



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/24569/2016
HU/24572/2016
HU/24577/2016

THE IMMIGRATION ACTS

Heard at Field House
On 14 August 2018

Decision & Reasons Promulgated
On 16 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

**SHARMILA BHANDARI (1)
BISHNU PRASAD BHANDARI (2)
A B (3)**
(NO ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Jaisri, Counsel
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS ON ERROR OF LAW

1. The appellants are citizens of Nepal. They are respectively a wife, husband and minor child. They appeal with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Devittie dismissing their appeals against decisions of the respondent, dated 17 October 2016, refusing their applications for leave to remain on the grounds of private and family life. The first appellant came to the UK in October 2009 as a Tier 4 student and was granted successive periods of leave in that capacity until 4 August 2014 when her leave was curtailed. After

three further applications were rejected or refused, the first appellant made an application on 20 October 2015 on human rights grounds. In the reasons for refusal letter, the respondent alleged that she had obtained her TOEIC test by deception, having used a proxy for the speaking test.

2. In relation to the allegation of deception, the judge directed himself in terms of *SM and Qadir (ETS – Evidence – Burden of Proof)* [2016] UKUT 229 (IAC) that the burden of proving dishonesty was on the respondent. He went on to find that the respondent had discharged the initial burden by adducing similar generic evidence to that which was considered in *Secretary of State for the Home Department v Shehzad & Anor* [2016] EWCA Civ 615 sufficient to shift the burden onto the appellant to raise an innocent explanation. He considered the first appellant's evidence and concluded it was not credible. He found the respondent had succeeded in showing the first appellant had practised deception in relation to the TOEIC certificate. The judge considered article 8 outside the rules and found the public interest prevailed.
3. Permission to appeal was sought on two grounds. Firstly, the judge had arguably erred because the generic evidence had not actually been filed in this case by the respondent. Secondly, in reasoning that the first appellant's language ability was not such that an incentive to cheat could be ruled out, he had overlooked the fact she had successfully sat an IELTS test after the TOEIC test.
4. Permission to appeal was granted by the First-tier Tribunal on the basis it was arguable there had been procedural unfairness as set out in the first ground. Although the judge would have dismissed the appeal in any event even if he had not found against the first appellant on the deception point, his error was potentially material given the likely consequences for the first appellant on any subsequent application of a finding of fraud.
5. No rule 24 response has been filed by the respondent.
6. I heard submissions from the representatives as to whether the First-tier Tribunal Judge had made an error of law in his decision. I shall only set these out as necessary to explain my conclusions.
7. I find Judge Devittie erred by proceeding on the basis that the respondent's generic evidence had been filed when it is clear it had not been filed in this particular case. Mr Jaisri was in attendance at the hearing in the First-tier Tribunal and was able to confirm this had been noted at the time. Ms Isherwood did not seek to argue otherwise, although she pointed out that the ETS spreadsheet had been adduced. On closer examination, it appeared that this document stated that there was no record of the first appellant taking the test. It did not, in fact, state that her test results had been categorised as invalid by ETS.
8. Clearly, albeit the generic evidence might have been looked at by this judge in other cases, it had not been filed by the respondent in this appeal so should not have been

relied on by the judge. This was procedurally unfair. It is also clear he misinterpreted the spreadsheet and believed it said something it did not. In the result, the judge's finding that the first appellant practised deception cannot stand and must be set aside. The respondent has not adduced any evidence requiring the first appellant to provide an innocent explanation.

9. However, that error is not material to the overall outcome of the appeal, which was to find that the removal of the appellants would not breach their rights under article 8 of the Human Rights Convention, even without the suitability/deception issue going into the balance. I asked Mr Jaisri to set out the highpoints of the appeal in terms of article 8. He referred to the fact the first and second appellants came to the UK in 2009 and their child was born here in August 2014. He referred to the earthquake in Nepal but accepted the judge had made findings which were open to him to make that the couple had both their families in Nepal, who would assist them with the difficult process of returning.
10. Mr Jaisri also pointed out the appellants had worked so as to be self-sufficient and that they spoke English. However, these are often referred to as neutral factors, meaning that the appellants' possession of these attributes does not add weight to their side of the balance when weighed against the public interest in maintaining immigration controls. Mr Jaisri conceded that, due to a series of misfortunes, such as the closure of colleges, the first appellant had not been able to gain any qualifications at all during the nine years she has lived her.
11. I must conclude that the decision of the First-tier Tribunal contains no material error in its assessment of article 8. It is possible to read paragraphs 17 to 19 of the decision separately from the sections dealing with the fraud allegation. Even without the finding of deception, the appellants' case could not succeed on article 8 grounds for the reasons given by the judge.

NOTICE OF DECISION

The Judge of the First-tier Tribunal's decision dismissing the appeals does not contain any material error of law and shall stand, although his finding that the first appellant practised deception is set aside.

No anonymity direction is made.

Signed

Date 14 August 2018

Deputy Upper Tribunal Judge Froom