IAC-HX-MH/11-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30818/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 July 2015	**On 11 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

CHOW WEE TEIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Armstrong of Counsel
For the Respondent: Ms Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Malaysia, born on 18 December 1981. She appealed against the respondent's decision dated 4 August 2014 to refuse her leave to enter. The decision reads as follows:

> "You were given notice of leave to remain in the United Kingdom as a Tier 4 (General) Student. You were given entry clearance UKBRPRC1454202 which had effect as leave to enter the United Kingdom on 8 February 2013 until 29 September 2016 but I am satisfied that false representations were employed or material facts were not disclosed for the purpose of obtaining

> the leave, or there has been such a change of circumstances in your case since the leave was granted that it should be cancelled. I therefore cancel your continuing leave. If your leave was conferred by an entry clearance, this will also have the effect of cancelling your entry clearance.
>
> In support of your application for leave to remain you completed a TOEIC Secure English Language Test on 18 September 2012 administered by Premier Language Training Centre. This testing centre has been found to have awarded fraudulent certificates. Therefore your certificate is deemed invalid by the Home Office. As you have submitted your results as part of your application for leave to remain, I am satisfied that your leave to remain has been obtained by false representation.
>
> You have not sought entry clearance under any other provision of the Immigration Rules. I therefore refuse you leave to enter the United Kingdom/I therefore cancel your continuing leave. If your leave was conferred by an entry clearance, this will also have the effect of cancelling your entry clearance. The cancellation of your leave will be treated for the purposes of the Immigration Act 1971 and the Nationality, Immigration and Asylum Act 2002 as a refusal of leave to enter at a time when you were in possession of a current entry clearance."

2. The appellant's appeal against the respondent's refusal was dismissed by Judge J Bartlett (the judge) in a decision promulgated on 9 January 2015. The judge found that whilst fraud was not made out in terms of paragraph 321A(2), the appellant could not succeed under paragraph 321A(1) a mandatory ground of refusal, because she did not hold a valid English language certificate by the time she re-entered the United Kingdom on 4 August 2014 and that was a change of circumstances under paragraph 321A(1). Further, the appellant did not satisfy Rule 276ADE or Appendix FM in terms of Article 8. The judge went on to consider the appellant's circumstances with regard to Article 8 outside the Rules but found that the respondent's decision was proportionate having taken into account the case law and s.117A and B.

3. The grounds claimed the judge failed to apply the threshold test in paragraph 321A in terms of an assessment of whether the alleged change in the appellant's circumstances was sufficient to justify cancellation. Further, in the event that that ground was not made out, the respondent would have been permitted to cancel leave on the basis of a change of circumstances, when the underlying substantive basis for that change of circumstances had not been made out. That would be conspicuously unfair and an abuse of power. Further, that the judge incorrectly weighed the interference in terms of Article 8.

4. Judge Colyer granted permission to appeal on 11 May 2015. He found it was arguable that the judge erred in failing to apply the paragraph 321A threshold and in failing to consider the allegation that the respondent's decision was an abuse of power. He found all grounds to be arguable.

Respondent's Rule 24 Response

5. The respondent claimed inter alia that the judge directed herself appropriately. It was a question of fact that the appellant's ETS certificate was cancelled by ETS. Whilst the respondent acknowledged the judge found no fraud on the balance of probabilities, for the purposes of the Secretary of State's cancellation at port pursuant to paragraph 321A, the Tribunal had no jurisdiction to undo ETS's decision to cancel the certificate nor was it relevant on what basis ETS cancelled the certificate. It remained a fact that the appellant did not have a valid certificate as had been required under the original grant of leave. It was for the appellant to seek a remedy for the invalidation elsewhere.

6. At the time of the original grant of leave, the appellant was considered to have a valid certificate by the Secretary of State, as ETS had not notified the Secretary of State that the certificate was invalid. Upon notice being given, the Secretary of State considered the certificate as invalid and cancelled leave at port.

7. The Secretary of State merely applied the law according to the facts presented to her. If the appellant had any complaint it was against ETS who invalidated the certificate.

8. The appellant's complaint at [11] of the grounds of appeal that the only basis for cancelling the certificate was fraud and therefore "… *the FTIJ could not in those circumstances proceed on the basis that it might be something else …"* was said to be wholly erroneous as it failed to recognise that the judge had no jurisdiction to consider ETS's invalidation. The only jurisdiction the judge had was to consider whether the respondent's accusation of fraud was established.

9. The appellant's complaint that there was no substantive basis for the interference in her private life failed to recognise it was a fact that she did not have a valid certificate.

10. The appellant's complaint that there had been no change of circumstances as the test was invalid at the outset, was wholly erroneous as it failed to recognise that the Secretary of State was unaware that the certificate was invalid at the outset.

Submissions on Error of Law

11. Mr Armstrong said that paragraph 321A is expressed in mandatory terms but in relation to 321A(1) there was a threshold. The Rule required "… *has been such a change in the circumstances …"* that leave should be cancelled. It was therefore clear but also confirmed in various case law that there needs to be an assessment of whether the alleged change of circumstances was sufficient to justify cancellation.

12. That was why the submission had been put to the judge which she recorded at [22(iii)] of her decision, that the alleged change of circumstances had to be material. In the view of Mr Armstrong, it could not

be material where the allegation was about fraud and fraud had not been made out.

13. The judge dealt with the issue of fraud at [29]-[33] of her decision. At [30] and [31] she said that there might be reasons why a certificate could be cancelled outside the circumstances of fraud. At [33] she said that *"..... the certificate was an important part of the granting of the Tier 4 visa for the appellant and it cannot be said to be insignificant."*

14. Mr Armstrong submitted that the judge's reasoning at [30] and [31] betrayed a misdirection and was irrational. There might well be cases where a certificate was cancelled on grounds other than fraud but that was not the situation in this case. The only basis for cancelling the ETS certificate was fraud and my attention was drawn to the statements filed by the respondent in this and all other related cases. The basis for the decision was fraud. The only evidence before the judge was that the cancellation was about fraud such that she could not in those circumstances proceed on the basis that it might be about something else.

15. As regards [33] the language certificate was not a requirement of leave to enter or remain. Paragraph 245ZV required 30 points and a certificate of acceptance for studies (CAS) required 30 points. See Appendix A [115]. The appellant had at all times a CAS. Whilst not an issue before me, I do not accept that there is no language requirement to obtain a CAS or under Paragraph 245ZV.

16. In any event however and fundamentally, the issue for the judge was whether the absence of the language testing certificate, when the appellant had previously had one, (it having been cancelled on grounds of fraud which the judge had found not to have been made out), was a change of circumstances such that leave could be cancelled. Mr Armstrong argued that the judge did not carry out that exercise and to the extent that she did so, her analysis was flawed for the reasons given above at [11]-[15].

17. As a result, the judge failed properly to apply the threshold required by Rule 321A(1). She misdirected herself and/or her reasoning was irrational in that it proceeded on the basis that there might be some basis for cancelling the certificate other than fraud when there was none.

18. In any event, it would be conspicuously unfair and an abuse of power assuming that the first ground at [11] above failed, if the respondent was permitted to cancel leave on the basis of the change of circumstances when the underlying substantive basis for that change of circumstances had not been made out. That was because ETS was a contractor of the respondent who had been requested by the respondent to investigate allegations of language testing fraud and the appellant had no remedy against ETS. What the respondent argued subsequently was that she did not need to make out fraud whilst that was the original expressed basis for her decision; all she need do now was assert change of circumstances

such that there need be no enquiry into the change or whether it was well-founded. That approach was a classic abuse of power in public law terms. The appeal was not about a merely technical breach. The respondent had made an allegation and acted upon it. She could not subsequently act so as to pretend that allegation was never made and that the case was only about the technical breach. If that was the case, the respondent would be acting to deny the appellant an effective remedy in respect of a finding made by ETS, the respondent's contractor and upon which the respondent relied upon in the action she took against the appellant.

19. As regards Article 8, Mr Armstrong submitted that there was an interference by the respondent in the appellant's private life in the United Kingdom. There was no effective justification for that interference and the judge failed to weigh that point. Mr Armstrong also submitted that whereas the judge at [32] rejected the argument that there was no change in circumstances in any event, because if the test certificate was invalid then it was invalid at the outset, hence nothing had changed, another judge had taken a different view.

20. Ms Isherwood relied upon the respondent's Rule 24 response.

Conclusion on Error of Law

21. The appellant was a student in the United Kingdom. She had been here lawfully, since 2005. In August 2014 she was returning here following a trip home when she was stopped at port. She was refused leave to enter, the reason given in the decision document being that a language test certificate obtained two years earlier had been issued by a test centre that had been found to have awarded fraudulent certificates. Accordingly, the appellant's certificate was deemed invalid. No case against the appellant herself was alleged or made out. On the morning of the hearing before the judge documentary evidence was produced from ETS that the appellant's certificate had been listed as invalid from 30 May 2014, the reason being that she had allegedly relied upon a test certificate obtained by the use of a proxy test taker. At that stage, the respondent sought leave to rely upon paragraph 321A(1) as well as the previously relied upon 321A(2).

22. Paragraph 321A(1) is concerned with change of circumstances, the respondent's case being that whatever the position was with regard to fraud, there was not at that time a language testing certificate. Accordingly, there was a change of circumstances and the appeal fell to be dismissed on that basis alone.

23. Mr Armstrong submitted that whilst paragraph 321A is expressed in mandatory terms, there was a threshold, by which he meant that there needed to be an assessment of whether the change of circumstances was sufficient to justify cancellation. In other words, that the Immigration Officer was exercising a discretion. Mr Armstrong relied upon Home Office guidance in the appellant's bundle "*Cancellation of entry clearance not*

conferring leave to enter: change of circumstances or purpose". This gives general grounds for refusal Section 3 - v22.0EXT published for Home Office staff on 23 March 2015, although Mr Armstrong said the guidance was no different on 4 August 2014 when the appellant's leave was cancelled. The guidance relied upon does not in terms mention paragraph 321A but rather paragraph 321 and specifically, 321(ii). Paragraph 321 concerns refusal of leave to enter whereas paragraph 321A refers to grounds on which leave to enter or remain which is in force, is to be cancelled at port or while the holder is outside the United Kingdom.

24. Paragraph 321 provides *inter alia*:

> "A person seeking leave to enter the United Kingdom who holds an entry clearance which was duly issued to him and is still current may be refused leave to enter only where the Immigration Officer is satisfied that:
>
> (ii) a change of circumstances since it was issued has removed the basis of the holder's claim to admission, except where the change of circumstances amounts solely to the person becoming over age for entry in one of the categories contained in paragraphs 296-316 of these Rules since the issue of the entry clearance."

25. The guidance reads:

> "Change of circumstances
>
> When a passenger's circumstances have changed so that they no longer have a basis for leave to enter in the category for which they were granted entry clearance, you **may** (my emphasis) refuse leave to enter under paragraph 321(ii) or V9.2 for example, when a passenger with entry clearance for employment has had their offer of employment withdrawn."

26. Paragraph 321A provides inter alia as follows:

> "The following grounds for the cancellation of a person's leave to enter or remain which is in force on his arrival in, or whilst he is outside , the United Kingdom apply;
>
> (1) there has been such a change in the circumstances of that person's case since the leave was given , that it should be cancelled"

27. In **BA (321A Immigration Rules mandatory) Nigeria [2006] UKAIT 00080**, the AIT concluded at [19]:

> "We conclude therefore that the immigration judge was wrong in law when he held that the immigration officer had a discretion under rule 321A. He does not. If the grounds are made out then any entry clearance which a passenger arriving in the United Kingdom may have is to be cancelled."

28. In **Boahen [2010] EWCA Civ 585**, Lord Justice Pitchford said at [38] *inter alia*:

> "The importance of identifying the true ground for the decision to cancel lies in the fact that an immigration officer must be taken to have justified the exercise of a power of cancellation on the grounds stated in the IS 82A notice. If the stated ground was unsustainable then the decision was

> unlawful despite the existence of an alternative ground on which the same decision could have been reached."

29. Mr Armstrong relied upon [41] of **MF (Pakistan) [2013] EWCA Civ 768** as support for his submission that the Immigration Officer was exercising a discretion when he cancelled the appellant's leave. Lord Justice Pitchford said at [41]:

> "In my judgment the facts to which I have referred in summary undoubtedly enabled the Secretary of State to consider cancellation of the appellant's leave. I would observe that cancellation is not an automatic consequence of a change of circumstances. The Rule requires that the Immigration Officer should consider whether there has been 'such a change of circumstances' that leave should be cancelled."

30. Lord Justice Pitchford went on to consider at [42] that whilst there might be disadvantages to the appellant in the event that leave was cancelled, the respondent would not be acting in any way unfairly if on the facts of the case, she properly proceeded to consider cancellation.

31. There is a real distinction between Paragraph 321 and 321A. Paragraph 321 anticipates in my view an analysis of the circumstances with regard to a refusal which is not required for a cancellation under 321A. Nevertheless, whilst the terms of Paragraph 321A are mandatory in nature, that is not to say that the respondent has power to cancel without lawful justification. It is in that sense only that she is exercising a discretion in making her decision. There is no conflict in that regard between **BA**, **Boahen** and **MF**.

32. Mr Armstrong submitted that the change of circumstances had to be material for the respondent to cancel leave under paragraph 321A(1) and that the change of circumstances could not be material where the allegation was about fraud and fraud had not been made out.

33. I find that in the respondent making a decision to cancel leave at port, she was exercising a discretion in the sense that she was considering whether there had been such a change of circumstances that leave should be cancelled. See **MF** at [29] above. I do not accept that the change of circumstances need be material in the manner in which Mr Armstrong submits.

34. The appellant was interviewed at port on 4 August 2014, having already established that ETS had cancelled the appellant's certificate. The interview was carried out by Immigration Officer Johnson and following that interview, the appellant had another interview with Border Force Higher Officer Dyson. The interviews were set out in the respondent's bundle. It was only after the Immigration Officers had interviewed the appellant and considered her responses that her leave was cancelled at port. Full details of the reasons for refusal were given in the respondent's subsequent letter dated 30 October 2014. In such circumstances, I find that the respondent was not obliged to do more in the exercise of her

discretion and particularly bearing in mind the mandatory nature of paragraph 321A as opposed to paragraph 321.

35. Mr Armstrong is correct in saying that the only basis for cancelling the ETS certificate was fraud, but that was a decision undertaken not by the respondent, but by ETS. If the appellant had any remedy in that regard, it was against ETS in contract or tort, not against the respondent. I find that having been made aware of an extensive fraudulent operation and having been made aware that ETS had decided for their own reasons, to cancel the appellant's language certificate, that was such a change in the appellant's circumstances since leave was given to justify cancellation at port. Having said that, the respondent went further. She did not immediately cancel the appellant's leave. The appellant was interviewed at port, not once but twice and it was only after the second interview that her leave was cancelled.

36. Mr Armstrong would have me accept that the circumstances of the cancellation of the appellant's leave were conspicuously unfair and an abuse of power which I do not accept on the evidence before me. In my view, the respondent was entitled to rely upon the ETS cancellation and make no further enquiry. Nevertheless, the respondent went further. The respondent did not accept the deception assessment of the appellant provided by ETS at face value but twice interviewed her and subsequently gave reasons for her decision in the letter dated 30 October 2014.

37. It might be that the judge did not find fraud on the part of the appellant but I do not accept as a corollary that she erred in failing to properly apply the threshold under Rule 321A(1). The respondent cancelled the appellant's entry clearance because ETS had cancelled her certificate. It is not correct that the appellant had no remedy against ETS as Mr Armstrong submits. The appellant had a remedy and still has a remedy in contract and tort against ETS. In my view, there was no requirement on the respondent to prove fraud individually against the appellant. It was in my view sufficient that a wide scale fraud had been revealed, that ETS had carried out an investigation and that ETS had chosen to cancel the appellant's certificate leading to the change in her circumstances which resulted in the respondent cancelling her leave.

38. I do not accept Mr Armstrong's submission that there was no change of circumstances in any event because if the test certificate was invalid, it was invalid at the outset and so nothing had changed. See the grounds at [21]. My attention was drawn to the decision of another judge but the decision was not put before me, nor did Mr Armstrong explain the facts of that appeal upon which the decision was based. The change of circumstances in the present appeal took effect in my view only when the appellant's certificate was cancelled by ETS.

39. The respondent has never acted to deny the appellant an effective remedy in respect of a finding made by ETS. On the contrary, the appellant has

chosen not to pursue a remedy against ETS. That clearly must be a matter for her.

40. Mr Armstrong said that there was no justification for the respondent's interference in the appellant's private life and the judge failed to weigh the issues, but that is to disregard what the judge had to say at [34]-[41] of her decision. She acknowledged that proof of fraud had not been made out on the part of the appellant in terms of **RP (proof of forgery) Nigeria [2006] UKAIT 00086**. The judge found the appellant did not meet the criteria of paragraph 276ADE and Appendix FM. She went on to consider Article 8 outside the Rules in terms of **Razgar**. She took into account the fact that the appellant had been in the United Kingdom for nine years and had undertaken a number of further education courses. She took into account the number of witness statements submitted as well as the relationship with Mr Rasalingham. There was no suggestion of family life with Mr Rasalingham. The judge found the appellant had social ties, however, their nature was weak and they could be established in another country. Further, the appellant had established those ties when she only had temporary immigration status such that there could be no expectation that she would be permitted to remain. The judge took into account s.117A and B of the Nationality, Immigration and Asylum Act 2002 in weighing the public interest. The judge took into account that the appellant appeared to be financially independent and had a good level of English. She weighed the issues and found the respondent's interference proportionate. Whilst the judge did not refer to **Patel [2012] EWCA Civ 741,** [57] of Lord Carnwath's judgment was relevant:

> "57. It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the Rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the Rules are not reviewable on appeal: Section 86(6). One may sympathise with Sedley LJ's call in **Pankina** for 'common sense' in the application of the Rules to graduates who have been studying in the UK for some years (see para 47 above). However, such considerations do not by themselves provide grounds of appeal under Article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under Article 8."

41. In summary, I conclude that the decision does not contain a material error of law, such that the decision of the First-tier Tribunal should be set aside.

Decision

42. The decision of the First-tier Tribunal contains no error of law and shall stand.

No anonymity direction is made.

Signed Date 28 July 2015

Deputy Upper Tribunal Judge Peart