



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

Appeal Number: IA/01581/2016

IA/01582/2016

THE IMMIGRATION ACTS

**Heard at Glasgow
On 27th September 2018**

**Decision issued
On 17th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**MRS AQSA KASHIF
MR KASHIF FAYYAZ
(No anonymity direction made)**

Respondents

For the Appellant: Mr J Bryce, Advocate, instructed by RH & Co,
Solicitors

For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal is brought by the Secretary of State against a decision by Judge of the First-tier Tribunal Debra Clapham. The appellants

before the First-tier tribunal is hereinafter referred to as “the claimants”.

2. The claimants are nationals of Pakistan. The first-named claimant appealed to the First-tier Tribunal against refusal of leave as a Tier 4 (General) Student Migrant. The reason for refusal was that the Secretary of State maintained that the first-named claimant had fraudulently obtained a TOEIC certificate from ETS (Educational Testing Service). The second-named claimant appealed against refusal of leave as a dependant.
3. The Judge of the First-tier Tribunal stated that there was a burden on the Secretary of State to show fraud. In this case, however, the judge found the Secretary of State’s concerns were based on “no more than speculation and supposition and there is nothing apart from the generic evidence which has been lodged and the look up tool.” The burden of proof was not discharged and the appeal was allowed.
4. Permission to appeal was granted on the basis that the judge had arguably confused who bore the burden of proof and to what extent. There was an arguable failure to provide sufficient reasoning as to why the first-named claimant’s evidence was accepted.
5. The claimants’ rule 24 reply notice, prepared with considerable thoroughness by Mr Bryce, acknowledged that the application by the Secretary of State disclosed error of law by the Judge of the First-tier Tribunal. The claimants sought a remittal of the appeals for a fresh hearing with an amendment to the grounds of appeal to include human rights grounds.
6. Mrs O’Brien concurred with the proposal for remittal.
7. There was a discussion about the proposed amendment to the grounds of appeal. It was suggested that the claimants might have to make a human rights claim to the Secretary of State. It was pointed out that the refusal decisions each contained a s 120 “one stop” notice but there had been no response to this by the claimants. Mr Bryce was given a short adjournment to look into this matter. On his return he stated that a human rights claim would be made within four weeks in response to the s 120 notice. Mr Bryce expressed the view that the First-tier Tribunal would then have to consider any human rights issue raised, in terms of s 85 of the 2002 Act prior to its amendment by the 2014 Act.
8. Accordingly the decision of the First-tier Tribunal is set aside for error of law. The appeals are remitted to the First-tier Tribunal with no findings preserved for the appeals to be heard before a

differently constituted tribunal. It will be for the First-tier Tribunal to allow the grounds of appeal to be amended as appropriate.

9. The tribunal rehearing the appeal will need to assess the evidence in accordance with the case law on the burden of proof, as referred to in the application for permission to appeal and the rule 24 notice.

Conclusions

10. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
11. The decision is set aside.
12. The appeal is remitted to the First-tier Tribunal with no findings preserved.

Anonymity

No anonymity direction has been made.

Deputy Upper Tribunal Judge Deans
2018

13th October