



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/31942/2015**

Appeal Numbers:

IA/31944/2015

THE IMMIGRATION ACTS

Heard at : Field House

Decision and reasons

On 21 July 2017

Promulgated

On 24 July 2017

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MANJITDER KAUR
AMANDEEP SINGH**

Respondent

Representation:

For the Appellant: Mr P Singh, Senior Home Office Presenting Officer

For the Respondent: Ms S Praisoody, instructed by Deccan Prime Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of First-tier Tribunal Judge Malcolm allowing Ms Kaur and Mr Singh's appeals against the respondent's decision to refuse Ms Kaur's application for leave to remain as a Tier 4 (General) Student Migrant and Mr Singh's application for leave to remain as the dependant of a Tier 4 migrant.

2. For the purposes of this decision, I shall hereafter refer to the Secretary of State as the respondent and Ms Kaur and Mr Singh as the appellants, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellants are citizens of India. The first appellant was born on 5 January 1985 and the second appellant on 21 December 1984. They entered the United Kingdom on 1 January 2011 with visas valid until 30 October 2012. On 10 October 2012 the first appellant applied for leave to remain as a Tier 4 student and was granted leave to remain from 12 December 2012 to 30 September 2014, and the second appellant was granted leave in line as her dependant. On 30 September 2014 the first appellant applied for further leave to remain as a Tier 4 student migrant and the second applied for leave to remain as her dependant.

4. The appellants' applications were refused on 14 September 2015. The first appellant's application was refused under paragraph 322(2) on the grounds that she had submitted, in relation to her previous application on 10 October 2012, a fraudulently obtained TOEIC certificate from the Educational Testing Service (ETS) in relation to an English language test she claimed to have taken at New London College. The respondent had been informed by ETS that a proxy test taker had been used and that they had therefore declared the appellant's test result as invalid and cancelled it. As the appellant's application was refused under one of the general grounds for refusal, the respondent was not satisfied that she met the requirements of paragraph 245ZX(a) of the immigration rules. The application was also refused on the basis that the appellant's CAS (Confirmation of Acceptance for Studies), assigned by The London College (UK), was not valid as the college was not listed as a Tier 4 sponsor when the Tier 4 Sponsor Register was checked on 14 September 2015. The respondent considered that, since the first appellant's application fell for refusal under paragraph 322(2), she did not fall under the Patel ruling and therefore no further 60 days were given to her. The first appellant was accordingly awarded no points for Attributes and Maintenance and her application was also refused under paragraph 245ZX(c) and (d) with reference to Appendix A and C. The second appellant's application was refused in line with that decision.

5. The appellants appealed against that decision. Their appeal was heard by First-tier Tribunal Judge Malcolm on 9 September 2016 and was allowed in a decision promulgated on 5 December 2016 on the basis that the first appellant's evidence, that she had taken the English language test, was accepted and that it was therefore accepted that she had not used deception.

6. Permission to appeal to the Upper Tribunal was sought by the respondent, and granted on 7 June 2017, on the grounds that the judge had arguably erred in law by failing to assess whether the respondent had discharged the burden of proving deception in line with SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 229 and by failing to give adequate reasons for preferring the first appellant's subjective evidence to the documentary evidence adduced by the respondent.

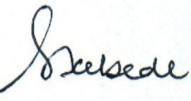
7. At the hearing before me Ms Praisoody accepted Mr Singh's submissions that the judge had materially erred in law by failing to consider the shifting burden of proof and by failing to consider the look-up tool which specifically referred to the first appellant. Both parties agreed that the appropriate course was for the case to be remitted to the First-tier Tribunal to be heard afresh.

8. Accordingly, the decision of Judge Malcolm is set aside in its entirety and the appellant's case is remitted to the First-tier Tribunal to be heard afresh.

DECISION

9. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside.

10. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2) (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge Malcolm.

Signed 
Upper Tribunal Judge Kebede

Date: 21 July 2017