Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07911/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 February 2020	**On 6 March 2020**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

YAMUNA [W]

(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr E. Turfan, Home Office Presenting Officer

For the Respondent: Mr H. Kannangara of Counsel for the Respondent

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent is a national of Sri Lanka. She initially arrived in the United Kingdom on 18 October 2010, as a student. Her leave was subsequently extended until 19 October 2015. However, her leave was curtailed and she was served with a notice of removal on 15

September 2014. She applied for leave to remain outside the Immigration Rules on 16 October 2016 but her application was refused on 27 January 2016.

2. The Appellant made a human rights claim on 22 June 2016 and her application was refused on 12 March 2018. She appealed and her appeal was allowed by First-tier Tribunal Judge Bennett in a decision promulgated on 13 July 2018. The Secretary of State for the Home Department appealed and First-tier Tribunal Judge Pickup granted her permission to appeal on 22 August 2018.

3. In a decision promulgated on 1 November 2018 Deputy Upper Tribunal Judge Symes found that there was an error of law in First-tier Tribunal Judge Bennett's decision and remitted the appeal to the First-tier Tribunal to be heard *de novo.* The appeal then came before First-tier Tribunal Judge Rai who allowed the Appellant's appeal in a decision promulgated on 20 September 2019. The Secretary of State appealed and First-tier Tribunal Judge Chohan granted her permission to appeal on 6 January 2020.

ERROR OF LAW HEARING

4. The Home Office Presenting Officer and Counsel for the Respondent both made oral submissions and I have referred to them below, where relevant.

ERROR OF LAW DECISION

5. It is the Appellant's case that the Respondent used a proxy to take her TOEIC speaking test at New London College on 19 March 2013 and then relied on the result of this test in relation to her application for further leave to remain as a student. As a consequence, the Secretary of State for the Home Department refused the Respondent's application for leave on family life grounds under paragraph R-LTRP.1.1.(d)(i) and section S-LTR of Appendix FM to the Immigration Rules.

6. S-LTR 2.1 provides that:

"The applicant will normally be refused on grounds of suitability if any of paragraphs S-LTR.2.2. to 2.5 apply.

7. S-LTR.4.2 states:

"The applicant has made false representations or failed to disclose any material fact in a previous application for…leave to remain".

8. In her decision the Judge noted that this provision had to be applied but did not remind herself of any relevant case law. In particular, she failed to remind herself that when considering S-LTR.4.2 she had to apply a moderately complex test. Firstly, there is an evidential burden on the Secretary of State for the Home Department to establish that there is prima facie evidence to suggest that an applicant has practiced dishonesty or deception. The evidential burden then shifts to the applicant to show that it is at least plausible that there is an innocent explanation for the evidence relied upon by the Secretary of State. If the applicant meets this test, the legal burden then falls on the Secretary of State to establish on a balance of probabilities that the applicant did practice dishonesty or deception.

9. She also failed to undertake any such exercise.

10. Counsel for the Appellant submitted that the Judge had not needed to do so as the Home Office Presenting Officer had conceded that the Appellant had not used any deception when taking her TOEIC test. In particular, he relied on an extract from paragraph 13 of the Judge's decision which stated:

"…Ms Ayodele [the Home Office Presenting Officer] accepted that the appellant had submitted 6 months' payslips and 6 months bank statements showing her partner…had an income of over £18,600. She stated that if the appellant could produce an employer's letter confirming the same, the matter of the English language test would not be an issue as the appellant had completed a recognised degree, and the case could proceed under the 5 year route".

11. It is not clear to me why evidence had been led in relation to the five year route, when paragraph 5 of First-tier Tribunal Judge Rai's decision had noted that the Appellant had applied for leave to remain outside the Immigration Rules and paragraph 6 indicated that her application had been considered under the 10 year route. However, the typed record of proceedings indicates that counsel for the Appellant had raised the 5 year route at the hearing and also said that English language requirement would be met as the Appellant had a Master's

degree from a [UK] university. Paragraph 13 of the decision also expressly mentioned the 5 year route. Therefore, the reference to having completed a recognised degree would appear to be one in the context of the 5 year route and not one relating to the TOEIC test.

12. There was a typed record of proceedings on the Tribunal file but it was not easy to follow as at times the Judge did not distinguish which of the two representatives was addressing her. But, it is clear that the Appellant was cross-examined about taking a TOEIC test at New London College. The record also states that at the end of the hearing the Home Office Presenting Officer merely stated: "I make no further submissions – I ask you to take into account the evidence you have heard today".

13. There was then a record of other submissions, which would appear to have been made on behalf of the Appellant and which accepted that the Respondent had discharged the initial evidential burden in relation to the asserted deception on the part of the Appellant but went on to assert that the Respondent had not done anything to discharge the overall legal burden.

14. The note of the hearing prepared by Ms Ayodele stated:

"In terms of the TOEIC, I extensively cross examined the appellant…There were no apparent gaps in her evidence. I relied on the [refusal letter] as well as the supplementary evidence bundle provided for the ETS matter".

15. Having looked at the totality of the evidence referred to above in my paragraphs 11 – 14. I find that Ms Ayodele had not conceded the TOEIC issue and that it remained before First-tier Tribunal Judge Rai.

16. I have also taken into account the fact that First-tier Tribunal Judge Rai did not refer herself to the ETS case, *SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof)* [2016] UKUT 229 (IAC), in which the Upper Tribunal found that "the Secretary of State's generic evidence, combined with her evidence particular to these two appellants, sufficed to discharge the evidential burden of proving that their TOEIC certificates had been procured by dishonesty". All of this generic evidence was before the Judge. In addition, there was a report by Professor French but she did not assess it.

17. At most, she said in paragraph 12 of her decision that she had had sight of a supplementary bundle from the Secretary of State regarding TOEIC evidence. In addition, she did not take into account the fact that as well as generic evidence, there was a report of the investigation into tests taken at New London College between 20 March 2012 and 15 May 2013, which stated that of the 1423 taken during this period of time, 1055 were found to be invalid, 368 were found to be questionable and none were found to be valid.

18. The report also noted that during an audit on 14 May 2013 a number of "pilots" were seen taking tests on behalf of others and that two test takers subsequently admitted under caution that they had used a pilot. It was also noted that the same voice had been used in multiple tests. The report also noted that documents seized from directors' homes showed that the College had kept records from 17 July 2014 which recorded the names of each candidate, the representative or pilots they had used, their agents' names and the fee paid. As the Respondent accepts that she took a test at that college during this period of time, the evidential burden fell on her to provide an explanation to show that she too had not used a "pilot" to take her test on 19 March 2013. This was relevant and potentially very damaging evidence which needed to have been addressed by the Appellant and the Judge.

19. Instead, at paragraph 24 of his decision First-tier Tribunal Judge Rai relied on one piece of evidence which indicated that the Respondent had obtained a degree from Anglia Ruskin University in April 2015, to find that the Respondent had not used deception in 2013.

20. I have reminded myself that in *Budhathoki (reasons for decisions)* [2014] UKUT 00341 (IAC) the Upper Tribunal found that:

"It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail of issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach in deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost".

This principle applied equally to both parties.

21. The Upper Tribunal also found in *MK (duty to give reasons) Pakistan* [2013] UKUT 00641 (IAC) that:

> "If a tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in that determination and for such findings to be supported by reasons…"

22. For all of these reasons, I find that First-tier Tribunal Judge Rai did err in law in her decision.

23. Both parties agreed that, due to the fact that First-tier Tribunal Judge Rai had not made any sustainable credibility findings on the key issues, it would be appropriate to remit the appeal to the First-tier Tribunal.

DECISION

(1) The Secretary of State for the Home Department's appeal is allowed.

(2) First-tier Tribunal Judge Rail's decision is set aside.

(3) The appeal is remitted to the First-tier Tribunal to be heard *de novo* by a First-tier Tribunal Judge other than Judges Bennett, Symes, Rai, Pickup, Chohan or Kaler.

Nadine Finch

Signed Date 28 February 2020
Upper Tribunal Judge Finch