



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/02231/2016
IA/02232/2016
IA/02233/2016

THE IMMIGRATION ACTS

Heard at Field House
On 5 June 2018

Decision & Reasons Promulgated
On 19 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

CHRISTINA [R]
JOY [L]
[A J]
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr J Gushan (for Maalik and Co)
For the Respondent: Ms A Everett (Home Office Senior Presenting Officer)

DECISION AND REASONS

1. These are the appeals of Christina [R], a citizen of India born 31 May 1985, and her dependents Joy [L] and [A] against the decision of the First-tier Tribunal of 20 November 2017. The original appeals were brought against the decision of 31 May 2016 to refuse her application as a Tier 4 student, her dependents being refused in line with her. Although there are multiple Appellants, given the case centres on the circumstances of Ms [R], I shall refer to her in the singular as “the Appellant”.

2. Ms [R] was granted leave to enter as a Tier 4 student on 15 May 2011 until 30 April 2013, extended until 25 May 2015. Her application for further leave was subsequently refused because a certificate attesting to her English language proficiency (following an assessment of her language skills on 17 July 2013) had subsequently been relied on in the course of an immigration application of 8 March 2014. However the test's issuing body, ETS, had subsequently had cause to doubt the veracity of her test which they declared invalid following voice verification tests. Accordingly the Respondent considered that she had made material false representations in the course of her application.
3. The First-tier Tribunal directed itself to the governing authorities including *SM and Qadir*, *MA* and *Shezad*. It accepted that the Secretary of State had discharged the necessary evidential burden to put the Appellant's honesty in issue given the material from ETS. Evaluating the response to that allegation then supplied by the Appellant, it noted that she had been able to give impressively detailed evidence as to events at the test centre on the day in question and the arrangements for the examination. She had successfully obtained numerous English language qualifications in India and the United Kingdom, including obtaining a Bachelors Degree in English whilst in India and working as an English teacher for three years before coming to this country.
4. Having regard to the considerations identified in *MA*, the First-tier Tribunal noted that there was no evidence that the voice record identified in the Appellant's case had been matched with other records identified as the voices of proxy test sitters. Nor had she obtained her results from an institution that was inherently suspect, for example where the entire testing system was cast into doubt via evidence such as that emanating from *Project Façade* investigations into misconduct at various test centres. In her live evidence she "demonstrated a degree of mastery of the English language." Bearing in mind that previous judicial examination of the Secretary of State's evidence from Professor French had concluded that the mode of enquiry employed by ETS was "extremely likely to produce some false positives", the First-tier Tribunal concluded that the positive evidence to which the Appellant could point outweighed the material on which the Home Office relied, with the consequence that the Secretary of State had not discharged the burden of proof that ultimately lay upon her to show dishonesty.
5. Grounds of appeal of 27 November 2017 argued that the Judge had overlooked the detail of Professor French's evidence: it was clear that the chance of false positives was less than 2%. His conclusions were more contemporary and of at least equivalent expertise to those of Dr Harrison relied upon by the Tribunal in *SM and Qadir*, and thus demanded greater engagement than they had received. Furthermore, the judge had not identified compelling circumstances such as to justify a conclusion that the Appellant's private and family life rights were disproportionately breached.

6. The First-tier Tribunal granted permission to appeal on 20 April 2018 on the basis that the Secretary of State's more recent evidence from Professor French did not suffer from the "multiple frailties" of that criticised in *SM and Qadir*.
7. Ms Everett submitted that the First-tier Tribunal had essentially looked at the Secretary of State's case via the wrong lens: had it appreciated that ETS tests were rarely, rather than often, suspect, it might well have come to a different conclusion when balancing the Home Office's inevitably somewhat general material against the specific riposte supplied by the Appellant. She also argued that there was no reason for the appeal to succeed on the basis that the decision was not in accordance with the law. In reply Mr Gulshan argued that the decision was a lawful one that took account of all relevant evidence and considerations, properly applied the shifting standard of proof, particularly bearing in mind the relative brevity of the Secretary of State's advocate below, who had not referenced the Professor French report.

Findings and reasons

8. The First-tier Tribunal clearly scrutinised the appeal before it with care. It correctly applied the burden of proof, recognising that the Secretary of State had made out a prima facie case that had to be answered, before going on to conclude that the Appellant had provided a satisfactory explanation, which was of a quality to prevent the Secretary of State from discharging the ultimate legal burden.
9. The judge below was clearly aware of the case that had been put by the Secretary of State in *MA (ETS - TOEIC testing) Nigeria* [2016] UKUT 450 (IAC), to which it repeatedly referred, and which cautioned having regard to considerations such as the motive for engaging in fraud. As that case held, the "question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact sensitive." The Tribunal's conclusions as to factors that had concerned the President in *MA* have not been challenged in the grounds of appeal or before me; Ms Everett's submissions concentrated wholly on the issue of whether the First-tier Tribunal had looked at the evidence through the right lens.
10. Professor Peter French (BEd, BLing, PhD, FRSA, FIOA) describes himself as an experienced expert in the field of forensic speech and acoustics and chairman of J P French Associates. He has worked in the field for 30 years and, as well as carrying out research, has been involved in implementing quality regulation and accreditation for forensic speech science. In his 20 April 2016 report, he concludes:

"4. Conclusions

1. The conditions used for trained listener pair confirmation, in conjunction with the (albeit unspecified) conservative thresholds set for ASR match identification (witness statement of Peter Millington, paragraph 31), would, in

my view, have resulted in substantially more false rejections [of the proxy server allegation] than false positives.

2. Even though there is still material missing from the body of information called for by Dr Harrison, I am not convinced that the provision of such information could be used to establish a closely specified percentage of false positives.

3. If the 2% error rate established for the TOEFL pilot recordings were to apply to the TOEIC recordings, then I would estimate the rate of false positives to be very substantially less than 1% after the process of assessment by trained listeners had been applied. ...

4. Even if the TOEIC recordings were on average somewhat shorter and poorer in quality than the TOEFL pilot test recordings, on the basis of the information that has been provided, I would still estimate the number of false positives emanating from the overall process of ASR analysis followed by assessment by two trained listeners to be very small."

11. The judge below was highly impressed with the Appellant's history of English language achievements, which included graduate level study and teaching in the English language before she arrived in the UK; it was also impressed by her fluency at the hearing. Of course the latter consideration is less relevant as it does not show proficiency as the date of the impugned test, a point made in *MA Nigeria* itself; however the other corroboration of proficiency is found via measures that clearly pre-date that test.
12. As noted by the Upper Tribunal in *Nawaz* [2017] UKUT 288 (IAC) both experts regularly relied on in these appeals, Dr Harrison and Professor French, come from the same stable (JP French Associates) and "unsurprisingly there is a good deal of common ground between them". Both experts have been taken seriously in Upper Tribunal decisions. I do not think one could say the approach of either has necessarily been preferred or discounted by the Upper Tribunal in a decision intended to give guidance; both have been identified as worthy of consideration. It would have been preferable had the opinion of Professor French been more fully set out, but I do not think that the Judge can be criticised absent evidence that any particular findings from that report were pressed upon him by the advocate of the Secretary of State below. The First-tier Tribunal was clearly very impressed with Ms [R] as a witness and properly took account of her history of established English language proficiency.
13. The implication of the second ground of appeal, which takes as its premise that this appeal could have succeeded only on a Human Rights Convention ground, is that this is an appeal under the *post-Immigration Act 2014* regime. However that proposition is incorrect.
14. Although the Home Office decision appealed against post-dates 6 April 2015, it is expressly not one to which the new "relevant" provisions of the Nationality

Immigration and Asylum Act 2002 apply; because the application was made other than on human rights grounds and prior to 6 April 2015. The Immigration Act 2014 (Commencement No. 4, Transitional and Saving Provisions and Amendment) Order 2015 inserts Article 9(1)(c)(iv) into Commencement Order No. 3 such that the “saved” provisions are preserved in relation to “a decision made on or after 6th April 2015 ... to refuse an application made before 6th April 2015 ... to vary a person’s leave to enter or remain and where the result of that decision is that the person has no leave to enter or remain ... unless that decision is also a refusal of an asylum, protection or human rights claim.”

15. This application was *not* refused on the basis that it was a human rights claim, being made under Part 6A of the Rules governing the Points Based System. Furthermore, it was not treated as such a claim, either by the deeming provisions referenced in Appendix AR which treat certain family migration and long residence routes as automatically amounting to a human rights claim, nor following any individualised consideration of the claim’s subject matter within the refusal letter. Accordingly it is clear that it is an appeal under the *pre*-Immigration Act 2014 amendments. All grounds of appeal provided for in the unamended Nationality Immigration and Asylum Act 2002 are thus available, including the ground of appeal that a decision is “not in accordance with the law”.
16. Once the Judge below had found that the allegation of dishonesty was not made out, it was necessary to consider whether the decision against which the appeal was brought was a lawful one. Given that that decision was wholly predicated on the Appellant’s suspected dishonesty, the very basis of the refusal clearly required reconsideration. It seems to me that no criticism can properly be made of the way in which the First-tier Tribunal disposed of the appeal.

Decision:

The decision of the First-tier Tribunal contains no material error of law.
The appeal is dismissed.

Signed:

Date: 8 June 2018



Deputy Upper Tribunal Judge Symes