IAC-AH-KEW/KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37227/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th February 2016	**On 25th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR SURESHKUMAR SOMASABAPATHY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs C Hulse (Counsel)
For the Respondent: Mrs Brockleby-Weller (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Sangha promulgated on 5th August 2015, following a hearing at Birmingham Sheldon Court on 24th July 2015. In the determination, the judge allowed the appeal of Mr Sureshkumar Somasabapathy when he applied for further leave to remain to study for an MSc in Tourism and Event Management at the University of Bedfordshire, whereupon the Secretary of State applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

Permission to Appeal

2. Permission to appeal was granted on the basis that the ETS spreadsheet, which was attached to Annex G of the Explanatory Statement from the Respondent's side, identifies the Appellant by name and records, and states that the test taken on 6th February 2013 by him was invalid. The judge failed to take this matter into account in reaching his decision to allow the appeal of the Appellant.

3. The Appellant attended the hearing. I heard submissions from both representatives following which I announced that I would reserve my determination.

No Error of Law

4. In her submissions before me, Mrs Brockleby-Weller, appearing on behalf of the Respondent Secretary of State, relied essentially upon the Grounds of Appeal. She stated that the judge had failed to give adequate reasons for findings on material matters. The judge had stated (at paragraph 28) that, "on the totality of the evidence before me, therefore, I find that the Respondent has failed to discharge the burden of proof upon her and the reasons given by the Respondent do not justify the refusal."

5. However, the Immigration Officer had provided an appeal bundle of documents in support of the allegation (in respect of paragraph 321A of the Immigration Rules) including witness statements from Mr Peter Millington and Miss Rebecca Collings, and an email document from ETS task force dated 10th September 2014. A witness statement from Mr Michael Sartorius was also provided.

6. In particular, the witness statements from Mr Peter Millington and Miss Rebecca Collings clearly provided that tests are categorised as "invalid" where ETS are certain that there is evidence of proxy test taking or impersonation. They make it clear that,

> "ETS described that any test categorised as cancelled (which later became known as invalid) had the same voice for multiple test takes. On questioning they advised that they were certain there was evidence of proxy test taking or impersonation in those cases" (see paragraph 28 of the witness statement of Miss Rebecca Collings).

7. The witness statement of Mr Peter Millington also is to the same effect when it observes that,

> "Following comprehensive investigations ETS provided the Home Office with lists of candidates whose test results showed 'substantial evidence of invalidity.' The Home Office was provided with the background to the process used by ETS for reaching that conclusion" (see paragraph 6 of the witness statement of Mr Peter Millington).

8. Indeed, Mr Peter Millington went on to say in his witness statement that, "where a match has been identified their approach was to invalidate the

test result. As set out in the witness statement of Miss Rebecca Collings, ETS have informed the Home Office that there was evidence of invalidity in those cases" (see paragraph 46 of the witness statement of Mr Peter Millington).

9. Accordingly, what Mrs Brockleby-Weller argued before me was that taking account of this evidence it was clear that in order to be categorised as "invalid" on the spreadsheet provided to the Home Office, the case has to have gone through a computer programme analysing speech and then two independent voice analysts. If all three are in agreement that a proxy has been used then the test will be categorised as "invalid." A print-out of the relevant section of the ETS spreadsheet was attached at Annex G of the Explanatory Statement. The spreadsheet identifies the Appellant by name and records that the test taken on 6th February 2013 was invalid.

10. For her part, Mrs Hulse argued that the background to this appeal is the fact that the Appellant had initially had no problems whatsoever in undertaking studies as a student when he arrived at Kensington College, because he had studied English in India already, and it was only upon completion of his course at Kensington College, that he then had aspirations of undertaking a masters course at Bedfordshire University, for which he enrolled on an English language course.

11. Mrs Hulse explained that the Appellant undertook an ECS English language course, which had been approved by the Home Office, and the attractiveness of this course was that it was an online course, and the dates that the Appellant had been given were of 6th February 2013 and 15th February 2013. The Appellant sat the test on those two days and within fifteen days he was issued with an English language certificate, which would have enabled him to undertake his masters course as he intended.

12. What is extraordinary about the allegation made by the Respondent Home Office is that an imposter was used only with respect to the test on 6th February 2013. Nothing is said about the second date on which the Appellant sat the test, namely, on 15th February 2013. It did not make sense to have this allegation raised, unless it could be said that the Appellant had used an imposter for both days.

13. In any event, the Appellant was never called in subsequently by the test providers to have the voice of the Appellant matched with the voice of the claimed imposter. Mrs Hulse then went through the background to the difficulties that had arisen with the ETS system, which had delegated responsibility for the undertaking of these tests for various centres, but which centres had then fallen short of proper standards, whereby some centres were shown to have used imposters, which the Home Office had found out to have been the case, resulting in considerable reputational damage to the ETS.

14. She drew my attention to what Mr Peter Millington describes at page 8 (paragraph 29) and at paragraph 32, and at paragraph 39, the latter involving a statement by Mr Millington that the tests are "as accurate as possible" and acknowledges that the system that was in place was "imperfect."

15. It is only because the system was "imperfect," that two language analysts were then used, only one of which was an expert in the field, and the second one of which simply tended to follow the findings and views of the first expert. These matters had been exposed following a Panorama programme, which highlighted the exercise of abuse by some centres, and the Home Office had been naturally most concerned to ensure that ETS was employing the system in the correct manner as intended.

16. It is for all these reasons, that the use of a "generic" test by the Respondent Home Office is bound to lead to some cases which have been wrongly identified as involving abuse. This is especially the case here, where the Appellant is only faulted for one of the days, namely, 6th February 2013, but not the second day on 15th February 2013, which would appear to make no sense whatsoever.

17. All in all, concluded Mrs Hulse, the judge at the hearing, Judge Sangha, had been correct to undertake the sort of analysis which he did, which was after all as a result of a first judge having adjourned the matter a month earlier because that judge was not satisfied that the system employed by the government through test providers was sufficiently clear and credit worthy. Judge Sangha was entitled to conclude as he did and this Tribunal should not intervene to upset those conclusions.

18. In reply, Mrs Brockleby-Weller simply stated that she would rely upon the fact that a system, described through the witness statements of Mr Peter Millington and Miss Rebecca Collings, was backed up by a computer programme analysing speech and two independent voice analysts.

19. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of **TCEA [2007]**) that I should set aside the decision and re-make the decision. It is well-known that the test for "perversity" is a "very high hurdle" see Brooke LJ in **R (Iran) [2005] EWCA Civ 982**.

20. This is a case where the Appellant was only apprehended after he had gone on holiday back to India, whereupon on his return on 16th September 2014 he was subjected to an initial examination and an interview because the Home Office records appeared to indicate that an English language certificate which was used by the Appellant in support of a previous application for leave to remain had been fraudulently obtained.

21. The Respondent relied upon evidence from the ETS which was validated by witness statements provided by the Home Office officials namely

Rebecca Collings and Peter Millington (see paragraph 20 of the determination).

22. The judge went on to state that the burden rests upon the Secretary of State, relying upon **AA (Nigeria) [2010] EWCA Civ 773**. The judge had regard to the Upper Tribunal's determination in **Gazi [2015] UKUT 00327**, where Mr Justice McCloskey stated (at paragraph 27) that,

> "In most of them the appeals have succeeded on the grounds that the Secretary of State had failed to discharge the burden of proving fraud on the part of the Appellant. The effect of these decisions, explicit in some and implicit in others, is that the ETS testing has yielded false positive results. In all of these cases, the evidence considered by the FTT has included the witness statements of Mr Millington and Miss Collings" (see paragraph 23 of the determination).

23. The judge then went on to say that the evidence before the judge had "some minor inconsistencies," but the burden of proof still remained on the Respondent to provide

> "Specific and individual evidence in relation to this Appellant to support the allegation that he used deception by relying on the ETS documents that he submitted with his application" (paragraph 24). The judge went on to say that, "the only evidence before me is the generic evidence of Ms Collings and Mr Millington and that, in my assessment, does not show the exact reason why the ETS invalidated the certificate of this Appellant in particular and there is no evidence before me relating to this Appellant specifically to prove that his test was undertaken by a proxy" (paragraph 24).

24. The judge finally ended by saying that the documents attached to the "generic statements of Rebecca Collings and Peter Millington simply record the words 'invalid' against the Appellant but there is no documentary evidence to prove that the test taken by this Appellant was taken by a proxy" (paragraph 26).

25. It seems to me that the judge was entitled to come to the conclusion that he did. Such a finding is not "perverse" and cannot be said to be irrational. This was the evidence before the judge and the judge gave the evidence the weight that he could in the precise circumstances of this case, which included the fact that the Appellant sat his test on two days, on 6th February 2013 and on 15th February 2013, but the allegation was only in respect of the test on 6th February 2013, and the Appellant was not thereafter called back to the centre to have his voice assessed against that of the alleged imposter.

26. In **Dasgupta [2016] UKUT 0028** the Tribunal made it clear that in error of law appeals, the Upper Tribunal should apply the principles in **Edwards v Bairstow [1956] AC 14**. This being the case, I find that the decision of Judge Sangha cannot be set aside and must stand.

Decision

27. There is no material error of law in the original judge's decision. The determination shall stand.

28. No anonymity order is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 21st April 2016