



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: IA/33689/2015

IA/33693/2015

THE IMMIGRATION ACT

Heard at Taylor House

On 11th December 2018

Decision & Reasons Promulgated

On 11 January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

SA & EA

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Clark Senior Home Office Presenting Officer

For the Respondent: Mr Muquit Counsel

DECISION AND REASONS

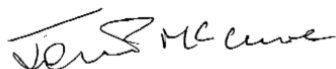
1. This is an appeal by the SSHD against the decision of First-tier Tribunal Judge Abebrese promulgated on the 11th October 2018 whereby the judge allowed the respondents' appeal against the decision of the SSHD to refuse the respondents' claims based on the Immigration Rules and Article 8 of the ECHR.
2. I have considered whether or not it is appropriate to make an anonymity direction. As the decisions impact upon the rights and status of a child, I consider it appropriate to make an anonymity direction.
3. Leave to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Gill on 6th November 2018. Thus the case appeared before me to determine whether or not there was a material error of law in the decision.
4. In the first instance the position of the second respondent has to be considered. The second respondent applied as the child of a Tier 1 (Entrepreneur) Migrant. The father of the family has leave as a Tier 1 migrant. His status is unaffected by the issues in the present appeal. Whilst issues arise in the case of the first respondent and the validity of an English language test Certificate, the same considerations do not apply to the second respondent. Her appeal dependent upon the status of the father of the family is unaffected by the issues raised. Her appeal stands as allowed and nothing in this decision alters that. There is no error in respect of the second respondent.
5. The issues in the appeal relate to the first respondent and whether she has submitted an English Language test certificate that was obtained by fraud or dishonesty. The TOEIC certificate has been identified as a certificate issued at college where there was widespread practice of proxy test takers and other malpractices such that certificates issued after test at the college have been invalidated.
6. Guidance has been given in the cases of *SM & Qadir v SSHD* [2016] UKUT 229 and *SSHD v Shehzad* [2016] EWCA Civ 615 as to how the issues should be approached in such cases. The SSHD bears an evidential burden in the first instance sufficient to raise a prima facie case. Once the evidence establishes that prima facie case, the applicant has the burden of adducing evidence raising an innocent explanation. Provided the applicant can raise such an explanation, the SSHD bears the burden of proving that the certificate is false or has been obtained by dishonest means or fraud.
7. In examining the decision by Judge Abebrese there is clearly an argument for saying that he has not followed the structured approach advocated in the caselaw. He does in paragraph 18 set out the approach to be followed but then refers to the evidence submitted being generic without finding that the evidential burden has in the first instance been discharged by the SSHD. However that may matter little as the caselaw identifies that the "generic" evidence is sufficient to discharge the evidential burden.

8. The judge thereafter considers the evidence presented by the respondent and then allows the appeal. The problem with regard to that approach, is that what has been considered to be generic evidence has specifically dealt with the college in question and has specifically identified the practices that have led to the certificates being obtained dishonestly or by fraud. The judge was required to look at the evidence and make findings on that evidence as to whether in light of that evidence the SSHD had proved that the certificate submitted by the respondent had been obtained by dishonest means or fraud.
9. The evidence submitted included the generic evidence from Mr Millington and Ms Collins as well as evidence from a senior home office administrator tying the evidence together. There are also reports by Dr French, the Criminal Investigation Report Façade and the spreadsheet. The spreadsheet specifically identified the level of false positives and was supported by the report of Dr French. Part of the respondent's case must be that false positives have been produced in the evidence. Careful consideration needed to be given to those reports and reason given for not accepting the evidence and conclusions set out therein. It may be that the respondent's evidence is such that the reports do not discharge the burden but consideration has to be given to the evidence and reasons for discounting the evidence. In light of the judge's failure to give reasons for not accepting the evidence, the judge has failed to approach the cases in accordance with the guidance given.
10. In the circumstances there is a material error of law. The only course is for the appeal of the first respondent to be remitted to the First-tier for rehearing.
11. As indicated there is no error with regard to the second respondent and the decision to allow her appeal stands.

Notice of Decision

12. I dismiss the appeal of the SSHD in respect of the second respondent.
13. I allow the appeal of the SSHD in respect of the decision of the first respondent.
14. I set the decision of Judge Abebrese in respect of the first respondent aside.
15. I remit the case of the first respondent to the First-tier Tribunal for hearing afresh.

Signed

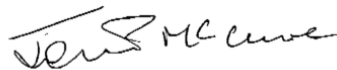


Deputy Upper Tribunal Judge McClure

Date 12th December 2018

Direction regarding anonymity- rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify the appellant or any member of the appellant's family. This direction applies both to the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings

A handwritten signature in black ink, appearing to read 'James McClure', is written in a cursive style.

Signed

Deputy Upper Tribunal Judge McClure

Date 12th December 2018