



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

Appeal Number: OA/00740/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 12 February 2016**

**Decision & Reasons Promulgated
On 26 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

**MINAL RUSHIKESHBHAI VYAS
(NO ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr B Singh, Counsel instructed by The Sethi Partnership
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India born on 9 September 1997 whose application for entry clearance to the UK to join her husband was refused by the respondent on the basis that the genuineness of the documents her husband had used to obtain his UK citizenship were doubted. The appellant appealed to the First-tier Tribunal ("FtT") and in a decision promulgated on 23 January 2015 her appeal was dismissed.
2. The factual background to this appeal is that in 2006 the appellant's husband (hereinafter "the sponsor") entered the UK on a Nepalese

passport with leave as the spouse of a person settled in the UK. He was naturalised as British on 14 June 2010. In March 2012 he divorced and in April 2012 married the appellant, who at that time was residing in the UK. The appellant returned to India to apply for leave to enter the UK as the spouse of the sponsor.

3. In a decision dated 28 November 2013 the respondent refused the appellant's application. The respondent's Notice states:

"Checks conducted by our office have shown that your sponsor travelled to the UK as the spouse of GP in 2006 on a Nepalese passport. However in 2004 he made an application in Mumbai as a visitor using an Indian passport bearing a different date of birth and place of birth to that of the later application. On both applications, the sponsor remained the same. I am therefore satisfied to a higher degree of probability that the application in 2006 was made under a different identity. This therefore leads me to doubt the genuineness of the document used to obtain his citizenship in the UK. Consequently I therefore refuse your application under paragraph EC-P1.1(d) of Appendix FM of the Immigration Rules (E-ECP 2.1)"

Decision of the First-tier Tribunal

4. The appellant appealed and her appeal was heard by FtT Judge Khan. The FtT directed itself at paragraph [9] of the decision that the burden of proof was on the appellant to show that she met the requirements of EC-P1.1.
5. The FtT described the sponsor as being vague and evasive throughout his oral testimony and it found that he had obtained his Indian passport by unlawful means and that he was not entitled to it.
6. With regard to the sponsor's Nepalese passport, the FtT found that the sponsor had obtained it in 2006 and that the documents he relied on to show he was Nepalese were "unreliable and not credible in any way". At paragraph [29] The FtT commented on the sponsor's birth certificate which was registered in 2008. The FtT stated it did not accept the certificate as evidence of the sponsor's Nepalese citizenship as the document did not refer to any earlier registration, the sponsor having claimed to have lost his birth certificate. The FtT also referred to the sponsor's Nepalese citizenship card and stated that little or no weight could be attached to it as it was not translated and the reason the sponsor had given for not having it translated was that he would have to provide finger prints. The FtT stated that if the sponsor is "genuinely a Nepalese citizen then what is the problem with providing his fingerprints".
7. The FtT concluded that the sponsor had failed to establish his true identity and had obtained his British citizenship using unreliable documents.

Relevant paragraphs of Appendix FM to the Immigration Rules

8. This appeal turns on the following paragraphs of Appendix FM:
- ‘EC-P.1.1 The requirements to be met for entry clearance as a partner are that-
- (a) the applicant must be outside the UK;
 - (b) the applicant must have made a valid application for entry clearance as a partner;
 - (c) the applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability–entry clearance; and
 - (d) the applicant must meet all of the requirements of Section E-ECP: Eligibility for entry clearance as a partner.
- S-EC.2.1. The applicant will normally be refused on grounds of suitability if any of paragraphs S-EC.2.2. to 2.5. apply.
- S-EC.2.2. Whether or not to the applicant’s knowledge-
- (a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or
 - (b) there has been a failure to disclose material facts in relation to the application.’
9. Under the above described paragraphs of Appendix FM, an applicant for entry clearance will normally be refused on grounds of suitability if, even if not to her knowledge, false information has been submitted in relation to the application. This includes false information submitted to obtain a document used in support of the application.

Error of law

10. For the reasons set out below, I find that the FtT made two material errors of law.
11. The first error relates to the burden of proof. It is clear from the decision that the FtT has proceeded on the basis that the burden of proof fell on the appellant. This is set out at paragraph 9 where the FtT stated that it was for the appellant to establish, on the balance of probabilities, that EC-P1.1, S-EC2.1 and S-EC2.2 were met.
12. The grounds of appeal argue that this is misconceived and I agree. This is a case where the respondent alleged the sponsor had used false information. It is well established that where an allegation of this nature is made the burden of proof, ultimately, falls on the respondent. As explained in *Shen (Paper appeals; proving dishonesty)* [2014] UKUT 236 (IAC) at [25] (emphasis added):
- “On analysis we believe that the way in which the burden of proof operates is as follows. We accept that if an application form is false in a material way, that this may be relied upon as some *prima facie* evidence which assists in

establishing dishonesty. The inference of deliberate deception can be strengthened by reference to other facts, for example if the conviction is shortly prior in time to the completion of the application form this will furnish circumstantial supporting evidence that the conviction must have been high in the applicant's mind and any explanation based upon oversight would carry little weight. However, this is not dispositive of dishonesty and it is open to an Appellant to proffer an innocent explanation. If an innocent explanation is advanced (by which we mean one that meets a basic, minimum level of plausibility) then the burden switches back to the SSHD to answer that evidence. **At the end of the day the SSHD bears the burden of proof.** This is a proposition which is uncontroversial and has been confirmed on many occasions: e.g. JC (Part 9 HC395 - burden of proof) China [\[2007\] UKAIT 00027](#) para 10; MZ (Pakistan) v Secretary of State for the Home Department [\[2009\] EWCA Civ 919](#) para 25; Mumu (paragraph 320; Article 8; scope) [\[2012\] UKUT 143 \(IAC\)](#)"

13. The FtT fell into error by failing to recognise that a nuanced approach to the burden of proof, as set out in Chen, was required and that "at the end of the day" the burden of was borne by the respondent.
14. The FtT's second material error was its failure to have regard to, or give reasons for making no reference to, relevant evidence. The key issue before the FtT was whether the sponsor was Nepalese. However, the decision contains no analysis of at least three documents purporting to show the sponsor was Nepalese. These are:
 - a letter from a Municipality Office dated 13 August 2014 stating that the sponsor was born in Nepal and giving his personal details including his citizenship number and passport number.
 - A letter from a District Administration Office dated 4 June 2014 stating the sponsor's citizenship number and passport number.
 - A Residence Certificate dated 3 June 2014 from a Municipality Office stating the sponsor's citizenship number and passport number.
15. Whilst the FtT was not required to make specific findings on every aspect of the evidence before it, these documents are key evidence that go to heart of the central issue in the case and the judge erred by not considering them (or explaining his reason to discount them) before concluding, as he did at paragraph [30], that the documents the appellant sought to rely on to establish the sponsor's Nepalese citizenship were unreliable and not credible.

Remade decision

16. Having found that the decision contains a material error of law, I now proceed to remake the decision.
17. This appeal turns on the application of paragraph S-EC2.2(a) of Appendix FM, which provides that an applicant will normally be refused entry clearance if false information, representations or documents were

submitted in relation to the application for entry clearance and that this includes false information submitted to obtain a document used in support of the application.

18. The respondent alleges that paragraph S-EC2.2 applies because the sponsor used false documents and information to show he was a Nepalese citizen in order to obtain documents (his British passport and certificate of naturalisation) that were then used in support of the appellant's application for entry clearance.
19. In a case, such as this, where the respondent is alleging false documents and information were used, the approach to the burden of proof is not straightforward. It was helpfully summarised by the Upper Tribunal in *Muhandiramge (section S-LTR.1.7)* [2015] UKUT 675 (IAC), as follows:
 - (a) First, where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue: for example, by producing the completed application which is prima facie deceitful in some material fashion.
 - (b) The spotlight thereby switches to the applicant. If he discharges the burden - again, an evidential one - of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.
 - (c) Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's prima facie innocent explanation is to be rejected."
20. Applying this approach to the present case, and relying on the evidence that was before the FtT, my findings are as follows:
21. In 2004 the sponsor applied to enter the UK as a visitor using an Indian passport bearing a different date and place of birth to that shown on his Nepalese passport, which he used to enter the UK in 2006 and subsequently obtain British citizenship. The discrepancy between the two passports raises a serious concern about the genuineness of the documents the sponsor used to obtain his citizenship (ie the Nepalese passport). Accordingly, the respondent has satisfied the initial evidential burden.
22. The initial evidential burden having been satisfied by the respondent, the evidential burden is then on the sponsor to give a plausible explanation as to the genuineness of his Nepalese passport and citizenship.
23. The sponsor has submitted a wide range of documents from Nepal that, on their face, show he was born in Nepal and has Nepalese citizenship. These include (a) a Nepalese passport issued in August 2006; (b) a birth certificate from Nepal (dated 22 January 2008); (c) a letter from a municipality office in Nepal stating that the sponsor was born in Nepal and giving his personal details including his citizenship number and passport

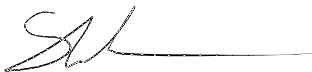
number (dated 13 August 2014); (d) a letter from a District Administration Office in Nepal setting out the sponsor's citizenship number and passport number (dated 4 June 2014); and (e) a residence certificate from a Nepalese municipality office stating the sponsor's citizenship number and passport number (dated 3 June 2014). I am satisfied that by submitting these documents, which on their face appear genuine, the sponsor has met the evidential burden of giving a plausible explanation for his Nepalese citizenship.

24. Accordingly, the evidential burden having been satisfied, the burden of proof rests on the Secretary of State to establish, on the balance of probabilities, that the sponsor's prima facie innocent explanation is to be rejected. The respondent has not submitted any evidence to show why or how any of the aforementioned documents are or might be false and accordingly has not discharged the burden.
25. Indeed, the evidence before me, irrespective of where the burden of proof lies, overwhelming supports the view that, on the balance of probabilities, the sponsor is a Nepalese national. He has submitted a wide range of documents confirming his citizenship including, inter alia, a passport and birth certificate, and there is no evidence before me (just as there was none before the FtT) to show these documents are not genuine. Accordingly, I am satisfied that paragraph S-EC.2.2(a) does not apply and therefore that the appeal should be allowed.

Notice of Decision

- a. The appeal is allowed.
- b. The decision of the First-tier Tribunal involved the making of a material error of law and is set aside.
- c. I remake the decision of the First-tier Tribunal by allowing the appeal.
- d. No anonymity direction is made.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 23 February 2016