



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/06271/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 16<sup>th</sup> August 2018

Decision & Reasons Promulgated  
On 04<sup>th</sup> September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS JING HU  
(ANONYMITY ORDER NOT MADE)

Respondent

**Representation:**

For the Appellant: Ms H Petersen, Senior Home Office Presenting Officer

For the Respondent: Mr K Uddin instructed by Dias Solicitors

**DECISION AND REASONS**

1. For convenience purposes I shall employ the appellations “Appellant” and “Respondent” as at first instance. The Appellant is a citizen of China whose appeal was allowed under the Immigration Rules by First-tier Tribunal Judge Steer in a decision promulgated on 16<sup>th</sup> May 2018. The judge noted that there was no evidence that the Appellant had ever come into actual possession of the false test certificate and the judge found the Appellant to be credible (paragraph 34). The judge concluded that she had only sought the certificate not because she was unable to meet the required level of competency in English but because she was concerned to

comply with the immigration laws and to apply for further leave to remain in time prior to the expiry of her existing leave.

2. In paragraph 36 the judge noted that the Appellant had met the requirements of the Immigration Rules and it was not necessary to consider the appeal outside the Rules. The appeal was allowed under the Immigration Rules with reference to paragraph 276B.
3. Grounds of application were lodged and it was pointed out that the Appellant's appeal rights were restricted to human rights grounds and therefore when the judge was allowing the appeal under the Immigration Rules she was not permitted to do so.
4. It was also said that the judge had failed to consider the mandatory public interest factors outlined in Section 117B of Part 5A of the Nationality, Immigration and Asylum Act 2002. It was said in the grounds that the Appellant "has admitted to using deception" given that there were strong public interest factors it was respectfully submitted that the interference with her Article 8 rights under the ECHR was justified.
5. Permission to appeal was granted by First-tier Tribunal Judge Andrew in a decision dated 28<sup>th</sup> June 2018 and thus the appeal came before me on the above date.
6. Before me Ms Petersen relied on her grounds. The factors under 117B were factors to be taken into account in the overall balancing exercise which had not been carried out by the judge. I was asked to find there was a material error in law, to set the decision aside and dismiss the appeal.
7. For the Appellant Mr Uddin relied on what the judge had said in paragraph 33 of the decision. That paragraph refers to the IDIs which provided guidance to the Respondent's caseworkers. The judge was correct to narrate the terms of the IDI and that formed the basis of what was said in paragraph 34 namely that the Appellant had never come into actual possession of the false certificate. There had been no deception. There was no *actus reus*. Section 117B had two points which related to this case namely the ability of the Appellant to speak English and whether she would be a burden on public funds.
8. While the judge had erred in allowing the appeal under the Immigration Rules that was not a material error because the judge had made it clear that the Appellant had met the requirements of the Immigration Rules and the judge should therefore have allowed the appeal on human rights grounds.
9. It was submitted that there was no material error in law and the decision should stand.
10. I reserved my decision.

### **Conclusions**

11. As the judge noted in paragraph 25 of the decision the Appellant admitted that the test certificate was false but maintained she had never used it. She explained that she

took an IELTS test on 14<sup>th</sup> April 2012 but panicked as she was waiting for the results of that test and was concerned as to the imminent expiry of her leave to remain. In addition to reaching the TOEIC test the Appellant booked and subsequently took the second test on 12<sup>th</sup> May 2012. The Appellant had only ever relied on her two IELTS test certificates which she had obtained legitimately. It was said in paragraph 25 that the Appellant was a genuine student and had obtained qualifications from reputable institutions. The judge noted that the Appellant had become aware she was doing something terribly wrong and it was the most regretful decision she had made and she was truly sorry.

12. The judge accepted the Appellant's evidence. As she put it the Appellant had never come into actual possession of the false test certificate and the judge accepted that she had only sought the certificate not because she was unable to meet the required level of competency in English but because she was concerned to comply with the immigration laws.
13. While the grounds of application contend that the Appellant used deception it seems to me that that is not what really happened in this case. As Counsel put it there was no *actus reus* in that the Appellant had started on a route of deception (an initial *mens rea*) but quickly realised that this was wrong and did not go through with the deception. She never made use of the false test certificate. As such there was no deception against any person because the Appellant did not use it. It therefore seems to me that while the Appellant can be faulted for taking the initial steps she withdrew from the actual use of the test certificate and therefore it cannot properly be said that she used deception. In terms of the public interest factors under 117B she does speak English and she would not be a burden on public funds and given the findings of the judge that she was a credible witness it seems to me there is therefore no material error of law in this decision. The judge was correct to say that the Appellant met the Immigration rules which is a weighty consideration in the assessment of a breach of human rights and it follows that the appeal is allowed on human rights grounds. Subject to that correction it follows that the decision must stand.

### **Notice of Decision**

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

The appeal is allowed on human rights grounds.

No anonymity order is made.

Signed *JG Macdonald*

Date 24<sup>th</sup> August 2018

Deputy Upper Tribunal Judge J G Macdonald