Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37230/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
on 20 November 2015	**on 21 December 2015**

Before

MR C M G OCKELTON, VICE PRESIDENT
& UPPER TRIBUNAL JUDGE MACLEMAN

Between

AMANDEEP SINGH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
Appellant present; not represented
For the Respondent: Mr A Webster, Advocate, instructed by the Advocate General for Scotland

DETERMINATION AND REASONS

1. The appellant is a citizen of India, born on 2 August 1993. He came to the United Kingdom as a student. On 15 September 2014 the respondent cancelled his leave on the grounds that he had employed false representations. Information from the English Testing System (ETS) indicated that a false English language certificate had been used as part of his application for leave to remain.

2. The appellant appealed to the First-tier Tribunal on the following grounds:

- The decision is not in accordance with immigration law and rules;
- The appellant has not implied any false representation to the respondent;
- The decision is otherwise not incompatible (*sic*) with the ECHR;
- The appellant sat in the test himself and video evidence can confirm above contention;
- No false documentation was submitted with an application.

3. A panel of the First-tier Tribunal comprising Judge J C Grant-Hutchison and Judge A M S Green dismissed the appellant's appeal by determination promulgated on 7 January 2015.

4. The appellant appeals to the Upper Tribunal on the following grounds:

'**[1]** **Failure to Consider and Apply the Correct Standard of Proof or a Requirement for Cogent Proof/Inadequate Evidence**

3) The determination correctly identifies that the burden of proof is on the respondent to support the conclusion that the appellant has acted dishonestly. However, it does not or does not correctly determine the standard of proof that should be applied, or whether cogent proof is required in order to prove dishonesty.

4) The cases, and in particular RP (proof of forgery) Nigeria, Waniku v Secretary of State for the Home Department [2011] EWCA Civ 264 at paragraph [20] per Moore-Bick LJ together with the respondent's own policy (ch. 50 of the EIG, paragraph 50.12) support the view that the Tribunal would require the respondent to adduce cogent evidence of deception before a decision based on paragraph 321A of the Immigration Rules is taken.

5) It is clear that there was no such evidence adduced by the respondent in the instant case. The spreadsheet evidence that was adduced by the respondent that related directly to the appellant suffered from a discrepancy, in that it was not consistent with the ETS search document adduced by the respondent.

6) In any event, the respondent's evidence was inherently insulated from the Tribunal's forensic mechanisms because it was either third hand hearsay created by an unaccountable foreign company, ETS, or hearsay evidence of a generic type. This was not sufficient to prove the serious allegation made against the appellant by the respondent in this case, and the Tribunal paid insufficient regard to the hearsay nature of the evidence against the appellant.

[2] **Unfairness: Article 6 of the ECHR**

7) While the normal position is that Article 6 of the ECHR is not engaged in immigration cases because immigration law is

administrative in nature, it is respectfully submitted that the instant appeal involved a criminal allegation and therefore imports the protections imposed by Article 6 of the ECHR to such matters.

8) The leading case with respect to whether an allegation is criminal in nature is Engle v Netherlands (No 1) (1976) 1 EHRR 647, in particular at paragraph 82. The test is three-pronged, but each limb is not a necessary condition. The three questions asked in Engle to determine what a charge is criminal are:

   a) What is the categorisation in domestic law?

   b) Is the offence one of general application?

   c) What is the severity of the penalty imposed on, or the result of, the allegation being established?

9) In this case, the allegation against this appellant implies a crime (fraud), but no criminal proceedings have been brought. The notion of deception is generally applicable; and the consequences for the appellant of the allegation of deception being made out are severe in that he is required to immediately forfeit his studies in the UK and is subject to a bar on re-entry under part 9 of the Immigration Rules the future.

10) … in light of these features of the case Article 6 ECHR is engaged. If that is so this supports the appellant's contention that the standard of proof applicable is an enhanced standard. It also indicates that there has been a breach of Article 6(3)(d), namely to have the facility to examine the witnesses relied upon against him, because of the willingness of the Tribunal to accept the respondent's hearsay evidence against the appellant.'

5. The respondent replied to the grounds of appeal under Rule 24 as follows:

'…

3. Hearsay is admissible in the IAC, strict rules of evidence do not apply. Any document issued by a third party, such as a college, university or English test result can only be verified as genuine or false by the third party who issued it. Such verification would by definition be hearsay but will probably fall under one of the exceptions to the hearsay rule in civil proceedings given that the third party is the only party which can verify it.

4. The Tribunal had before it specific evidence of that verification as "invalid". At paragraph 27 the Tribunal said that it was satisfied with the provenance of the document (from ETS the English language test verifier) and that it identified the appellant.

5. The suggestion that an "enhanced standard of proof" is applicable in all civil proceedings where deception is alleged goes against well established authorities including B (Children), Re [2008] UKHL 35 (11 June 2008).

6. The tribunal at [27] accepted the specific evidence adduced by the SSHD coupled with the adverse credibility findings against the appellant arising out of cross-examination at [30], the SSHD had made out its case of deception and providing a false document. The appellant stated incorrectly when he took the English language test and was not believed as to why he allegedly took the test in London when he was living in Glasgow – 400 miles away.'

6. The decision granting permission to appeal to the Upper Tribunal was issued on 10 March 2015. Notice of the hearing before us was issued on 30 October 2015. A letter on file from the appellant's former representatives, dated and faxed on 16 November 2015, advises that they are no longer acting and that he will represent himself.

7. The appellant told us that he depends on money which his mother sends him from India, but she was unable to send him money recently due to family circumstances, and so he could not pay his lawyer. He said that if he were given a few days, he would be able to do so.

8. We decided that those circumstances did not justify an adjournment. The appellant has had ample time to prepare. Also, the legal argument was clear from the grounds.

9. Mr Singh insisted to us that notwithstanding the shortcomings in his evidence, he did sit the test to obtain his English language certificate.

10. On ground 1 and the question of the standard of proof, Mr Webster referred us to *Scottish Ministers v Stirton and Anderson* 2014 SC 218, [2013] CSIH 81. He reminded us that the First-tier Tribunal may admit evidence whether or not that evidence would be admissible in a civil trial: Tribunal Procedure (First-tier Tribunal) (Immigration etc) Rules 2014, rule 14(2). Such evidence includes hearsay. The Civil Evidence (Scotland) Act 1988 provides that in civil proceedings evidence shall not be excluded solely on the ground that it is hearsay, and provides also for admission of written statements. He submitted that the further matters raised under ground 1 go only to the weight to be given to items of evidence, which was very much a matter for the First-tier Tribunal. The tribunal had evidence of a systematic and thorough investigation by the Secretary of State. At paragraph 31 the panel reached its conclusions "on a balance of probabilities and taking into account the strength, cogency and quality of the evidence". The ground of appeal the well-justified adverse comments by the panel about the appellant's own evidence, which went a long way to support the conclusion that he did not sit the test.

11. On ground 2, Mr Webster submitted although the appellant says that the leading case is *Engle,* that overlooks *Maaouia v France* [2001] 33 EHRR 42, which decided that proceedings such as the present do not fall within Article 6.

12. Mr Singh did not wish to reply to Mr Webster's submissions.

13. We reserved our determination.

14. In *Scottish Ministers v Stirton and Anderson* the Court said:

Standard of proof.

[117] It was conceded, as it had to be, that the applicable standard of proof is the balance of probabilities (POCA, s 241(3); *Serious Organised Crime Agency* v *Gale* [2011] 1 WLR 2760). There is no intermediate or "heightened civil standard" (*Mullan* v *Anderson* 1993 SLT 835; *B* v *Scottish Ministers* 2010 SC 472). That much is clear. However, the reclaimers seek to qualify the position with reference to the quality of evidence required to meet the civil standard in the circumstances of this case. The quality of evidence necessary to meet the standard of proof, whether that is the civil or criminal standard, will depend on the circumstances of the case. Where the alleged facts are inherently improbable, it may be more difficult to prove that those facts are more probable than not. It does not follow, however, that proof of unlawful conduct will necessarily fall into the category of inherent improbability.

[118] Despite the somewhat opaque *obiter dictum* of Lord Morison on the inherent unlikelihood that "a normal person" will commit a serious crime (*Mullan* v *Anderson* (*supra*), at 842), proof of unlawful or criminal conduct in civil proceedings does not fall into any special category. There is no presumption that serious criminality is inherently improbable and there is no necessary connection between the seriousness of an allegation and its probability (*In re S-B (Children)* [2010] 1 AC 678 at 686, citing *In re B (Children) (Care Proceedings: Standard of Proof)* [2009] AC 11, Lord Hoffman at para 15, Lady Hale at para 73). Thus,

"It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely. If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so" (*ibid*).

In all cases, the probability of the alleged conduct will depend on the whole circumstances of the case. Where the principal question is whether property was obtained through unlawful conduct, rather than whether the reclaimers themselves have committed any particular unlawful act on any particular occasion (POCA, s 242(1)), there is even less force in the argument that a higher degree of cogency, quality or quantity of evidence is required according to the gravity of the allegations (*Olupitan* v *Director of the Assets Recovery Agency* [2008] Lloyd's Rep FC 253, Carnwath, LJ at paras 22 - 24).

[119] The court has no difficulty with the Lord Ordinary's application (para [102]) of the appropriate standard of proof. In particular, a requirement that "there *must* be stronger evidence when the allegation is a serious one" (*ibid,* emphasis added) does not form part of the law for the reasons given. Such a *ratio* cannot be derived from the *dicta* of the Full Bench in *Mullan* v *Anderson* (*supra*). That being so, it is sufficient to record that the judgment of the United Kingdom Supreme Court in *In re S-B (Children) (Care Proceedings: Standard of Proof)* (*supra*) reflects the existing position in Scotland and, insofar as it addresses the application of the civil standard of proof, ought to be followed.

15. The grounds in this case were prepared by an English barrister, but that is little excuse for ignoring *Scottish Ministers v Stirton and Anderson.* Certainly, the grounds should not have failed to observe *S-B*.

16. The standard of proof is the balance of probability.

17. The rest of ground 1 is only disagreement with the findings reached by the panel. The panel had before it evidence of an invalid test result linked to the appellant, as set out at paragraph 27 in particular. The panel would have been entitled to decide as it did on the respondent's evidence alone, had there been nothing else in the case; but the ground entirely ignores the further findings based on the appellant's evidence, which was counter-productive. He said in his grounds that he could produce video evidence, but it was never forthcoming. He was unable to describe the location of test centre, other than being in London. He said that he took the test in June or July 2013, when by the documentary record it was in February 2013. There was no rational explanation for taking the test in London, involving a lengthy journey, when he could easily have done so near his home in Glasgow, and he said he had to be careful with his financial outgoings.

18. *Maaouia v France* holds as follows:

> "33. The Court notes, firstly, that the Government have not denied the existence of a dispute (*contestation*) within the meaning of Article 6 § 1. However, they maintained that the dispute in question did not concern the determination of the applicant's civil rights or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention.
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> 34. The Court points out that, under its case-law, the concepts of "civil rights and obligations" and "criminal charge" cannot be interpreted solely by reference to the domestic law of the respondent State. On several occasions, the Court has affirmed the principle that these concepts are "autonomous", within the meaning of Article 6 § 1 of the Convention (see, among other authorities, the König v. Germany judgment of 28 June 1978, Series A no. 27, pp. 29-30, §§ 88-89; the Baraona v. Portugal judgment of 8 July 1987, Series A no. 122, pp. 17-18, § 42; and the Malige v. France judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, p. 2935, § 34). The Court confirms those principles in the instant case, as it considers that any other solution might lead to results that are incompatible with the object and purpose of the Convention (see, *mutatis mutandis*, the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, p. 34, § 81, and the König judgment cited above, pp. 29-30, § 88).
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> 35. The Court has not previously examined the issue of the applicability of Article 6 § 1 to procedures for the expulsion of aliens. The Commission has been called upon to do so, however, and has consistently expressed the opinion that the decision whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of Article 6 § 1 of the Convention (see, for example, Uppal and Singh v. the United Kingdom, application no. 8244/78, Commission decision of 2 May 1979, Decisions and Reports (DR) 17, p. 149; Bozano v. France, application no. 9990/82, Commission decision of 15 May 1984, DR 39, p. 119; Urrutikoetxea v. France, application no. 31113/96, Commission decision of 5 December 1996, DR 87-B, p. 151; and Kareem v. Sweden, application no. 32025/96, Commission decision of 25 October 1996, DR 87-A, p. 173).
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> 36. The Court points out that the provisions of the Convention must be construed in the light of the entire Convention system, including the Protocols. In that connection,

the Court notes that Article 1 of Protocol No. 7, an instrument that was adopted on 22 November 1984 and which France has ratified, contains procedural guarantees applicable to the expulsion of aliens. In addition, the Court observes that the preamble to that instrument refers to the need to take "further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention ...". Taken together, those provisions show that the States were aware that Article 6 § 1 did not apply to procedures for the expulsion of aliens and wished to take special measures in that sphere. That construction is supported by the explanatory report on Protocol No. 7 in the section dealing with Article 1, the relevant passages of which read as follows:

> "6. In line with the general remark made in the introduction ..., it is stressed that an alien lawfully in the territory of a member state of the Council of Europe already benefits from certain guarantees when a measure of expulsion is taken against him, notably those which are afforded by Articles 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private and family life), in connection with Article 13 (right to an effective remedy before a national authority) of the ... Convention ..., as interpreted by the European Commission and Court of Human Rights ...
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> 7. Account being taken of the rights which are thus recognised in favour of aliens, the present article has been added to the ... Convention ... in order to afford minimum guarantees to such persons in the event of expulsion from the territory of a Contracting Party. The addition of this article enables protection to be granted in those cases which are not covered by other international instruments and allows such protection to be brought within the purview of the system of control provided for in the ... Convention ...
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> ...
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> 16. The European Commission of Human Rights has held in the case of Application No. 7729/76 that a decision to deport a person does 'not involve a determination of his civil rights and obligations or of any criminal charge against him' within the meaning of Article 6 of the Convention. The present article does not affect this interpretation of Article 6."

37. The Court therefore considers that by adopting Article 1 of Protocol No. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens the States clearly intimated their intention not to include such proceedings within the scope of Article 6 § 1 of the Convention.

38. In the light of the foregoing, the Court considers that the proceedings for the rescission of the exclusion order, which form the subject matter of the present case, do not concern the determination of a "civil right" for the purposes of Article 6 § 1. The fact that the exclusion order incidentally had major repercussions on the applicant's private and family life or on his prospects of employment cannot suffice to bring those proceedings within the scope of civil rights protected by Article 6 § 1 of the Convention (see, *mutatis mutandis*, the Neigel v. France judgment of 17 March 1997, *Reports* 1997-II, pp. 410-11, §§ 43-44, and the Maillard v. France judgment of 9 June 1998, *Reports* 1998-III, pp. 1303-04, §§ 39-41).

39. The Court further considers that orders excluding aliens from French territory do not concern the determination of a criminal charge either. In that connection, it notes that their characterisation within the domestic legal order is open to different interpretations. In any event, the domestic legal order's characterisation of a penalty

> cannot, by itself, be decisive for determining whether or not the penalty is criminal in nature. Other factors, notably the nature of the penalty concerned, have to be taken into account (see Tyler v. the United Kingdom, application no. 21283/93, Commission decision of 5 April 1994, DR 77, pp. 81-86). On that subject, the Court notes that, in general, exclusion orders are not classified as criminal within the member States of the Council of Europe. Such orders, which in most States may also be made by the administrative authorities, constitute a special preventive measure for the purposes of immigration control and do not concern the determination of a criminal charge against the applicant for the purposes of Article 6 § 1. The fact that they are imposed in the context of criminal proceedings cannot alter their essentially preventive nature. It follows that proceedings for rescission of such measures cannot be regarded as being in the criminal sphere either (see, *mutatis mutandis*, Renna v. France, application no. 32809/96, Commission's decision of 26 February 1997, unreported).
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> 40. The Court concludes that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention.
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> 41. Consequently, Article 6 § 1 is not applicable in the instant case."

19. In that light, ground 2 is also unsound.

20. If the criteria in *Engle* were to be applied, this case would still not be classified as a criminal allegation. Domestic law categorises the case within immigration law, not criminal law. The "penalty" is cancellation of leave to remain, not a criminal sanction.

21. If Article 6 of the ECHR were engaged, the case discloses no breach. The ground gives us no reason to think that the right of appeal to the First-tier Tribunal is inconsistent with the right to "a fair and public hearing within a reasonable time by an independent and impartial Tribunal established by law."

22. The appellant was not deprived of the facility to examine the respondent's witnesses. He did not apply for citations for them to attend the First-tier Tribunal, as he might have done under rule 15 of the Tribunal Procedure (First-tier Tribunal) (Immigration etc) Rules 2014.

23. Neither of the appellant's grounds establishes any error of law by the First-tier Tribunal. Its determination shall stand.

24. No anonymity order has been requested or made.

Upper Tribunal Judge Macleman

20 November 2015