



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

Appeal Numbers: IA/30428/2014
IA/30430/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 15th September 2015**

**Decision & Reasons Promulgated
On 1st October 2015**

Before

UPPER TRIBUNAL JUDGE RENTON

Between

**DULANJALI CHATHURIKA RAMAWICKRAMA (FIRST APPELLANT)
PRASANA KUMARA GAMAGE (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Jafar, Counsel instructed by Liyon Legal Ltd
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellants are both citizens of Sri Lanka. The first Appellant was born on 12th January 1990, and the second Appellant, her dependent husband, on 28th September 1987. The first Appellant had leave to remain in the UK as a Tier 2 (General) Migrant until 30th August 2015. She and her husband

visited Sri Lanka on holiday, and on their return to the UK on 30th July 2014 they were refused leave to enter and their existing leave to remain was cancelled under the provisions of paragraph 321(a) of HC 395. The Appellants appealed that decision, and their appeals were heard by Judge of the First-tier Tribunal Fowell (the Judge) on 2nd February 2015. He decided to dismiss the appeals under the Immigration Rules and on human rights grounds for the reasons given in his Decision dated 7th February 2015. The Appellants sought leave to appeal that decision, and on 29th April 2015 such permission was granted.

Error of Law

2. I must first decide if the decision of the Judge contained an error on a point of law so that it should be set aside.
3. As the Judge explained in paragraph 2 of his Decision, this is one of the many cases arising out of the BBC Panorama programme reporting widespread fraud at English language test centres. The decision to refuse the Appellant's leave to enter and to cancel their existing leave was on the basis that the first Appellant's English language test at South Quay College in October 2013 had been taken by a proxy tester.
4. The Judge dismissed the appeals as he was satisfied from the evidence before him that this was the case.
5. At the hearing Mr Jafar argued that the Judge had erred in law in coming to that conclusion as he had applied the wrong burden and standard of proof. He referred to paragraph 28 of the Decision where the Judge wrote:

"28. The burden of proof is in fact on the Appellant in a case of this sort, and the standard of proof is the balance of probabilities, that the Secretary of State made an error in revoking her leave to remain."

And again at paragraph 34:

"... I conclude that she has not been able to prove to the required standard that the decision was in error."

6. In response, Mr Whitwell acknowledged that there was such an error of law, but argued that it was not material. He referred to the evidence produced by the Respondent before the Judge. There were two generic statements describing how the investigations had come about, and further statements from an Immigration Officer and a case worker at Heathrow Airport setting out the particular facts of this case. This evidence was sufficient to establish on a balance of probabilities that an invalid English language test had taken place even if the correct standard and burden of proof had been applied.
7. I find that there was a material error of law in the decision of the Judge such that it must be set aside. It is not in dispute that in deciding the

factual issues in the case the Judge applied the wrong standard and burden of proof. It was argued by Mr Whitwell that this error was not material, but I do not find that to be the case. There was evidence from the first Appellant disputing that a proxy tester had been used, and the Judge in his analysis was critical of the evidence relied upon by the Home Office. Therefore it cannot be said that the appeal would have been dismissed regardless of the standard and burden of proof applied by the Judge.

8. I then decided that as the relevant findings of fact had to be remade, the appeal would be remitted to the First-tier Tribunal for the decision to be remade there under the provisions of Practice Statement 7.2(b).

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

The decision will be remade in the First-tier Tribunal.

Anonymity

The First-tier Tribunal did not make an anonymity direction and I see no reason to do so.

Signed

Date

Upper Tribunal Judge Renton