



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/49461/2014

THE IMMIGRATION ACTS

**Heard at: Manchester
On: 19th November 2015**

**Decision & Reasons Promulgated
On: 21st December 2015**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Immigration Officer, Manchester Airport

Appellant

and

**Ebrahim Mansour Khani
(no anonymity direction made)**

Respondent

Representation:

For the Appellant: Mr McVeety, Senior Home Office Presenting Officer
For the Respondent: Mr Schwenk, Counsel instructed by Arshed and Co
Solicitors

DETERMINATION AND REASONS

1. The Respondent is a national of Iran born on the 31st August 1969. On the 26th March 2015 the First-tier Tribunal (Judge Herwald) allowed his appeal against the decisions of an Immigration Officer at Manchester Airport to refuse him leave to enter and to curtail his entry clearance as a Tier 1 (Entrepreneur)

Migrant. The Immigration Officer now has permission¹ to appeal against Judge Herwald's decision.

Background

2. On arrival at Manchester Airport on the 9th December 2014 the Respondent had two UK visas in his Iranian passport. One was a visit visa valid until September 2016. This five year multiple entry visa had been granted to him because he has a child at school in the United Kingdom. The second visa was a Tier 1 (Entrepreneur) visa, granted on the 18th November 2012 and due to expire on in March 2016. This was issued in connection with the Respondent's business interests in the United Kingdom. The Immigration Officer checked the records and observed that in support of his Tier 1 application the Respondent had submitted an English language certificate issued by ETS. When interviewed the Respondent was observed to be unclear about where and when he might have taken such a test. Further checks led the officer to conclude that the Respondent had employed fraud in obtaining that certificate, namely the use of a proxy test taker. It was for this reason that his leave as Tier 1 Migrant was curtailed.
3. When the appeal came before the First-tier Tribunal the Respondent had mounted a robust defence against the allegation of fraud. He provided a witness statement and oral evidence pointing out that he speaks English in addition to five other languages; his successful international business (a marine diving consultancy) is conducted almost exclusively in English, and that he has an IELTS speaking score of 8. He vehemently denies having used a proxy to take his test. If he was vague at the port interview it was because he was tired after a long flight and was not immediately able to recall the exact circumstances of the test, which had been taken three years earlier. He also relied on a report from a Dr Philip Harrison of JP French and Associates, a Forensic Speech and Acoustics Laboratory. Dr Harrison's report is, in essence, a critique of the evidence relied upon by the Secretary of State in most if not all of what have become known as the "ETS cases".
4. Judge Herwald directed himself to the appropriate standard and burden of proof in respect of an allegation of fraud. He set out the Respondent's evidence as to where and when he took the test in some detail. He then examined the evidence put forward by the respective parties as to the reliability of the analysis of the ETS tests. He concluded, in summary, that the "lengthy and cogent", "highly persuasive" report of Dr Harrison cast sufficient doubt on the methodology employed by the Secretary of State so as to mean that the allegation of fraud could not be proven. He

¹ Permission granted by Designated First-tier Tribunal Judge Zucker on the 1st June 2015

noted that the refusal notice characterised the test result as “questionable” and that this indicated that the analysis was inconclusive as to whether the test had been taken by a proxy; this caused Judge Herwald sufficient worry for him to find that the burden of proof had not been discharged. Having reached that conclusion he allowed the appeal under the Immigration Rules.

Error of Law

5. Having heard submissions from both parties I indicated that I was not satisfied that the decision of the First-tier Tribunal contains an error of law such that it should be set aside. My reasons are as follows:

i) Ground 1 is that the First-tier Tribunal “erred in law in finding that a false document was not submitted under paragraph 321A(2)”. It will be observed that this ‘ground’ does not actually identify an error of law, rather it represents a disagreement with the outcome of the appeal. The particulars under this heading are, in effect, that the First-tier Tribunal applied the wrong standard of proof, applying the criminal standard rather than the balance of probabilities.

There is no justification for this conclusion. Judge Herwald sets out the correct standard of proof at paragraph 13 of the determination. There is nothing in the determination to indicate that he did not apply that standard. He made a careful assessment of whether the Immigration Officer had produced cogent evidence. Finding that he had not, the Judge was entitled to allow the appeal.

ii) Ground 2 asserts that there was a misdirection in that there was a failure to address whether there had been a material change in circumstance such that leave could properly be curtailed under paragraph 321A(1). The grounds submit that the fact that the certificate itself had been invalidated was sufficient to show such a change in circumstances, even absent any evidence of deliberate deception on the part of the Respondent.

The ‘change in circumstances’ is said to be that the English language certificate submitted in 2012 is no longer valid. Any recent withdrawal of that certificate does not mean that it was invalid when it was submitted, and relied upon, when leave was granted. There is, as far as I am aware, no requirement to show that an English language certificate remain valid for the entire duration of a person’s leave. Further, and more fundamentally, there can be no error on Judge Herwald’s part since the refusal notice specifically relies on paragraph 321A(2) (fraud and false

representations) and makes no reference to 321A(1). He cannot now be criticised for failing to deal with a reason for refusal that was never raised. The Tribunal cannot be expected to go on a fishing expedition looking to every rule that an appellant might not comply with.

- iii) Ground 3 is that the Judge erred in law in allowing the appeal “under the Rules”. This decision was a curtailment of leave made with reference to 321A(2). If the Judge found that the burden of proof was not made out it follows, agrees Mr McVeety, that the consequence is that the original leave is reinstated. That leave was as a Tier 1 Entrepreneur. Although not stated, it is presumably to this matter that the First-tier Tribunal referred.

Decisions

- 6. The decision of the First-tier Tribunal contains no error of law and it is upheld.
- 7. I was not asked to make an order for anonymity and in the circumstances I see no reason to do so.

Upper Tribunal Judge Bruce
19th November 2015