



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal Number: IA/31780/2015**

**IA/31785/2015**

**THE IMMIGRATION ACTS**

**Heard at Manchester Piccadilly  
On 19 January 2018**

**Decision and Reasons Promulgated  
On 23 January 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BIRRELL**

**Between**

**RAMILA BASNET NIROULA  
PREMDEEP NIROULA  
(ANONYMITY DIRECTION NOT MADE)**

**Appellant**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellant: Mr Lourdes counsel instructed by the Appellants

For the Respondent: Mr McVitie Senior Home Office Presenting Officer

## **DECISION AND REASONS**

### Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.
2. The first Appellant (A1) was born on 28 July 1983 and is a national of Nepal .The second Appellant (A2) is the husband of A1 and his appeal was dependent on that of his wife.
3. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.
4. This is an appeal by the [Respondent] against the decision of First-tier Tribunal Judge Coll promulgated on 8 March 2017 which allowed the Appellants appeals against the decision of the Respondent dated 15 September 2015 to refuse leave to remain as a Tier 4 student to the limited extent that it was not in accordance with the law and he remitted it to the Respondent to make a fresh decision allowing A1 the opportunity to obtain a fresh CAS.
5. The refusal letter was underpinned by the assertion that A1 had used a proxy in a language test.

### The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Coll ("the Judge") allowed the appeal against the Respondent's decision to the limited extent set out above finding that A1 had not used a proxy in the impugned language test.
7. Grounds of appeal were lodged arguing: that
  - (a) [The] Judge was in error at paragraph 18 in relation to the burden of proof in suggesting that it was a matter for the Respondent to produce expert evidence to show that her past and subsequent language test results were inconsistent.
  - (b) The Judge failed to properly engage with the evidence of Dr French.
  - (c) The Judge failed to engage with the issues relating to why an applicant might use a proxy

8. On 12 September 2017 First-tier Tribunal Judge Ransley gave permission to appeal on the grounds set out in the application and additionally on the basis that the decision was ultra vires as there was no power to allow the appeal under the Rules.

## Discussion

9. I invited both Mr McVitie and Mr Lourdes to remind me of the commencement date and any relevant transitional provisions in relation to the additional basis on which permission was granted by Judge Ransley. I retired in order to enable them to make the necessary enquiries.
10. At the hearing I heard submissions from Mr McVitie on behalf of the Respondent that :
  - (a) He argued that the Judge did not have the power to remit the case to the Respondent.
  - (b) He argued that the approach of the Judge was flawed in relation to the burden and standard of proof.
  - (c) It was not clear from his decision that he appreciated that there was a 3 stage process and he appears to have placed the burden on the Respondent at all times.
11. On behalf of the Appellants Mr Lourdes conceded that the decision was unsustainable.

## The Law

12. The issues arising out of the ETS cases have been considered by the Upper Tribunal in SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC) and Secretary of State for the Home Department v Mohammed Shehzad and MD Chowdhury [2016] EWCA Civ 615. In these cases the Upper Tribunal held that the initial evidential burden of furnishing proof of deception was on the Secretary of State. Where the Secretary of State provided prima facie evidence of deception, the burden shifted onto the individual to provide a plausible innocent explanation, and if the

individual did so the burden shifted back to the Secretary of State. It was satisfied that the Secretary of State had discharged the evidential burden that lay on her with the production of the so called generic evidence. Since hearing this case the Court of Appeal has heard the Respondents appeal against Qadir in SM and Qadir v Secretary of State for the Home Department [2016] EWCA Civ 1167. Which endorsed the approach taken by the Upper Tribunal. The Court of Appeal at paragraph 18 went on to summarise those facts which were relevant to the issues that had to be determined in these cases

### **Finding on Material Error**

13. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.
14. In relation to the additional ground on which permission was granted I am now satisfied having considered the relevant provisions that this was a refusal decision to which the 'old appeal rights' applied and therefore there was no error of law in respect of that part of the decision. The changes to the immigration appeals system in the Immigration Act 2014 were brought into force on a phased basis. The Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014 applied to persons who made an application on or after 20 October 2014 for leave to remain as a Tier 4 Migrant under the points based system. Where a case does not come within the scope of the Commencement Order continue under the old appeals system. In this case the application was made on 5 February 2014 and therefore the old appeals system applies.
15. In relation to the other grounds argued I am satisfied that Mr Lourdes was right to concede that the decision was unsustainable given the lack of clarity as the burden and standard of proof. While the Judge refers to Qadir there is nowhere a clear recognition of the three stage process in relation to the burden of proof and a recognition that the so called generic evidence satisfies the initial burden on the Secretary of State. In accepting that the Appellant had previously studied in Nepal in English the Judge at paragraph 18 erroneously placed the burden of proof on the Respondent to establish through an expert language report her

implied contention that A1s previous qualifications were incompatible with the TOIC scores that had been invalidated.

16. The failure of the First-tier Tribunal to address and determine these issues constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.

17. I therefore found that errors of law have been established and that the Judge's determination cannot stand and must be set aside in its entirety. All matters to be redetermined afresh.

18. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25<sup>th</sup> of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:

*(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or*

*(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.*

19. In this case I have determined that the case should be remitted as I have found a fundamental flaw in the Judges approach.

20. I consequently remit the matter back to the First-tier Tribunal sitting at Manchester to be heard on a date to be fixed before me.

Signed

Date 21.1.2018

Deputy Upper Tribunal Judge Birrell