IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/44518/2014

THE IMMIGRATION ACTS

Heard at Field House
On 5th October, 2015
Given extempore

Decision & Reasons Promulgated
On 6th November 2015

Before

Upper Tribunal Judge Chalkley

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NANDINEE TOOLSY
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Jarvis, a Senior Home Office Presenting Officer
For the Respondent: Ms. S Townshend of Counsel instructed by Harris Kumar Caleechum

DECISION AND REASONS

1. The appellant in this appeal is the Secretary of State and the respondent is Mrs Nandinee Toolsy. To avoid confusion I am going to refer to the Secretary of State "the claimant". The respondent is a citizen of Mauritius born on 28th October, 1971 and she appealed against the decision of the claimant, taken on 14th November, 2014, cancelling her leave and entry clearance to the United Kingdom as a spouse or partner under paragraph 321A(1) and 321A(2) of the Immigration Rules.

2. At Heathrow, on her return from holiday with her husband after a long and tiring flight, the respondent was interviewed by an Immigration Officer, as a result of which he purported to cancel her leave. The notice is dated 14th November 2014 and says:

> "You were given notice of leave to remain in the United Kingdom as a spouse partner on 28th February 2013 but I am satisfied that false representations were employed for the purpose of obtaining the leave and that there has been a change of circumstances in your case since the leave was granted that it should be cancelled. I therefore cancel your continuing leave. If your leave was conferred by entry clearance this will also have the effect of cancelling your entry clearance.
>
> The Home Office have now identified that you made false representations in that application for the purpose of obtaining leave to remain.
>
> In your application you submitted a TOEIC certificate from Educational Testing Service ETS.
>
> ETS has a record of your speaking test. Using voice verification software ETS is able to detect where a single person is undertaking multiple tests. ETS undertook a check of your test and confirmed to the Secretary of State for the Home Department that there was significant evidence to conclude that your certificate was fraudulently obtained.
>
> Your scores from the test taken on 29th September, 2012 at London College of Media and Technology have now been cancelled by ETS.
>
> On the basis of the information provided to it by ETS the Home Office is satisfied that there is substantial evidence to conclude that your certificate was fraudulently obtained. In the light of this information I am accordingly satisfied that you have utilised deception to gain leave to remain in the UK.
>
> Had the Home Office been aware of these facts when considering your application on 28th February, 2013 you would not have been granted leave as a spouse partner as you would have failed to meet the full requirements for entry and in addition you would have fallen to be refused under the general grounds for refusal, specifically paragraph 320(7A) of the Immigration Rules HC 395 as amended.
>
> I am satisfied that you have used false documents in order to obtain your leave to remain and I therefore cancel that leave under paragraph 321A(2) of the Immigration Rules HC 395 as amended. In addition the employment of deception amounts to a significant change in your circumstances and I also cancel your leave to remain under paragraph 321A(1) 9f the Immigration Rules HC 395 as amended.
>
> For the above reasons I am also satisfied that you used deception in this application. This means that any future applications for entry clearance or leave to enter the UK you make will be refused under

> paragraph 320(7B) Immigration Rules (unless it will be a breach of your rights under the Human Rights Act 1998 or the Refugee Convention) for a period of one year starting on the date on which you are removed from the UK following this refusal."

3. It can be seen, therefore, that the consequences of the actions of the Immigration Officer on 14th November, 2014, have very serous consequences for this respondent.

4. The respondent appealed that decision and her appeal was heard by First-tier Tribunal Judge Trevaskis at Newport on 1st April, 2015. He heard oral evidence from the respondent and from her partner. He noted the provisions of paragraph 321A(1) and 321A(2) of the Immigration Rules and at paragraph 25 of the determination said this:

> "I have had the benefit of hearing the [respondent] and her partner give evidence; I take account of the fact that the [respondent] speaks and understands English very well and that she has lived in the United Kingdom for over ten years, has studied to a high level in English and has worked in an occupation where communication in English is important. I also note that she has passed the life the UK test, and the associated English language test, which is to a higher standard than the test which is the subject matter of this appeal."

5. At paragraph 26 of the determination he then said

> "There has been no direct evidence presented to me which satisfies me that the English language test taken by the [respondent] on 19 September 2012 was taken by anyone other than the [respondent] herself. The decision to invalidate her test appears to have been taken for no reason related to the test itself, but rather related to the centre at which the test was taken, and the statistical incidence of tests at that centre which were demonstrably fraudulent. It is clear from the statements relied upon by the [claimant] that the action taken against ETS was against the background of public disclosure in the media, which was acutely embarrassing to the [claimant]; the BBC information was first made known to the [claimant] in early January 2014, and the analysis of over 10,000 test results was provided to the [claimant] by 24 March 2014, at a time when ETS was bidding to be reselected as a test provider for the [claimant]; this scenario leads me to suspect that not every test result was individually scrutinised, and many were reclassified for reasons not based upon the circumstances of the test itself; I find that the test taken by this [respondent] was one of those which was invalidated by association, and not by reason of any specific impropriety in the test itself."

6. He went on to say that he was not satisfied that there are reasonable grounds for believing that the respondent obtained her leave by means of fraud, nor that there had been such a change in her circumstances that her leave should be cancelled. He, therefore, allowed her appeal under the Immigration Rules.

7. The claimant, dissatisfied with that decision, obtained permission to appeal to the Upper Tribunal and in doing so relied on these grounds:

"1. The First-tier Tribunal has failed entirely to provide adequate reasons for finding that:

> "There has been no direct evidence presented to me which satisfies me that the English language test taken by the appellant on 19th September 2012 was taken by anyone other than the [respondent] herself."

2. The Immigration Officer provided at appeal a 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 Pollock Collings and an email document from ETS Task Force dated 10th September 2014. The witness statements from Mr Peter Millington and Miss Rebecca Pollock Collings clearly provide that tests are categorised as "invalid" where ETS are certain that there is evidence of proxy taking or impersonation-

> "ETS described that any test categories as cancelled (which later became known as invalid) had the same voice for multiple test takes. On questioning they advised that they were certain that there was evidence of proxy taking or impersonation in those cases." [At paragraph 28 the witness statement from Miss Rebecca Collings]
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> "Following comprehensive investigations ETS provided the Home Office with lists of candidates which test results showed 'substantial evidence of invalidity'. The Home Office was provided with the background to the process used by ETS to reach that conclusion." [At paragraph 6 the witness statement of Mr Peter Millington] and "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." [At paragraph 46 the witness statement of Mr Peter Millington].

3. Taking account of this evidence it is 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 would be characterised as 'invalid'. The spreadsheet identifies the [respondent] by name and records that the test was taken on 29th September, 2012 was invalid.

4. In the light of the evidence it is clear that the First-tier Tribunal has erred in its finding that it was "not satisfied" that there are reasonable grounds for believing that the [respondent] obtained her leave to remain by means of fraud or that there has been such a change in her circumstances that leave should be cancelled.

5. Had the First-tier Tribunal properly taken the evidence into account the First-tier Tribunal would have found that this is exactly what the documents assert and evidence;

6. It is clear from the evidence that where ETS invalidates the test results as in the instant case, this is because there is evidence of proxy taking or impersonation. The First-tier Tribunal has failed entirely to provide adequate reasons for its finding to the contrary.

7. In considering the appeal and allowing it sunder the Immigration Rules the respondent notes that the Judge of the First-tier Tribunal has materially erred in law such that the decision should be set aside."

8. I am very grateful to Mr Jarvis and Miss Townsend for their submissions to me.

9. Criticising paragraph 26 of the determination, Mr Jarvis suggested that the judge attempted to deal with the evidence of fraud, but has, at paragraph 2,6 demonstrated a misunderstanding of the evidence before him. ETS used software and this software identifies the voices of candidates. Where it was suspected that fraud has taken place, analysts then examined the tapes as well. Appendix E of the documents before the judge shows that the respondent's certificate had been fraudulently obtained by her.

10. Referring to paragraph 24 of the Peter Millington statement, Mr Jarvis said that the Secretary of State cannot show that this respondent's test result was wrong. It can only show the approach taken by ETS and the Secretary of State. The Home Office are able to distinguish between the invalidity of results which came as a consequence of them having been taken the test at a centre where numerous other results have been invalidated and those where the invalid result comes from a finding by ETS that there has been substantial evidence of invalidity.

11. This respondent was treated as someone who has used deception.

12. ETS itself was satisfied that deception was used. The Secretary of State is not in a position to produce evidence to Immigration Judge and is not in a position to produce evidence to the Tribunal today, but is satisfied that such evidence exists.

13. I find this very unsatisfactory. I am left feeling very uneasy about the judge's determination. The judge, I believe, demonstrates at paragraph 26 of the determination that he has misunderstood the evidence before him. He has clearly been influenced by his view of the respondent's ability to speak and understand English. He is also wrong when he says that "*this scenario leads me to suspect that not every test result was individually scrutinised and many were reclassified for reasons not based upon the circumstances of the test itself*." That clearly demonstrates a misunderstanding of the evidence before him. It may well be that having

examined the evidence carefully another First Tier Tribunal Judge may very well come to the same conclusion, but for First Tier Tribunal Judge Trevaskis to say that, *"no direct evidence has been presented to* [him] *which satisfies* [him] *that the English Language test taken by the* [respondent] *on 19th September 2012 was taken by anyone other than by the* [respondent] *herself*" does display a misunderstanding of the evidence.

14. It has not been pleaded by the Secretary of State that she was in fact entitled to make the decision she did under 321A(i). The change of circumstances being the cancellation by ETS of the English language certificate. As I say, that is not something that had been pleaded and cannot, therefore be relied upon by the respondent.

15. Counsel has very properly and helpfully drawn my attention to the decision of the President in judicial review proceedings in *Gazi IJR* [2015] UKUT 00327 and also to comments made by Lord Justice Beatson in the appeal of *Amit Sood* [2015] EWCA Civ 831. Mr Jarvis was not able to explain why the appellant was not invited to undertake a retest and the reasons are not readily apparent.

16. I have concluded that this determination should be set aside and that the appeal should be reheard afresh by another First-tier Tribunal Judge at Newport. No interpreter is required. 3 hours should be allowed for the hearing

Notice of Decision

The determination is set aside. The appeal is remitted to the First Tier Tribunal for hearing afresh before a judge other than First Tier Tribunal Judge Trevakis.

Richard Chalkley

Upper Tribunal Judge Chalkley