



**Upper Tribunal  
(Immigration and Asylum Chamber)**  
Number: IA/27526/2015

Appeal

IA/27528/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 12 June 2017**

**Decision & Reasons Promulgated  
On 13 June 2017**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**RAKESH SHRESTHA  
SUNITA SHRESTHA  
(anonymity direction not made)**

Respondent

**Representation:**

For the Appellant: Mr Jarvis Senior Home Office Presenting Officer  
For the Respondent: No appearance.

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Hussain promulgated on 11 January 2017 in which the Judge allowed the appeal of Mr Rakesh Shrestha against the refusal of his application for leave as a Tier 4 (General) Student Migrant and that of Mrs Sunita Shrestha, his dependent, in line.

## **Background**

2. Mr Rakesh Shrestha entered the United Kingdom on 4 September 2009, lawfully, with a Visa, the validity of which was extended to 23 January 2012. His wife entered the United Kingdom on 8 January 2010 with a visa extended in line with that granted to Mr Rakesh Shrestha. The application leading to the impugned decision was refused on 21 July 2015.
3. The Reasons for Refusal decision relating to Mr Rakesh Shrestha refused the application by reference to paragraph 322(1A) of the Immigration Rules on the basis it was said deception had been used in connection with the application. This is an ETS case in which the decision-maker found that an ETS certificate provided in support of an application as evidence of an English language ability was not genuine.
4. The Reasons for Refusal letter relating to Mrs Shrestha noted her status as a dependent partner of Mr Rakesh Shrestha and that as his application for leave as a Tier 4 Student had been refused she could not show she was the spouse or civil partner, unmarried or same-sex partner of a person who had valid leave to enter or remain as a Points-based System Migrant as required by the Rules, leading to a refusal by reference to paragraph 319C(b) of the Rules.
5. The Judge noted that neither Mr Rakesh Shrestha nor his wife were represented at the hearing, either in person or through a representative, although notice of the hearing had been validly served.
6. The Judge was clearly dissatisfied with the evidence relied upon by the Secretary of State claiming at [11] that the finding that the sponsor's assessment of the appellant's linguistic skills could not be relied upon because the TOIEC certificate on which reliance was placed was false was "nothing short of perverse", on the basis there was no obligation upon the sponsor to carry out verification of the certificate. In relation to the certificate itself, the Judge noted the existence of an evidential burden upon the Secretary of State to support an allegation of deception by the use of a proxy to take an English language test and that if the evidential burden is discharged it will be for the appellant to provide an explanation in rebuttal.
7. When considering the Secretary States evidence, the Judge noted that the usual generic witness statements had been provided and at [15] "the only evidence that appears to have been specific to the appellant is a spreadsheet which claims that on 19 October 2011 the appellant took a test at Elizabeth College which certificate has been invalidated. He also took a test at the Westlink College on 18 November 2011 that has also been invalidated". The Judge asserted there was no evidence to link the appellant to the certificate numbers on the spreadsheet, that it remained unexplained why the appellant would have taken two tests a month apart at two different centres, and why the result taken at Elizabeth College is not referred to in the reasons for refusal letter.

The Judge concluded at [17] that the evidential burden had not been discharged.

### **Error of law**

8. Although the above is not the specific subject of the Secretary of States application for permission to appeal, had it been, it is clear that the finding of the Judge is infected by arguable legal error in that it is settled law that the generic evidence taken together with the ETS spreadsheet providing specific details relating to the appellant is sufficient to allow the Secretary State to discharge the evidential burden of the use of deception in the taking of an English language test.
9. It is not relevant that the Secretary of State relied on one false certificate rather than two as only one false document is required to engage paragraph 322(1A) of the Rules.
10. In relation to the spreadsheet to be found in the Secretary States bundle before the Judge, at page E1, this refers to both the Elizabeth College and Westlink College and the two test dates both of which have been stated by ETS to be invalid. Information within the spreadsheet linking Mr Rakesh Shrestha with those tests includes his name, a certificate number ending in 68 in relation to the test taken at Westlink College which is also the certificate referred to in the refusal letter as having been provided by Mr Rakesh Shrestha in support of the application for leave as a Tier 4 Migrant as evidence of his English language ability.
11. The spreadsheet also contains a date of birth. There was at page D1 of the Secretary of States bundle a further document headed "ETS Invalid Test Analysis" containing not only Mr Rakesh Shrestha's Home Office reference, name, nationality, date of birth, gender and details of the certificate in question referred to in the spreadsheet, but also Mr Rakesh Shrestha's passport number which corresponds with the photocopy passport available in the evidence. There was, arguably, more than sufficient material made available to link Mr Rakesh Shrestha to the evidence relied upon by the Secretary of State, meaning the primary finding should have been that the evidential burden had been discharged.
12. As neither Mr Rakesh Shrestha nor his wife attended the hearing, meaning no evidence to rebut this finding or to provide an innocent explanation was provided, the only available decision should have been that the appeal is dismissed.
13. As stated, however, this was not the thrust of the application for permission to appeal to the Upper Tribunal which was on a more fundamental point, that the Judge had no jurisdiction to determine the appeal as the appeal had been abandoned.
14. The application was made on 23 January 2012 even though not determined until 21 July 2015. As it was made in 2012 the Secretary of State submits it is an appeal governed by the provisions of the

- Nationality, Immigration Asylum Act 2002 before amended by the Immigration Act 2014. As such section 104 of the 2002 Act has effect.
15. An appeal is pending under section 104 during the period beginning when it is instituted and ending when it is finally determined, withdrawn or abandoned. Section 104 (4) provides that "an appeal under section 82 (1) brought by a person whilst he is in the United Kingdom shall be treated as abandoned if the appellant leaves United Kingdom".
  16. It is said by the Secretary State that Mr Rakesh Shrestha and his wife left the United Kingdom in November 2015 after the date the appeal was lodged but before it was determined. A screen print from the Secretary of State's case management system notes communication between Mr Rakesh Shrestha and Secretary of State in relation to flight details in relation to the family return had been obtained, a removal screen completed, and both sets of passports sent to Heathrow by courier to enable Mr Rakesh Shrestha and his wife to leave the UK. It is noted paperwork regarding family return was emailed to Mr Rakesh Shrestha acknowledged receipt.
  17. Although it does not appear this fact was brought to the attention of the Judge, the effect of the statutory provision is that the First-tier Tribunal had no jurisdiction to consider the appeal. In *Virk v Secretary of State for the Home Department [2013] EWCA Civ 652* it was held that although the Secretary of State had failed to raise before the First-tier Tribunal the issue of that Tribunal's jurisdiction to entertain a family's application for leave to remain, the Upper Tribunal was entitled to dismiss the family's subsequent appeal against the First-tier Tribunal's decision on the basis that the First-tier Tribunal had not had jurisdiction, notwithstanding that the point had not been raised below.
  18. I find the Judge erred in law and set the decision aside in its entirety on the basis of the statutory abandonment.
  19. The Upper Tribunal cannot remake the decision for want of jurisdiction.

## **Decision**

20. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. The Upper Tribunal cannot remake the decision for want of jurisdiction.**

Anonymity.

21. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....  
Upper Tribunal Judge Hanson

Dated the 12 June 2017