Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/36568/2014

THE IMMIGRATION ACTS

Heard at Phoenix House
On 30 October 2015

Decision & Reasons Promulgated
On 3 November 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MR MD ABDUL KADER
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr, K Shikder of Counsel
For the respondent: Ms Willcocks- Briscoe Senior Presenting Officer

DECISION AND REASONS

1. The appellant in this appeal is the Secretary of State for the Home Department. The respondent is Mr Kader. However for the convenience, I shall continue to refer to Mr Kader as the appellant and the Secretary of State as the respondent which are the designations they had before the First-tier Tribunal.

2. The appellant appealed to the Upper Tribunal against the determination of First-tier Tribunal Judge Roopnarine-Davies allowing the appellant's appeal

against the decision of the respondent dated 13 September 2014 cancelling the appellant's leave to remain in the United Kingdom as a Tier 4 (General) Student, under the points-based system pursuant to paragraph 321A (1) of the Immigration Rules.

3. Permission to appeal was initially refused by First-tier Tribunal Pooler and on a renewed application, Upper Tribunal Judge Kekic granted the respondent permission to appeal on 27 July 2015, stating that it is arguable that the Judge materially erred in law in failing to have proper regard to the evidence submitted by the respondent that appellant's English test results had been invalidated by the tester which meant that he had no valid certificate as required. It is arguable that the Judge should have considered the respondent's decision to cancel leave in the context of the appellant being without a valid language certificate.

First-tier Tribunal Judge's findings

4. The First-tier Tribunal allowed the appellant's appeal for the following reasons which I summarise. Paragraph 321A (1) of the Immigration Rules provides for the cancellation of a person's leave to enter or remain which is in force on his arrival in whilst he is outside the United Kingdom, where "there has been such a change of circumstances of that person's case since the leave was granted and that it should be cancelled". It is a mandatory ground of cancellation. Whilst the respondent retains the discretion in exercise of the power no such option is open to the Tribunal. In **JC (Part 9 HC 395-burden of proof) China [2007] UKAIT 00027**, it is stated that deception means the making of false representations or submitting false documents (whether or not material to the application) of failing to disclose material facts. This is a serious allegation and must be proved by the respondent on a balance of probability. False means actual dishonesty.

5. The appellant entered the United Kingdom on 6 October 2009 with leave as a Tier 4 General Student, such leave being valid until 13 April 2013. Leave was subsequently extended to study for an MA until 30 January 2014. Further leave was granted on 22 April 2014 to remain as a Tier 2 General Migrant Worker until 11 May 2017. Leave was cancelled when the appellant was returning from a holiday in Bangladesh on 20 August 2014 at Port.

6. In the explanatory statement of 27 March 2015 (it is doubted that the appellant has received this given the date of the statement) it is clear that the respondent based her decision on the findings of widespread fraud in relation to ETS Certificates arising out of a general enquiry into the process by the Home Office. Deception on behalf of the appellant has not been particularised. A transcript of the respondent's interview with the appellant on 21 August 2014 showed that the appellant responded to the questions put to him at the airport in an open and straightforward manner and in articulate English.

7. The explanatory statement makes no reference to any findings of inconsistencies in the appellant's evidence at his interview (paragraph 18 onwards). Rather the respondent relied on the evidence of ETS in the enquiry which is asserted was produced by a "highly diligent process". I agree that the respondent has failed to prove the precedent facts necessary for the exercise of the power in paragraph 321 A (1) in line with the case of **RP (proof of forgery) Nigeria [2006] UKAIT 00086.**

8. The Judge allowed the appeal on the basis that the respondent's decision was otherwise not in accordance with the law and that the appellant had leave to remain in the United Kingdom and awaits a lawful decision by the respondent.

Grounds of appeal

9. The respondent in her grounds of appeal states as follows. The Judge has failed to give adequate reasons for findings on a material matter. The judge has not provided adequate reasons for her finding "deception on behalf of the appellant has not been particularised".

10. The respondent provided at appeal a bundle of documents in support of the allegation. This includes witness statements from Mr Peter Millington and Miss Rebecca Collings and an email document from ETS Task Force dated 10 September 2014. The witness statement from Mr Millington and Miss Collings clearly provides that tests are categorised as "invalid" where ETS are certain that there is evidence of proxy test taking or impersonation.

11. The ETS described that any test characterised as cancelled (which later became known as invalid) has the same voice for multiple test takes. On questioning they advised that there were certain there was evidence of proxy test taking or impersonation in those cases. Further, in the statements of Miss Rebecca Collings stated that upon comprehensive investigations ETS provides the Home Office with lists of candidates whose test results show "substantial evidence of invalidity". The Home Office was provided with the background of the processes used by ETS to reach that conclusion. Mr Peter Millington statement said that "where a match has been identified that approach is to invalidate the test results. As set out in the witness statement of Miss Rebecca Collings, ETS has informed the Home Office that there was evidence of invalidity in those cases".

12. Taking into account this evidence it is clear that in order to be characterised as "invalid" on the spreadsheet provided to the Home Office, the case has to have gone through a computer program analysis and then to independent voice analysts. If all three are in agreement that a proxy has been used then the test would be categorised as "invalid". A printout of the relevant section of the ETS spreadsheet was attached at Annex E of the explanatory statement. The spreadsheet identifies the appellant by name and records that the test that was taken on 15 January 2013 was invalid. In light of this the judge has erred in his findings.

13. Had the first-tier Tribunal properly take into account the evidence, the Judge would have found that this is exactly what the documents assert and evidence to prove it. It is clear from the evidence that the ETS invalidates test results, as in the instant case, this is because there is evidence of proxy test taking or impersonation. The Judge has failed entirely to provide adequate reasons for his finding to the contrary.

14. In reaching the material finding the Judge relies on the appellant's current English language ability. However, the appellant's present English language ability has little bearing on whether the appellant used a proxy in his English language test taken on 15 January 2013, some three years ago.

The hearing

15. At the hearing I heard submissions as to whether there is a material error of law in the determination.

Decision on error of law

16. I have given anxious scrutiny to the determination of first-tier Tribunal Judge who allowed the appellant's appeal to remain as a Tier 4 Student (under the points-based system). The Judge found that the respondent, on whom the burden lies, had not proved that the appellant's application was correctly refused under paragraph 321A of the Immigration Rules in respect of the English language test and as such, the respondent had not demonstrated that the appellant employed fraud to the burden of proof required.

17. In the Judicial Review application **JR/12120/2014** President McCloskey stated that the litigation context in which this challenge (the ETS English language test) unfolds is conveniently identified in an earlier decision of this Tribunal promulgated in September 2014, **R (Mahmood) – v – Secretary of State for the Home Department [2014] UKUT 00439 (IAC)**, at [1]:

> This is another of the currently plentiful crop of "ETS" judicial review cases. These have gained much currency during recent months, stimulated by action taken on behalf of the Secretary of State for the Home Department ("the Secretary of State"), the Respondent herein, in the wake of the BBC "Panorama" programme broadcast on 10 February 2014. "ETS" denotes Educational Testing Services, a global agency contracted to provide certain educational testing and assessment services to the Secretary of State. In order to secure leave to remain in the United Kingdom, by virtue of the relevant provisions of the Immigration Rules it was incumbent on the Applicant to provide evidence that he had obtained a specified type of English language qualification. The action taken on behalf of the Secretary of State, which the Applicant challenges by these proceedings, was based on an assessment that the English language certificate on which he relied had been procured by deception.

18. The Judge in her determination correctly identified that the burden of proof is on the respondent and it is on a balance of probability. However the Judge failed to take into account certain evidence and place sufficient emphasis on material evidence and came to a legally erroneous conclusion.

19. The evidence provided by the respondent was a statement from Mrs Rebecca Collings who stated that "ETS described that any test characterised as cancelled (which later became known as invalid) had the same voice for multiple test takes. On questioning the respondent was advised by the ETS that they were certain that there was evidence of proxy test taking or impersonation in those cases. The Judge in her determination did not give good reasons for why she considered the witness statements of Mr Peter Millington and Collings could not be relied on in respect of this particular appellant. Mr Peter Millington stated in his witness statement, "it is clear that in order to be characterised as 'invalid' on the spreadsheet provided to the Home Office, the case has to have gone through a computer program analysing speech and then two independent voice analysts. If all three are in agreement that a proxy has been used then the test would be characterised as 'invalid'".

20. The evidence of both witnesses is clear that when a test result is characterised as "invalid", it has gone through rigorous checks including a computer program analysing speech and two independent voice analysts. Therefore the Judge by not engaging with the evidence of the two witnesses fell into material error in her finding that the respondent has not proved that the appellant has used deception. It was incumbent on the Judge to give reasons for rejecting this evidence and this was not done and that brought the Judge into material error.

21. The Judge also materially erred by finding that the appellant spoke articulate English when questions were put to him at the airport and that proves that he did not use a proxy in his English language test in 2013. This is a perverse finding because essentially the Judge is saying that the appellant spoke such good English in 2015 that it would not have been necessary for him to take an English language test by proxy in 2013. There are nearly 3 years between the English language test and the questions put to the appellant at the airport.

22. There was a failure by the Judge to take into account all the evidence in the appeal and adequate reasons for why the respondent had not discharged her burden of proof that the appellant used deception in his English language test.

23. The features of the general grounds for refusal in Part 9 of the Immigration Rules were considered by the Asylum and Immigration Tribunal in **JC (Part 9 HC395 - burden of proof) China [2007] UKAIT 00027** ('**JC**'). Part 9 of the Immigration Rules contains "general grounds" for the refusal of entry clearance or leave to enter (paragraphs 320, 321), for the cancellation of leave to enter or remain (paragraph 321A) and for refusal

of variation of leave to enter or remain or for curtailment of leave (paragraph 322). These provisions represent, as it were, the list of general grounds which the Home Secretary currently thinks must or should operate to complement the substantive Immigration Rules. They cover circumstances where the respondent considers that a person should not be permitted to enter or remain even though he meets the ordinary substantive requirements of the Immigration Rules. They are general grounds for saying "no". Each of the general grounds has an exclusionary, rather than an inclusionary, intent. The applicant is not showing why he qualifies; rather the decision-maker is seeking to show why the applicant is, or should normally be, *dis*qualified. (See **JC**, paras. 8, 10 and 14.)

24. Each of the general grounds depends for its application on the decision-maker being able to establish a precedent fact or facts, and in relation to all of the general grounds the burden of proof is on the decision-maker to establish the facts relied upon (**JC**, para. 10). The reason why the burden rests on the decision-maker is that each of these grounds alleges in one way or another failing or a wrongdoing on the part of an applicant (**JC**, paras. 11-12). The standard of proof is at the higher end of the spectrum of balance of probability, but the standard is flexible in its application, and the more serious the allegation or the more serious the consequences if the allegation is proven, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities (**JC**, para. 13). However, once the decision-maker establishes the underlying facts, the burden shifts to the appellant, even when the general ground concerned is discretionary, stating that refusal should "normally" be refused (**JC**, para. 15).

25. In respect of paragraph 321A(ii), the precedent fact on which the application of this provision depends is that the appellant produced a false English test result with his application, and the burden of establishing this fact lies on the respondent (**JC**, paras. 16-17).

26. The ETS entity is one of a small number of Home Office suppliers of so-called "Secure English Language Testing" ("SELT") and was appointed in 2011. The test is taken by an applicant and he is notified by the ETS of their grades and ETS issue a certificate which is then forwarded to the respondent for further leave to remain.

27. The respondent provided evidence in the form of statements from two witnesses that there was evidence of fraud at the ETS test centres. The full procedure of the test are set out in the President's determination so I will not repeat it here. Suffice it to say that it is evident that ETS informed the Home Office that they had been able to identify impersonation and proxy testing using voice recognition software. ETS sent the Home Office the results of their analysis of the first batch of test centres on 24 and 28 March 2014. Ms Rebecca Collings in her statement stated that any test categorised by ETS as cancelled, which later became known as "invalid", had the same voice for multiple test takers. On questioning, ETS "advised

that they were **certain** there was evidence of proxy test taking of impersonation in those cases". [Emphasis mine]

28. There was no dispute that the appellant's test results were amongst 10,000's test scores analysed and her test was deemed to be "invalid" i.e. that the ETS was certain there was evidence of proxy test taking or impersonation in her case.

29. I take into account President McCloskey's observation "At this juncture, it is appropriate to highlight the single piece of documentary evidence relating to the decision in the Applicant's case which has been produced by the Secretary of State. It consists of a photocopied excerpt from a spreadsheet taking the form of a horizontal line containing six pieces of information: the "ETS Registration ID", the Applicant's first and last names, the test date, the Applicant's date of birth and the name of the test centre. Neither the word "*invalid*" or "*cancellation*" or any derivative of either appears". Mr Millington stated that the technology used entailed over 70,000 pairings of nonmatching comparisons and that the matching samples produced values that were higher than values from the non-matching samples the majority of the time, with a **less than 2% error rate**. [Emphasis mine.]

30. I take into account that the statement of Mr Millington is that "the ETS accepted that voice biometric technology is currently imperfect … too many false positives would fatally undermine the integrity of the voice biometric system". However, Mr Millington stated "In recognition of the risk of 'false positives'", ETS "…. subjected each flagged match to a further human verification process". This required the recruitment of additional staff who, it is said, received "mandatory training in voice recognition analysis" and were "initially mentored by experienced OTI analysts". The statement continues "Having engaged the necessary number of analysts, the process operated was that each 'flagged comparison' would be considered by two analysts separately. Each analyst would then form an opinion. The purpose of the exercise was to establish whether, in both analysts' opinion, the samples constituted a "match", having been thus designated by the "biometric engine." Given the evidence by the respondent it is clear that the Home Office accepts the results provided by the ETS and conduct no further investigations.

31. The respondent has the burden of proving the existence of the factors upon which reliance is placed to found the exercise of the power conferred by paragraph 321A of the Immigration Rules. The stringent civil standard applicable in cases of fraud has been achieved by the respondent's evidence: see **RP (Proof of Forgery) Nigeria [2006] UK AIT 00086**. It is argued that the evidence provided by the respondent is generic and in the absence of individual evidence pertinent to the appellant, the Appellant's test performance cannot be shown to be fraudulent. I consider less than 2% error rate to be proof by the respondent by evidence on a balance of probabilities.

32. I have a duty to enquire, and determine, whether there is sufficient evidence to justify the respondent's belief that appellant had employed deception. I have to consider the evidence against this specific appellant. I have conducted this enquiry on the evidence and the onus lies on the respondent to prove to the satisfaction of the court, on the balance of probabilities, the facts relied on by the respondent.

33. Even applying a standard at the higher end of the spectrum of balance of probability, on the evidence, I find that the respondent has established the precedent fact of the production of a false English test result. The burden therefore now shifts to the appellant to show that the respondent's decision to exercise her power under paragraph 321A is improper.

34. The appellant's case is that she has produced a valid English test result and that the respondent has not discharged her burden of proof. There is no other credible evidence provided by the appellant to challenge the respondent's case.

35. I do not accept the appellant's evidence that he has such a good English language skills that he did not need to take his English language test by proxy, the implication being that he would have passed the test without the assistance of a proxy. I how however take into account that he only received 5.5 for listening, 4.5 for writing and 5 for speaking. These scores do not, in themselves, demonstrate that the appellant's language skills were so good that he would not have required the assistance of a proxy and was confident he could pass on his own. The appellant took the test in 15 January 2013, and if his English language skills were as good as claimed, he would have achieved higher scores to reflect this.

36. Having considered all of the evidence in this case as a whole, I find that the appellant fraudulently, in an attempt to mislead the respondent, provided his English-language test results which he knew to be obtained by proxy and therefore fraud. I find that the respondent has discharged her burden of proof. I find that the respondent has demonstrated on the requisite standard of proof that the appellant's appeal falls to be refused pursuant to paragraph 321A of the Immigration Rules.

37. I therefore set aside the decision of the First-tier Tribunal allowing the appellant's appeal and substitute my decision and dismiss the appellant's appeal.

DECISION

I set aside the decision of the First-tier Tribunal allowing the appellant's appeal

I dismiss the appellant's appeal.

Dated this 2nd day of November 2015

Signed by

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Mrs S Chana
A Deputy Judge of the Upper Tribunal Chana