IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/39201/2014
IA/42703/2014
IA/42712/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th February 2016	**On 1st March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MR BISHNU PRASAD BHANDARI (FIRST APPELLANT)
MS LILA BHANDARI (SECOND APPELLANT)
[B B] (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms B Asanovic of Counsel
For the Respondent: Mr L Tarlow, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the appellants against a decision of the First-tier Tribunal dismissing their appeals against the decisions of the respondent cancelling the appellants' indefinite leave to remain in the UK.

Background

2. The appellants are citizens of Nepal. The first and second appellants' dates of birth are 3 September 1981, 28 January 1985 respectively. The third appellant is their daughter, whose date of birth is 26 April 2008, and is dependent upon her parents. The first appellant was granted entry clearance in 2008 for work permit employment and the second and third appellants as dependents. The appellants had been issued with a biometric residence permit on 18 November 2013 which conferred settlement status of indefinite leave to remain in the UK. On 7 October 2014 and 30 October 2014 respectively the first and second appellants, having been to Nepal for a short period, arrived in the United Kingdom and having presented their passports to Immigration Officers were identified from records available to Border Force Officers as the holders of an invalid English test result provided by Educational Testing Services ('ETS'). Consequently, they were stopped at the airport and interviewed. Following their interviews with the Border Force Officers the first and second appellants' continuing leave was cancelled because the Secretary of State considered that the appellants had made a false representation in the application for the purpose of obtaining the indefinite leave to remain. The Secretary of State considered, on the basis of information provided by ETS, that there was substantial evidence to conclude that the certificates were obtained fraudulently. Accordingly, the appellants' and their daughter's leave was cancelled. The appellants appealed against the respondent's decisions to the First-tier Tribunal.

The Appeal to the First-tier Tribunal

3. The First-tier Tribunal, in dismissing the appellants' appeals, found that the appellants were not credible witnesses. The Judge found that much had been made of the appellants' purported English language ability. The appellants required an interpreter to give evidence before the Tribunal and required an interpreter at interview when they arrived at Heathrow Airport. The First-tier Tribunal Judge found that both appellants had used false documents, namely, false language test results to obtain their leave to remain and that the respondent was correct to cancel that leave. The Judge considered that the evidence before her showed that ETS had determined that the test the appellants relied upon was invalid because a proxy was used in each test. The Judge attached no weight to a report of Dr Harrison which draws attention to deficiencies in the analysis carried out by ETS.

The Appeal to the Upper Tribunal

4. The appellant sought permission to appeal against the First-tier Tribunal's decision to the Upper Tribunal. The grounds of appeal assert that there is a fundamental error of fact in relation to the second appellant. It is asserted that the appellant cannot be identified from the ETS evidence of printouts of results which are included in the bundle of evidence before the First-tier Tribunal. It is submitted that the ETS printouts do not either have a number or name identifying who took the test. Furthermore, they do not contain any allegations of any invalid or defective test. It is also asserted in the grounds that the Judge failed to attach weight to the expert report of Dr Harrison. It is submitted that this was inherently infer. It is also asserted that the Judge took irrelevant matters into consideration and failed to take into account relevant matters. On 7 August 2015 First-tier Tribunal Judge R A Cox granted the appellants permission to appeal.

The Hearing Before the Upper Tribunal

5. Mr Tarlow made an application at the beginning of the hearing for the case to be adjourned. He submitted that there is an ETS case currently before the President of the Upper Tribunal that was heard two days earlier. A further hearing day has been set for 4 March 2016. He submitted that the case was going to deal with all issues in relation to ETS cases involving deception, proof, evidence of the Secretary of State and the witness evidence of Dr Harrison and that guidance will be issued. He submitted that given the relatively short time period, in the interests of justice, the appeal should be adjourned until after the decision in the test case is released. Ms Asanovic resisted the application for an adjournment. She submitted that today's decision is about an error of law and that does not require guidance as to how to treat the evidence.

6. I decided not to grant the respondent an adjournment in this matter. I considered that I was able to proceed on the error of law issue.

Summary of Submissions

7. I indicated to the parties that ground 1 of the grounds of appeal might be determinative of the second appellant's appeal. Ground 1 asserts that the Secretary of State had not provided specific evidence from ETS and that the judge made an error of fact. The second appellant cannot be identified from the ETS printout which is included in the bundle in her name. I drew Mr Tarlow's attention to a document contained within the respondent's bundle of documents that was before the First-tier Tribunal in respect of the second appellant. The document was at Appendix G. This document appeared to be a printout from information obtained from ETS. However, there is no indication of the second appellant's name or that her test result was invalid. The case was adjourned for a short adjournment to allow Mr Tarlow to consider that document. After the adjournment Mr Tarlow referred to the bundle he asserted was before the First-tier Tribunal Judge and a witness statement of Michael Sartorius dated 1 March 2015. He handed that bundle to me. I checked the court file and the bundles that were submitted. This witness statement was not contained in the bundle

before the Judge in relation to the second appellant and neither was the more detailed printout. Mr Tarlow submitted that the witness statement of Mr Sartorius was produced for a particular reason and that was to tie up the appellants' test results with the notice of refusal. I asked Mr Tarlow if he had any evidence that that bundle was served on the First-tier Tribunal. Ms Asanovic indicated that she did not have a copy of that in her bundle either. She had a copy of the bundle that was submitted for the hearing as served on the representatives for the appellants which matched the bundle that I had identified in the court file. Mr Tarlow referred to the First-tier Tribunal Judge's decision where she indicated that she had a bundle for the second appellant that was very similar to the bundle for the first appellant. I noted that the bundle for the first appellant did not contain a witness statement from Mr Sartorius either.

8. In relation to the second ground of appeal that relates to both the first and the second appellant Ms Asanovic indicated that contact had been made with regard to the grounds of appeal which set out that at the hearing the Home Office Presenting Officer had been given an opportunity to consider Dr Harrison's report and for the matter to be adjourned but she had declined to do so. She indicated that Mr Tarlow had confirmed that no issue was taken as to the recital of those facts as set out in the grounds of appeal. She submitted that all the appellant has to show is that the Harrison report is material. She referred to the case of **R (on the application of Gazi) and Secretary of State for the Home Department (ETS – judicial review) IJR [2015] UKUT 00327 (IAC)** which considered Dr Harrison's report as relied on in the present case. She submitted that Dr Harrison had set out a number of concerns regarding the methodology adopted by ETS. She submitted that there is a presence of false positives which undermines the Secretary of State's reliance on the evidence of the test as discharging the burden of proof. She submitted that in this case there were other language tests taken in close proximity by the appellants. These were in the appellants' bundle before the First-tier Tribunal Judge. She submitted that the decision of the Judge may have been different if she took into account the report of Dr Harrison.

9. It is asserted in the grounds of appeal that it was unfair for the First-tier Tribunal Judge to exclude the evidence of an expert report from consideration with no warning to the appellant. It is asserted that the Judge's reason, given at paragraph 30, for not being prepared to place any weight on the report was because it was prepared for another case. Ms Asanovic submitted that it was unfair because this issue was not raised at the time of the hearing. It is asserted that as the report did not refer to any particular circumstances or applicant but simply examined the procedure and the quality of the testing used by ETS the fact that the report was prepared for another case is completely irrelevant for the purposes of whether one can rely on it. It is asserted that the significance of Dr Harrison's report is that it demonstrated that there is an indeterminate number of false positives that it relies on automated voice recognition software which did not appear to make allowances for a

specific group non-native English speakers and it did not disclose the full parameters of its operation or the level of experience or training of the persons who were undertaking the testing. She also submitted that against such a background it was difficult to place reliance on the ETS results particularly as in this case the two appellants both had passed English language tests both before and after the test identified by ETS as having been taken by a proxy.

10. Ground 3 asserts that the Judge took irrelevant matters into consideration. At paragraph 12 it is submitted that the Judge erred when considering that the appellants had not contacted ETS to challenge the allegation that they had used proxies in order to take the tests. It is asserted that failure to take an action or absence of evidence can be relevant for determining credibility only in situations where the evidence or the action is obvious and easily taken. It is asserted that it is not obvious that one should challenge the ETS service where there is a right of appeal against cancellation. The Judge did not take into consideration the first appellant's explanation that he did not know anything about the allegation of the use of a proxy until he had received notice of cancellation of leave. The Judge has not engaged with that explanation. It is submitted that the Judge took an irrelevant matter into consideration namely that in a courtroom situation both the first and second appellants used interpreters. It was submitted before the First-tier Tribunal Judge that the level of English language required to be passed is a very low one. The appellants had passed tests that required a higher level of understanding of English than the B1 level. The second appellant passed the ESOL speaking and listening entry 3 in May 2014 and also a Life in the UK Test on 12 April 2014.

11. Mr Tarlow replied on the Rule 24 response. He submitted that the weight given to the evidence at paragraph 13 was a matter for the judge to make. She correctly noted the report from Dr Harrison was not prepared for this appeal. He submitted that there was no material error and that the decision of the First-tier Tribunal should stand.

Discussion

12. In relation to ground 1, I find that there was a material error of law in the First-tier Tribunal's decision in relation to the second appellant. The judge did not have the full printout in relation to the second appellant or a witness statement from Michael Sartorious for either appellant. At paragraph 11 the judge sets out the evidence before her and no mention is made of such a witness statement. The judge made a factual error on relation to the second appellant. In discharging the burden that is placed upon the respondent to prove deception the reliance on a document that does not even bear the second appellant's name nor does it give any indication on the face of it that the test result was invalid is inadequate bearing in mind that it is deception that the respondent was required to prove.

13. The Tribunal Judge at paragraph 15 appears to accept at face value that the evidence before her showed that ETS had determined that the test the appellants relied upon is invalid because a proxy was used in each test. The evidence that was before the Judge was the two generic witness statements provided by Ms Collings and Mr Millington that described the processes through which an individual will be identified by ETS.

14. The evidence of Ms Collings, Mr Millington and Dr Harrison was considered in the context of a challenge by way of Judicial Review in the case of **R (on the application of Gazi) v Secretary of State for the Home Department (ETS – judicial review) IJR [2015] UKUT 00327 (IAC)** the Upper Tribunal found:

> "35. In my view, taking into account Chapter 50 of the EIG, the Respondent's evidence, summarised in Chapter II above, was sufficient to warrant the assessment that the Applicant's TOEIC had been procured by deception and, thus, provided an adequate foundation for the decision made under section 10 of the 1999 Act. True it is that, at this remove and with the benefit of Dr Harrison's report, there may be grounds for contending that said evidence is not infallible. And there may be sufficient material for a lively debate about its various ingredients. However, this Tribunal, as emphasised above, must evaluate and determine the Applicant's improper purpose challenge by reference to the material presumptively considered by or available to the decision maker when the impugned decision was made. I find no clear or logical basis for distinguishing between the first tranche of decisions and those made later. Furthermore, while the policy evidential requirements enshrined in the EIG are strict, they require neither absolute certainty nor infallibility. For the purpose of disposing of this ground of challenge and bearing in mind that the jurisdiction being exercised is one of supervisory review rather than merits appeal, its suffices for this Tribunal to be satisfied that the evidence upon which the impugned decision was made has the hallmarks of care, thoroughness, underlying expertise and sufficient reliability. The cornerstone of the Applicant's case is that the evidence was insufficient for this purpose. I reject this challenge."

15. As set out in **Gazi** the witness statements of Ms Collings and Mr Millington are sufficient to warrant the assessment that the appellants' TOEICs had been procured by deception. However, as also set out in **Gazi,** in light of Dr Harrison's report there may be grounds for contending that that evidence is not infallible and it is clear that the Upper Tribunal in **Gazi** did not accept without question the evidence of Mr Millington and Ms Collings. The context of the proceedings in **Gazi** are also relevant. The challenge was by way of Judicial Review on the basis of improper purpose. As the Upper Tribunal set out at paragraph 34:

> "… This ground of challenge can succeed only if the Applicant establishes that the purpose for which the Secretary of State invoked the discretionary power under section 10 of the 1999 Act was motivated by a design other than furthering the policy and objects of the statute (the Padfield principle). The quest to establish improper motive in the context of this challenge engages, in my view, a relatively elevated threshold. Improper purpose, or motive, is not, as a general rule, easily proved."

16. The evidence of Ms Collings and Mr Millington does not create any presumption that the test result in any case is invalid unless evidence to the contrary is adduced. Whether the respondent has proved that an appellant has used deception must be a matter for the judge to consider on all the evidence available.

17. It is not clear why the Judge was not prepared to even consider or attach any weight to Dr Harrison's report on the basis that it was prepared for another case when she was content to accept the generic witness statements of Mr Middleton and Ms Collings also prepared for another case. Further, one of the reasons given by the Judge for not attaching weight was the fact that Dr Harrison's report was not disclosed to the respondent in good time for the hearing and that the respondent had had no opportunity to consider it. As was accepted by Mr Tarlow, the Home Office Presenting Officer at the First-tier Tribunal hearing declined the opportunity to adjourn the matter on the basis that time was needed to consider the report. The report in any event had been in the public domain for a considerable period of time.

18. It is difficult to assess whether or not the Judge might have come to a different conclusion had she considered the report of Dr Harrison and the criticisms made therein of the ETS method of analysis.

19. The Judge refers at paragraph 17 to the first appellant's interview record with the Immigration Officer at Heathrow. The Judge draws an adverse inference as to his credibility from his failure to answer questions he should have known the answers to if he had genuinely sat the test claimed. The Judge considers the appellant's explanation that he was tired after his flight but considers that this does not explain the serious discrepancies between his interview and his later witness statement. The Judge was entitled to arrive at that finding.

20. The judge appears to have disregarded the evidence of several other English language tests undertaken by the appellants. The Judge was influenced by the fact that the appellants required an interpreter to give evidence before the Tribunal and required an interpreter to be interviewed when they arrived at Heathrow. At paragraph 12 the judge found:

> "… Much has been made of the appellants' purported English language ability, but the appellants required an interpreter to give evidence before the Tribunal and required an interpreter to be interviewed at Heathrow airport …"

21. The use of interpreters in formal interview settings and in court proceedings raises no presumption that an appellant cannot speak English to the level required by the TOIEC testing.

22. Further, the judge drew adverse inferences as to the appellants' credibility because:

> "Furthermore genuine examinees who had taken the English language test with no assistances from an exam taker pretending to be the appellants,

> would, upon receipt of the reasons for cancellation of leave have contacted ETS to object to their conclusions and indicate a mistake had been made and to ask to listen to the tapes of the tests for both appellants …"

23. As set out in the grounds of appeal the appellants had a right of appeal against the respondent's decision. The tests were taken in May 2013. The cancellation of leave was 17 October 2014 some 17 months later. It is not an obvious and easily taken action when there had been such a lengthy delay between the taking of the tests and the cancellation of leave and where a right of appeal exists.

24. I find that there was a material error of law in the First-tier Tribunal's decision not to engage at all with the evidence of Dr Harrison whilst apparently accepting without any evaluation or analysis the similarly generic witness statements of Mr Millington and Ms Collings. There was no analysis of the document in relation to the second appellant which, as set out above, I found constituted a material error of law. The Judge appears to have taken the evidence of Ms Collings and Mr Millington at face value. Given that the burden is on the respondent to prove deception a more rigorous analysis of the evidence presented was required.

25. I find that there are material errors of law in the First-tier Tribunal decision and I set aside that decision pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA').

26. I considered the Practice Statement concerning transfer of proceedings. I am satisfied that the nature and extent of judicial fact finding that is necessary in order for the decision in the appeal to be re-made is such, having regard to the overriding objective, that it is appropriate to remit the matter to the First-tier Tribunal.

27. I remit the case to the First-tier Tribunal for the case to be heard before a different judge pursuant to section 12(2)(b) and 12(3)(a) of the TCEA. The case is to be listed at Hatton Cross for a de novo hearing before any judge other than Judge E B Grant the date of the hearing to be fixed at the next available opportunity.

Notice of Decision

The appellants' appeals are allowed and the matter will be remitted to the First-tier Tribunal for a *de novo* hearing before a Judge other than Judge E B Grant. The case is to be listed at the next available date at Hatton Cross.

No anonymity direction is made.

Signed P M Ramshaw Date 25 February 2016

Deputy Upper Tribunal Judge Ramshaw