IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/28827/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23rd April 2015	**On 19th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR KENNETH KWAMA ASARE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Jorro (Counsel)
For the Respondent: Mr David Clarke (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge S. Aziz, promulgated on 7th January 2015, following a hearing at Hatton Cross on 23rd December 2014. In the determination, the judge allowed the appeal of Kenneth Kwama Asare. The Respondent 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 Ghana, who was born on 16th January 1980. He appeals against the decision of the Respondent Secretary of State dated 26th July 2014 cancelling his Tier 1 visa valid, upon arrival at Heathrow Airport, on 26th July 2014, on grounds that he had made false representations for the purpose of obtaining his leave.

The Appellant's Claim

3. The Appellant's claim is that he is a person with a good previous immigration history, having come to the UK on many occasions previously and returned back to Ghana. He had come to the UK as a visitor before gaining his first work permit in 2007. After an investment of £1,000,000 in 2010, he was issued with a Tier 1 (Investor) visa. He was granted a further Tier 1 visa in October 2013. He had submitted an English language test certificate as part of his application. He had explained that the English test was at Watford College and it was taken on 16th or 17th July 2013. It was taken on a computer in a room with 30 other people and he had his photo taken on that day. He rejects the Respondent's case against him that when questioned about the arrangements made for him to take the test he was unable to recall any information. His explanation that the fees had been arranged through an agent was not satisfactory because he could not name the agent, according to the Respondent, and he was also unable to explain why he had chosen the particular college to undertake the test, according to the Respondent. Thereafter, when the Respondent carried out investigations it was revealed that deception had been employed in order to gain the certificate. Consequently, the Appellant's valid leave was cancelled.

The Judge's Findings

4. The judge heard evidence from the Appellant in person that he did undertake the English language test. He also heard evidence that the Appellant maintained that, provided he could be returned his passport by the Home Office, he was quite prepared to retake the test again and to show that he was able to pass it. The passport was not returned to him (see paragraph 24). When the Appellant was cross-examined, he said that he took his English language test at Watford College and paid a fee and did so in cash. He received a receipt, a copy of which is contained at page 53C of the Appellant's bundle. At the hearing he produced the original receipt.

5. The judge considered the applicable law and drew attention to paragraph 321A of the Immigration Rules. This makes it clear that,

> "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 change in the circumstances of that person's case since the leave was given, that it should be cancelled; or

(2) false representations were made or false documents were submitted …"

6. The judge then referred to the law on deception, and drew attention to **Ahmed (Pakistan) [2011] UKUT 00351**, which made it clear that in order to have made false representations or submitted false documents so as to attract a mandatory refusal under Part 9 of the Immigration Rules, an applicant must have deliberately practised "deception", as defined at paragraph 6 of the Rules. The meaning of the deception is the making of false representations.

7. The judge then proceeded to make findings of fact. He noted that the Appellant's leave was cancelled at Heathrow Airport on 26th July 2014 and that, "he was someone who had an excellent immigration history dating back many years" (paragraph 35). Attention was also drawn to the fact that, "since the late 1990s he has been granted various immigration visas. There is no evidence to suggest that he has failed to comply with any of the conditions …" (paragraph 36). A reference was made to, "a large amount of documentary evidence at pages 59 to 226 of the Appellant's bundle" which corroborated the Appellant's assertion that, "over the past few years he has invested large sums into the British economy" (paragraph 37). However, there was evidence in the form of statements from the Respondent's side of two witnesses, namely, Miss Rebecca Collings and Mr Peter Millington, both of whom worked at the Home Office, who stated that various investigations had shown that systematic cheating had been taking place with respect to English language tests through Educational Testing Services ("ETS") "at several English language test centres" and that "ETS was one of the nineteen providers granted permission by the Home Office to offer approved English language testing …" (paragraph 40).

8. The Respondent's representative argued that the two Home Office statements confirmed that some of the candidates "who produced English language certificates issued by ETS as part of their PBS applications had not genuinely sat the test" (paragraph 41). In response, the Appellant's representative had argued that, "these were generic statements and did not establish that the Appellant was one of those individuals …" (paragraph 41).

9. However, the Respondent's representative then relied "upon the statement from Mr Michael Sartorius dated 22nd December 2014, as evidence that the Appellant had been singled out as one of the individuals who had not genuinely sat the test". The judge observed that Mr Michael Sartorius was another one of the employees at the Home Office and that, "he states that the Appellant is an individual whose English language test has been invalidated by ETS" and the reason for this is that, "because ETS were not satisfied that he had sat his English language test" (paragraph 42).

10. The judge's conclusion was that he would "place little weight on the statements from the Home Office officials which, at best, provides 'hearsay' evidence as to what ETS have informed them in respect of the Appellant's English language test" (paragraph 43).

11. Moreover, the judge went on to say that, "even if I were to accept that the document from ETS shows that the Appellant's English language test has been declared invalid, it does not explain 'why' the test was invalidated …" (paragraph 45). Therefore, it was concluded that the Respondent had not discharged the burden of proof that was upon the Respondent. Therefore, it was concluded that the Respondent's decision to cancel the Appellant's leave under the 1971 Act was incorrect (see paragraph 47).

12. The appeal was allowed.

Grounds of Application

13. The grounds of application state that the judge erred in law in allowing the Appellant's appeal on the basis that little weight was to be given to generic evidence produced by the Respondent as it was "hearsay" evidence.

14. On 24th February 2015, permission to appeal was granted.

15. There was a Rule 21 response by the Appellant (who is referred to as such on the basis that he was the Appellant in the appeal before Judge Aziz below).

Submissions

16. At the hearing before me on 23rd April 2015, the Appellant's representative, Mr Jorro of Counsel, also presented a skeleton argument for consideration. The Respondent Secretary of State's representative, Mr Clarke, identified the issues before this appeal. He submitted that a civil standard of proof should have been applied. The judge's error principally lay in his conclusions from paragraphs 43 to 45 where he stated that, "little weight on the statements from the Home Office officials" was to be placed (see paragraph 43). This was because they amounted to hearsay evidence. Furthermore, at paragraph 44 of the determination, the judge refers to the fact that, "we simply have a record sheet purporting to be issued by ETS", which was wrong because this was accompanied by witness statements from three Home Office officials (see paragraphs 40 to 41). And this appears to have been overlooked. Furthermore, the judge's suggestion that, "even if I were to accept the document from ETS" that this would not make a material difference was wrong on the basis of the judge's conclusion that, "it does not explain 'why' the test was invalidated" (paragraph 45).

17. Second, Mr Clarke submitted that there was an application to amend grounds that had to be made today on the basis of a "**Robinson** obvious" point. This was to do with the fact that, as the judge recognised, the "English language test has been invalidated by ETS" (paragraph 42) in consequence of which, the Appellant's leave had also been cancelled by the Home Office. The effect of this was that there had been "a change of circumstances of that person's case since the leave was given" (see paragraph 321A(i)).

18. For his part, Mr Jorro submitted that the burden of proof lay fundamentally upon the Respondent Secretary of State to show that the Appellant had been guilty of

deception by making a false representation. This was far from proven. It simply had not been proven that the Appellant had cheated in taking his test. If he could not recall the precise details of the test when he was questioned at Heathrow, this was because it was a year since he had taken the test. But even so, if one looks at the interview itself, it is plain that, rather than saying that he cannot recollect the details, he is remarkably accurate, consistent, and plausible with respect to what he says.

19. One only has to look at the interview from the beginning to see that this is the case. For example, when he is asked (Q.3) how many people were in the test, he replied, "a lot of people, more than a hundred people. But the room I did the test in, there was 30 people in the room". He went on to explain he did the test "on computer". When asked whether this was a question and answer test, involving typing, or a multiple choice test, he replied, "some of them. It gave a choice and you selected the answer and some of them you type answer". He told the interview he sat the test last July and he told the interview that it was on 16th or 17th July (see Qs.6 to 7). He went on to even describe that the test took two to three hours (Q.9). If he was unable to remember his score, and replied, "can I have a look and tell you?" this was hardly surprising (see Q.10). Read as a whole, Mr Jorro submitted, the interview actually shows that the Appellant was perfectly conversant with the test that he had taken a year earlier.

20. Second, just because evidence was being submitted through three employees of the Respondent Secretary of State, did not mean to say that this evidence had to be accepted as determinative of the issues before the Tribunal, which were whether the Appellant had been guilty of deception. The matter went to "adequacy of reasons", as explained helpfully in the Appellant's skeleton argument. Mr Jorro submitted that there was a difference between a case where the reasons are wrong and a case where the reasons are simply inadequate. If the reasons are wrong, then the Respondent Secretary of State needs to make an "irrationality" challenge. They had not done so. Therefore, the challenge to the judge's decision could only lie on the basis of "adequacy of reasons" and as such, this was bound to fail.

21. The established case law is clear. My attention was drawn to the judgment of Carnwath LJ in **HS (Afghanistan) [2009] EWCA Civ 771**, which referred to "the limited circumstances in which one should set aside the judgment for inadequate reasons" (paragraph 27). The court explains that,

> "A claim that the reasons are inadequate must be distinguished from a claim that the reasons are wrong. That is only permissible in this jurisdiction if it can be shown that the reasons are not merely wrong, in the sense that the conclusions are not ones with which the Appellant or indeed the court might agree, but that they are irrational. In this case, as I say, the challenge is to the adequacy of the reasons …" (paragraph 29).

22. Mr Jorro submitted that if one looked at the question of "inadequacy of reasons" one had to turn to the judgment of Ward LJ in the same case, because His Lordship makes it abundantly clear that the essential question is as follows:

> "In a nutshell I have to say to myself: do I understand why she decided how and why she did? I am in no doubt about it. She found the applicant credible because she had

> seen her and observed her and she gave her evidence in a straightforward manner, in other words, the classic advantage a trial judge has of seeing the witness's demeanour and deciding accordingly. That by itself is often enough to bolster a credibility finding. I saw her, I heard her, I believed her: *cadit quaestio.*" (Paragraph 41)

23. Third, there could be all sorts of reasons why the Appellant's test certificate was invalidated, and not all of them need have anything to do with the exercise of deception, but it was for the Respondent Secretary of State to prove the issue. The judge held that the Respondent could not so prove and that the Appellant was credible in what he said. That was a matter open to the judge.

24. Fourth, the consequences of taking an alternative view in this case were very far ranging and serious. The Cambridge College case, though very long, makes it abundantly plain, that the consequences of deception are that a party would be shut out from applying again for the next ten years, because he or she had made false representations. It is for this reason that the bar is set at a high standard and it is for the Secretary of State to satisfy that bar. If the Secretary of State is unable to do so, then though the test may be invalidated and the leave may consequently be cancelled, at least it is open to the Appellant to apply to retake the test, and having passed it, to then apply to have his leave reinstated.

25. For all these reasons, submitted Mr Jorro, the proper course here was not to make a finding that the Respondent Secretary of State had been able to show that the Appellant had exercised deception, because on the facts of this case the judge simply was not satisfied that the Respondent had been able to so do.

26. In reply, Mr Clarke submitted that there was an allegation from the Respondent Secretary of State that the Appellant had been unable to understand and recall the questions and the nature of the interview which he purported to have undertaken. The judge did not make any findings on this issue. A failure to so do was an error of law. Second, as far as the "adequacy of reasons" was concerned, the judge had given a very low weight to the three witness statements from officials in the Home Office and it must be questionable that this was right.

Error of Law

27. I am satisfied that the making of the decision by the judge involved the making of an error of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. Whereas the judge was entirely right in concluding as he did that the burden of proof on the Respondent Secretary of State had not been satisfied to the extent of being able to demonstrate that deception had been exercised in the form of the making of false representations or submitting false documents, because he had heard the evidence from the Appellant himself, who had been cross-examined, he was not correct and that he failed to deal with all the other issues that were before the Tribunal. Therefore, whereas it follows on from the judgments in **HS (Afghanistan) [2009] EWCA Civ 771**, that the judge cannot be faulted for showing the right level of "adequacy of reasons" because he does indeed do so from paragraphs 40 to 47, he fails to deal with the law at paragraph 321A(i) of the Rules.

This deals with "a change in the circumstances of that person's case since the leave was given". In the instant case, the judge failed to address this issue. This was a case where the Appellant no longer had a test certificate because it had been invalidated by ETS itself (see paragraph 42). The Appellant's leave had been curtailed. His possession of a valid test certificate was pivotal to his appeal. The Appellant's leave in the UK therefore stood to be cancelled by virtue of that reason alone. That does not, of course, mean to say that the Appellant was also guilty of exercising "deception" because that is a far too great a leap in the argument given what was said by the Tribunal in **Ahmed (Pakistan) [2011] UKUT 00351**, which the judge properly had regard to at paragraph 32 of the determination.

Remaking the Decision

28. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing the appeal of the Respondent Secretary of State for the following reason. The Appellant does not have a valid English language test certificate such that there has been a change in the circumstances of the Appellant in consequence of which the Secretary of State was entitled to cancel the Appellant's leave to enter or remain in the UK. It is, of course, on this basis, entirely open to the Appellant to apply to re-sit the English language test again and to subsequently thereafter apply for leave to enter. Whether or not he does so is a matter entirely for him.

Notice of Decision

29. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal by the Secretary of State is allowed to the extent that there has been a change in the circumstances of the Appellant since the leave was given and that paragraph 321A(i) has been met by the Respondent Secretary of State. For the avoidance of doubt, the Respondent Secretary of State has not been able to show that the Appellant made false representations or submitted false documents.

30. This appeal is allowed by the Respondent Secretary of State.

31. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 14th May 2015