



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

Appeal Number: IA/26097/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 30th August 2017**

**Decision & Reasons Promulgated
On 5th October 2017**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS GYANI SHOVA GURUNG
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Mr P Richardson, Counsel instructed by Paul John & Co Solicitors

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal, that is Mrs Gurung as the appellant and the

Secretary of State as the respondent. The appellant is a national of Nepal who entered the United Kingdom in September 2010 and was granted subsequent extensions of leave until 21st September 2015. On 30th September 2014 she made an application for further leave as a married spouse. She had married on 4th August 2014. On 3rd July 2015 her application was refused under Appendix FM, R-LTRP.1.1 of the Immigration Rules and she brought an appeal which was listed before First-tier Tribunal Judge Hussain.

2. The judge set out the following:

- “2. *The respondent’s reasons for refusing the appellant’s application are set out in a refusal letter dated 3 July 2015. The application was considered under Paragraph R-LTRP.1.1 (d)(i) but was found by the Secretary of State not to satisfy the requirement with regards to suitability. Her reasons for that position is given in Paragraph 12 of refusal letter which states that during an administrative review process, ETS confirmed that her test score was obtained through deception. Because the validity of the test results could not be authenticated, the scores from the test taken on 22 August 2012 have been cancelled. The appellant therefore was considered a person who had sought leave to remain in the United Kingdom by deception following information provided to the Secretary of State by Education Testing Service (ETS) that an anomaly with her speaking test indicated the presence of a proxy test taken.*
3. *Notwithstanding the fact that the appellant has failed to meet the suitability criteria, it was accepted that she met the eligibility requirements in paragraph R-LTRP.1.1.(d)(ii)”.*

3. The judge allowed the appeal, noting at paragraph 13 that:

“13. *The suitability provision that is said to apply in this case is to be found in S-LTR.2.2 which provides that application will be refused 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’.*
14. *As I observed at the hearing, the language of sub-paragraph a) of Section L-LTR.2.2 is clear, in that, the false information must be submitted in relation to ‘the’ application, meaning the application under consideration. In this case, according to paragraph 12, the allegation concerning the submission of a*

proxy-taken certificate relates to tests taken on 22 August 2012. Remarkably, the allegation does not specify whether the certificate of the test in question was submitted to support the application. The answer to that question must be in the negative because according to page 43 of the appellant's application form, the certificate she relied on is from IELTS. The respondent has not challenged that decision. I conclude therefore, that the appellant has not submitted any evidence in connection with her current application that is caught by sub-section S-LTR2.2(a). In any event, the respondent has not provided a shred of evidence to support the allegation that the appellant's English language test with ETS involved a proxy test taken".

The judge allowed the appeal finding that the appellant's application was made under the five year route and that she satisfied all of the eligibility requirements. It can be seen that the judge concluded that the suitability provision was said to apply to be found in S-LTR2.2.

4. The Secretary of State made an application for permission to appeal on:

Ground (i)

The First-tier Tribunal assumed that the respondent had refused the appellant's application under the suitability requirement 2.2 rather than 1.6 as the S-LTR2.2 referred to false information being provided in the current application and the judge stated that no evidence had been submitted in relation to the current spouse application and therefore the appellant met the suitability requirements. The application for permission noted that "the refusal letter states that the appellant does not meet the suitability criteria but is unspecific as to upon which grounds. Reliance is placed on ground S-LTR1.6".

The respondent maintained that the appellant did not meet the suitability criteria and was required to consider whether it was on the five or ten year route.

Ground (ii)

In finding the appellant to be suitable the First-tier Tribunal wrongly stated that there was no evidence that the appellant used a proxy for their ETS English language testing. It was submitted that at Annex M1 and M2 of the respondent's bundle the ETS source data clearly showed that the appellant's test result had been deemed invalid. In the light of this evidence the respondent concluded that the appellant had used deception.

5. At the hearing Mr Bramble confirmed that this was an appeal which attracted the full range of old appeal rights as the application was made on 30th September 2014 (prior to 6th April 2015). Mr Bramble accepted that the decision did not stipulate which paragraph of the Immigration

Rules in relation to suitability was indicated, but noted that the judge had referred to there being no shred of evidence to support the allegation that the appellant's English language test with ETS involved a proxy test taken but that the evidence was clearly provided as could be seen from M1 and M2 of the annexed respondent's bundle before the judge. That had stated that the test was invalid. The judge had erred in focusing on S-LTR.2.2 and the onus was on the judge to confirm that all the Immigration Rules had been complied with.

6. In response Mr Richardson submitted that the entirety of the evidence was the look-up tool and it was worth emphasising that there were no witness statements from the Secretary of State placed before the judge. I queried this on the basis that those statements were now in the public domain but it was submitted that the evidence was so incomplete as to be virtually meaningless. Mr Richardson submitted that the Secretary of State was not absolved by relying on other reported cases. If I was not with him on that point, whatever the errors regarding suitability, there were proper findings of fact. I read out the judge's reference on file which indicated that the Presenting Officer agreed with the view of the judge that S-LTR.2.2 formed the basis of the refusal letter from the Secretary of State. Mr Richardson indicated that the appellant did not rely on the previous grant in her application because she had made an application as a spouse which should be considered under the five year route. The decision letter was open to interpretation that was supplied by the judge and if required, the solution was to send the matter back to the First-tier Tribunal for findings of fact to be made. It is clear from paragraphs 12 and 13 that the judge had considered that S-LTR.2.2 applied.

Conclusions

7. In conclusion, the applicant, when making a spousal application under the Immigration Rules must not fall foul of the suitability provisions which I set out as follows

*S-LTR.1.1. The applicant **will be refused** limited leave to remain on grounds of suitability if ...*

S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.

and

*S-LTR.2.1. The applicant **will normally** be refused on grounds of suitability if*

*S-LTR.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.*

8. A decision taken under S-LTR 1.6 is a mandatory refusal and if the Secretary of State makes a decision under this provision unless the fact on which the decision is taken is challenged it is not a matter of discretion to be reviewed by the judge. A decision taken under S-LTR 2.2 is not a mandatory refusal and the exercise is a matter which the judge may consider. Thus the importance of identifying and applying the correct provision is clear.

9. In the refusal decision the Secretary of State cited the Immigration Rules in relation to suitability S-LTR 1.1 to 3.1 and merely stated

'You are specifically considered a person who has sought leave to remain in the United Kingdom by deception following information provided to us by Educational Testing Service (ETS), that an anomaly with your speaking test indicated the presence of a proxy test taker.

Therefore it is considered that you do not meet the Suitability requirements for consideration of limited leave to remain in the United Kingdom as a partner under E-LTRP and /or the parent under E-LTRPT and /or on the grounds of private life under Paragraph 276ADE'.

10. That the Secretary of State referred in the decision to the documentation in relation to a previous application would indicate that, in fact, the Secretary of State relied on S-LTR1.6 but nowhere in the decision is that specifically identified. There is no reference to the particular suitability provision relied on in the Secretary of State's decision. It is not clear on the basis of the decision letter as to which particular part of the suitability Rule, which is the basis for refusing the application, the Secretary of State was placing reliance.

11. Although I do note that the Presenting Officer indicated that the paragraph under consideration was S-LTR 2.2 and which applies to documents being submitted in relation to "the application", it is not clear from the face of the refusal letter and nor is it clear from the judge's finding at paragraph 13 that the suitability provision found to apply was indeed S-LTR.2.2. The judge merely refers to the provision S-LTR.2.2 is 'said to apply in this case'.

12. It is clear that S-LTR2.2 (a) applies to factors in relation to the current application. I explored the notion that “documents have been submitted in relation to the application” may include documents in relation to previous leave but Mr Richardson was quite clear that the application was based on a spousal application and not in relation to her previous Tier 4 applications and I accept that.
13. I do, however, find that it is equally possible that “there has been a failure to disclose material facts in relation to the application”, that is S-LTR.2.2(b) may refer to a relevant fact and material fact as to whether prior deception has taken place. That was a question not addressed by the judge because of his dismissal of the evidence.
14. In relation to ground (ii) of importance is that there was evidence in relation to previous deception said to have been practised by the appellant regarding an application submitted on 20th September 2012 in which the appellant submitted a TOEIC certificate. It was incumbent on the judge to address that documentation even if S-LTR2.2 applied. There are widely reported decisions which have attached the witness statements of the Secretary of State in relation to the deception practised regarding ETS and at section M of the respondent’s bundle the ETS TOEIC test certificate was classified as invalid and “matched to T4 application dated 20th September 2012. Notes of 12th May 2013 on that case confirm date of test and speaking score”.
15. The refusal letter from the Secretary of State states:

“ETS have confirmed that your test score was obtained through deception. Because the validity of your test results could not be authenticated your scores from the tests taken on 22nd August 2012 have been cancelled. You are specifically considered a person who has sought leave to remain in the United Kingdom by deception following information provided to us by Educational Testing Service (ETS), that an anomaly with your speaking test indicated the presence of a proxy test taker”.

The refusal letter continues at paragraph 13 and I repeat:

“Therefore, it is considered that you do not meet the suitability requirements for consideration of leave to remain in the United Kingdom as a partner under E-LTRP and/or parent under E-LTRPT and/or on the grounds of private life under paragraph 276ADE”.

16. As pointed out by the Secretary of State the appellant needs to meet the suitability requirements whether she is considered under the five or ten year route and I disagree with Mr Richardson that the evidence supplied by the Secretary of State cannot without more found a finding of deception. That said, the judge did not turn his mind or address his mind to that because he proceeded on the basis that it was S-LTR2.2 which applied and in the manner described above and only on the basis of the

documentation presented with the current application. In my view even if SLTR 2.2 did apply it was beholden of him to consider the documentation which was presented and whether the appellant had failed to disclose material facts, that is whether she had practised deception or not previously. It was not the case that there was not a shred of evidence regarding deception and the judge simply did not address the documentation in the respondent's bundle at M.

17. As such, I find that there is an error of law and set aside the decision. I was invited to remit this matter to the First-tier Tribunal but I also find that the Secretary of State's decision is defective in that it does not specify which particular paragraph of the suitability requirements are relied upon and to that extent, I remake the decision and do allow the appeal to the extent that it should be remitted to the Secretary of State for a lawful decision. Remittal to the First-tier Tribunal will merely present the First-tier Tribunal with the same dilemma.
18. I therefore set aside the decision of First-tier Tribunal Judge Hussain and allow the appeal but only to the extent that the matter is remitted to the Secretary of State for a lawful decision.

Decision

The appeal of Ms Gurung is allowed to the extent that the matter is remitted to the Secretary of State for a lawful decision.

No anonymity direction is made.

Signed Helen Rimington

Date 4th October 2017

Upper Tribunal Judge Rimington

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award in the light of the complexities of the matter.

Signed Helen Rimington

Date 4th October 2017

Upper Tribunal Judge Rimington