



**Upper Tribunal
(Immigration and Asylum Chamber)
Number: IA/47121/2014**

Appeal

IA/47122/2014

THE IMMIGRATION ACTS

**Heard at Field House, London
Reasons Promulgated
On 28th January 2016
February 2016**

Decision &

On 12th

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

IMMIGRATION OFFICER

Appellant

And

**MR ANANTHABABU RANGARAJAN
MRS LAVANNIYA SOMMASUNDARA IYER
(ANONYMITY DIRECTION NOT MADE)**

Claimants

Representation:

For the Immigration Officer: Miss Willocks-Briscoe
For the Claimant's: Mr Jesman (Counsel)

DECISION AND REASONS

1. This is the Immigration Officer's appeal against the decision of First-tier Tribunal Judge Lawrence promulgated on the 24th July 2015 in which he

allowed the Claimants' appeal against the cancellation of their Leave to Remain in the United Kingdom, under the Immigration Rules. The Claimants are husband and wife, and Mrs Iyer's claim is dependent upon that of her husband. As this is the Immigration Officer's appeal, for the purpose of clarity throughout this decision, the Immigration Officer will be referred to as "the Immigration Officer" and the Appellants before the First-tier Tribunal Mr Rangarajan and Mrs Iyer will be referred to as "the Claimants".

Background

2. On the 15th October 2012, Mr Rangarajan had submitted an application for Leave to Remain as a Tier 4 General Student. In support of that application he submitted a TOEIC certificate in respect of an English-language test, which he is said to have taken at New College Finance on the 25th July 2012. Thereafter on the 10th November 2014 he was granted Leave as a Tier 2 (General) Migrant until the 30th November 2017. On the 19th November 2014 the Claimants sought entry into the UK and Mr Rangarajan was interviewed about his TOEIC certificate. The Immigration Officer alleged that the certificate was fraudulently obtained and as a result the Claimants' leave was cancelled. Both Claimants appealed against that decision, which appeal was heard by First-tier Tribunal Judge Lawrence at Hatton Cross on the 3rd July 2015. First-tier Tribunal Judge Lawrence allowed the Claimants' appeals for the reasons set out in full within his decision. This is a matter of record and is therefore not repeated in full here, but in summary, First-tier Tribunal Judge Lawrence did not accept that the Immigration Officer had discharged the evidential burden of establishing a prima facie case that Mr Rangarajan had obtained his English Language Test Certificate by fraud and that there was no prima facie case for the Claimants to rebut. He therefore allowed the appeals of both Claimants.
3. The Immigration Officer sought to appeal that decision, and in the Grounds of Appeal it is argued that the Immigration Officer had provided witness statements from Mr Peter Millington and Ms Rebecca Collings and an email document from ETS Taskforce dated the 10th September 2014, together with

a witness statement from Mr Michael Sartorius. It was argued that the witness statements of Mr Peter Millington and Ms Rebecca Collings provided evidence in respect of the tests which were categorised as "invalid", where it is said ETS was certain that there is evidence of a proxy test taker or impersonation having been used, and that ETS had concluded that in any test categorised as "cancelled" which later became known as "invalid", the same voice had been used for multiple test takers. Mr Millington had described how following comprehensive investigations ETS had provided the Home Office with lists of candidates whose results showed "substantial evidence of invalidity"; that the Home Office had been provided with the background to the process used by ETS to reach that conclusion and that where a matter had been identified the approach was to invalidate the test results and for ETS to notify the Home Office that there was evidence of invalidity in those cases. It is argued that in order for the test to be categorised as "invalid" on the spreadsheet the Home Office had gone through a computer program analysing speech and then two independent voice analysts had been involved, before tests would be categorised as invalid.

4. It is argued that the spreadsheet from ETS identified that the Appellant's test taken on the 25th July 2012 was invalid and that therefore the Judge materially erred in finding that the Immigration Officer had not discharged the evidential burden and that nothing shifted to the Claimants to rebut. It is argued that the First-tier Tribunal Judge had failed to provide adequate reasons for his finding to the contrary.

5. Permission to appeal has been granted by First-tier Tribunal Judge Hollingworth on the 24th November 2015, in which he stated that:

"An arguable error of law has occurred in relation to the construction placed upon the evidence made available to the Tribunal appertaining to the test certificate in question and the degree of weight to be attached to that evidence in applying the burden and standard of proof."

6. Miss Willocks-Briscoe on behalf of the Immigration Officer, submitted that the

Immigration Officer had satisfied the initial evidential burden of establishing a prima facie case that the test result had been obtained by fraud. In addition to the witness statements of Peter Millington and Rebecca Collings, she argued that within the Respondent's bundle there had also been the cancellation of Leave to Enter Report dated the 24th June 2015, which contained an explanatory statement running to some 28 paragraphs, which she submitted had been signed by Chief Immigration Officer Mr Benson. Although it was conceded that there was no formal Statement of Truth on that document, she argued that it was a formal document that set out the basis of the Immigration Officer's case and gave further clarification as to why the Claimants' Leave to Enter had been cancelled. She argued that the explanatory statement at paragraph 15 had given further details as to the Home Office's Case Information Database and as to the checks undertaken to ensure whether or not the test had been identified as being "invalid" or simply "questionable". She argued that at paragraph 17, there had been within that explanatory statement, evidence as to how the printout from the relevant ETS records had been obtained together with witness evidence supporting the Home Office records from the Case Information Database and that at [19] there was further evidence of how the decision to cancel the Claimants' leave in the interview had taken place. She argued that the evidence submitted had not therefore been submitted in a vacuum and that there was sufficient evidence to establish a prima facie case and that the First-tier Tribunal Judge, she argued was not simply entitled to ignore the Immigration Officer's position or the accompanying evidence.

7. Mr Jesman on behalf of the Claimants' conceded that there was an error of law in the decision of First-tier Tribunal Judge Lawrence at [10] when stating "The Respondent alleges the test had been fraudulently obtained. The Respondent bears the evidential, as opposed to the legal burden of proof on those and the standard of proof is the higher one. Once discharged the evidential burden shifts to the Appellant and he has to rebut it on the balance of probability basis. I reiterate the legal burden of proof does not lie with the Respondent at any stage. That lies with the Appellant from start to finish". Mr Jesman conceded that the standard of proof in respect of the evidential

burden borne by the Claimant was not "a higher one" but remained the balance of probabilities, although the evidence necessary to establish a prima facie case of fraud would need to be more cogent, the more serious the allegation.

8. However, he argued that such error was not material in that the Immigration Officer had only submitted two generic statements from Mr Millington and Ms Collings, and that those statements and the shortcomings of those statements have been fully considered and criticised by the President of the Tribunal Mr Justice McCloskey in the case of R (on the application of Gazi) v Secretary of State for the Home Department (ETS-judicial review) IJR [2015] UKUT 327 (IAC). He argued that the screen printout did not establish a sufficient evidential trail and that the Immigration Officer had not discharged the evidential burden of establishing a prima facie case. He argued that the Immigration Officer had not been represented by a Home Office Presenting Officer at the appeal before Judge Lawrence and there had been no audio recordings or further statement submitted to establish that the Claimant had utilised fraud.
9. Mr Jesman further argued that even if it was a prima facie case, the evidence that the Claimant could speak English was overwhelming in that the Claimant had been able to complete a dissertation in English, and he had no need to cheat and had worked for a care home for 3 years and that if he did not speak English he would not have kept that job. He argued that the explanatory statement did not amount to a witness statement and that the right of the statement had not been present at court to be cross-examined.
10. Both advocates agreed that if there was a material error of law and the decision of First-tier Tribunal Judge Lawrence was set aside, the case would need to be remitted back to the First-tier Tribunal for remaking.

My Findings on Error of Law and Materiality

11. As was quite properly conceded by Mr Jesman on behalf of the Claimants, it is

clear that First-tier Tribunal Judge Lawrence has erred in law at [10] of his decision when stating that in respect of the evidential burden, as opposed to the legal burden, in respect of the allegation that the test had been fraudulently obtained that "the standard of proof is the higher one". As was stated by the House of Lords in the case of the Re B (children) [2008] UKHL 35, there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not. Further, as was stated by Lord Nicholls in the Re H (Minors) (Sexual Abuse) : (Standard of Proof) [1996] AC 563 at 586, "When assessing the probabilities the Court will have in mind as a factor, to whatever extent is applicable in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before the Court concluded that the allegation is established on the balance of probability. Fraud is usually less likely than negligence... The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probabilities, its occurrence will be established". Therefore, although the cogency of the evidence may need to be greater, the evidential burden on the Immigration Officer was simply to establish a prima facie case that the Claimants' test results had been achieved as a result of the use of fraud on the balance of probabilities. It was not, in respect of the standard of proof, "the higher one", as asserted by First-tier Tribunal Judge Lawrence. There is a clear error of law in this regard.

12. I further bear in mind that in considering whether or not such error is material, as was established by the Court of Appeal in the case of CA v Secretary of State for the Home Department [2004] EWCA Civ 1165 in the judgement of Lord Justice Lords in giving the lead judgement of the Court of Appeal at [14], "No doubt it must be a material error of law. If it could truly be shown that the result before the Adjudicator must have been the same even if there had been no legal error, there would be scope for the IAT to dismiss the appeal despite the error". It is therefore only if the result must have been the same, even if there had been no legal error that I am in a position to say that the error of law is not material and to dismiss the appeal, having found that there has been an error of law."

13. In this regard, although I have fully considered and borne in mind the criticisms made by Mr Justice McCloskey of the statements of Mr Peter Millington and Ms Rebecca Collings in the case of R (on the application of Gazi) v Secretary of State for the Home Department (ETS-judicial review) IJR [2015] UKUT 327 (IAC), I do bear in mind that in the present case, there was also an explanatory statement submitted within the Cancellation of Leave to Enter Report from Mr Benton, which has been signed and dated by him on the 24th June 2015. Although in this regard First-tier Tribunal Judge Lawrence at [11] found that "the Cancellation of Leave to Enter Report sets out the history but does not amount to evidence regarding the test certificate", I further find that the First-tier Tribunal Judge's reasoning in that regard is inadequate, in that he has failed to explain how the explanatory statement does not amount to evidence regarding the test certificate when further explanatory evidence is given by Mr Benson regarding the concerns in respect of the Claimant's individual test certificate as set out at paragraphs 4 to 6 of the statement, and in particular how Border Force Officer Mundi had conducted an initial examination of the Claimant and noted that the Claimant was the subject of Home Office records and how the English Language certificate which was used by the Claimant in support of his application for Leave to Enter was said to have been fraudulently obtained and at paragraph 15, he had detailed the checks that Border Force Officers would do to check the Home Office Information Database regarding the results being deemed to be "invalid" or "questionable", and as to the use of the ETS Look Up Tool. That statement further describes the test taken by the Claimant at New College of Finance at paragraph 17 and the information there within that paragraph evidencing the ETS printout and the case Information Database Records together with the further evidence and information provided at paragraph 19 regarding the investigations made by Border Force Officer Sahodeb. The simple statement from First-tier Tribunal Judge Lawrence that the Cancellation of Leave to Enter Report "does not amount to evidence regarding the test certificate", is therefore inadequately reasoned. This again amounts to an error of law.

14. Even bearing in mind the generic nature of the evidence of Mr Millington and Ms Collings, given that their statements were not even produced in respect of this particular appeal, the evidence of Mr Benton was produced in respect of this individual Claimant's appeal and in circumstances where the Judge has not fully explained why that evidence is not relevant and has not been given weight, and linked to circumstances where the Judge has erred in applying the wrong standard of proof in respect of the evidential burden on the Immigration Officer to establish a prima facie case of fraud, I do not consider that it could be said that the result must have been the same even if there had been no legal errors in these regards. I therefore do conclude that the errors do amount to material errors of law, such that the decision of First-tier Tribunal Judge Lawrence should be set aside.

15. Given that the consideration of the evidence in this case has been tainted by the application of the wrong standard of proof in respect of the evidential burden, I concur with the submissions made on behalf of both parties that in the event of the Upper Tribunal finding a material error of law, the case should be remitted back to the First-tier Tribunal for reconsideration by any Judge other than First-tier Tribunal Judge Lawrence. I therefore do set aside the decision of First-tier Tribunal Judge Lawrence, the same containing a material error of law and I remit the case back to the First-tier Tribunal for rehearing de novo, before any First-tier Tribunal Judge other than First-tier Tribunal Judge Lawrence.

Notice of Decision

The decision of First-tier Tribunal Judge Lawrence containing material errors of law is set aside.

The case is remitted back to the First-tier Tribunal for a hearing of the appeal de novo, to be heard before any First-tier Tribunal Judge other than First-tier Tribunal Judge Lawrence.

No application for an anonymity order was made at the First-tier Tribunal and no

such order was sought before me. I therefore do not make any anonymity order in this case.

Signed

Dated 28th January 2016

Rob McGinty

Deputy Judge of the Upper Tribunal McGinty