



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07482/2017

THE IMMIGRATION ACTS

Heard at Field House
On 23 November 2018

Decision & Reasons Promulgated
On 12 December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

MISS LAY LAY NWE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O’Ceallaigh of Counsel

For the Respondent: Mr Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Myanmar. She was born on 13 February 1980.
2. The appellant appealed against the respondent’s decision dated 30 June 2017 to refuse her leave to remain.
3. The appeal was dismissed in a decision by Judge D. Ross promulgated on 12 July 2017. Whilst the judge accepted that the appellant had established a private life in the United Kingdom because she had lived here for almost ten years, he did not

consider that the interference by the respondent in the appellant's private and family life was of such gravity as potentially to engage the operation of Article 8. The judge considered the appellant had submitted a false English language certificate and attempted to remain here on a false basis. He took into account s.117B. He found the appellant's immigration status had been precarious since her leave was curtailed on 15 October 2015 such that he did not give much weight to any private life established since then. He found the respondent's decision was proportionate.

4. The grounds claim the judge misdirected himself regarding the test for an innocent explanation. See **SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 222 (IAC)**. The judge failed to properly appraise himself of the decision in **SM and Qadir** in that he suggested that Professor French's report was before the Tribunal in that case, when it was not.
5. At [12] the judge said the appellant "*can produce no explanation as to why somebody else's voice appears on the tape*". The grounds claim the judge erred in failing to direct himself as to what was required by the appellant in discharging the burden upon her. **Shen (Paper appeals; proving dishonesty) [2014] UKUT 236 (IAC)**. The appellant merely needs to proffer an innocent explanation that meets "*a basic level of plausibility*" in which case "*the burden switches back to the Secretary of State to answer that evidence*".
6. Accordingly, the judge set the benchmark for an explanation too high. In essence, the judge placed the legal burden upon the appellant.
7. The level of offending behaviour relied upon by the respondent (which allegations were refuted by the appellant) did not even at their highest, come within the scope of the provision under which the decision was made. The guidance sets a very high threshold which had not been met.
8. Judge Povey granted permission on 8 October 2018 inter alia as follows:
 2. *The primary issue was whether the appellant had previously obtained an English language certificate by deception. The grounds submitted that the judge had applied the wrong legal test to the appellant's evidence and fallen into misdirection regarding the background information and the Immigration Rules.*
 3. *The first ground of appeal is arguable. At [12], the judge determined the English language certificate issue. Reliance was placed by the judge on the tape recording to conclude that 'it is clear' that the respondent had discharged both its evidential and legal burdens. The determination recited that the judge had looked at the 'rest of the evidence'. However, it was unclear how the judge had weighed or determined the appellant's evidence of attending the test centre, sitting the test, requesting the audio recordings to prove her innocence or her shock at finding someone else's voice on them. It was arguable that the judge had applied the various evidential and legal burdens of proving correcting and failed to adequately explain the conclusions reached".*

Submissions on Error of Law

9. Mr O’Ceallaigh relied upon the first ground, submitting that the judge misdirected himself regarding the test for an innocent explanation.
10. Mr Jarvis conceded there had been a material error in the judge’s approach.

Conclusion on Error of Law

11. The judge was clearly suspicious regarding the circumstances particularly because the tape recording produced for the appellant’s test was admitted by the appellant not to be a recording of her voice.
12. The case law has established what is required in terms of the burden of proof. In simple terms, the respondent’s generic evidence of cheating was sufficient to establish the respondent’s evidential burden. The appellant then has the burden of establishing the circumstances in which the test was taken, following which the burden goes back to the Secretary of State.
13. Mr O’Ceallaigh identified the failings referred to in **Saha [2017] UKUT 00017 (IAC)** in particular, those mentioned at [40][ii], [iii], [iv], [ix], [x], [xi], [xiv], [xx], all of which were common with the appellant’s circumstances as were those matters highlighted at [42][b], [d], [g] and [43]. Mr Jarvis did not seek to challenge that position.
14. **Majumder [2016] EWCA Civ 1167** was an appeal from **SM and Qadir**. See [18]:

“I have stated that the UT decided that the Secretary of State had discharged the evidential burden that lay on the Secretary of State so there was a burden, again an evidential one, on Mr Majumder and Mr Qadir of raising an innocent explanation. The UT accepted (at [69]) the submission on behalf of the Secretary of State, that in considering an allegation of dishonesty the relevant factors included the following: what the person accused had to gain from being dishonest; what he had to lose; what is known about his character; the cultural environment in which he operated; how the individual accused of dishonesty performed under cross-examination, and whether the Tribunal's assessment of that person's English language proficiency is commensurate with his or her TOEIC scores; and whether his or her academic achievements are such that it was unnecessary or illogical for them to have cheated. There was no criticism in this court by Mr Kovats of that approach”.
15. Whilst the judge correctly identified at [12] of his decision, the correct approach, he failed to take account in his decision that the appellant had a BSc in chemistry studied in English in her own country. She had an MBA from Coventry University, obtained the same year she was meant to have cheated. She had attended and obtained various certificates following English language courses in this country. All of this documentation was contained in the appellant’s bundle. The judge’s approach was to require the appellant to explain (“*she can produce no explanation as to why someone else’s voice appears on the tape*”) thus reversing the burden and setting the benchmark for an explanation too high. **Saha** was authority for various explanations

as to the lack of integrity of the various test systems which might have resulted in the admittedly bizarre result that the voice on the test was not that of the appellant.

Notice of Decision

16. The decision of the First-tier Tribunal contains material errors of law, is set aside and will be re-made in the First-tier following a de novo hearing.

No anonymity direction is made.

Signed

Date 23 November 2018

Deputy Upper Tribunal Judge Peart