IAC-AH-LEM-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35456/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th February 2016	**On 13th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR AAMIR AYUB KHAN KHAKWANI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No attendance
For the Respondent: Mr S Staunton, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on 31st December 1989. On 31st November 2012 the Appellant was granted a biometric residence permit which conferred leave to remain as a Tier 4 (General) Student. On 7th September 2014 the Entry Clearance Officer at Terminal 4, Heathrow Airport issued the Appellant with Notice of Refusal of Leave to Enter on the basis that the Entry Clearance Officer was satisfied that either false representations were employed or material facts were not disclosed for the purpose of obtaining the leave or that there had been such a change of circumstances since the leave was granted that it should be cancelled.

The reason for this was that the Educational Testing Service (ETS) had indicated that a false English language certificate was obtained by the Appellant which he used as part of his application for leave to remain on 30th November 2012.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Lingam at Taylor House on 28th July 2015. In a determination promulgated on 28th August 2015 the Appellant's appeal was allowed under the Immigration Rules and alternatively under Article 8 of the European Convention of Human Rights.

3. The Secretary of State appealed to the Upper Tribunal on 11th September 2015. On 12th January 2016 First-tier Tribunal Judge Holmes granted permission to appeal. Judge Holmes noted that it was arguable that the judge fell into error in his approach to the decision by ETS to withdraw the language test certificate and upon which the Appellant had relied when seeking leave to remain. He considered that arguably the judge had treated the Respondent as having the burden of proof in establishing deception on the part of the Appellant in undertaking the language test that led to the issue of that certificate. Even if the judge was correct to do so Judge Holmes considered he was arguably wrong to dismiss the Respondent's evidence in the way that he did and that the judge had failed to apply the guidance to be found in *Gazi* and had thus failed to identify that the same evidence that was then described by McCloskey J as being "sufficient to warrant the assessment that the Appellant's TOEIC had been procured by deception and thus provided an adequate foundation for the decision made under Section 10" was before him. He thus considered that arguably any decision by the judge that the Respondent's evidence was not sufficient to discharge any burden of proof that lay upon the Respondent was either flawed, or disclosed a departure on his part from the applicable civil standard of proof of the balance of probabilities.

4. Moreover the judge considered that the approach taken in the alternative to the Article 8 appeal arguably failed to apply the guidance of the Supreme Court upon the proper approach to a "private life" appeal as set out in *Patel [2013] UKSC 72* and amplified in *Nazim [2014] UKUT 25* and that it was also arguable that the judge failed to follow the guidance on the approach to Section 117A to D to be found in *AM (Malawi) [2015] UKUT 260*.

5. It is on that basis that the matter comes before me to determine initially whether there is a material error of law in the decision of the First-tier Tribunal Judge. For the purpose of continuity throughout the appeal process Mr Khakwani is referred to herein as the Appellant and the Secretary of State as the Respondent albeit that this is an appeal by the Secretary of State. The Appellant fails to attend. I note that due notice has been given to him and to solicitors who were originally instructed to act in his behalf. I note that there is correspondence from those solicitors indicating that they have had no further instructions and wish to withdraw their representation. I am satisfied from the enclosed correspondence

that Mr Khakwani has been properly served but merely fails to attend the hearing. The Secretary of State appears by her Home Office Presenting Officer Mr Staunton.

Submissions / Discussions

6. Mr Staunton relies on the Grounds of Appeal as his starting point as to whether there is a material error of law. He asks me to find that there is a material error of law and thereafter to go on and remake the decision dismissing the Appellant's appeal. He contends that the conclusion in the decision that the Secretary of State has not discharged her burden of proof in demonstrating that the Appellant used deception is entirely inadequate. He points out that after brief consideration of the Respondent's evidence to be found at paragraphs 18 to 22 of the decision the only point taken against the documentation is that the database documentation is said not to be "legible at all". He submits that it is unclear on what basis a computer print-out could not be understood nevertheless it was apparent from the determination that the judge had not requested a legible copy from the Presenting Officer nor was it recorded that the representative raised any issues regarding the documents.

7. However he further goes on to comment that the First-tier Tribunal Judge did have before her extensive evidence namely the generic witness statements of Rebecca Collings, Peter Millington and Mona Shah. He submits that all are highly material to the issue of deception and that the First-tier Tribunal Judge failed to engage with their relevance. He submits that the Secretary of State does not need to produce the software or voice recording to establish fraud. In any event they are the property of ETS and not the Secretary of State and he refers to the point taken by the First-tier Tribunal Judge at paragraph 23. He submits that the standard of proof is the balance of probabilities and that this was clearly discharged in this case.

8. Further he submits that the finding that the First-tier Tribunal Judge found the Appellant's ability to speak English detracted from the assertion that a proxy had been used is unsustainable. He points out in the assessment that the First-tier Tribunal Judge had failed to note the passage of time (more than two years), did not recognise that there were many reasons why an individual would use a proxy and that the Appellant's ability to converse in English was not determinative of, nor materially detracted from, the question of deception. In such circumstances he submits that the First-tier Tribunal Judge had failed to provide adequate reasons for rejecting the Respondent's evidence. He submits that there was a material misdirection of law in applying an impermissibly high standard of proof in determining the deception issue and that the judge has applied a standard far more onerous than the balance of probabilities. The judge has failed, he submits, to properly reason why the documentary evidence in itself does not discharge the requisite standard of proof and that in failing to do so the judge has imposed an elevated standard of proof

rendering the decision one that materially misdirects and should be set aside.

9. Finally the Secretary of State considers that there are material misdirections of law so far as the judge's assessment of Article 8 is concerned. These are set out in detail within the Grounds of Appeal and that the issue of deception clearly infects any proportionality assessment. He asks me to find that there are material errors of law throughout the decision, to set it aside and to remake it allowing the Secretary of State's appeal.

The Law

10. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

12. This matter is not assisted by the failure of the Appellant to personally attend. I have already ruled that he has had good notice of this appeal. Whilst his instructed solicitors have come off the record I note that the Appellant has been personally served at his last known address by first-class post and I have ruled that he has been properly served and consequently that his absence is therefore, I assume, of his own choosing.

13. I have had the opportunity of considering the Grounds of Appeal in detail and of the submissions made by Mr Staunton. I have heard nothing of course from the Appellant nor his instructed solicitors and I take it that he consequently relies on the findings of the First-tier Tribunal Judge.

However as a starting point I have to decide whether or not there is a material error of law in the decision of the First-tier Tribunal. I am satisfied that there are several material errors of law that make the decision unsafe. For the reasons set out above and the submissions of Mr Staunton and on due consideration of the decision in itself I am satisfied that the judge has imposed the wrong standard of proof in this matter and that the burden of proof is the balance of probabilities not the far more onerous burden applied in determining the deception issue. Further I have had the opportunity to consider the print-out of the spreadsheet from ETS. I find it extremely difficult to support the contention made by the First-tier Tribunal Judge that it is illegible. It is clearly legible and there is no suggestion that at any stage within the First-tier Tribunal Judge's decision that the Appellant's instructed solicitors challenged the legibility of that document. These errors are material and make the decision unsafe.

14. In addition I have given due consideration to the allowing of the appeal pursuant to the European Convention of Human Rights. Whilst acknowledging that the judge has at paragraphs 28 and 29 given consideration of *SS (Congo) and Others [2015] Civ 387* and whilst noting that the Tribunal is required to attach little weight to the Appellant's private life with reference to Section 117B of the NIAA 2002 the First-tier Tribunal Judge fails to adopt this requirement in substance. Further I note the submission made quite properly by Mr Staunton and by the Secretary of State of reliance upon *AM (Section 117B) Malawi [2015] UKUT 0260 (IAC)* and the rational therein that an Appellant can obtain no positive right to a grant of leave to remain from either Section 117B(2) or (3) whatever the degree of fluency of his English or the strength of his financial resources. In all of such circumstances I am satisfied that the judge has failed to address the issues of Article 8 within proper reference to both the relevant statutory guidance and authorities and that the finding under Article 8 contains material errors of law and is therefore set aside.

The Remaking of the Decision

15. Whilst I do not have the benefit of the Appellant's personal attendance, which would of course have been helpful, I have the benefit of all the evidence that was before the First-tier Tribunal Judge including the three generic witness statements and the print-out from ETS which I find to be legible. Those documents are in the absence of contrary evidence persuasive. In such circumstances I am satisfied that the Entry Clearance Officer was entitled to issue the Notice of Refusal that he did in September 2014 and the appeal of the Secretary of State is allowed.

Decision

16. The appeal of the Secretary of State is allowed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris