



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/27297/2015  
IA/27305/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 19<sup>th</sup> April 2017

Determination & Reasons Promulgated  
On 9<sup>th</sup> May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS ARJU AKTHER SUBORNA (1)  
MR MAMUN AHMED (2)  
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Hyder (LR) of Counsel, Simon Noble Solicitors  
For the Respondent: Mr K Norton (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge R Calender Smith, promulgated on 14<sup>th</sup> July 2016, following a hearing at Taylor House on 1<sup>st</sup> July 2016. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal. In those circumstances, the matter went to the Upper Tribunal on 5<sup>th</sup> January 2016, when in a decision promulgated on 9<sup>th</sup> February 2016, DUTJ IAM Murray concluded that the judge in allowing the appeal, had failed to have regard to the evidence of Professor Peter

French, on the operation of the ETS educational system, and that evidence was critical insofar as it demonstrated that the margin of error was considerably less than had been assumed on the side of the Respondent authority, and the failure to take that evidence into account rendered the decision unsafe. It was upon this Tribunal now, to undertake the second stage hearing of all the issues, and this I now do.

### **The Appellant**

2. The Appellant is a citizen of Bangladesh, born on 28<sup>th</sup> January 1988, and her husband was born on 24<sup>th</sup> May 1983. He is dependent on the principal Appellant, who applied against the decision of the Respondent dated 20<sup>th</sup> July 2015 refusing her leave to remain as a Tier 4 (General) Student.

### **The Evidence**

3. In his opening speech before me, Mr S Hyder, appearing on behalf of the Appellant submitted that he would rely upon the Appellant's witness statement at paragraphs 7 to 10. Second, on the fact that she had submitted a City & Guilds certificate (see paragraph 19 of IJ Calender Smith's determination which this has been referred to). Third, on the CAS from the college (see paragraph 21 of IJ Calender Smith's determination which this has been referred to). Fourth, to pages 77 to 84 of the Appellant's bundle, which sets out the numerous educational qualifications that the Appellant has obtained both in Bangladesh and in this country. Subject to this, he called his evidence.
4. The Appellant gave evidence. She spoke in English. She adopted a witness statement (at pages 3 to 8) dated 28<sup>th</sup> June 2016. No further questions were asked by Mr Hyder at this stage.
5. In cross-examination the Appellant was asked about the test that she undertook on 17<sup>th</sup> April 2012. The Appellant confirmed that she personally went to the test centre to undertake this test. It was put to her that the Secretary of State had conducted investigations into the taking of that very test and the investigations had shown that somebody else had taken the test. The Appellant emphatically stated that this was not the case. She said that she remembered going to the test centre only after having paid for the test two days before, and having been sent a payment receipt showing that she had given a registration fee which she could take along to the test centre. She recalls having paid £145 at the time. She recalls that the test started at 9.45am in the morning, and the instructions she was sent were that she had to arrive fifteen minutes beforehand so that the preliminaries could be gone through. When she did attend, she recalls having attended at 9.20am in the morning. She had had her student ID which she had to show at the reception, together with her passport, and then she was shown how the student ID could be logged into the computer, to enable her to undertake the test, which ran for some twenty minutes.
6. In re-examination the witness said that she chose this test centre because she recalls that time was of the essence, because of her status, and this was the only available centre during that month. She had already in 2010 undertaken an IETLS test in

Bangladesh and she got a score of 5.5. She was asked why she had not submitted this IELTS test to the authorities here. She said that the reason was simple, namely, that the test is valid, but is then automatically declared invalid after two years, so that a test undertaken in 2010 would have been of no validity now.

7. In his closing speech Mr Norton submitted that there were two issues. First, the issue of fraud in relation to the taking of the ETS test. Second, the fact that there was no valid CAS issued. At this stage, Mr Hyder intervened to say that before DUTJ Murray, it had been accepted by the Respondent that there was no issue in relation to the CAS. This is because subject to the Appellant not having cheated in her ETS test, the Appellant would then be given 60 days period of grace, in which to find a college where a CAS could be issued. He submitted that this concession had already been made before the Upper Tribunal on 5<sup>th</sup> January 2017. DUTJ Murray recorded how the Presenting Officer “accepted that there is no merit in the ground of application relating to the CAS” (see paragraph 18). It was also accepted that this was the case at paragraph 26. Mr Hyder submitted that if this was so, then the only issue was in relation to whether the Appellant had cheated on the ETS test. In this regard, the Appellant claimed to have gone to the test centre and taken the test. The inference she wishes the Tribunal to draw from this is that, because she had already passed the IELTS test in 2010 and then also the City & Guilds test in May 2014, she had no incentive to cheat. However, she has no corroborative evidence to show that she did undertake the test on 17<sup>th</sup> April 2012 as she contends. It is at this stage that the report of Professor Peter French becomes relevant because this postdates the case of Kadir, and what he states is that if the 2% error rate established for the TOEFL pilot recordings were to apply to the TOEIC recordings, then he 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 (see his conclusion at paragraph 3). This suggests that the error rate is very very low. The Appellant has to provide better evidence than that of a mere “bare assertion”. Finally, it is not the case that the Respondent has not been able to discharge the legal burden, because there is specific evidence in relation to the Appellant herself that is highlighted at H1 to I3.
8. For his part, Mr Hyder submitted that the main issue now was whether there was “specific evidence” against the Appellant. It was being said that there was documentation at H1, but this says nothing about fraud and simply states that the test is “invalid”. However, given that one knows that after two years the test becomes automatically “invalid”, this does not suggest that the Appellant has engaged in fraudulent activity. Secondly, if one then looks at I2, there is again nothing here specific against the Appellant. The same applies to I3. The only evidence that the Respondent can really rely upon is that of Professor Peter French, but even here if one goes to the summary of his report, what he states is that there is a 2% error which can go down to 1% after the process of assessment by trained listeners has been applied. However, one cannot know whether the Appellant fell within this class of cases of error. Third, what Professor French says at paragraph 3.37 is that, “the system identified 58,464 matches of which just 33,735 were confirmed by the listener .....” (paragraph 3.37). Given that not all of the 58,464

matches had been investigated by the listeners, it was simply impossible to say whether the Appellant's case had not fallen into error.

### **My Findings**

9. I have given careful consideration to all the documentary evidence, the oral evidence of the Appellant, and the submission that have been made before me today. I am satisfied that the Appellant discharges the burden of proof. My reasons are as follows. First, the Respondent Secretary of State has discharged the evidential burden of proof by putting forward generic evidence to the effect that the Appellant has submitted a test result which cannot be treated as valid. Second, the Appellant has, thereafter, provided an explanation of her having sat the test. I have heard her evidence, and I have seen her give that evidence, and I am satisfied that, on a balance of probabilities, she is a credible and plausible witness, who did indeed undertake the test as she claims to have done. Her choice of the test centre was dictated by her wanting to undertake the test in that month. She explained how she paid the fee, and the registration ID that she was sent. She fully recalls having gone to the test centre, and the manner in which she was then inspected, and taken to the computer, where she inserted her ID number and proceeded to undertake a twenty minute test. But, the Appellant has passed a IELTS test in 2010 scoring a mark of 5.5, and she has also undertaken another test in 2014 which she also passed. In addition, she gave evidence in English, and had no difficulty understanding what was being put to her and there has been no incentive whatsoever for her to cheat, and I am satisfied in the circumstances that she has genuinely undertaken the test and returned a valid score. Finally, for all these reasons, the legal burden of proof on the Respondent Secretary of State of showing that the Appellant did embark upon fraudulent activity has not been discharged.

### **Notice of Decision**

10. It has already been established that the decision of the First-tier Tribunal involved the making of an error of law such that it fell to be set aside. That decision was set aside. I have remade the decision. I have done so on the basis of the evidence that I have heard today. I am satisfied that the Appellant discharges the burden of proof and this appeal is allowed.
11. No anonymity direction is made.
12. This appeal is allowed.

Signed

Date

Deputy Upper Tribunal Judge Juss

8<sup>th</sup> May 2017

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have made a fee award of any fee which has been paid or may be payable.

Signed

Date

Deputy Upper Tribunal Judge Juss

8<sup>th</sup> May 2017