



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

Appeal Numbers: OA/00216/2015
OA/00221/2015
OA/00227/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 7 July 2016**

**Decision & Reasons
Promulgated
On 14 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS S H SHAH
MISS H H SHAH
MR H M SHAH
(ANNONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer
For the Respondent: Mr Z Malik, Counsel

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State with permission of Upper Tribunal Judge Storey from a determination of First-tier Tribunal Judge Rastogi, promulgated on 9 December 2015. The three appellants (as I shall call them, to reflect their status in the First-tier Tribunal) are

Indian nationals. They are part of a family (father, mother and daughter) but the presenting issue which the First-tier Tribunal Judge had to determine was whether there had been deception by the principal appellant in relation to ETS testing, as a consequence of which the appellants should be removed.

2. On 16 December 2014 the appellants lodged their notices and grounds of appeal. On 12 March 2015 the Secretary of State was directed to file and serve all the evidence upon which she relied within 28 days of her receipt of the notice of appeal that means by 9 April 2015. Then on 12 June 2015 both parties were directed to file bundles of the evidence on which they were to rely no later than five days prior to the hearing. The Secretary of State was further directed to supply the documents that had been required by 9 April 2015 "without further delay". The direction issued at this time included the following warning "If the documents are not filed with the Tribunal ten working days before the date of the hearing, subject to Rule 14, the appeal may be determined in the absence of those documents".
3. When the matter came on for hearing before the First-tier Tribunal Judge, the evidence had not been served. The judge dealt with the late service of evidence by the Secretary of State and by the appellants separately. In relation to the late service by the Secretary of State, the judge said at paragraph 8:

"I was asked to deal initially with the respondent's application for permission to file and serve evidence as to the alleged deception on the day of the hearing as it had not previously been served upon the appellant within the appeal and neither had it been filed with the Tribunal in breach of the aforementioned directions. Mr Sharma had refused to accept service of the evidence for these reasons. Mr Collins [the Home Office Presenting Officer] was unable to tell me why the evidence had not been filed or served."

The late evidence which was sought to be introduced comprised what are often called generic statements dealing with the alleged deception from witnesses Rebecca Collins, Peter Millington and Lesley Singh, statements from two of whom had been filed in parallel judicial review proceedings.

4. As to the late service of evidence by the appellants, at paragraph 11, the judge records Mr Sharma

"confirming that the appellant's bundle was served late as his instructing solicitors were waiting for the respondent to serve her evidence of the alleged deception as the appellants could respond to it. This was endorsed by the letter the solicitors sent to the Tribunal when sending the appellant's bundle."
5. The way the appeal is put today by Mr Duffy is two-fold. He says first that it was wrong of the judge to refuse to admit the evidence of the Secretary

of State and secondly (in the alternative) it was wrong of the judge to admit the evidence of the then appellants. He argues there should be an equality of arms: what is good for one party is good for the other party, and not to treat both the same amounted to is procedural unfairness.

6. I regard Mr Duffy's submissions as flawed for two reasons. The admission of evidence, particularly late evidence, is a case management decision for First-tier Tribunal Judges exercising their discretion considering, amongst other things, whether there was good reason for not doing so. No reason at all was advanced on behalf of the Secretary of State; a reason which the judge obviously considered credible was put forward by the appellants. Since the considerations were different in each application, it is perfectly legitimate that the outcomes might be different.
7. The judge clearly accepted the appellants' explanation that they were waiting until the evidence from the Secretary of State had been received before they responded to it; and that no assumption could be made that the Secretary of State would rely upon evidence served in parallel judicial review proceedings.
8. Admission of evidence is a discretionary matter within the province of the First-tier Tribunal Judge. It may be that a different judge might have come to a different conclusion but the rulings made in relation to each of the applications were properly determined within the ambit of the judge's discretion and I can find no reason for either admissibility decision being classified as an error of law.
9. The second reason why I reject this appeal on the 'equality of arms' footing is that it was very fairly conceded by Mr Duffy that if the First-tier Tribunal Judge had taken the alternative course and not allowed either party to adduce evidence, the outcome would have been the same. The burden of proving deception lay on the Secretary of State and absent evidence, the appeal would have succeeded. Had I found an error of law, I would have concluded that it was not material.

Notice of Decision

The Secretary of State's appeal is dismissed and the decision of the First-tier Tribunal Judge is affirmed.

No anonymity direction is made.

Signed

Mark Hill

Date

14 July 2016

Deputy Upper Tribunal Judge Hill QC

