IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37917/2013

THE IMMIGRATION ACTS

Heard at Field House
On 5 January 2015
Oral judgment

Decision & Reasons Promulgated
On 18 March 2015

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MR MIZANUR RAHMAN
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:
For the Appellant: Mr Whitwell, Home Office Presenting Officer
For the Respondent: Ms Glass, SEB Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge Mayall, promulgated on 3 October 2014 following a hearing at Hatton Cross on 19 September 2014, in which the Judge allowed the appellant's appeal against the refusal of the Secretary of State to vary his leave to remain so as to permit him to remain in the United Kingdom as a Tier 4 (General) Student Migrant. The applicant entered the United Kingdom lawfully following a grant of leave as a Tier 4 Student on 10 February 2010 valid until 31 January 2013. On that day, 31 January

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2013, he made an application for further leave to remain which was that refused in the decision dated 27 August 2013. The application was refused under the provisions of the Immigration Rules and a direction for the appellant's removal from the United Kingdom made pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The reasons for the refusal are set out in clear terms as follows:

> "In your application you submitted an education certificate issued by AABPS. I am satisfied that the documents were false because AABPS have confirmed that you have not been registered with them or obtained an award accredited by them. As false documents have been submitted in relation to your application it is refused under 322(1A) of the Immigration Rules."

3. The evidence that was relied upon by the decision maker is in the form of an exchange of emails between the decision maker and the verification officer at AABPS. On 22 April 2013 an email was sent to the email address verifications@aabps.co.uk attaching the award and asking for the verification staff to confirm the award shown on the attached scan. The reply from the verification team sent by an administrative team leader on 23 April 2013 is in the following terms:

> "Dear Sir/Madam,
>
> Further to your recent correspondence regarding the authentication of certificate. We can verify that this certificate is not authentic. This student has not been registered with AABPS and has not obtained an award accredited by AABPS."

4. The appellant appealed to challenge that decision both under the Immigration Rules and Article 8 ECHR grounds. The judge noted in the determination the nature of the decision, the grounds of appeal, notes regarding the evidence provided and submissions made. It is in fact noted in paragraph 20 that the appellant's representative confirmed that there was in fact no Article 8 claim so the judge has made no error of law in not going on to deal with that aspect of the matter. It appears conceded that in fact that was withdrawn by the appellant's representative before the judge on that day.

5. The law clearly states that where an allegation of forgery or falsity is made the burden of proving that falls upon the person making the allegation. In this case it is the Secretary of State as the judge correctly identifies and directs himself in paragraph 23 of the determination. The standard is the balance of probabilities. The judge also stated: "Although I bear very much in mind that the more serious an allegation the more cogent the evidence will have to be to satisfy me to that standard." That was a correct legal self-direction and no legal error has been substantiated on the basis of the submissions made and the material I have considered.

6. In paragraph 26 of the determination the judge sets out the paragraph from the email from AABPS to which I have referred above.

7. In paragraphs 27 and 28 the judge makes some observations regarding the nature of the evidence to which I shall refer shortly.

8. At 29 he refers to the appellant's own evidence which includes a letter from Techshed who are the college where he claims to have studied and who he stated issued him with the certificates in question. I accept from the material which has been received that Techshed were an accredited supplier of services and accredited by AABPS at the relevant period that the certificates were issued. The judge records what he describes as disturbing features about the appellant's evidence as a discrepancy as to the course dates and the dates which Techshed say he undertook the course arose. There is a discrepancy as to the date of the letter from Techshed and there was no evidence of his having paid fees to Techshed.

9. The judge refers in paragraph 30 to the appellant's own evidence and in paragraph 31 to a degree awarded by the University of Wales. The judge makes the comment that it was difficult to see why the appellant needed to submit the AABPS certificate in order to obtain leave for his current proposed course of study. The degree itself would have been enough. Although that may be an observation by the judge that may or may not have merit, it is irrelevant because the disputed certificates were submitted and it was on the basis of seeking confirmation regarding the accreditation of those certificates that the email from AABPS was issued.

10. The core finding by the judge is to be found in paragraph 32 of the determination where the judge states as follows:

> "The allegation that he submitted a forged certificate is of course a serious one. As set out above it would require cogent evidence to satisfy me on the balance of probabilities that he was guilty of such an act. In balancing as I must all of the evidence including the oral evidence of the appellant and the lack of any real evidence from the respondent I am not satisfied to that standard."

11. On reading of the grounds of challenge, which are effectively that the judge erred in his treatment of the evidence from AABPS, there does appear on the face of it to be a challenge to the weight given to the various factors by the judge. I referred earlier to the case of **SS [2012] EWCA Civ 155**. That was a case involving former Upper Tribunal Judge Spencer who considered a medical report in a Sri Lankan case and made adverse findings against the appellant on the basis of all the evidence he had been asked to consider including the medical evidence. The challenge before the Court of Appeal was the weight that the judge had given to that particular piece of expert evidence. The Court of Appeal reminded the Tribunal and all who read that report of the basic principle that provided the judge has considered the evidence before him with the required degree of anxious scrutiny and provided the judge has given adequate reasons for findings made the weight to be given to that evidence is a matter for the judge and unless in such circumstances it can be shown that the decision is irrational or perverse on public law grounds there can be no basis for challenge.

12. I refer earlier to the fact that the judge did look at and has set out the nature of the wording of the AABPS certificate and has set out the nature of the evidence given by the appellant and records some discrepancies and concerns that he has within and arising from that evidence. It

appears therefore that the judge did consider all the evidence that was available as set out in the determination to a certain extent. The wording ‘anxious scrutiny’ is very important in this appeal and indeed if one tries to see a definition of that term in case law, including that from a senior court, you will not find it. Using common parlance it is a requirement for a judge to consider the evidence with the required degree of analysis to ensure there is no possibility of a party feeling that the case they have set out, or their evidence, has not been properly considered.

13. In this case the judge makes three references to the Secretary of State’s evidence. In paragraph 32 the judge makes a specific comment that in light of the lack of real evidence from the respondent he was not satisfied that the respondent had discharged the burden of proof upon her. I asked Ms Glass in the course of the proceedings how she interprets the phrase ‘real evidence’ and her interpretation is that it was evidence of sufficient weight to discharge the burden upon the Secretary of State to the required standard of the balance of probabilities. That is one possible interpretation but of course the judge did not define this term in the way that Ms Glass has defined it before the court.

14. Also somewhat disturbing are the contents of paragraphs 27 and 28. The judge notes that the original email contains the name of the appellant together with his date of birth. That gives a clear indication on the face of it that the email does at least appear to relate to a person with the appellant’s name and his date of birth. The judge states: “What is not before me, however, is the scan of the award shown. That was not available at the hearing.” In paragraph 28 the judge then states:

> “The respondent called no live evidence. Thus the only evidence before me is that of the two emails. There is no evidence, for example, of what checks were undertaken by AABPS or what records they in fact hold.”

I have looked at the file in some detail and in fact this specific point does not appear to have been used as the basis of a request to obtain additional information by the appellant before the hearing. Therefore before the hearing all the judge had was the email, the decision to refuse based upon that email and the evidence adduced by the appellant. It is not disputed that the appellant before the First-tier Tribunal produced these documents. That is not the issue. The issue is whether the documents are genuine and represent qualifications that had been properly awarded to him.

15. What it appears from paragraphs 27 and 28 is that the judge seems to have thought or indicated that he required more than had been produced, i.e. that he required some additional source of corroboration. AABPS are a reputable accredited organisation and I note the email was specifically sent to a verification team within that organisation. I mentioned earlier that if one looks at the website of this organisation it is possible if the appropriate information is entered for confirmation to be obtained as to whether a student is registered and to obtain confirmation as quickly as the internet will permit. That exercise has not been undertaken by this Tribunal as it is not appropriate to do so.

16. The problem with the determination is simply that when reading it it does appear arguable that the judge has erred in law in (i) failing to define the term ‘real evidence’, (ii) in appearing to discount the evidence from the Secretary of State without adequate reasons, and (iii) appearing to have discounted that evidence as a result of lack of corroboration when it is quite clear that in cases of this nature there is no legal requirement for such corroboration to be given.

17. The decision of the Secretary of State of 27 August 2013 was not an unlawful decision on the face of it as the verification email from AABPS does appear to suggest to a reader that there were more than sufficient grounds to support the conclusion false documents had been provided. The purpose of the appeal process was to properly examine whether the assertion made by AABPS was in fact factually correct or if it was correct whether the necessary mens rea, the mental element which it is submitted is required for 322(1A), was engaged.

18. My primary finding therefore is that the error is not to the weight the judge gave to the evidence but to the way in which the judge seems to have considered the Secretary of State’s evidence which is infected by a material error of law, and for that reason the determination must be set aside.

19. The advocates agreed this is a case in which further evidence may be available to assist the Tribunal that is not before it today. As there are elements upon which findings have not been made by the First-tier Tribunal, such as the culpability of Mr Rahman or another if the evidence as to falsity is accepted, the matter should be remitted to the First-tier Tribunal at this stage.

Notice of Decision

20. The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. The appeal shall be remitted to the First-tier Tribunal for further consideration.

Consequential Directions

1. The appeal shall be remitted to Hatton Cross to be heard by a salaried judge of the First-tier Tribunal nominated by the Resident Judge on 29th May 2013 at 10.00am.

2. Any additional document to be relied upon must be served upon the tribunal and the opposing party in an indexed and paginated bundle no later than 14 days before the hearing.

3. No interpreter shall be provided unless specifically requested by Mr Rahman with reasons. The language and dialect sought must be stated.

Signed Date 5th January 2015

Upper Tribunal Judge Hanson