



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/14058/2014

THE IMMIGRATION ACTS

Heard at Bradford

Determination

On 9th September 2014

Promulgated

On 15th September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

**MRS MARIAM SHAHEEN
(ANONYMITY NOT DIRECTED)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Hussain, Counsel instructed by Axiom Solicitors Limited

For the Respondent: Mr M Diwnnycz, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan who was born on the 19th March 1989. She appeals, with permission, from the dismissal by the First-tier Tribunal (Judge Pickup) of her appeal against the respondent's decision to curtail her extant leave to remain in the United Kingdom as the spouse of a British citizen. The decision to curtail her leave was made on the basis of a finding that the appellant had submitted an English language test certificate with

her application for entry clearance, the validity of which had been subsequently called into question by the issuing body.

2. In dismissing the appeal, Judge Pickup directed himself as follows:

I have borne in mind that the burden of proof on is on the appellant. The standard of proof is a balance of probabilities. [Paragraph 5]

In considering documents produced by or on behalf of the appellant I must bear in mind that in Tanveer Ahmed [2002] UKAIT 00438 STARRED, it was held that *“It is for an individual claimant to show that a document on which he seeks to rely can be relied on ... A document should not be viewed in isolation. The decision maker should look at the evidence as a whole or in the round (which is the same thing).”* [Paragraph 6, original emphasis]

The judge then summarised the oral testimony that the appellant had given at the hearing before continuing as follows:

Taken as a whole, I found her evidence unsatisfactory, vague, unpersuasive, and ultimately not credible. I reach the conclusion that she did not take the test properly and thus that she failed to demonstrate that her results can be relied upon. [Paragraph 15, emphasis added]

3. The appellant argues that the above passages of the determination clearly demonstrate, both individually and collectively, that the judge made the fundamental error of placing the burden of proof upon the appellant. It is also argued that the judge failed to appreciate that the issue to be determined was not whether the appellant’s English language certificate was a reliable document, but rather whether the respondent had proved that she had been obtained it *by deception*.

4. The respondent based the decision to curtail the appellant’s leave to remain upon the discretionary ground that is contained within paragraph 322(2) of the Immigration Rules. That paragraph, to which the judge made only passing reference, reads as follows:

323 A person’s leave to enter or remain may be curtailed on any of the grounds set out in paragraph 322(2)-(5)

322 (2) the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave, or in order to obtain documents from the Secretary of State or a third party required in support of the application.

[Emphasis added in respect of the material parts of the paragraph]

5. The particulars of the allegation that the appellant had made “false representations” were contained in the respondent’s explanatory letter. The material passage in that letter, to which the judge did not refer, reads as follows:

You were previously granted leave to enter in the United Kingdom until 04 January 2015 as a Spouse/Civil Partner. We have now identified that you made false representations in that application for the purpose of obtaining leave to enter. [Emphasis added]

6. The position regarding the legal burden of proof in relation to the general grounds for refusal under the Immigration Rules was comprehensively considered in JC (Part 9 HC395- burden of proof) China [2007] UKAIT 00027. In the course of stating a series of legal propositions, the Tribunal said as follows -

Sixth, in relation to all of the general grounds the burden of proof is on the decision-maker (entry clearance officer, immigration officer, Secretary of State) to establish the facts relied upon. Their common thread is that they depend for their validity on the decision-maker being able to establish a precedent fact. Unless it is not contested, the precedent fact needs to be established for the duty or power to be exercised.

7. It is thus clear that the legal burden of proving the precedent fact of the “false representation” that had allegedly been made by the appellant was one that rested squarely upon the respondent. It did not, as the judge supposed, rest upon the appellant. Furthermore, the decision in Tanveer Ahmed* [2002] UKAIT 0438 was of no relevance to the issue that the judge had to determine. This is because the principles of that decision are relevant only to situations in which a person seeks to rely upon a document in making an asylum or human rights claim, in respect of which the applicant bears the burden of proof. Moreover, whilst the standard of proof upon the respondent was that of a ‘balance of probabilities’, it will generally require particularly cogent evidence to discharge that burden where, as here, the allegation is one of fraud, and which may have very severe consequences for the appellant if proven.
8. It is clear from the above that the judge’s dismissal of appeal was based upon an error of law that was highly material to the outcome. I therefore set it aside and remake the decision.
9. The sole evidence upon which the respondent relies in support of the allegation that the appellant made false representations in order to obtain the English language test certificate is the report of an investigation conducted by the issuing body. This indicates that a two-part malpractice investigation had been carried out at the centre in Pakistan where the appellant had sat her English test. The first part involved statistical analysis; the second involved interrogation of both the candidates and the centre. The issuing body concluded that the appellant was one of some 255

candidates who had shown insufficient engagement with the test in order for it “to be able to confirm the validity of the scores with confidence” [emphasis added]. Their scores had thus been “cancelled”.

10. In my judgement, the mere fact that the issuing body felt unable to confirm the validity of the appellant’s score “with confidence”, does not come close to proving the respondent’s accusation that her score had been obtained by deception. At most, it proves that the score that she had apparently achieved was an unreliable indicator of her facility in the English language. Thus, the proper course would simply have been to give the appellant a reasonable opportunity to re-take the test in question; something which the evidence served upon the Upper Tribunal suggests that she may now have done.

Decision

11. The appeal is allowed.
12. The decision of the First-tier Tribunal to dismiss the appellant’s appeal against curtailment of her leave to remain is set aside, and it is substituted by a decision to allow that appeal.

Anonymity not directed.

Signed

Date

Deputy Judge of the Upper Tribunal