IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37186/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 26 November 2015 **On 9 December 2015**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant
and

REDWANUL KARIM
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:
For the Appellant: Ms S Sreeraman, Home Office Presenting Officer
For the Respondent: Mr I Hossain, Solicitor of Liberty Legal Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Lenier who, sitting at Taylor House on 11 March 2015 and in a determination subsequently promulgated on 30 March 2015, allowed the appeal of the Respondent (hereinafter called the claimant), a citizen of Bangladesh, born on 26 January 1990, against the decision of the Secretary of State dated 18 September 2014 to curtail his leave to remain, to refuse him leave to enter and to remove him from the United Kingdom under Section 47 of the Immigration, Nationality and Asylum Act 2006.

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2. The Respondent successfully sought permission to appeal that decision, the grounds of which in summary contended that the First-tier Tribunal Judge had stated at paragraph 50 of his determination:

> "Overall I was satisfied the evidence before me was unsatisfactory in many respects. I did not find the Respondent had established on the balance of probabilities that the Appellant had done anything wrong at all".

3. It was submitted that given the bundle of documents placed before the Judge by the Secretary of State in support of the allegation that information from ETS indicated that the claimant had obtained a false English language certificate from Synergy Business College of London on 28 March 2012, and given that the spreadsheet identified the claimant by name and recorded that the tests taken on 28 March 2012 were invalid, that it followed that it was clear, that the Judge had erred in his finding, above referred.

4. It was further submitted that had the Judge properly taken the evidence into account he would have found that documentary evidence supported the Respondent's assertions.

5. Thus the appeal came before me on 26 November 2015 when my first task was to determine whether the determination of the First-tier Tribunal Judge disclosed an error or errors on a point of law such as may have materially affected the outcome of the appeal.

6. Ms Sreeraman relied on the grounds maintaining that had the Judge paid proper and more careful attention to the witness statements of Rebecca Collings, Peter Millington and Gareth Jones as well as the other documentation before him within the Secretary of State's bundle, the outcome would have been materially different. She maintained that the weight of evidence was sufficient to demonstrate that the Secretary of State had discharged the burden of proof upon her to the requisite balance of probabilities.

7. Notably she accepted that although the claimant gave oral evidence he was not cross-examined.

8. Mr Hossain produced a skeleton argument upon which he relied in which he submitted that contrary to the assertions of the Secretary of State, the First-tier Tribunal Judge's determination revealed that it was "teemed with adequate reasoning for the finding that the Secretary of State's decision was not in accordance with the law".

9. In addition, the Judge had identified what he described as a major inaccuracy in the spreadsheet. That clear mistake in the base evidence lodged, alone was sufficient to discredit the evidence as submitted as a whole, whereas the statement provided by the claimant was consistent with the dates of the test.

10. Mr Hossain referred me to the decision of the President in R (on the application of Gazi) JR/12120/2014. Whilst he accepted that this was a judicial review case that in common with other recent case law found that judicial review was not the appropriate forum in which to decide ETS cases, it was nonetheless relevant. At paragraph 40 the President had inter alia this to say:

> "The present case illustrates every case belonging in this field will be unavoidably fact-sensitive. Each litigant will put forward his or her individual disputed assertions, agreed facts, considerations and circumstances. These will be evaluated by a fact-finding Tribunal, to be contrasted with a court or Tribunal of supervisory jurisdiction. This analysis is, in my view, amply confirmed by the growing number of FtJ decisions in this sphere. Within these, one finds emphasis on self-evidently important issues such as the Appellant's evident English language ability, demeanour and previous life events. Furthermore, it is trite that the assessment of each Appellant's demeanour and credibility will be carried out on a case by case basis".

11. Mr Hossain further referred to the Secretary of State's Enforcement Instructions and Guidance – Chapter 50 where under the subheading "50.12 Section 10(1)(b) – Leave to Remain by Deception" the instruction is as follows:

> "The evidence of deception should be clear and unambiguous in order to initiate action under Section 10. Where possible, original documentary evidence admissions under caution or statements from two or more witnesses should be obtained, which substantiate that if an offence has been committed before, authority is given to initiate action under Section 10 of the 1999 Act. The deception must be **material** – in other words, had the officer known the truth leave would not have been given. The evidence must always prove **to a high degree of probability** that deception had been used to gain the leave, whether or not an admission of deception is made. The onus – as always in such situations – is on the officer making the assertion to prove his case". (Emphasis added).

12. Mr Hossain continued that the ETS test was not infallible. Such was demonstrated for example in Gazi which further emphasised that each case was decided on its own facts.

13. Fortunately the claimant in this case had an in-country right of appeal and an opportunity to give oral evidence before the Judge.

14. The Secretary of State's grounds of challenge went straight to paragraph 50 of the First-tier Tribunal Judge's decision. However the evidence and the statements and the spreadsheet comprehensively considered by the Judge over paragraphs 24 to 44 of the determination showed that he had carefully analysed each and every part of the evidence before him at the date of the hearing. The Judge had clearly explained why he concluded that the Secretary of State had failed to produce any direct and reliable evidence against the claimant in these particular circumstances. It was

further to be noted that the claimant's interview was in English and without the aid of an interpreter as noted by the Judge at paragraph 32 of his determination in which he had stated as follows:

> "32. The initial interview record showed the Appellant confirmed he had taken the tests. It was recorded by the interviewer that he was able to answer questions in basic English, in a fluent manner and there were no points where he appeared to lack credibility. At the second interview on 18 September 2014, the Appellant confirmed the dates when he took his tests as 26 March 2012 and 28 March 2012. He said he did not know the test was not genuine. He confirmed that he submitted the tests as part of his application for entry clearance".

15. Ms Sreeraman in response submitted that little weight should have been given by the Judge to the fluency of the claimant's English at his interviews, given that this was several years after he had entered the United Kingdom.

16. She repeated that if the Judge had adequately or carefully considered what was said in the witness statement produced, the outcome would have been materially different. He failed to appreciate that the evidence in those witness statements was sourced directly from ETS.

17. Having heard the parties' submissions I reserved my decision.

Assessment

18. Following a well-known report on the BBC television programme "Panorama" it has become notorious that the Secretary of State is satisfied that an extremely large number of English language tests were taken by impersonators rather than the person claiming to be doing the test.

19. Be that as it may, I am not aware of anyone having been prosecuted for any involvement in the alleged wholesale criminal conspiracy.

20. In a detailed and well reasoned determination, indeed rightly described by Mr Hossain as "well explained and well drafted" the First-tier Tribunal Judge looked very carefully at extensive generic evidence that led to a finding by the Secretary of State this claimant had been involved in such fraud.

21. Whilst acknowledging that evidence, the First-tier Tribunal Judge found no evidence proving conclusively that this claimant had done anything wrong. He recognised, as do ETS, that false positives were a possibility (see paragraph 46) and that the Secretary of State had done nothing to show that false positives were not the explanation in this case.

22. It follows that the First-tier Tribunal Judge was faced with no more than a weak prima facie case.

23. In deciding if this claimant had done anything wrong, the First-tier Tribunal Judge was entitled to be impressed by the claimant's command of the English language, the claimant having in common with his two interviews given his evidence before the Judge in fluent English and without the aid of an interpreter. I do however appreciate Ms Sreeraman's submission that this must be seen in the context of the fact that the claimant had by then, already lived in the United Kingdom for several years. Of course a person who speaks excellent English might have cheated, but the Judge was entitled to regard that as inherently unlikely.

24. The claimant gave evidence. He was in a better position than anyone to know if he had cheated and he said clearly that he did not. He was entitled to be believed unless his evidence was unsettled in some way. But far from challenging the evidence, the Secretary of State's representative at the hearing asked no questions. The claimant was not cross-examined at all.

25. It follows therefore that the First-tier Tribunal Judge was entitled to accept the oral evidence and indeed he may well have been criticised if he had done anything else.

26. This is a decision that takes seriously the prima facie evidence raised by the Secretary of State and has evaluated it with the unchallenged oral evidence of the claimant. It is not an error of law to believe a witness.

27. The grounds in any event fail to place the Judge's findings in the context of his overall reasoning on the totality of the evidence.

28. Whilst paragraph 50 is more particularly addressed in the grounds of challenge, it would be as well, bearing in mind what the Judge had noted at paragraph 32 of the determination (above), to set out in full what he had to say at paragraphs 48 and 49 of his determination in which he had this to say:

> "48. It was clear the spreadsheet contained a major inaccuracy. The Appellant's original score reports showed the tests were on 26 March 2012 and 28 March 2012. The spreadsheet produced by ETS showed the Appellant's tests on 28 March 2012 and 17 April 2012. The Appellant gave oral evidence which I accepted, that the correct dates were 26 and 28 March, as shown on his certificates. This was consistent with what he had said when interviewed.
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> 49. The certificate number given on the spreadsheet for the test allegedly taken on 17 April was different from that recorded for 26 March. It appeared clear the test that took place on 17 April, marked as invalid, did not relate to the Appellant. Ms Bassi submitted only the test of 28 March would be relied upon as evidence of invalidity. However the Home Office cancellation of leave to remain report at paragraph 17 stated the tests relied upon as invalid were on 28 March 2012 and 17 April 2012. Mr Hossain submitted, in my view correctly, that the Respondent could not pick and choose. The spreadsheet clearly showed the Appellant's correct name, date of birth and the college where he took the test, alongside the incorrect certificate number and

> date. Given how little evidence was supplied, the fact there were such significant mistakes within it did not support it being generally reliable. I also bore in mind that there was no independent verification of this spreadsheet. There was insufficient evidence to establish how voice comparisons were made. However, there appears to be a possibility that there were comparisons between tests, as otherwise it would be unclear how other samples of the Appellant's voice would be obtained. If a test on 28 March taken by the Appellant was compared by one taken not by the Appellant on 17 April, it was unsurprising they did not match. It is accepted this supposition is speculative, as there was simply insufficient information. However the comparison was done, if any use was made of the test recorded on 17 April wrongly ascribed to the Appellant, any invalid result would not relate to the Appellant. In my view, key information relied upon from the spreadsheet was unreliable".

29. This was a finding made on its own facts and dependent to a large extent on the clearly favourable impression the claimant gave, in oral evidence and on the documentary evidence tendered before the Judge.

30. My decision should not be seen as a general criticism of the Secretary of State's evidence in ETS cases, it is simply a recognition that in the present case, the First-tier Tribunal Judge gave cogent and lawful reasons for reaching his decision that was supported by and open to him on the evidence and thus sustainable in law.

31. I find upon a reading of the Judge's determination as a whole, that it is entirely clear why the appeal was allowed. The reasoning of the First-tier Tribunal Judge cannot be said to be irrational nor his conclusions perverse. The Judge was required to explain why he reached his conclusions but was not required to assemble and set out in the determination everything that was capable of supporting a contrary view.

32. As was said by Davies LJ at paragraph 21 of ZS (Jamaica) [2012] EWCA Civ 1639: "a court should not be astute to categorise as an error of law what is no more than a disagreement with an assessment of the facts".

33. Mindful of the guidance of the Court of Appeal in R (Iran) [2005] EWCA Civ 982, I find that this is not a case where the First-tier Tribunal Judge's reasoning was such that the Tribunal was unable to understand the thought process that he employed in reaching his decision.

34. I find that the Judge properly identified and recorded the matters that he considered to be critical to his decision on the material issues raised before him in this appeal.

Notice of Decision

35. The making of the previous decision involved the making of no error on a point of law and I order that it shall stand.

36. No anonymity direction is made.

Signed Date 7 December 2015

Upper Tribunal Judge Goldstein