



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00480/2016
HU/00479/2016

THE IMMIGRATION ACTS

Heard at Field House
On 22 December 2017

Decision & Reasons Promulgated
On 3 January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SUBASH CHANDRA KAYASTHA
KRITINA SHRESTHA KAYASTHA
(NO ANONYMITY ORDER MADE)

Respondents

Representation:

For the Appellant: Mr P Duffy (Senior Home Office Presenting Officer)
For the Respondent: Ms A Patyna (counsel instructed by Indra Sebastian Solicitors)

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal allowing the appeals of Kritina Shrestha Kayastha and her husband Subash Chandara Kayastha, itself having been brought against the decision of 17 December 2015 to refuse them leave to remain on human rights grounds.
2. The appeals ultimately arise from the application of 11 November 2015 for the Respondents to obtain further leave to remain as a Tier 2 migrant and dependent. They had previously been granted leave to enter in the student route on 30 December 2010 until 9 May 2012, which had been extended until 30 August 2014.
3. The applications were all refused because the Home Office considered that information from the English language testing authority, ETS, indicating that Ms

Kayastha's test results had been cancelled for dishonesty, was sufficient to indicate that dishonesty had been used in the course of her dealings with the Home Office. Furthermore Ms Kayastha had relied upon a Certificate of Sponsorship (CoS) which was not genuine, which also attracted a general refusal reason. The application of their daughter Sukriti Kayastha was refused in line with theirs.

4. Before the First-tier Tribunal, the Secretary of State relied upon the customary combination of evidence: an extract from the "look-up" tool used to link the migrant whose English language test results had been cancelled to the information provided by ETS, and the generic witness statement evidence from Peter Millington and Rebecca Collins, and a report by Professor French. The judge also noted she had read a report by Project Façade in relation to Premier Language Training Centre, and noted that all the tests taken that day at the relevant test centre were identified as questionable or invalid.
5. The Respondent vigorously denied involvement in any dishonesty in the English language testing process in her witness statement. As to the CoS allegation, she Respondent freely admitted before the First-tier Tribunal that the CoS she had obtained was indeed false, but maintained she had been a victim of, rather than party to, the dishonesty. She had paid £10,000 for training and fees after two interviews organised by the company that had promised to issue the CoS to her. She had complained to the police and to the Office for the Immigration Services Commissioner, and produced evidence confirming this.
6. The First-tier Tribunal allowed the Respondent's appeal. Its reasons for sustaining the Respondent's challenge to this suitability ground were essentially that she had scored 5.5 and 6 in writing and speaking in a subsequent test on 20 August 2014 (ie scores exceeding the B1 level which a Tier 4 student must show), and also spoke good English at the hearing before her, though she noted that these indicia of language proficiency post-dated the impugned test results. Additionally the Respondent had passed a number of qualifications with relatively high ratings under the Regulated Qualifications Framework system, including Business Management Diplomas and a Masters Degree, taught in English.
7. The First-tier Tribunal accepted the Respondent's evidence regarding the fraud she had suffered regarding her Tier 2 CoS as credible and accordingly found that the second refusal reason was also unsustainable.
8. Reviewing the appeal in the light of these findings as to the Respondent's suitability for the route in question, the First-tier Tribunal decided that it was appropriate to allow the appeal, because it was proportionate for her to be granted limited leave to remain sufficient to permit her to make another application to remain in the United Kingdom. Additionally, it was appropriate for her to pursue her intention to help the national authorities to investigate the company which had defrauded her and others.

9. Grounds of appeal from the Secretary of State argued that once it was accepted that the initial evidential burden of establishing dishonesty had been traversed, the onus shifted to the Respondent to offer an adequate explanation and the First-tier Tribunal had failed to assess the reasons given adequately. Furthermore, reliance on the Respondent's English language ability at the date of hearing was contrary to the guidance in *MA Nigeria*.
10. Judge Osborne granted permission to appeal for the First-tier Tribunal on the basis that the First-tier Tribunal had relied upon the Respondent's ability to speak English in determining whether she had met the evidential burden; furthermore, she had not been able to recall details of the test itself. This cast doubt on whether the assessment that she had met the burden on her to provide an adequate explanation was lawful. The decision to refuse further leave was proportionate absent clear reasons as to why return to Nepal would be disproportionate.
11. Before me, Mr Duffy for the Secretary of State argued that the evidential burden could not have been satisfied only by reference to the factors identified below: post-ETS test evidence of English language proficiency had been warned against in *MA Nigeria*, a decision which had also warned against speculation as to the reasons why a person proficient in English might have procured a proxy test result.
12. Ms Patyna submitted that the First-tier Tribunal had been entitled to make the findings that she did, and that it had not impermissibly taken irrelevancies into account: the factors identified had been part of a reasoned and rational review of the evidence.

Findings and reasons

13. I indicated that I would uphold the decision of the First-tier Tribunal at the hearing, and these are my reasons.
14. The Upper Tribunal cites expert evidence deployed by a litigant seeking to cast doubt upon the validity testing process used by ETS in *Gazi* (IJR) [2015] UKUT 327 (IAC):

“Dr Harrison also examines, with accompanying critique and commentary, the discrete issues of factors affecting performance; the typical performance of human verification; the definition of thresholds; the explicit acknowledgement of human errors; the lack of testing of the performance of analysts; the dubious touchstone of “confidence” (see Mr Millington’s witness statement); the dearth of information about the actual analysis methodology; the lack of detail about the experience and knowledge of both the recruited analysts and their supervisors; the indication that any training of the newly recruited analysts was hurried; the shortcomings in Mr Millington’s speech recognition averments; and the clear acknowledgement on the part of ETS that false identifications (viz false positive results) have

occurred. One passage relating to the human verification process is especially noteworthy:

“... although the analysts only verified matches where they had no doubt about their validity – ie where they were certain about their judgments – this should not be taken as a reliable indicator of the accuracy of those judgments. This approach does not remove the risk of false positive results.”

Dr Harrison also highlights that both the automatic system and the human analysts are capable of false positive errors. The Secretary of State’s evidence does not disclose either the percentage or the volume of such errors.”

15. No findings were made on that evidence in *Gazi*. However in the subsequent appeal of *Qadir* [2016] UKUT 229 (IAC) the UT conclude that the Home Office evidence had significant shortcomings, in particular at [63], a lack of qualifications or expertise of the officials who visited ETS and produced witness statements based on their visit to ETS, during which ETS was the sole arbiter of the information disclosed and assertions made, undue Home Office dependency on the information from ETS when ETS had put forward no witness or indeed any other evidence whatsoever of their own, the lack of any expert evidence backing up the opinion of the staff who visited ETS, and the fact that voice recording files had never been put forward pertaining to the appellants themselves. Accordingly the Tribunal accepted that the methods used by ETS were not necessarily guaranteed to avoid the occasional false positive whereby an innocent student was wrongly identified as having cheated in their test.
16. However, the Upper Tribunal in *Qadir* accepted that the Secretary of State's generic evidence, combined with her evidence particular to individual appellants linking them to the allegations made by ETS (via the “Lookup Tool” which matches the person who has the name, date of birth and nationality of the certificate holder impugned by ETS) sufficed to discharge the evidential burden of proving that their TOEIC certificates had been procured by dishonesty, and thus calling for a credible explanation to be put by the individual so accused.
17. In *MA Nigeria* [2016] UKUT 450 (IAC) the Upper Tribunal stated that

“we acknowledge the suggestion that the Appellant had no reason to engage in the deception which we have found proven. However, this has not deflected us in any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere. We are not required to make the further finding of why the Appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter.”

18. In *Nawaz* [2017] UKUT 288 (IAC) the Upper Tribunal noted that Professor French, who it acknowledged as an expert of comparable quality to Dr Harrison, had confirmed that technical analysis of voice comparison evidence was not an exclusively technical subject and could be conducted by trained non-specialists, leading the Tribunal to accept that natural ability, training, even of a fairly basic kind, and experience could all play a valuable part in the ETS testing process. It would be necessary to bear in mind the difficulties posed by voice comparison evidence of non-native speakers and the lack of any available records of contemporaneous notes of the testers.
19. The President of the Upper Tribunal explained in *Muhandiramge* [2015] UKUT 675 (IAC), that decisions in these cases involve a “moderately complex exercise” in which “the evidential pendulum swings three times and in three different directions”. To quote more of his evocative words directly:

“(a) First, where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue: for example, by producing the completed application which is prima facie deceitful in some material fashion.

(b) The spotlight thereby switches to the applicant. If he discharges the burden - again, an evidential one - of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.

(c) Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's prima facie innocent explanation is to be rejected.

A veritable burden of proof boomerang!”

20. Applying these principles to the case in hand, I do not consider that the findings of the First-tier Tribunal were irrational or took into account irrelevant considerations. The First-tier Tribunal’s decision is generally consistent with the staged approach identified in *Muhandiramge* via which the burden shifts from one party to another: it found that the Secretary of State had discharged the evidential burden, having supplied the look-up tool and associated evidence. It then assessed the oral evidence and accepted that the Respondent might well find it difficult to recall events that took place several years earlier. It took account of several features of her evidence and history that were relevant to the assessment of her English language proficiency: the fact she had studied to a reasonably high level in English, and that her language skills were attested to by her relatively fluency at the hearing, and by other, earlier evidence; the Tribunal was clearly alive to the fact that the bare fact of other English language qualifications would not necessarily carry the day, because of the passage of time. It is also clear that the Tribunal was generally impressed by the Respondent’s character, shown by her active steps in seeking to participate in an investigation into the fraud she suffered when seeking a CoS to qualify her for the Tier 2 Migrant route.

21. The acceptance of her evidence necessarily implies that it then fell upon the Secretary of State to discharge the ultimate legal burden. The First-tier Tribunal was aware of the fact that not all the results from the test centre that day were necessarily dishonestly obtained: “questionable” results are not the same as “invalid” ones, as the term is used to connote cases where ETS assesses the TOEIC score as doubtful because of the broader context of the case rather than treating it as definitively dishonest. Whilst it may be thought that the Tribunal’s conclusion was a generous one, I do not consider that overall its conclusion was outside the range of reasonable responses to the material before it.
22. I accordingly find that the Secretary of State’s grounds of appeal are not made out on the English language issue. The reasoning of the First-tier Tribunal on the other issue of suitability was not disputed.
23. Mr Duffy realistically conceded that, if the Upper Tribunal upheld the approach of the First-tier Tribunal on suitability, then it should make a decision that recognised that the matter was effectively outstanding before the Secretary of State, as the only material refusal reasons had been overturned. Of course the jurisdiction of the Tribunal is limited to the statutory grounds of appeal, brought under the Human Rights Convention alone; it cannot allow an appeal simply because a decision is “not in accordance with the law”.
24. I accept that the Respondents had inevitably established a degree of private life in the United Kingdom during their significant period of lawful residence in this country studying and working. Given that neither of the suitability issues have been sustained, the Respondents are potential candidates for the grant of leave to remain. Given their English language proficiency and independent means (necessarily established by having fulfilled the requirements of the student route for a significant period) and the consideration that their residence has been consistently lawful, the section 117B factors are either neutral or point in their favour.
25. As Mr Duffy reminded me, the Home Office has policies to ensure that a person who loses the benefit of a CoS for reasons beyond their control should not be prejudiced. The existence of such dispensations is relevant to the assessment of proportionality. So, filling out the reasoning of the First-tier Tribunal somewhat, I accept that the refusal of the applications for leave to remain was disproportionate to the private life of the Respondents, bearing in mind that the public interest would be well-served by their availability in providing further evidence to permit an investigation into the activities of the company that defrauded them and others and thus tended to undermine immigration control.

Decision:

The appeal of the Secretary of State is dismissed. The appeals against the original decisions of the Secretary of State refusing the applications for leave to remain are

allowed on human rights grounds. The original applications are accordingly outstanding before the Home Office for lawful decision.

Signed:

Date: 22 December 2017

A handwritten signature in black ink, appearing to read 'MAS' followed by a stylized flourish that extends downwards and to the right.

Deputy Upper Tribunal Judge Symes