IAC-AH-LEM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/46013/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th April 2016	**On 4th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MS ESTHER FLORIDA JOTHIMATHEW
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Kanwangara (Counsel)
For the Respondent: Ms N Willocks-Briscoe (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Feeney, promulgated on 7th August 2015, following a hearing at Taylor House on 7th July 2015. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State subsequently

applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female citizen of India who was born on 29th March 1989. She appeals against the decision of the Respondent dated 13th November 2014 cancelling her leave to remain in the UK under paragraph 321A(1) of the Immigration Rules HC 395.

The Appellant's Claim

3. The Appellant's claim is that she first entered the UK on 3rd August 2004 with entry clearance to study on a student's visa until 30th September 2005. This was extended subsequently. The Appellant subsequently transferred onto a Tier 1 (Highly Skilled) Migrant visa. On 30th August 2012, the Appellant applied for a spouse's visa on the basis of being a settled person with a residence permit and this was granted until 17th March 2015. In April 2014, the Appellant left for a six-month visit to India, but upon return she was interviewed at Heathrow Airport on 13th November 2014, and her leave was cancelled on the basis that she had used false documents to present herself as a person who had sat the relevant English language test, which it was alleged she had not done, having used a proxy.

The Judge's Findings

4. The judge did not accept the Respondent's case against the Appellant. He did not find the evidence on the Respondent's side to be satisfactory, and not least because it had not been identified that the evidence could expressly be said to relate to the Appellant herself. As against that, the judge held that the Appellant had provided "a consistent account about how she arranged for and paid for her test" (paragraph 19).

5. The judge allowed the appeal.

Grounds of Application

6. The grounds of application state that the judge misunderstood the evidence before her and arguably failed to give adequate reasons for concluding that the Respondent had not discharged the burden of proving deception.

7. On 17th February 2016, permission to appeal was granted on the basis that,

> "Whilst it may ultimately be found that the grounds are simply a disagreement with the judge's decision, it is at least arguable that the judge misunderstood the evidence …".

Submissions

8. At the hearing before me on 4th April 2016, Ms Willocks-Briscoe made the following submissions. First that the conclusions reached by the judge at paragraph 16 namely that, "I can see that Appendix E shows that the test taken by this particular Appellant was deemed to be invalid", and that, "however I note that the appendix does not offer an explanation as to why the test was designated as such" was misconceived. This was because the test scores had been validated by ETS. Second, there were witness statements from Peter Millington and Rebecca Collins that an invalid test is so marked once it has been shown that the test was taken by a proxy test taker. The judge, accordingly, has misunderstood the evidence. He said, she had gone on to say that there was a paucity of evidence which was untrue. Given that the judge had found the onus had now shifted on the Appellant to show why she could not be said to have procured this test result as a result of a proxy arrangement by her. Accordingly, the judge failed to give proper weight to what was provided by the Secretary of State. There was simply a misunderstanding of the evidence produced on behalf of the Secretary of State.

9. For his part, Mr Kanwangara referred to the fact that recently the president of the Tribunal had, in a specially convened panel hearing, heard and determined the case of **Qadir (IA/36319/2016),** and although the judgment was not out, what the president had said had been widely reported in the press, and he himself had a press release from the solicitors acting for Qadir. In that case, the president had shown the system used by ETS to have been a discredited one. Second, and in any event, on the particular facts of this case, the judge had come to the correct conclusion. He had found that there was actually no evidence from the ETS at all. The witness statements of Peter Millington and Rebecca Collins did not explain why this particular Appellant's test was considered to be invalid. The Secretary of State had only managed to get permission on the basis of what Peter Millington and Rebecca Collins said in their witness statements. On the other hand, the judge had found the Appellant to be giving a "consistent account" about how she arranged for and paid for her test. If the burden is on the Secretary of State to show a proxy was used, that burden had not been discharged. The judge concluded (at paragraph 23) that there was a "lack of information regarding this particular Appellant's test result …".

10. In reply, Ms Willocks-Briscoe submitted that if I were to make a finding of an error of law, then I should adjourn the substantive determination of this appeal until such time that the president's decision in **Qadir** becomes available.

No Error of Law

11. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

12. First, there is nothing to suggest that the judge misunderstood the test. What he was referring to was the fact that the statements of Peter Millington and Rebecca Collins did not show why the test of this particular Appellant was invalid.

13. Second, the judge was not satisfied at the hearing about the further checks in relation to the "human verification process".

14. Third, he was right to conclude that there was a "paucity of information regarding this particular Appellant to an extent that it is not clear even to Ms Southgate-Smith whether this Appellant's test had to be assessed by individuals" (paragraph 17).

15. Fourth, Mr Peter Millington's statements refer to "other reasons as to why test certificates are invalidated and that these include situations where there has been a test administration irregularity", but it was not clear whether this case had been marked as one where there had been an administrative irregularity.

16. On the other hand, the Appellant was a person who had not even given "a consistent account" but had been able to talk about a test that she had sat two years earlier and, "she had also worked in customer facing roles in well-known companies and this would have meant at the very least some ability to understand and communicate in English" (paragraph 20).

17. Finally, it is significant that this is an Appellant who (see paragraph 4 of the determination) had arrived in the UK in August 2004 and had been given various extensions of leave to remain, following her entry as a student, in the capacity of a highly skilled migrant, and then on the basis of marriage, and had only been apprehended after she had returned back from India on a six-months' leave, and told that there was a question mark about an English language test that she had sat two years previously.

18. All in all, the judge was entitled to come to the conclusions that she did. There is no perversity in the decision that she reached.

Notice of Decision

19. There is no material error of law in the original judge's decision. The determination shall stand.

20. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 28th April 2016