribunal Judge Chalkley

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD SADIKUR RAHMAN CHOWDHURY
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Steven Walker, Home Office Presenting Officer
For the Respondent: Mr Michael Biggs of Counsel, Universal Solicitors

REASONS FOR FINDING AN ERROR OF LAW

1. In this appeal, the Secretary of State is the appellant and, to avoid confusion, I shall refer to her as being the, "claimant".

2. The respondent is a citizen of Bangladesh, who was born on 10th May 1986. On 10th September 2015, the claimant refused to vary the respondent's leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant and decided to remove the respondent from the United

Kingdom by way of directions under Section 47 of the Immigration and Nationality Act 2006. The respondent appealed and his appeal was heard at Taylor House on 27th October 2016, by First-tier Tribunal Judge R G Walters.

3. The basis for the claimant's decision was that, in conjunction with a previous application for an extension of his student visa (made on 22nd December 2011), the respondent submitted a TOEIC certificate from Educational Testing Service ("ETS") to the claimant and to his educational sponsor, in order for the latter to provide the respondent with a Confirmation of Acceptance for Studies ("CAS"). The claimant contends that ETS has found evidence to conclude that the examination was taken by a proxy and not by the respondent and, therefore, declared the respondent's test, "invalid". The claimant was, therefore, satisfied that a false document had been used by the respondent in connection with his previous application and so refused the application under paragraph 322(2) of HC 395, as amended ("the Immigration Rules").

3. Judge Walters, in a brief determination which fails to set out even a precis of the oral evidence he heard, found the respondent to be an honest and reliable witness and accepted his evidence. He found that the respondent had not made false representations to ETS and that the result of his test was not, therefore, invalid. In consequence, the judge found that paragraph 322(2) did not apply to the respondent and allowed the respondent's appeal.

4. Dissatisfied with the judge's determination, the claimant sought and obtained permission to appeal. In granting permission, First-tier Tribunal Judge Ransley thought that it was arguable as submitted in the grounds that the judge failed to give adequate reasons for finding that the claimant had not discharged the legal burden for proving that the respondent had acted dishonestly.

5. The grounds point out that the Secretary of State provided a number of documents in support of the ETS allegation, including witness statements from Mr Peter Millington, Ms Rebecca Collings and Ms Hilary Rackstraw and the ETS SELT sourced data. The grounds assert that the First-tier Tribunal has failed to provide adequate reasons for finding the respondent to be credible and, in reaching material findings, the First-tier Tribunal relied on the respondent's level of spoken English at the appeal hearing. As the grounds point out, there may be reasons why a person who is able to speak English to the required level would, nonetheless cause or permit a proxy candidate to undertake the ETS test on their behalf, or otherwise cheat and the judge erred in failing to consider the possibility of these other reasons.

6. At the hearing before me, Mr Walker relied on the grounds and pointed out that the judge had nowhere engaged with the claimant's evidence. For the respondent, Mr Biggs reminded me of paragraph 36 of *South Bucks District Council and Another v Porter* [2004] UKHL 33.

7. He suggested that at paragraph 4 of the judge's determination the judge demonstrates that he has examined and read the claimant's bundle. Mr Biggs suggested that what the judge had said at paragraph 4 of the determination was an adequate consideration of the claimant's evidence by the judge. His findings of fact start at paragraph 11 and at paragraphs 12 to 15 the judge analyses the evidence of the respondent and his conclusions at paragraph 19 are he submitted wholly adequate. The Secretary of State is very well aware of the reasons for the judge's finding in favour of the respondent, Mr Biggs suggested. He found the respondent to be a credible witness. Any error of law cannot be immaterial because he made an unassailable conclusion in respect of the respondent's credibility. In addressing me in closing Mr Walker simply emphasised that the determination was not adequately reasoned and that there had been no engagement at all by the judge with the respondent's evidence. I reserved my decision.

8. At paragraph 36 of *South Bucks District Council and Another v Porter* Lord Brown of Eaton-under-Heywood said:-

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principle important controversial issues', disclosing how any issue of fact or law was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reason must not give rise to a substantial doubt as to whether the decision maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative planning permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasoned challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision".

9. The respondent's bundle, which, as he confirms at paragraph 4 of his determination, was before the First-tier Tribunal Judge, contained a nine-page witness statement by Rebecca Collings dated 23rd June 2014. It also contained a fourteen-page witness statement from Peter Millington dated 23rd June 2014 and a two-page statement from Hilary Rackstraw, a senior caseworker employed by the Home Office dated 25th October, 2015. The bundle relied upon by the Secretary of State also contained a report on forensic speaker comparison tests undertaken by ETS and a witness statement from Professor Peter French of J P French Associates Forensic Speech and Acoustics Laboratory and Professor of forensic speech science

at the Department of Language and Linguistic Science at the University of York, extending to fourteen pages. At paragraph 4 of the judge's determination, he says that he heard oral evidence from the respondent and oral submissions from both representatives, all of which are fully set out in the Record of Proceedings and have been taken into account by him. He has also taken into account the following documents placed before him:

(1) the appellant's bundle;

(2) the respondent's bundle.

10. That, with respect, is the only reference the judge makes to the documents placed before him on behalf of the claimant. Nowhere does he refer to any of the specific evidence relied on by the Secretary of State and nor does he indicate why he prefers the respondent's evidence.

11. In paragraphs 11 to 18 the judge said this:-

"11. The [respondent] gave evidence and adopted his witness statement at P2 onwards. In it he states that he personally attended the TOEIC English test and did not use a proxy test taker.

12. In support of the [respondent's] competence in the English language he submits certificates relating to his IELTS test in January 2009, a communicative English language training course in March to May 2009 and an ETS TOEIC test in 2011.

13. Additionally the [respondent] states that since coming to the UK he has obtained an advanced diploma in human resource management, a BA Hons in business administration and an MSc in international marketing. He produces the certificates for these and states that all the instruction for these courses and examinations were in English.

14. The [respondent] then gave detailed evidence in his witness statements as to the actual test and its component parts taken on 22.12.11.

15. The [respondent] gave evidence in English and demonstrated his fluency in the language. I found him an honest and reliable witness and accepted his evidence.

16. Paragraph 322(2) bears the heading:

'Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused' and continues:

'(2) the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave in order to obtain documents from the Secretary of State or a third party required in support of the application for leave to enter on a previous variation of leave …'

17. The [claimant's] allegation is that the [respondent] represented to ETS that it was he who was answering the test whereas it was in fact a proxy test taker. ETS therefore issued the TOEIC certificate for the [respondent] to produce to the [claimant].

> 18. I did not find that the [respondent] made such false representations to ETS."

12. In reaching the conclusion he does at paragraph 18 of his determination, First Tier Tribunal Judge Walters has failed to examine and consider the witness statements relied on by the Secretary of State. Instead, the judge appears to have been satisfied by the English language certificates and the fact that the respondent has obtained a diploma in human resource management, a Bachelor's degree in business administration and a Master's degree in international marketing, all taught in English. The judge also found that the respondent demonstrated his fluency in the language when giving evidence to him, but of course that was almost five years after the test in question. Having looked at the evidence of the respondent, the judge should have considered the witness statements and other evidence relied upon by the claimant.

13. The First Tier Tribunal Judge says in paragraph 4 of his determination that he has read the claimant's bundle, but he does not engage with it and explain why he prefers the evidence of the respondent. The evidence of the claimant makes very serious allegations, suggesting that the respondent has been a party to an attempted fraud on the claimant. The evidence was such and the allegations so serious that it needed more than a mere acknowledgement, which is all this judge has given to it. It needed to be carefully examined and a proper explanation give as to why the respondent's evidence was to be preferred.

14. It was simply not sufficient to find that the respondent was credible, without undertaking an examination and consideration of the claimant's evidence. It appears that, the judge was influenced by the fact that the respondent had gained qualifications after being taught in the English language. He also appears influenced by the fact that before him, the respondent, "demonstrated his fluency in the language". However, the judge does not appear to have considered that even though the respondent might very well have been qualified in 2011 to pass the TOEIC test, he may have used a proxy instead of sitting the test himself.

15. I have concluded that the judge's reasons are inadequate, they do not enable the reader to understand why the matter was decided as it was and what conclusions were reached on **"principal important controversial issues"**, disclosing how any issue of law or fact was resolved.

16. It might well be that, having considered the claimant's evidence, together with the evidence of the respondent, another judge may very well reach the same conclusion as this judge and allow the respondent's appeal, however, for the reasons I have given, I find that the determination of Judge Walters cannot stand. I set it aside and direct that the appeal should be reheard by the First-tier Tribunal by a judge other than Judge R G Walters. Two hours should be allowed for the hearing of the appeal.

Richard Chalkley

Upper Tribunal Judge Chalkley **22nd August 2017**