



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

Appeal Number: HU/05571/2019

THE IMMIGRATION ACTS

**Heard at Birmingham
On 6 December 2019**

**Decision & Reasons Promulgated
On 13 January 2020**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**Miss Geeta Rani
(ANONYMITY NOT DIRECTED)**

Respondent

Representation:

For the Appellant: Mr D Mills (Senior Presenting Officer)

For the Respondent: Mr G O'Ceallaigh (Counsel)

DECISION AND REASONS

1. I shall, throughout this decision, call the appellant the Secretary of State and the respondent the claimant. This is the Secretary of State's appeal to the Upper Tribunal, brought with the permission of a Judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (the tribunal) which it made on 18 July 2019 (the date of its written reasons), following a hearing of 18 July 2019 and which it sent to the parties on 30 July 2019. The tribunal decided to allow the claimant's appeal from the Secretary of State's decision communicated on 13 March 2019, refusing to grant her leave to remain on

Human Rights grounds under Article 8 of the European Convention on Human Rights (ECHR).

2. By way of brief background, the claimant is a female national of India and was born on 15 March 1983. She had entered the United Kingdom (UK) on 1 September 2011, for the purposes of study, having been granted a visa as a result of an entry clearance application. She subsequently obtained further leave as a student but, according to the Secretary of State, there came a time in August 2014 when it was found necessary to serve her with “removal papers”. There subsequently followed an unsuccessful application for further leave on Human Rights grounds refused in 2015, before the current unsuccessful claim was also made and refused.

3. At the appeal heard by the tribunal on 18 July 2019, the key issue was whether or not the claimant had, with respect to an in-country application of 24 August 2012 for further leave as a student, deployed fraud. Essentially, the Secretary of State’s position was that she had used a proxy English language test-taker for the purposes of obtaining what is known as a TOEIC certificate regarding her ability to speak English. The Secretary of State’s view was that since (she believed) fraud had been used, it was inappropriate to grant further leave. The claimant’s position before the tribunal was that she had not used fraud at all.

4. There was, before the tribunal, the sort of evidence which has become familiar in cases such as this. It included what is often referred to as “the generic evidence” comprising witness statements regarding the way in which fraud has been conducted and detected and which has involved the use of proxy English language test-takers. The tribunal also referred to a “revised look-up tool” with which it had also been provided. But having heard oral evidence from the claimant and from her uncle, it decided that there had been no fraud or dishonesty on the part of the claimant. Having set out the competing arguments and having (on my reading) somewhat confusingly but in the end correctly directed itself as to the burden and standard of proof, it went on to explain why it was concluding as it was with respect to the claimant’s credibility. As to that, it said this:

“My Finding and Facts of Law Relating to this Appeal.

21. Having carefully listened to the evidence given the evidence of the appellant and her uncle as well as the documentary evidence before me I’m satisfied that this appellant on the facts of this case did indeed take this test without a proxy test taker. It would appear that certainly the home affairs select committee of inquiry addressed by Professor Sommer acknowledge that there were a number of ways in which students themselves could have been on the receiving end of fraud namely that “we concluded that the controls around the processes of registering applicants on to the computer system used for testing and the ways in which records of results were combined were unsatisfactory and inadequate. We have particular concerns for circumstances in which local testing centres might decide to falsify results for the benefit of applicants who had paid additional fees for them to do so.
22. We identified a number of routes by which this could happen we agreed that in one testing centre that there could be a mix of genuine applicants and those who were paying for fraudulent results. Looking at the records supplied by ETS of the home office in relation to the cases we concluded that there was an absence of cross checking facilities to identify circumstances in which voice test were miss ascribed to individuals”.

23. Having listened to the appellant on her uncle carefully and looked at the generic evidence in the appellant's case I'm satisfied that she was a credible witness and so was our uncle. There was no reason in her background circumstances for her to pay additional monies for this test to be falsified particularly when she had undertaken a 4 week course for which a receipt was obtained. There was therefore no need to take a four week course if she was going to fraudulently arrange for false results to be obtained. That would seem to be a completely unnecessary and wasteful expenditure. The booking and attendance at that this course was significant.
24. I am also satisfied on the balance of probabilities that this appellant did not need to falsify her English language test results given her ability at the time, and in fact she said in oral evidence both the written and oral tests she was asked to conduct were quite surprisingly straightforward. Since then the appellant has also spent a considerable amount of money challenging these decisions and again where there was a request for further clarification that there was no CCTV footage obtained. I am satisfied that it is certainly plausible that this was a genuine applicant whose results were falsified by a proxy test taker without her knowledge or assistance. I find that she was not involved in any dishonesty whatsoever.
25. In the circumstances it is right that her removal would be a breach of her rights under Article 8 of the ECHR as it would be wholly disproportionate to remove her when she is simply doing nothing wrong according to the immigration rules and practice. I also find that as it was said in the case of R (Hasan) the SSHD 2018 and Khan -v- (VSSHD) [sic] 2018 EWCA CIV 1684 that where and [sic] out of country FTT was successful "the secretary of state ought to take whatever steps were possible to restore successful... appellants to the position that they would have been [sic] but for the impugned decision. That would clearly include the need to grant entry clearance in certain cases".
26. I find however that there is an innocent explanation which meets the minimum threshold of plausibility which has not been discounted by the generic evidence put forward on behalf of the respondent. I find that the respondent cannot meet the legal burden of proving that the appellant acted fraudulently and therefore she's entitled to her human rights appeal being allowed outside of the immigration rules. This delay has cost the appellant a significant loss both financially, educationally and in terms of private life and family life.
27. It is therefore the right decision to allow this appeal under article 8 outside of the rules applying the 5 stage test in ex parte Razgar 2004 HL page 27 the questions I have to ask myself in such circumstances are:- 1. Has the appellant engaged private and family life? 2. Will grave consequences flow from the removal of the appellant in terms of a private and family life? 3. Would such a removal be in accordance with the law? 4. Would such a removal be necessary in a democratic society for the maintenance of immigration control? 5. Would such a decision to curtail the appellants [sic] leave to remain and remove the appellant be proportionate to the legitimate aim to maintain the immigration control?
28. I find on the facts of this case, peculiar to the appellant that the respondent has not discharged the burden which is shifted back to them after the appellant has established a plausible and innocent explanation for taking this test which she did. I find that it would be wholly disproportionate to

remove this appellant from the United Kingdom and prevent her from completing her studies based on the fact that she has established on a balance of probabilities that she did take this test without a proxy test taker.

5. The above passage might, at certain points, have benefited from more complete proof-reading but the meaning is, nevertheless, clear. The Secretary of State's application for permission to appeal to the Upper Tribunal contained contentions to the effect that the tribunal had been wrong to accept the claimant's credibility; had been wrong not to accept evidence offered on behalf of the Secretary of State with respect to fraud; had been wrong to attach weight to its view as to the claimant's ability to speak English in assessing whether or not a proxy test taker had been used; and had been wrong to attach weight to the claimant's ability to recall details of her journey to the test centre and the examination process.

6. The judge who granted permission to appeal relevantly said this;

"2. In this appeal the judge allowed the appeal of the appellant on grounds that she had "provided an innocent explanation which met the minimum threshold of plausibility which had not been discounted by the generic evidence put forward on behalf of the respondent".

3. In the grounds which make reference to case law including SM and Qadir [2016] UKUT 229, and Shezhad and Another [2016] EWCA Civ 615 it is submitted that the judge has arguably erred in law by misdirecting himself as to the evidence in the light of guidance given by case law.

4. The grounds may be argued."

7. Permission having been granted the case was listed before the Upper Tribunal (before me) for a hearing so that consideration could be given to the question of whether or not the tribunal had erred in law. Representation at that hearing was as stated above. I am grateful to each representative.

8. Mr Mills, for the Secretary of State, relied upon the points made in the grounds of appeal to the Upper Tribunal. He reminded me of the Secretary of State's view that the current generic evidence relied upon in cases such as this is considered to be reliable. It was not, however, necessary for me to hear from Mr O'Ceallaigh.

9. In my judgment the tribunal, in the passage set out above, provided adequately explained and legally sustainable reasons for its conclusion as to the claimant's credibility and for its resultant conclusion that she had not acted fraudulently. It effectively resolved matters in her favour for a combination of reasons being her credible appearance before the tribunal; her obvious abilities to communicate in English; her determination in seeking to challenge the adverse decision based upon the allegations of fraud; and her having taken a course geared towards the passing of such tests which it thought she would not have taken had she been intending to employ a proxy test-taker. It is also implicit from what the tribunal had to say that it found the evidence of the claimant's uncle, which had a degree of corroborative value, to be credible too.

10. With respect to the grounds, it does seem to me that much of what is said fails to go beyond re-argument with the tribunal's conclusion as to credibility. It follows from what I have said already that I do not consider the tribunal to have been in error with respect to the way in which it directed itself as to the burden and standard of proof. The question of weight to be attached to particular aspects of the evidence was one for the tribunal. As to

its decision to take into account the claimant's abilities in the usage of the English language, it did not treat that as being determinative but merely a component of its wider and holistic consideration.

11. In the circumstances I have concluded that the tribunal did not make an error of law and that its decision shall stand. The Secretary of State's appeal to the Upper Tribunal is, therefore, dismissed.

Decision

The Secretary of State's appeal to the Upper Tribunal is dismissed.

No anonymity direction is made in this case. No such direction had been made by the First-tier Tribunal and none was sought before me.

Signed:

Dated: 7 January 2020

M R Hemingway; Judge of the Upper Tribunal