Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/03337/2018
HU/03341/2018
HU/03347/2018
HU/03350/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 October 2018	**On 10 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

J E P (FIRST APPELLANT)
E C P (SECOND APPELLANT)
A E P (THIRD APPELLANT)
J E P (FOURTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Miss D Ofei-Kwatia (Counsel)
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

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1. The appellants in this appeal comprise a family all of whom hold Indian nationality. The first and second appellants are the parents of the third and fourth appellants. The first and second appellants came to the United Kingdom as a student and her dependant partner respectively. They entered together in August 2009 and secured extensions of leave until June 2014. However they were refused further extensions. The third and fourth appellants were born in the UK in May 2010 and August 2012 respectively.

2. In September 2017 the appellants applied for leave on human rights grounds, in large part basing their applications on the fact that the third appellant had lived continuously in the UK for more than seven years and arguing that it will be unreasonable to expect her to leave the UK.

3. The respondent refused the applications on 11 January 2018. In respect of the first appellant the respondent alleged that in June 2013 she had obtained a TOEIC certificate from Educational Testing Service (ETS) by deception. She had taken the test at Eden College.

4. The appellants appealed. In the notices of appeal the appellants indicated that they wished their appeals to be decided without a hearing. Reduced appeal fees of £80 were paid. Judge of the First-tier Tribunal Moran decided the appeals without a hearing on 22 April 2018. His decision dismissing the appeals was promulgated on 27 April 2018. In paragraph 2 of his decision the judge stated as follows:

> "Both parties have consented to these appeals being heard on the papers. The appellants have not requested an oral hearing as is their right. Both parties have had ample time to submit whatever evidence they wish to be considered in the determination of these appeals. It is in the interests of justice to decide these appeals in accordance with the wishes of the parties, i.e. to decide them on the papers."

5. In the grounds seeking permission to appeal various assertions are made amounting to a denial that the appellants had consented to their appeals being decided on the papers. In short it was alleged that the appellants had changed their minds and notified the Tribunal of their decision to have their appeals heard at an oral hearing.

6. Permission to appeal was granted by the First-tier Tribunal because it was arguable that a request had been made for an oral hearing on 21 March 2018. However in relation to the claim that Tribunal staff had informed the appellants' solicitors by telephone that the matter had already been determined when it had not been there was no evidence on the Tribunal's file to confirm this.

7. Therefore the grant of permission to appeal stated that the appellants' solicitors must produce either contemporaneous evidence in the form of attendance notes or a witness statement to support their assertion. It is fair to say that evidence has now been produced. The appellants' solicitors have provided further evidence comprising a statement by the caseworker concerned confirming that he telephoned

the Tribunal and was told the decision had already been made, as a consequence of which it was not felt necessary to file further evidence.

8. The parties were in agreement that the decision should therefore be set aside.

9. It is as clear as it possibly can be that it was the absence of oral and other evidence being submitted on behalf of the appellants which led to the decision to dismiss the appeals. In upholding the decision that the first appellant had used deception by submitting a fraudulent ETS language certificate the judge noted that the burden shifted to her to provide an innocent explanation. He noted that this is not a particularly difficult task it is said for many appellants but in this case the first appellant had provided very little information or evidence generally and in particular to address the allegation of fraud. The judge found she had not engaged sufficiently with the allegation against her and therefore the allegation made by the respondent was proved.

10. In relation to the proportionality of removal having found that it would be in the best interests of the third appellant to continue her family life in the UK the judge found that it was not overwhelmingly or emphatically so. As a qualifying child there was a presumption that leave would be granted to all of the appellants unless there were powerful and strong reasons why it should not be.

11. Whilst the first appellant's fraud was a matter striking at the heart of the integrity of the system of immigration control it might well have been outweighed if the third appellant had been older and there were more difficulties in integrating into life in India. Again the appellants had not provided much evidence regarding the establishment of private life in the UK. In other words it is critical to decide whether the judge was right to proceed with the appeal on the papers or whether there was procedural unfairness in the decision not to do so.

12. For the reasons I have already given I am satisfied that had the message from the Tribunal not been relayed as it was the appellants would have filed evidence to address these crucial issues.

13. I therefore allow the appeals of the appellants to the extent that the decision of the First-tier Tribunal is set aside although I would like to add that there was no fault on the part of Judge Moran.

14. Having considered the Senior President's Practice Direction of 15 September 2012, I make an order under section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007. It is clear the appellants have not had a fair hearing and therefore this is an appropriate case to remit to the First-tier Tribunal for a fresh hearing before a different judge. None of the findings made by Judge Moran are preserved.

15. If the appellants wish to have an oral hearing, then the appropriate fees will have to be paid before the case can be listed.

Notice of Decision

The appeal is allowed. The decision of the First-tier Tribunal contains a material error of law and is set aside. The appeal is remitted to the First-tier Tribunal for a fresh hearing on all issues.

Signed Date 5 October 2018

Deputy Upper Tribunal Judge Froom