



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/38150/2014

THE IMMIGRATION ACTS

Heard at Field House
On 10th December 2015

Determination Promulgated
On 4th January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR MOHAMMOD ZIAUR RAHMAN CHOWDHURY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs (Counsel)

For the Respondent: Ms A Holmes (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Martins, promulgated on 6th May 2015, following a hearing at Hatton Cross on 11th February 2015. In the determination, the judge allowed the appeal of the Appellant, Mr Mohammad Ziaur Rahman Chowdhury, whereupon the Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Bangladesh, who was born on 1st March 1983. He appealed against the decision of the Immigration Officer on 14th January 2015, to cancel his leave to remain in the United Kingdom on account of the fact that he had made false representations for the purposes of obtaining leave. The Appellant had submitted a TOEIC certificate from the Educational Testing Services ("ETS"). The ETS has a record of the Appellant's speaking test and using voice verification software, ETS was able to detect when a single person is undertaking multiple tests.
3. ETS undertook a check of the Appellant's test and confirmed to the Secretary of State that there was significant evidence to conclude, that the Appellant's certificate was fraudulently obtained. The Appellant's scores from the test taken on 17th July 2012 at Elizabeth College had been cancelled by ETS.
4. On the basis of the information provided to it by the ETS, the Home Office was satisfied that there was substantial evidence to conclude, that the Appellant's certificate was fraudulently obtained.

The Appellant's Claim

5. The Appellant disagrees with this on the grounds that there was inadequate evidential basis for the Respondent's decision under paragraph 320(7B). Moreover, the Respondent had not served any adverse evidence upon the Appellant.

The Judge's Findings

6. The judge held that the Appellant was a genuine student, with a good standard of English, and had no reason whatsoever to undertake his English test by a proxy tester. He had no reason to risk not being able to pursue his ambition in studying at a masters level. He had no reason to risk his good name. In fact, during his interview with the Immigration Officer at the airport, his English was of a standard such that he could take the English test himself. He did not need the help of a proxy tester. (Paragraph 70).
7. Although there was evidence before the Tribunal in the form of witness statements from Rebecca Collings and Peter Millington (see paragraph 25) attesting to the system in place designed to elicit fraudulent applicants, the judge held that, "nowhere in them, is there specific reference to how the Appellant was identified as someone whose certificate was not legitimately obtained" (paragraph 67). It was said that the specific documents/recordings of the Appellant's tests and the results having been subjected to voice recognition technology, was conclusive evidence, but the judge held that, this "was not before the Tribunal" (paragraph 67). The judge allowed the appeal of the Appellant.

Grounds of Application

8. The grounds of application state that the judge failed to give adequate reasons for finding that the Home Office had not discharged the evidential burden arising from the evidence of impersonation at the test centres.
9. On 1st September 2015, the Upper Tribunal granted permission on the basis that, insofar as the judge had held (at paragraph 67) that there was no specific reference as to how the Appellant was identified as someone whose certificate was not legitimately obtained, the witness statement of Michael Sartorius plainly addressed this very point.

The Hearing

10. At the hearing before me on 10th December 2015, Ms Holmes, appearing on behalf of the Respondent Secretary of State, relied upon the extensive Grounds of Appeal. She submitted that the quality of the evidence presented before the judge was plainly good enough for the judge to have concluded in favour of the Respondent Secretary of State. This evidence consisted of the statement of Rebecca Collings (at paragraph 28) where she states 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”.

There was evidence from Mr Peter Millington (at paragraph 6) that,

“following comprehensive investigations ETS provided the Home Office with lists of candidates whose test results show ‘substantial evidence of invalidity’. The Home Office was provided with the background for the process used by ETS to reach that conclusion”.

11. Peter Millington had also stated (at paragraph 46) that, “where a match has been identified their approach is to invalidate the test result. 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. Furthermore, a spreadsheet had been provided to the Home Office together with two independent voice analysts’ data confirming that a proxy had been used in this case.
13. For his part, Mr Biggs submitted that there were two issues here. First, there was a finding at paragraph 67 by the judge that there was a “specific reference to how the Appellant was identified as someone whose certificate was not legitimately obtained”. This finding had to be read in the context of the determination as a whole.
14. Second, there were the general findings made by the judge himself in relation to the issues before her and these confirmed that the way in which the decision was arrived at was one that was open to the judge so that there could be no error of law at all.

15. Mr Biggs carefully took both these points in turn. In relation to paragraph 67, he referred to the fact that this was a seventeen page determination which went into great detail in the way in which the analysis was undertaken by the judge. On that basis alone, it could not be said that there were inadequate reasons given. It was true that the judge does not deal specifically with the evidence of Michael Sartorius.
16. However, the judge was plainly aware of his evidence because his name is mentioned at the outset of the determination as comprising part of the evidence to which the judge had regard, when reference is made to the documents before the court (see paragraph 30(m)), when the judge states that there is "a witness statement of Michael Sartorius, caseworker of the Home Office". Furthermore, insofar as reference is made to a spreadsheet, this is the spreadsheet from the Respondent Secretary of State's office. It is not the spreadsheet from the ETS. In any event, by the time that the statements from Rebecca Collings and Peter Millington were before the Tribunal six months had gone by and these statements were relatively old.
17. As far as the general tenor of the determination itself was concerned, the judge's factual analysis was impeccable and the judge found the Appellant to be credible. Another judge may have disagreed with what the Appellant maintained. This judge, having reviewed the evidence from the Appellant, was persuaded that he was a genuine student who had not engaged in fraudulent activity. In her "findings and conclusions", the judge begins at the outset by stating that, "I had the opportunity of hearing and observing the Appellant give evidence which he did in a straightforward and helpful manner. I had no reason to disbelieve what he told me and I find him credible" (paragraph 59). These findings that the judge made on credibility were highly significant given that there had been no challenge to the judge's findings of credibility in the appeal by the Secretary of State today.
18. In the same way the judge's findings at paragraph 61, that the Appellant had a good immigration history, had completed courses he had undertaken successfully, gaining a second class degree from the University of Sunderland, (see paragraph 61), were findings that were open to the judge. She made them on the evidence before her. Moreover, the judge expressly had regard to the "relevant sources of evidence including the ETS look up tool, Home Office records and the statements of the Appellant during interview, which all led to the conclusion that his English language test certificate had been obtained fraudulently" (paragraph 65), but the judge rejected this.
19. In a similar fashion, the judge rejected the evidence from the Home Office staff (at paragraph 66). The legal burden of proof was upon the Secretary of State. The evidential burden was upon the Appellant. The Appellant had discharged that and the judge was satisfied.
20. Finally, insofar as it is said that Michael Sartorius's evidence had not properly been considered, it adds nothing whatsoever of any significance to the case otherwise made by the Respondent Secretary of State, because all it is is a simple summary of the witness statements of other Home Office staff.

21. In reply, Ms Holmes submitted that no matter how admirable the judge's determination may be in its extensive analysis, the judge still had to show that all the relevant evidence had been properly taken into account. It was not known, for example, whether the spreadsheet prepared by the Home Office had been taken into account. There was no reference to it. It was not known whether Mr Sartorius's witness statement had been taken into account, because all that one had was simply a reference to the witness statement under the heading of "documents". Given the evidence before the judge as to how the results by ETS were obtained, it behoved the judge to provide a detailed explanation for why she had concluded as she had.

22. Finally, the judge allowed the appeal on Article 8 grounds because she held that

"There are exceptional circumstances, in my view, of the Appellant being caught up in an unfortunate situation, because the test centre he happened to take his English test at, had been involved in behaviour leading to invalidation of certificates" (paragraph 71).

The Appellant had acquired some private life in the UK, and the judge held that this private life would be interfered with, and that this interference would be disproportionate to the legitimate aim that was sought to be achieved.

No Error of Law

23. 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) such that I should set aside the decision and remake the decision. It is well-known that the test for perversity is a high one. In **R (Iran) [2005] EWCA Civ 982**, Brooke LJ held that, "it is well-known that 'perversity' represents a very high hurdle" (paragraph 11). His lordship went on to explain that, "far too often practitioners use the word 'irrational' or 'perverse' when these epithets are completely inappropriate" (at paragraph 12).

24. It is, of course, the case that there is a system in place from the Respondent Secretary of State which seeks to use the ETS to find people who have been involved in false representations and the use of proxy test takers. The Grounds of Appeal are ample in demonstrating the extent to which efforts have been made to ensure that people are properly identified.

25. At the same time, however, where deception and deceit are concerned, the onus is upon the person who alleges such conduct. It has to be proved to a sufficient standard.

26. In this case, it is not as if the judge has not had regard to the manner in which the system is said to operate. The judge gives particular attention to the witness statements of Rebecca Collings and Peter Millington. (See paragraph 25). He does refer to the witness statement of Michael Sartorius, whom he correctly identifies as a "caseworker of the Home Office". However, as Mr Biggs has submitted before him in his clear and comprehensive submissions before me, this witness statement in

itself does not add anything to what is not already before the judge in the form of witness statements from other Home Office staff.

27. As against the evidence from the Home Office, the judge then considers the evidence from the Home Office from the Appellant himself. She concludes that, "I had the opportunity of hearing and observing the Appellant give evidence" and that he had done so in a "helpful manner", such that she had "no reason to disbelieve what he told me" (paragraph 59). She notes that he has got a creditable educational background with an HND in business studies and an undergraduate degree from the University of Sunderland, together with a masters degree now. His English proficiency language score with the IELTS test certificate stands at 5. (See paragraph 61). He also had an "impeccable immigration history" (see paragraph 62).
28. After reviewing all this evidence, the judge then goes on to actually state that, "balanced against the above profile of this Appellant, is the fact that the TOEIC test certificate is submitted for an extension of his leave in order to pursue his degree course, was invalidated by ETS after he submitted his application and been granted leave" (see paragraph 63). The judge went on to consider the basis of this.
29. The nub of the judge's ruling is that, having considered all the evidence that is compiled against the Appellant, that "nowhere in them, is there specific reference to how the Appellant was identified as someone whose certificate was not legitimately obtained" (paragraph 67). That was a conclusion that the judge was entirely entitled to come to. Another judge, hearing the evidence, in the way in which it unfolds before the other judge on a particular time and day, may well have taken a completely different view.
30. The question in this appeal turned ultimately on the findings of fact by Judge Martins in the appeal that she heard. It did not turn on the arguments advanced before Judge Martins. This is to say nothing of the fact that Judge Martins did take these arguments fully into account, but in concluding as she did, she made findings on the relevant and material matters that needed determining. That was a conclusion that was open to the judge. There is no error of law.

Decision

31. There is no material error of law in the original judge's decision. The determination shall stand.
32. No anonymity order is made.

Signed

Dated

Deputy Upper Tribunal Judge Juss

18th December 2015