



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

Appeal Numbers: HU/07739/2015
HU/07742/2015
HU/07744/2015
HU/07748/2015

THE IMMIGRATION ACTS

Heard at Field House

On 6 October 2017

**Decision & Reasons
Promulgated**

On 28 December 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**NIYOMI [G]
HORATHAL [D]**

[H D]

[N D]

(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr S Walker (Senior Home Office Presenting Officer)

For the Respondents: Mr A Burrett (Counsel)

DECISION AND REASONS

1. The respondents are nationals of Sri Lanka. The first and second are a married couple and the third and fourth are their children. Their appeals against decisions to refuse their human rights applications, in which they sought leave to remain, were allowed by First-tier Tribunal Judge R Chowdhury (“the judge”) in a decision promulgated on 12 January 2017.
2. Before the First-tier Tribunal, the respondents were represented by Counsel. There was no appearance by or on behalf of the Secretary of State. The judge found the respondents to be credible witnesses, having heard from the first and second of them. She found, in relation to the Secretary of State’s finding that the second respondent obtained an English language test certificate by fraud or deception, that this case was not made out. She went on to find that the appeals fell to be allowed as the decisions to refuse the human rights claims, and consequent removal to Sri Lanka, would be disproportionate. She found that the third respondent’s appeal should be allowed in the light of his particular needs.
3. The Secretary of State applied for permission to appeal. It was contended, first, that the judge erred in finding that she had not discharged the burden of proof in relation to the allegation of fraud or deception. Witness statements filed on behalf of the Secretary of State explained the careful means by which deception or fraud was uncovered and a spreadsheet provided evidence to demonstrate, on a balance of probabilities, that the second respondent obtained a test certificate improperly. It appeared that the judge had misinterpreted the evidence.
4. In a second ground, it was contended that the judge erred in her human rights assessment. In particular, the proportionality assessment was tainted by the error in respect of the finding on the second respondent’s use of deception. So far as the third respondent was concerned, the judge failed to identify evidence regarding the negative impact she found which would result from his removal from the United Kingdom. As he was only 6 years old, his family and private life ties would be centred on his sibling and parents. Moreover, any ties established in the United Kingdom were made when the family’s immigration status was precarious.
5. Permission to appeal was granted by a First-tier Tribunal Judge on 28 July 2017. The judge granting permission found that the “generic evidence” relied upon by the Secretary of State was arguably sufficient to meet at least the primary evidential burden, whereas the judge’s analysis appeared not to reflect this.
6. The respondents provided a Rule 24 response on an uncertain date. They contended that the judge had properly directed herself and applied guidance given in SM and Qadir and Gazi, cases referred to expressly in the decision. The judge heard all the evidence and was entitled to find that the Secretary of State had not discharged the burden of showing that

the second respondent's test results were fraudulently obtained. The judge plainly considered the "generic evidence", as part of the analysis. The Secretary of State did not seek to challenge the Article 8 assessment, save in relation to the finding that fraud or deception existed.

Submissions on Error of Law

7. Mr Walker, for the Secretary of State, said that the judge had misdirected herself in relation to the test certificate aspect of the case. The Tribunal was provided with the usual evidence in such a case. As the English language test results were undermined, the basis of the leave to remain given to the second appellant was removed.
8. The second ground concerned an error in the human rights assessment. In paragraph 25 of the decision, the judge found compelling circumstances but the proportionality assessment was tainted. The judge found that removal would have a negative impact on the third respondent, at paragraph 35 of the decision. This finding was based on his particular health needs. However, there were facilities available to cater for these in Sri Lanka. Family and private life would be centred on the entire family. The judge had failed to engage with the high threshold set out in the judgment in Agyarko.
9. In summary, the judge misdirected herself regarding the test certificate and had failed to show that the respondents would face insurmountable obstacles to integration into Sri Lanka.
10. Mr Burrett said that reliance was placed upon the Rule 24 response. The Secretary of State had not provided a representative at the First-tier Tribunal hearing. Her case was contained in the decision letter and the evidence made available. The judge had properly taken all of this into account and was entitled to find that the second respondent took the English language test and that the respondents were credible witnesses.
11. The respondents provided a bundle and the judge took witness statements into account. She was not required to do more than she did. In essence, the judge preferred the respondents' evidence to the evidence relied upon by the Secretary of State. Taking into account what was in the decision letter, the overall conclusion was open to the judge. The respondents had provided an explanation to meet the Secretary of State's case, assuming that the evidence relied upon by her was sufficient to meet the initial evidential burden. As the Secretary of State provided no representative, there was no cross-examination. The respondents' evidence amounted to a rebuttal of the Secretary of State's case.
12. In a brief response, Mr Walker said that paragraphs 17 and 18 of the decision showed the judge's error. She found that there was a dearth of evidence relating to the second respondent's case in particular, but this was not so. Although there was no Presenting Officer on the day, the

evidence was sufficiently particularised, so as to bear directly on the second respondent's case. The judge made no express findings regarding the explanation offered to address the evidence made available by the Secretary of State.

Conclusion on Error of Law

13. The decision shows clearly that the judge accepted the case advanced by the respondents, having heard from the first and second of them and having taken into account documentary evidence. The Secretary of State made available witness statements from Ms R Collings and Mr R Millington. The judge referred to this evidence as having been "comprehensively criticised" in case law which she referred to, including the Upper Tribunal decisions in SM and Qadir [2016] UKUT 229 and Gazi [2015] UKUT 327. She referred to the evidence as disclosing "hardly any useful particularised information with regard to" the second respondent. This is a reasonable assessment of the witness statements themselves. However, the Secretary of State relied on other evidence in addition, including an ETS spreadsheet which the judge referred to in paragraph 14 of her decision. The clear conclusion that fraud or deception had not been established by the Secretary of State does not reveal any engagement with or analysis of the spreadsheet. It is also clear from paragraph 14 of the decision that the judge took into account the respondents' bundle, consisting of 148 pages, although there is no reference to any particular document contained in it, notwithstanding the relevance of several items to the contested issues in the appeals. Mr Burrett suggested that it was here, in the bundle, that the response to the Secretary of State's case was to be found, assuming that the witness statements from Ms Collings and Mr Millington were sufficient to at least meet the initial evidential burden.
14. Dealing first with the witness statements which appear in the bundle, the second respondent's statement appears at pages 3 to 6. At paragraph 3, she asserts that her test certificate was not forged and refers to communication with her sponsoring college. There is little else concerning the test or certificate. Her husband's witness statement appears at pages 6 and 7 but adds little. What is important in the bundle, and which the decision makes no mention of, is the correspondence between pages 128 and 135 and the statement from the second respondent which then follows, at pages 136 to 138.
15. This evidence shows that the second respondent's sponsoring college, having been notified that the test certificate and results were withdrawn following the ETS investigation, sought to arrange an interview with her to discuss her position. The initial date was replaced by a subsequent one in view of her pregnancy. Following an interview on 16 October 2014, the college emailed on 24 October with a decision to withdraw sponsorship and expel the second respondent from her course. The basis of the decision was that she was unable to say what the structure of the TOIEC test was or which particular sections were included. In a statement made

on 30 October 2014, after her college's decision, the second respondent complained that she was not given an opportunity to sit a special test, described as a secured English language test. Instead of offering her that opportunity, her sponsoring college questioned her about her attendance and the previous TOEIC test.

16. The sponsoring college made clear their finding that they were not satisfied that they should prefer the second respondent's assertion that her certificate was valid, when compared with information supplied by UKVI and ETS. Their overall conclusion was that the documents she provided to them, which led to their sponsorship of her, were "misleading".
17. This was extremely important evidence which required careful assessment. Set against that evidence, the single sentence at paragraph 16 of the decision, which records that the judge had the benefit of hearing oral evidence and had no reason to doubt the respondents' credibility, is too fragile a basis for the overall conclusion. If the judge were to find that the Secretary of State had failed to discharge the burden upon her, engagement was required with evidence which showed that the sponsoring college's conclusion regarding the test certificate was similar to the adverse finding made by the Secretary of State.
18. I conclude that the Secretary of State's grounds of appeal are made out. The conclusion that there was no fraud or deception was insufficiently reasoned and the Article 8 assessment which followed was based on an insufficiently reasoned premise. The Secretary of State did not provide a representative but, nonetheless, her case and all the salient features of the evidence required assessment and analysis. Some of the respondents' evidence was capable of supporting the Secretary of State's case, rather than undermining it.
19. The decision contains a material error of law and must be remade. It is clear that the appropriate venue is the First-tier Tribunal. The decision will be remade at Hatton Cross, before a judge other than Judge R Chowdhury.

Notice of Decision

The decision of the First-tier Tribunal is set aside. It will be remade in the First-tier Tribunal at Hatton Cross, before a judge other than First-tier Tribunal Judge R Chowdhury.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell

ANONYMITY

There has been no application for anonymity and I make no direction or order on this occasion.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell