



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/23081/2016

THE IMMIGRATION ACTS

Heard at Field House
On 19th July 2019

Decision & Reasons Promulgated
On 25th July 2019

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

MS SAOVANEE [K]
(NO ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Bazini, Counsel, instructed by E2W(UK)Ltd.

For the respondent: Mr Walker, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Thailand. She came to the United Kingdom as a student on 23 January 2010 with leave until 20 July 2011. She made an in time application for further leave to remain, again as a student. This was granted until 24 September 2013. On 22 January 2013 she made a further application for leave to remain as a student. This was granted, valid until 29 December 2014.

2. She left the United Kingdom. She then was granted entry clearance as a fiancé, valid from 16 April 2016 until 16 October 2016. She was in a same-sex relationship with Ms [SH], a British national. Ms [H] is also originally from Thailand. She came here at the age of 11. They first met in 2012 and a relationship developed. They began living together in April 2016. They were married at Croydon Registry office on 9 July 2016.
3. On 20 September 2016 she applied for leave to remain on the basis of her marriage. The respondent accepted that she met the eligibility requirements of Appendix FM. However, the respondent found she did not meet the suitability requirements. This was on the basis she had engaged in personation in an earlier English language test.
4. Reference was made to her application of 22rd January 2013 for leave to remain as a student. With that application she had submitted a certificate from Educational Testing Service (ETS) about her proficiency in English. This related to a test taken on 29 August 2012 at Synergy Business College. However, her test results had since been cancelled on the basis they had been fraudulently obtained by the use of a proxy test taker. In light of her engaging in fraudulent behaviour her application was refused under paragraph 276D was reference to paragraph 322(2) of the immigration rules. Because of this conduct her presence in the United Kingdom was not considered conducive to the public good.
5. The respondent had regard to EX1(b) and concluded that there were no insurmountable obstacles to family life with her partner continuing outside the United Kingdom. Regard was also had to the appellant's private life under paragraph 276 ADE. She had not been here the necessary time and the respondent did not see very significant obstacles to her reintegration into Thailand. No other basis was seen justifying the grant of leave.
6. General grounds of appeal were lodged.

The First tier Tribunals

7. The appellant's appeal was heard by First-tier Tribunal Judge Flynn at Taylor House on 26 January 2018. In a decision promulgated on 2 March 2018 the appeal was allowed. At that hearing the respondent had produced the lookup tool and a report on Synergy Business College following a criminal enquiry known as Project Façade. What have come to be known as 'the generic statements were also produced. These set out the background to the widespread personation and the mechanisms used for checking.
8. The appellant produced various certificates including confirmation that on 4 December 2014 she was awarded a Masters of Business Administration from

the University of Wales. The appellant gave evidence about attending the test centre.

9. Judge Flynn found her evidence to be credible. Whilst there was evidence of widespread cheating at Synergy Business College the judge found there was insufficient evidence to show the appellant used a proxy. The judge then went on to consider the other issues arising, which included reaching a finding of insurmountable obstacles to family life continuing elsewhere. The judge also found no adverse section 117 B factors arising.
10. The respondent then applied for permission to appeal to the Upper Tribunal, arguing that the judge had failed to properly apply the correct burden and standard of proof in line with SM and Qadir [2016] EWCA 1167. Permission was granted on this basis. Following a hearing the respondent's appeal was allowed in the Upper Tribunal. The decision of First-tier Tribunal Judge Flynn was set aside and the appeal remitted to the First-tier Tribunal for a de novo hearing.
11. The de novo hearing then took place before First-tier Tribunal Judge Cohen at Taylor house on 4 April 2019. This time, in a decision promulgated on 26 April 2019, the appeal was dismissed. Mr Bazini appeared on behalf of the appellant, as he does now.
12. First-tier Tribunal Judge Cohen was critical of the appellant's command of English at the hearing. The judge referred to the specific evidence about the college contained in the Project Façade report. The judge found the appellant's explanation for picking the college and details of taking the exam vague and implausible. The appellant's evidence was that she had requested a copy of the speaking test but was unable to provide confirmation of this. Again the judge was critical of the appellant not producing evidence to show what attempt she had made to obtain the recording. The judge concluded that the respondent was entitled to dismiss the application on suitability grounds.
13. The judge then went on to consider the other issues arising and concluded there were no insurmountable obstacles to family life continuing in Thailand. Similarly there were no significant obstacles for the appellant reintegrating into life in Thailand. No other features existed to justify allowing the appeal.

The Upper Tribunal

14. Application was made for permission to appeal to the Upper Tribunal, only this time by the appellant. Permission was granted on the basis it was arguable there was an insufficient foundation for the conclusion the appellant lacked credibility. Furthermore, the judge did not properly evaluate the evidence, including a failure to consider evidence of English proficiency submitted by way of certificates and qualifications. Reference was made to

various certificates from 2010 and 2012. From 2012 to 2014 the appellant and studied for, and obtained, a Masters in Business Administration. It was arguable the judge failed to properly evaluate this evidence of her competency in English. It was also arguable that the judge attached excessive weight to the appellant's failure to obtain copies of the voice recordings.

15. At hearing, Mr. Walker accepted that the grounds advanced demonstrated a material error of law. In particular, he said there was a failure by the judge to make a finding about the appellant's English in light of her ability to obtain a Masters Degree in Business Administration. The appellant's representative also referred to an email sent by the appellant to ETS for an explanation which was not forthcoming. The correspondence was contained in the appellant's bundle. He said that the appellant's attempts to resolve the matter had not been taken into account by the judge.

Consideration

16. On the basis of the presenting officer accepting there is a material error of law in the decision, and having regard to the points arising and the content of that decision, it is my conclusion it cannot be sustained. Consequently, I set the decision aside on the basis there has been a material error of law in the evaluation of the evidence and remit the matter again to the First-tier Tribunal for remaking de novo.

Decision

The decision of First-tier Tribunal Judge Cohen materially errs in law and is set aside. The appeal is remitted back to the First-tier Tribunal for a rehearing.

Deputy Upper Tribunal Judge Farrelly.

22nd July 2019

Directions

1. Relist for a de novo hearing in the First-tier Tribunal at Taylor house excluding First-tier Tribunal Judge Flynn and First-tier Tribunal Judge Cohen.
2. An interpreter is not required, as advised by the appellant's representative.
3. The hearing should not last more than two hours. The appellant's representative anticipated the appellant and one witness would give evidence.
4. Whoever is deciding the appeal should bear in mind this is would now be the third hearing and seek to apply the guidance in SM and Qadir [2016] EWCA 1167. They should bear in mind that the legal burden remains throughout with the respondent. The generic statements; the look up tool and the investigation into the college have been used before to satisfy the evidential burden on the respondent to establish a question to be answered by the appellant. The appellant's explanation will need to be analysed. It would then be a matter of evaluating the totality of the evidence to see if the respondent has established on the balance probabilities personation. It will also be necessary to look at the wider article 8 issues arising.
5. It is open to the appellant's representatives to update their appeal bundle to include the emails referred to enquiring about the voice recordings. They may wish to consider updating the evidence in relation to general family and private life. A skeleton argument from the appellant's representatives would be useful.

Deputy Upper Tribunal Judge Farrelly.

22nd July 2019