



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

Appeal Number: HU/02404/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 19 February 2020
Extempore**

**Decision & Reasons Promulgated
On 5 March 2020**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**INDERPREET KAUR
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms R Popal of Counsel, Sriharans Solicitors

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State appeals with permission against of First-tier Tribunal Judge P Carroll, promulgated on 9 September 2019, allowing the appellant's appeal against a decision to refuse her leave to remain on the basis of ten years' residence and in consequence refusing a human rights claim..
2. The respondent arrived in the United Kingdom in 2006 with entry clearance as a student, which was renewed on several occasions, the last renewal being until 11 April 2014. She applied within time to extend that.

That application was refused but she appealed against the decision, her appeal rights becoming exhausted only on 28 November 2016. She then applied for indefinite leave to remain on long residence grounds.

3. The Secretary of State refused the application on two grounds. First, in relying on Section 322(5) asserting that she had used a TOEIC certificate to which she was not entitled, the second by reference to paragraph 276B that through use of the TOEIC certificate she did not meet the requirements set out in S-LTR suitability of leave to remain.
4. On appeal, the judge took into account the evidence submitted by the Secretary of State, in the form of a bundle comprising a witness statement specific to the case from Mr Kelvin Hibbs with annexes and witness statements from Ms Collings and Professor French, which are common to many ETS cases.
5. The judge noted that the statement from Mr Hibbs says:

“as a result of the questionable result the [respondent] was called for an interview (see record below) and from this a decision was taken that the [respondent] did not sit the test as claimed.”
6. The judge noted in paragraph 1:

“Not only is there no copy of the ‘record’ but the reference to ‘the questionable result’ differs from the evidence in Annex A in which the result is described as invalid, not questionable.”
7. She went on to conclude that is for the respondent to adduce sufficient evidence to meet the evidential burden to demonstrate fraud and that this had not been done. She also went on to conclude, having heard evidence from the respondent, that she was satisfied that she had undertaken the test as claimed. The judge also found that the respondent had lived in the United Kingdom for ten years lawfully and that she met the requirements of paragraph 276B(i)(a) and went on to allow the appeal on Article 8 grounds.
8. The Secretary of State sought permission to appeal on the grounds that the judge did not provide sufficient reasons for concluding that the respondent had not used fraud and had not properly addressed the evidential burden upon the respondent to offer an innocent explanation in the light of the generic evidence of fraud.
9. The Secretary of State also said that a material error of fact in finding that the respondent had demonstrated ten years’ lawful residence, it being submitted there was no point in the refusal letter there was any acceptance of this. It was also averred that the judge had erred in concluding that the respondent had successfully applied for extension of leave in 2014 and that the respondent had not taken an issue with the validity of the TOEIC at that point. It is also pointed out that the appeal

was unsuccessful and she chose to remain in the United Kingdom without valid leave.

10. When the matter came before me it was accepted by Mr Tarlow that there were defects in the evidence, in that there is an inconsistency in Mr Hibbs' statement.
11. I conclude that in the circumstances identified by the judge where the evidence put forward by the Secretary of State is inconsistent, it cannot be said properly that the evidential burden has been discharged by the Secretary of State. In the circumstances and given the sustainable findings of fact about the respondent having actually undertaken the test, I conclude that in the particular circumstances and factual matrix of this appeal, that the judge was entitled and gave good reasons for concluding that there had not been the use of dishonesty or fraud in this case given the inconsistent nature of the evidence put forward and relied upon by the Secretary of State. Accordingly, it follows that the conclusion that paragraph 322(5) was not made out is sustainable.
12. Turning to the second ground, it is unclear to me what the point the Secretary of State is making. It is evident that the respondent's leave to remain in the United Kingdom was preserved by the application of Section 3C of the Immigration Act 1971. That is because her application to extend leave made in 2014 had been made within time and she had a right of appeal against that decision, which she exercised. It did however take a significant length of time for it to be reached, but the point is that she had reached ten years' lawful residence by the time her leave had expired. It is also of note that she applied for indefinite leave to remain on the date her appeal rights were exhausted.
13. Given the sustainable finding that there had not been fraud used the basis for refusal under S-LTR falls away and there is no other basis in which it could be said that the Secretary of State had taken issue with whether the respondent met the requirements of paragraph 276B. Accordingly, I am satisfied that the judge's decision on this point did not involve the making of an error of law either.
14. Accordingly, I am satisfied that the judge's decision did not involve the making of an error of law. Adequate and sustainable reasons have been given for all the findings of fact and for the conclusion that the respondent met all the requirements of the Immigration Rules. The judge was entitled to note that there was no public interest in refusing leave as has been noted by the Upper Tribunal in OA and Others (human rights; "new matter"; s.120) Nigeria [2019] UKUT 00065 (IAC). The fact that the requirements of the Immigration Rule means were met means that the Secretary of State cannot rely on the public interest in maintaining immigration control as set out in Section 117B to defeat an argument that removal would be disproportionate. Accordingly, I dismiss the Secretary of State's appeal and I uphold the decision of the First-tier Tribunal.

Notice of Decision

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.
2. No anonymity direction is made.
3. If the respondent wishes to make submissions as to costs, these must be made within 10 working days of the issue of this decision, and served on the Upper Tribunal and on the Secretary of State. The Secretary of state has 10 working days to serve a response on the appellant and on the Upper Tribunal. In both cases, the submissions are limited to 3 sides of A4.

Signed

Date 26 February 2020

A handwritten signature in black ink, appearing to read 'Jonathan Rintoul', written in a cursive style.

Upper Tribunal Judge Rintoul