Judgments

QBD, ADMINISTRATIVE COURT

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CO/2970/2014

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

Royal Courts of Justice

Strand

London WC2A 2LL

Thursday, 3 July 2014

B e f o r e:

MR JUSTICE OUSELEY

Between:

THE QUEEN ON THE APPLICATION OF LONDON SCHOOL OF MARKETING LTD

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

Computer- Aided Transcript of the Stenograph Notes of

WordWave International Limited

A Merrill Communications Company

165 Fleet Street London EC4A 2DY

Tel No: 020 7404 1400 Fax No: 020 7404 1424

(Official Shorthand Writers to the Court)

Mr M Reason (by Direct Access) appeared on behalf of the **Claimant**

Mr R Dunlop (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T

(As approved by the Court)

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1. MR JUSTICE OUSELEY: The system whereby students obtain visas or leave to remain in this country is one in which the Home Office has invested a substantial measure of trust and operational judgment to commercial bodies who wish to take students from abroad and, in many instances, from home.

2. One issue is whether the student's command of English is sufficient for a student to undertake the course envisaged. Standard English Language Tests (SELTs) have to be passed. The government has refined its process so that there were six providers of such tests. Only certificates of the appropriate test from one of those six providers would suffice. The largest was ETS, a very substantial provider of this sort of facility.

3. In furtherance of its global commercial operation, in which the Home Office trusted, it set up a network of local centres, which seem to have had a high degree of autonomy, in which the language tests would be conducted. Panorama appears to have got wind, maybe before the Home Office, maybe after the Home Office, that all was not well. But it must have been unwell for some time before the programme in January

2014 for the BBC to consider there was something worth investigating and to set up facilities for the programme.

4. But it was as a result of the programme that the government became aware that there was wholesale fraud being undertaken with the active connivance, it seems, of ETS staff. Sometimes it would be the invigilator who would provide the answers to the students, dictating them; at other times the student would not be the student at all but someone impersonating the student.

5. This form of impersonation has been known in a number of areas for some time. From becoming aware of the problem the government began some form of investigation. It has produced evidence for the purposes of this case as to how ETS has been able to work out, through voice technology analysis amongst other things, where impersonation is likely to have taken place.

6. It has garnered then from that, evidence of widespread impersonation and other fraud running into tens of thousands of cases.

7. The government then considered where the consequences of these fraudulent tests lay. They lay in the receipt by various educational institutions of test results which would then enable them to issue Confirmation of Acceptance for Studies certificates which would play a crucial part in the granting of the relevant immigration permission. The bodies entitled to issue those CAS' were highly trusted sponsors. The sponsors have other duties as well under the relevant policy. They have themselves to be satisfied that the individual intends to and is able to fulfil the course and has to ensure that that procedure is followed, through, for example, attendance record checks and appropriate marking.

8. The relevant minister announced to Parliament that he was going to suspend with immediate effect the highly trusted sponsor status, Tier 4 sponsorship status, for educational institutions where there appeared to be a significant number of students who were on the list developed by ETS of forged or fraudulent SELT passes.

9. The claimant in these proceedings was seen by the government as one such body. There was a visit on 16 and 17 June of which the explanation was that the officials were seeking information to help in the investigation in relation to ETS. It was not a suggestion that the institution itself was under investigation. The announcement that the institutions, 57 or so, were to have their status suspended was followed by letters to the individual institutions.

10. On 24 June 2014 such a letter was sent to the London School of Marketing. The letter from UK Visa and Immigration (UKVI) said that it had assigned CAS' to 184 students who had had their Test of English for International Communication (TOEIC) certificates withdrawn by ETS as a result of a fraud in the SELT process. The letter said that those who obtained certificates in that way posed a threat to immigration control because if a student had gone to those lengths to obtain the certificate he or she would be unlikely to be compliant with their visa conditions, genuinely to intend to study, or able to speak English to the level necessary for the course they purported to be seeking to follow.

11. It was said in the letter that the institution had failed adequately to assess students prior to assigning a CAS. There is also a point which has not really featured in the argument about the way in which an employment process was conducted.

12. This led to an immediate and detailed response from the London School of Marketing in a letter of 25 June 2014 setting out, as it saw, both the facts from its side, the smaller number of students who were affected and contending that, in fact, its students had passed through the college successfully. The 184 certificates were said to have been issued between the beginning of January 2012 through to the end of 2013.

This was followed up with evidence for the purposes of these proceedings which made some adjustments to the figures.

13. The claimant has launched judicial review proceedings challenging the decision to suspend and has sought interim relief that has come before me as an oral permission hearing. It is important to understand what the policy provides. The policy sets out what is expected and explains the circumstances in which there may be a suspension or revocation of the licence. Paragraph 131 says:

"If we consider that you have not been compliant with your duties, have been dishonest in your dealings with us, or you are a threat to immigration control in some other way, we will take action against you. This action may be to (a) revoke or suspend your licence or (b) reduce the number of CASes you can assign.

132. If we decide to take action against you will we usually give you an opportunity to explain your case to us."

14. The circumstances in which there would be a suspension is described in this way at:

"139. We will immediately suspend your licence while we make further enquiries. If we have reason to believe that you are breaching your sponsorship duties and/or are a threat to immigration control (for example assigning CAS to students who do not enroll or fail to complete their course) to the extent that we may have to revoke your licence...

142. If your licence is suspended it will be suspended in all the tiers, categories and subcategories in which you are registered, and while it is suspended we will remove your entry from the register of sponsors on our website."

15. The process is then set out. There are two steps, two starting points: first if the Home Office is satisfied that there is enough evidence to suspend the licence without the need for further investigation, it writes providing detailed reasons for the suspension. On the other hand, if it has evidence that warrants the licence being suspended pending a full investigation, the institution is written to with initial reasons for the suspension and informing them that an investigation will take place. It may not be possible to say how long it would be but during the investigation the institution can make what written statements it thinks necessary including sending in evidence. When the investigation is finished the institution is written to, giving detailed reasons for suspending the licence. I should add: or it may be exonerating the institution if satisfied by the explanations given. But if, at that stage, detailed reasons are given, the institution then has 20 working days to respond and thereafter the government has 20 days in which to issue the decision.

16. The duties include using the processes or procedures necessary to fully comply with duties, ensuring that students have complied with conditions; and the revocation will be effected by previous history, efforts, and degree of responsibility and action taken when the problem came to light.

17. The position in this case is therefore that the Home Office has started from the second position set out in its policy at paragraph 150. The licence has been suspended in all categories pending a full investigation. I am told by Mr Dunlop on instructions that the Home Office expect that it will be in the position either to give detailed reasons for the suspension or to exonerate the claimant within days rather than weeks. If it decides to continue the investigation, that then has to follow the timetable in paragraph 151.

18. Mr Reason for the claimant submits that there is an arguable case that the government has acted unlawfully in this matter, chiefly because it has treated the claimant unfairly, not addressing its mind to the specific case and, most importantly, not treating them fairly through giving them an opportunity to say what it

is they have to say before taking the step of suspending a licence pending a full investigation. He contends that that is something to which he is entitled as a matter of common law fairness before a step is taken which is capable of being damaging to the institution in a number of ways. It damages its reputation vis- a- vis the examining body which it uses, the Anglia Ruskin University. It is damaging to its reputation vis- a- vis the students who, upon hearing of suspension, may decide not to wait until it has been exonerated, and students who are already enrolled or are due to pay, refuse to or seek a refund in relation to course fees paid.

19. He submits that there is therefore at least a serious question to be tried. Damages would be no adequate remedy to the reputational loss. It is unlikely that damages would be paid anyway and he suggests as well that steps proposed by the institution would secure sufficient of the Home Office concerns that it should be required to suspend the suspension. The sort of steps that it had in mind include that no tests other than those from two bodies other than ETS would be accepted as the basis for a CAS. There would be a specific assessment of each student based on internal assessment criteria on the form which it has provided. No new CAS' would be issued until 25 January 2015 and thereafter no more than 10 would be issued a year. It has a rather more substantial block allocation, as is not uncommon, so it would be a significant reduction. It has for this year 57 CAS' allocated, of which only is abroad, three of whom are taking tests. Those are allocated and awaiting processing, a process held up by the suspension of the licence.

20. I start my consideration of these issues with this observation. The number of suspensions announced in Parliament suggests that there will be a number of applications for permission to apply for judicial review and for interim relief. These applications for interim relief should not be considered on a paper application. They should be dealt with via an oral on notice hearing. I say that not just because of the potential complexities of fact which may need to be considered and the advantage of an oral hearing in enabling that to be done, but because the very background to these cases requires care to be taken before interim relief is granted.

21. The relevant legal framework is not as entirely straightforward as might be deduced from American Cyanamid. There is a clear public interest at stake as well as a private interest. The standard American Cyanamid formulation does not wholly take account of that public interest and the fact that this is a review of a decision taken by a public body acting in at least what it regards as the public interest in the enforcement of immigration control. That also takes with it the consequence that there are no damages available for loss suffered by a claimant if it turns out that the actions of the Secretary of State were unlawful.

22. Although I have seen suggestions in Mr Reason's argument that the policy to be focused on is the policy that was in play when the sponsorship licence was first granted, I do not think that is arguable. The relevant policy is the policy which I have read in force in March 2014 which, however, is not materially different from that in force a year earlier.

23. It is inherent in the whole process that the government, having passed over so much of the operation of the system to sponsors, retains the ability to intervene in a way that can seem peremptory. But that position is fully explained and has been known for some time in the policy pursuant to which the claimant operates as it does. It is a matter of policy that the Secretary of State is entitled to suspend a licence immediately without offering an opportunity for explanations to be given in the circumstances specified in paragraph 139 and as explained in 150B. There is no necessary implication in those circumstances that every case must involve a prior opportunity before suspension for an explanation to be afforded. It cannot be contended that the aspect of policy which says that that is not always required is unlawful.

24. It is wrong to say that there is no accusation of wrongdoing. There is an accusation of wrongdoing though it is not an accusation of participation in the ETS fraud. At heart, the point is this. The precise figures matter not. The point is as good on the latest figures put forward by LSM as it is on those put forward originally by the Secretary of State but I take the claimant's for these purposes. It has examined the 184 students referred to in the letter of 24 June 2014. 21 of those did not use an ETS TOEIC. 163 did, 17 of

whom have had their visas refused and were subsequently expelled. Of the remaining 146 students, only one is currently studying. 145 have completed their degree or diploma qualification.

25. There is a conundrum. At the heart of this, Mr Reason says it is clear that, although he cannot identify precisely how the problem arises, in fact the students were able to complete their course with a sufficient degree of competence and that there are records to back that up. So the concern that if there had been, as to which no concession is made, 184 false ETS CAS', no implication for immigration control arises and no evidence exists of any failure in oversight by the London School of Marketing. There was nothing to draw their attention to the fact that these students had problematic SELT tests, and nothing by way of attendance or competence to do so. But if so, why were false ETS' obtained by so many?

26. Mr Dunlop submits, and the evidence is clear as to the 184, that it is precisely the matter to which I have referred which the Home Office wish to investigate. It is, of course, not contended by the claimant that the investigation should stop. It is only too willing, says Mr Reason, to help with the information that they have. Indeed, a great box has been brought to court should the Home Office have any interest in it. Clear it is there is material to be investigated.

27. Nor is it said by Mr Dunlop that a suspension of the suspension, if I can put it that way, would impede the investigation as such. Accordingly, and bearing in mind that I am only concerned with the position at the moment up to the stage of the conclusion of the first phase of the investigation, namely, exoneration or carrying on with an investigation leading to revocation, the issue is a fairly narrow one. I have referred to the nature of the damage to which Mr Reason has referred. It seems to me that part of that, at least vis‑a‑vis the university, can be redressed in the interim by explaining the position fully to a body which has the intellectual capacity to understand what is said but there is, I would accept, some form of financial loss likely, albeit depending upon the length of the investigation. The greater the longer it goes on; and the less the shorter the period. There is, as I have said, no inhibition to the investigation.

28. However, there are two matters to which Mr Dunlop draws attention. The first is that if there is a problem underlying the circumstances that the government relies on, namely that the 184 false CAS', allied to a seemingly good success rate, shows a failure of oversight, that is going to continue. It is also, he says, the case that students, if their visa applications based on the CASes allocated are issued, may face all the problems of revocation of the sponsor's licence while they are in the country, which most of them apparently appear to be, which then leads to problems in relation to fees and obtaining alternative course places. Better to limit the damage to them and to the public interest, if there is damage at this stage, by not suspending the suspension.

29. I have come to the conclusion that interim relief should not be granted. It seems to me that at least for the period up to what I have termed the conclusion of phase one of the investigation and the detailed response to the points which the claimant is intending imminently to make, the public interest in avoiding what may be a possible but, if possible, a serious threat to immigration control should be given the greater weight. The issue over the students' interests vis‑a‑vis the college's commercial interest is one which I would resolve in favour of avoiding students having their arrangements upset rather than in favour of the college.

30. Nonetheless, I recognise that a decision in relation to that leaves open what will happen at the stage when there is a further letter if that further letter says the suspension is to continue. I propose to say nothing at this stage about it beyond to repeat the two observations I made at the outset. But there would of course by then be a detailed reasons letter which would presumably explain why the Secretary of State takes the view she does in relation to the threat in the light of the material which the college is more than willing to supply to it. That will no doubt form a significant part of any further challenge, should it be brought.

31. For my part, I not merely refuse interim relief but, subject to what Mr Reason may finally wish to say, any challenge will have to relate to the further letter, and these proceedings ought not to remain on foot to be the vehicle for a challenge to a further decision yet to be made, the outcome of which is not known. But for those reasons I refuse interim relief and I will hear what I should do about the action.

32. You have heard what I have to say, Mr Reason. What do you say about whether these proceedings should be dismissed or whether these proceedings, that is to say I refuse permission, or whether they should remain on foot to be the vehicle if there is a further adverse letter continuing suspension which you wish to take issue with?

33. MR REASON: It had not occurred to me that we would be in this position, that we would be refused our application today.

34. MR JUSTICE OUSELEY: Sorry?

35. MR REASON: It had not occurred to me that we would be refused our application today, so I have not - -

36. MR JUSTICE OUSELEY: You have not addressed that?

37. MR REASON: I have not taken instructions.

38. MR JUSTICE OUSELEY: I will not, at this hour, require that to be resolved. I will leave you to make a decision on that. I am very unfavourable, however, towards one action becoming the vehicle by amendment for another action, and then another action. But I do not intend to take you by surprise today. I shall simply refuse interim relief.

39. MR DUNLOP: My Lord, what then happens to the claim? You left open the issue of permission.

40. MR JUSTICE OUSELEY: Yes.

41. MR DUNLOP: Is the idea that Mr Reason will have the opportunity over the short adjournment to think about it and make submissions and we come back?

42. MR JUSTICE OUSELEY: This was down for and one and a half hours. It has been far too much time already, and I do not propose to return to it. I have an enormous number of things to do, to get on with the work I have to do before I agreed to take this case, so I am not going to resume this at 2.00pm, 2.30pm or at any other stage.

43. Mr Dunlop makes a point which seems to me may be best answered in this way. Although I would normally expect the issue to be resolved at this stage, as there may be a further decision, and I am anticipating it will not be very long in coming, in the light of what you have told me, Mr Dunlop, the decision on permission can await what happens in relation to that further letter. If the claimant is exonerated, it would have been a bit unfair to have refused permission, it seems to me, it might be said. It may be something to be examined. If, on the other hand, the decision is to continue with suspension, the claimant may be able to make an application. It would have to be an application to amend, which could be considered on paper, and go through the permission process in the same way, and they could all be wrapped up together.

44. MR DUNLOP: Very well, my Lord. One last thing: may I ask that a transcript be produced of this because, as you rightly anticipated, it may be that these issues are addressed in further cases.

45. MR JUSTICE OUSELEY: I am very happy for a transcript to be produced. I forget what the arrangements are as to whether one is automatically produced on an interim relief application as opposed to an oral permission application. If it is not covered by the standard contract between the Ministry of Justice and the courts, you will have to pay for it.

46. MR DUNLOP: We would ask for our costs of today and the application.

47. MR JUSTICE OUSELEY: Yes, Mr Reason, what do you say about costs?

48. MR REASON: My Lord, I am instructed to the seek costs to be postponed until the question of permission is determined.

49. MR JUSTICE OUSELEY: Costs in the case. Not just defendant's costs in the case. Perhaps it should be defendant's costs in the case.

50. MR DUNLOP: It should be defendant's costs of this application, we get those in any event. And then the rest of the costs of - -

51. MR JUSTICE OUSELEY: No, no. Costs in the case does not mean that. You want your costs in any event. I would order it now. The suggestion is that if you lose the case you should not get your costs. If he wins the case he does not get his costs.

52. MR DUNLOP: I do not think that should be right because they did not need to make the application for interim relief and that application was unsuccessful and part of the preparation was for that. Can I just suggest for simplicity's sake: costs reserved.

53. MR JUSTICE OUSELEY: No, I am not reserving the costs. The defendant's costs in the case. I do not mean to be too abrupt but the problem with reserving costs is that the judge who hears this case in its future manifestations, if any, may not have the foggiest idea what transpired.