



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

Appeal Number: HU/20964/2016

THE IMMIGRATION ACTS

**Heard at: Columbus House,
Newport
On 17th September 2018**

**Determination Promulgated
On 28th September 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YEE KEI LAU

(anonymity not direction made)

Respondent/Claimant

Representation

For the Appellant: Mr C Howells, Home Office Presenting Officer

For the Respondent/Claimant: Ms E Daykin, Counsel instructed by Zelin & Zelin

DECISION AND REASONS

1. This is an appeal against the decision of Judge Easterman in which he allowed the appeal of the Claimant against the decision of the Secretary of State to refuse her application for leave to remain in the United Kingdom as the spouse of Chun Tung Tsang (the sponsor) who is a British citizen.

2. The application under appeal was refused on 17 August 2016. The Claimant exercised her right of appeal to the First-tier Tribunal. The appeal came before Judge Easterman on 15 January 2018 and was allowed on human rights grounds. The Secretary of State applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge Osborne on 8 May 2018 in the following terms

The grounds assert that the judge failed to give adequate reasons for findings on a material matter. The Tribunal allowed the appeal against the refusal of leave to remain based upon deception for obtaining a TOEIC certificate from ETS by using a proxy test taker. The witness statements and spreadsheet extract show the Appellant's English language test had been invalidated because of evidence of fraud in the test taken by the Appellant. The judge accepted that the evidential burden fell upon the Appellant to offer an innocent explanation. There is no apparent explanation offered for the anomalies which caused the test to be invalidated. The judge relied upon the Appellant's English language ability but the test is not whether the Appellant speaks English but whether on the balance of probabilities the Appellant employed deception. The judge materially erred by failing to give adequate reasons for holding that a person who clearly speaks English should be given more weight in the balancing exercise for the reason she practised deception than someone who secured a test certificate by deception because of their inability to speak English. The judge failed to give adequate weight to the public interest in his assessment of proportionality.

Background

3. The history of this appeal is detailed above. The Claimant (the Appellant in the appeal to the First-tier Tribunal) is a citizen of the Hong Kong Special Administrative Region of China born on 28 June 1989. She first came to the United Kingdom on 3 September 2003 completing her schooling in the UK before returning to Hong Kong in 2007. She returned to the United Kingdom on 27 February 2010 with leave to enter as a Tier 4 student valid until 15 November 2011. This leave was subsequently extended to 30 October 2015. The Claimant left the UK and returned on 18 December 2015 with a new Tier 4 visa valid until 22 January 2018. On 7 June 2016 the Claimant married the sponsor and on 17 August 2016 she applied for leave to remain on the basis of that marriage. She used the Home Office Premium Service and was interviewed in connection with her application on the same day following which her application was refused.
4. The basis of the refusal was a single issue. The Claimant met all the requirements of the Immigration Rules for leave to remain as the spouse of a British citizen except for the suitability requirement. The Secretary of State considered that the Claimant had fraudulently used a proxy during a TOEIC speaking test on 22 August 2012 in connection with a previous application to extend leave to remain as a student. The Secretary of State

considered that as a result the presence of the Claimant in United Kingdom was not conducive to the public good and she therefore failed the suitability requirement. It is perhaps strange that whilst deciding that her presence was not conducive to the public good on 17 August 2016 the refusal letter ends not by curtailing her existing leave to remain but rather by noting that the Claimant had leave to remain valid until 22 January 2018 and was not therefore required to leave the United Kingdom as a result of the decision.

5. The appeal came before Judge Easterman and was allowed. The Judge found firstly that the Claimant did not use a proxy during the English language test and in the alternative that even if she had done she should not be excluded and therefore allowed the appeal on Article 8 ECHR grounds.

Submissions

6. At the hearing before me Mr Howells appeared on behalf of the Secretary of State and Ms Daykin represented the Claimant.
7. Mr Howells noted that the Judge had made alternative findings but said that there were nevertheless material errors in his decision. The Judge found that the Claimant did not use a proxy test taker but had sat the exam in the normal way. The initial burden of proof falls upon the Secretary of State to establish a prima facie case. The burden then shifts to the Claimant to provide an innocent explanation and then the burden shifts back to the Home Office to rebut that explanation. Paragraph 55 of the decision shows that the Secretary of State passed the first threshold and so the burden of proof shifted to the Claimant. Paragraph 44 clearly shows that the Presenting Officer said that the only question was whether there was an innocent explanation. The Judge, Mr Howells submitted did not clearly deal with this. In the finding there is no reference to there being an innocent explanation. In any event the Presenting Officer challenged the explanation that was offered. Mr Howells further submitted that the Judge placed undue weight on the Claimant's English language ability. Just because she speaks English does not mean that she did not use a proxy to take the test. Referring to the decision in MA (ETS - TOEIC testing) [2016] UKUT 450 (IAC) Mr Howells said in the abstract there could be a range of reasons. So far as the alternative finding is concerned this is one given of convenience and there is no adequate reasoning. Deception is deception no matter what the motivation and insufficient weight was given to the public interest.
8. For the Claimant Ms Daykin referred to her rule 24 response. These cases are fact specific. The Judge weighs the evidence at paragraphs 48 to 55 and makes clear findings. There is nothing

irrational about these findings. The Judge takes into account all relevant facts. It is clear that the Judge has taken into account the specific evidence of which the Claimant's ability to speak English was only a part. The Secretary of State never explained what anomalies caused the Claimant's test to be invalidated. The First-tier Tribunal took into account all relevant evidence and reached sustainable conclusions. So far as the alternative finding is concerned it is clear that the Judge had due regard to the public interest.

9. I said that I was satisfied that the Judge had taken account of all relevant evidence, including the public interest, and had reached a sustainable conclusion on the facts before him. I said that the Secretary of State's appeal would be dismissed, and I reserved my written decision.

Decision

10. This was an appeal that turned on a very specific issue. The Secretary of State refused the application because it was believed that the Claimant had used a proxy in her English language test for a previous application and that as a result her presence in United Kingdom was not conducive to the public good. The Claimant denied that she had used a proxy.
11. In considering his decision it is clear from the statement of reasons that the Judge was fully appraised of the relevant facts. He records at paragraph 10 of his decision that he has taken account not only of the Claimant's and Secretary of State's bundles but also the various witness statements and the relevant authorities. He self directs to MA (ETS - TOEIC testing) in particular. The Claimant made a detailed witness statement, to which the Judge refers in his decision, and also gave oral evidence. The witness statement and the oral evidence both concentrate on her memory of the English language test taken some five years earlier. The Judge's recital of the claimant's evidence is covered extensively from paragraphs 12 to 29 of the decision.
12. The Judge examines the Claimant's account against the Secretary of State's evidence between paragraphs 48 and 55 of the decision. It is a detailed if not painstaking consideration. The Judge does not specifically break this down into evidential burdens starting with prima facie case, moving on to innocent explanation and finishing with rebuttal. However, he does what is, in effect, the same thing. He finds, at paragraph 49, that the evidence of the Secretary of State is powerful and concludes at paragraph 55 that the initial burden was satisfied. He then examines (at paragraph 51) the Claimant's explanation and discusses potential arguments and counter arguments between

paragraphs 52 and 54. Having done so he finds at paragraph 55 that whereas the Secretary of State's evidence meets the first threshold he is persuaded, by the Claimant's evidence, that she did not use a proxy and sat the exam in the normal way. The Claimant's innocent explanation was that she had taken the test herself and the Judge believed the Claimant's evidence. It is the function of a First-tier Tribunal Judge to consider the evidence and to reach a decision and, unless that decision fails to take account of material facts or is irrational there is no error of law. In my judgement the Judge has considered that evidence and reached a rational decision upon that evidence.

13. The Secretary of State complains that in reaching this conclusion the Judge gives too much weight to the Claimant's ability to speak English. In my judgement he has not done so, this is merely one of the factors that is placed in the balance. I find no error of law.
14. Although this effectively finishes the matter it is also appropriate to turn to the alternate finding. I do so not simply because the Judge was, in my judgement, entitled to make such an alternate finding but also because of the matter that I have raised above but was not raised at the hearing and was the basis of the Secretary of State's refusal. It was a refusal that said that whilst her continued presence in United Kingdom was not conducive to the public good her existing leave to remain would not be curtailed and she would be allowed to remain in United Kingdom with the benefit of that leave for a further period of 18 months. This does not indicate that the Secretary of State truly believed that her presence was not conducive to the public good rather that the refusal of leave to remain was a penalty, deferred until her existing leave expired.
15. Turning back to the findings of the Judge this is a Claimant who has lived, for the most part, in United Kingdom since the age of 13. She is married to a British citizen with whom she has been living for a number of years. There can be no doubt that she has established a private and family life in the United Kingdom. She has not, on the evidence before the Tribunal, been convicted of any criminal offences. A finding, as made by the First-tier Tribunal Judge in the alternative, that the Claimant should not have been excluded under the suitability provisions even if she had used a proxy taker was, in my judgement, sustainable.
16. For all these reasons the appeal of the Secretary of State is dismissed, and the decision of the First-tier Tribunal stands.

Summary

17. Appeal dismissed. The decision of the First-tier Tribunal stands.

Signed:

Date: 25 September 2018

A handwritten signature in black ink, appearing to read 'J F W Phillips'. The signature is written in a cursive style with a large initial 'P'.

J F W Phillips
Deputy Judge of the Upper Tribunal