



Upper Tribunal
(Immigration And Asylum Chamber)

Appeal Number: IA/41238/2014

THE IMMIGRATION ACTS

Heard at: Field House (Taylor House)
on 14 October 2015

Decision and Reasons Promulgated
On 2 November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR CYRUS BAUAN MACATA NGAY

(NO ANONYMITY DIRECTION MADE)

Respondent

Representation

For the Appellant: Mr S Kandola, Senior Home Office Presenting Officer
For the Respondent: Mr Z Nasim, counsel (instructed by Chris Raja Solicitors)

DETERMINATION AND REASONS

1. I shall refer to the appellant as “the secretary of state” and to the respondent as “the claimant.”
2. The secretary of state appeals with permission against the decision of the First-tier Tribunal Judge, who allowed the claimant's appeal in a decision promulgated on 8 May 2015.
3. The claimant is a national of the Philippines, born on 15 February 1987. On 27 October 2014, the secretary of state cancelled his leave to remain in the UK under paragraph 321A (2) of the Immigration Rules.
4. The claimant had been granted leave to remain in the UK on 8 September 2014 until 27 July 2017 as the dependant of his wife, a Tier 2 (General) Migrant. It was

contended that false representations were employed and material facts were not disclosed for the purpose of obtaining that leave.

5. The claimant had originally applied for leave in January 2012 for leave to remain as a Tier 4 (General) Student. It is contended that he submitted a fraudulently obtained document, namely a TOEIC certificate as part of that application, which certificate had been fraudulently obtained.
6. On 30 October 2013, he was granted leave to remain as the dependant of his wife and had submitted the same TOEIC. It was accordingly contended that on 6 August 2014, he withheld material facts by not disclosing his previous deception when applying for his current leave to remain.
7. The First-tier Tribunal Judge allowed the appeal under the Immigration Rules on the basis that the secretary of state had erroneously relied upon paragraph 321A(2) in making the decision. She found that the secretary of state had not shown that false representations or false documents were submitted with his latest application. The claimant's evidence adduced (page 64) revealed that there was no reference to the disputed test document. Neither was there any reference to it or any statements made in connection with that application in the body of the letter. [20]
8. On 8 July 2015, First-tier Tribunal Judge P J M Hollingworth granted the secretary of state permission to appeal on the basis that an arguable error of law had arisen in relation to the construction placed upon and weight attached to the evidence adduced by the secretary of state.
9. Mr Kandola relied on the grounds seeking permission. The Judge had failed to provide adequate reasons for finding that the secretary of state erroneously relied on paragraph 321A(2) in making the decision. Reference was made to the evidence produced that there had been evidence of proxy test taking or impersonation. Accordingly the paragraph that the secretary of state relied upon in the refusal notice was correct.
10. He also contended that the relevance of paragraph 21 of the determination is not clear. There the Judge found that it could not be said that material facts were not disclosed. It is not a requirement for a dependant spouse to show an English language proficiency. The requirement "for the same is upon the applicant spouse." She fulfilled that requirement and the secretary of state did not dispute "the same" [21].
11. The secretary of state contended that the claimant was required to prove his English language proficiency in the application he made on 30 January 2012. Whether or not he was required to show English proficiency for his PBS dependant application, he had still previously practised deception.
12. Mr Kandola set out the immigration history submitting that the evidence of deception constituted a proper basis for cancelling the claimant's current leave.

13. On behalf of the claimant, Mr Nasim contended that the Judge directed herself properly with regard to the rules and correctly found that the secretary of state had failed to show that the claimant had made false representations or submitted false documents in the most recent application [20]. She found that paragraph 321A(2) related to the most recent application and her reasoning at [20] is correct as the words in paragraph 321A state "in relation to the application."
14. There was no need for the Judge to consider the evidence as the secretary of state's decision was not in accordance with the immigration rules. The immigration officer could only cancel leave if the claimant had submitted false documents or made false representations in "the most recent application." However, the Judge found that he had not submitted the certificate. Accordingly there was no deception.

Assessment

15. The facts are not in dispute. I have had regard to the decision of the Upper Tribunal in Khaliq (Entry clearance: paragraph 321) Pakistan [2011] UKUT 00350 (IAC).
16. The Tribunal held that a person who has entry clearance that, under the provisions of the Immigration (Leave to Enter and Remain) Order 2000, takes effect as leave to enter, does not on arrival in the UK "seek" leave to enter and paragraph 321 therefore does not apply to him. Paragraph 321A does, but only if the circumstances set out in that paragraph can be shown to exist in this case. The Tribunal referred to paragraph 321A of the rules which set out grounds on which leave to enter or remain which is in force is to be cancelled at port. That includes the position where:

"2. False representations were made or false documents were submitted (whether or not material to the application, and whether or not to the holder's knowledge), or material facts were not disclosed, in relation to the application for leave."
17. At [20] the Tribunal held that if the appellant could be shown to have produced to the entry clearance officer a false document in connection with his application for entry clearance, there might be little doubt that paragraph 321A applied.
18. In the circumstances, it was not possible to say that the appellant in that case made a false representation or submitted a false document in relation to his application for leave.
19. I also note that the claimant in the present appeal has not been judicially assessed as having been untruthful or deceitful.
20. I have also had regard to the Upper Tribunal decision in Amanov v SSHD (appeal number IA/31526/2014, where the Upper Tribunal, presided over by Mr Justice Green, construed paragraph 321A of the rules. In that case, the appellant had entered the UK as a Tier 4 student to undertake an English language course. It was

alleged however that the TOIEC test that he claimed to have taken in February 2012 was in fact taken by a proxy. He therefore obtained that particular qualification by deception.

21. The facts in Amanaov bear a resemblance to the claimant's position. In Amanaov, the appellant had been granted further extensions of leave as a student and in September 2013, applied for leave to remain to attend an honours course at a university. That was granted in October 2013, valid until September 2016 as a Tier 4 student. In 2014, he left the UK and returned on 6 August 2014 but was refused entry upon arrival on the basis that it had been found that the educational institution conducting the TOEIC course had been engaged in fraudulent procurement of certificates.
22. The question posed by the Tribunal at [5] was whether, for the purpose of paragraph 321A(2), leave to enter is to be cancelled if false documents were submitted in relation to any application for leave, or only if those circumstances were submitted in relation to the last application for leave to remain?
23. The Tribunal had regard to the judgement of the Upper Tribunal in Khaliq, supra. There had to be causality between the false document and the application for entry clearance.
24. The Tribunal contrasted paragraph 321A(2) with paragraph 320(11) of the Immigration Rules which refer to an applicant who had previously contrived in a significant way to frustrate the intentions of the rules by using deception in an application for entry clearance. That was construed to be a reference to an application wherever made. That is significant because it demonstrates that the word "the" in paragraph 321A of the rules is deliberate and is intended to be different to "an" because in the latter it is intended to refer to "an" application whenever made, and in the former to the application which led to "the" leave in issue [11].
25. In applying these Upper Tribunal decisions to the similar circumstances prevailing in the claimant's case, I find that the First-tier Tribunal properly construed the relevant Rule and the decision did not involve the making of any error of law.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any error of law. It shall accordingly stand.

No anonymity direction is made.

Signed

Date: 28 October 2015

Deputy Upper Tribunal Judge Mailer