Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/37010/2014**
IA/37011/2014
IA/37012/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons**
On 14 March 2016 **Promulgated**
On 30 March 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE IMMIGRATION OFFICER, HEATHROW

Appellant

And

HETAL AJITKUMAR LUMBHANI (1)
DHYANI AJITKUMAR LUMBHANI (2)
AJIT KUMAR JAYANTILAL LUMBHANI (3)
(NO ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Ms A Fijiwala, Home Office Presenting Officer
For the Respondent: Mr H Patel, Solicitor

DECISION AND REASONS

1. The respondents to this appeal are citizens of India. They are a mother, her child and her husband respectively. The appellant is the Secretary of State for the Home Department, who has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal R Chowdury, allowing the respondents' appeals against decisions of the appellant, dated 21 September 2014, to refuse them entry and to cancel their existing leave. The appellant considered the first named respondent had obtained leave by deception. She had submitted a TOEIC language

certificate with her application for leave as a Tier 1 Migrant. Evidence from ETS confirmed the certificate was false. Paragraph 321A(2) of the Immigration Rules, HC395 applied. The respondents appealed on the basis that there had been no deception and the certificate had been validly earned. The Judge of the First-tier Tribunal found the evidence relied on by the appellant in support of the allegation was "woefully inadequate" and allowed the appeals. Permission to appeal was refused by the First-tier Tribunal but granted on a renewed application by the Upper Tribunal.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. I shall therefore refer to the members of the family from now on as "the appellants" and the Secretary of State as "the respondent".

3. The respondent's application to adjourn this appeal pending the anticipated Presidential decision on ETS cases was refused by Upper Tribunal Judge Jordan. It was renewed by Ms Fijiwala. She said grounds seeking permission to appeal engaged the question of whether the Judge's assessment of the evidence was adequate. The Tribunal would benefit from waiting for the impending Presidential decision. Mr Patel opposed the application.

4. Having considered the arguments I refused the application. The first issue to be decided was whether the first-tier Tribunal decision was vitiated by error of law and there was no reason I could not decide that issue without waiting for the Presidential decision.

5. I was not asked and saw no reason to make an anonymity direction.

6. I heard argument on the question of whether the judge's decision is vitiated by material error of law.

7. Ms Fijiwala relied on the grounds seeking permission to appeal. She relied on the point made in the grant of permission to appeal that the Judge had only looked at the parts of the judgment of McCloskey J in *R (on the application of Gazi) v SSHD (ETS – judicial review) IJR* [2015] UKUT 00327 (IAC) which were critical of the generic evidence and she had, in particular, overlooked paragraph 35. The Judge had not made a full and balanced analysis of all the evidence.

8. Mr Patel made contrary submissions which I do not need to set out here. Having considered the matter, I find the Judge did not make a material error of law such that her decision allowing the appeals should stand. My reasons are as follows.

9. The Upper Tribunal granted permission to appeal because it was arguable the First-tier Tribunal had erred by overlooking paragraph 35 of the judgment of McCloskey J in *R (on the application of Gazi) v SSHD (ETS – judicial review) IJR* [2015] UKUT 00327 (IAC). In that case, the President said,

> "… the Respondent's evidence … was sufficient to warrant the assessment that the Applicant's decision had been procured by deception and, thus, provided an adequate foundation for the decision made …"

10. However, those words are apt to be misconstrued if read in isolation. Read in the context that the Upper Tribunal was assessing a ground of challenge in judicial review proceedings that the Secretary of State's decision was vitiated by improper purpose in that she knew or ought to have known that there was no or insufficient evidence that the applicant had engaged in deception. All the President is saying in paragraph 35 is that the generic evidence consisting of the statements of Ms Collings and Mr Millington was sufficient to warrant an assessment of deception. He was not saying that evidence would in all cases prevail. Indeed, the ratio of the case is that the best forum for a challenge was the First-tier Tribunal because of its ability to investigate the facts. The Judge did not therefore err in overlooking that particular passage.

11. A fair reading of the decision shows the Judge considered all the evidence and made a thorough assessment of it. She considered the statements of Ms Collings and Mr Millington,as produced in the statement of Mr Harold, and also took into account the President's comments on that sort of evidence in *Gazi*. She also took into account Dr Harrison's report, which was also considered in *Gazi*. She noted the respondent had not provided disclosure of the voice recordings relied on despite requests being made by the appellants' solicitors. She heard oral evidence from the first appellant, who was cross-examined. The Judge considered the fact the first appellant thought she had taken the TOEIC test in London whereas the college which gave the certificate appeared to be in Leicester. She did not regard this as significant and it appears the appellant had taken the test twice. The Judge directed herself in terms of *RP (Proof of forgery) Nigeria* [2006] UKAIT 00086 and found the respondent's evidence was "woefully inadequate" and did not discharge the burden of establishing deception. She was entitled to come to that conclusion and I see no error in her approach or assessment.

12. I find therefore that the decision of the First-tier Tribunal does not contain a material error of law of the kind contended by the respondent. Accordingly it shall stand and the respondent's appeal is dismissed.

NOTICE OF DECISION

The First-tier Tribunal did not make a material error on a point of law and its decision allowing the appeals under the Immigration Rules shall stand.

No anonymity direction has been made.

Signed **Date 14 March 2016**

Judge Froom, sitting as a Deputy Judge of the Upper Tribunal