



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

Appeal Number: IA/02082/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 8<sup>th</sup> February 2018**

**Decision & Reasons  
Promulgated  
On 2<sup>nd</sup> March 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE KELLY**

**Between**

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

Appellant

**and**

**NNR**

**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr Tarlow, Senior Presenting Officer  
For the Respondent: Mr A Sufian (Counsel)

**DECISION AND REASONS**

1. I extend the anonymity order made by Judge Eldridge.
2. This is an appeal by the Secretary of State against the decision of Judge Eldridge, sitting at Hatton Cross, to allow the appeal of NNR against the refusal his application for leave to remain in the United Kingdom on family life grounds. For ease of reference, I shall nevertheless refer to the parties in accordance with their status in the First-tier Tribunal.
3. The Appellant is a national of India who was born on 29<sup>th</sup> April 1983.

4. The main reason that the Secretary of State refused the application was because the Appellant had not met the suitability requirements of Appendix FM of the Immigration Rules. This was because the Secretary of State alleged that in July 2013 the Appellant had relied upon a fraudulently-obtained English language test certificate in seeking limited leave to remain in the United Kingdom as a student. It is clear from Judge Eldridge's Record of Proceedings that the Appellant contested that allegation and claimed to have legitimately sat an English language test.
5. It is right to say that the Secretary of State also gave other reasons why she was refusing the Appellant's application. It was nevertheless clear from her reasons for refusal letter that the allegation of deception was the primary reason for refusal. Moreover, any decision to uphold this aspect of the Secretary of State's reasoning would have been determinative of the appeal, regardless of any other reasons that there may have been for dismissing it. Its importance cannot therefore be overstated.
6. However, in an otherwise extremely detailed and careful analysis of the Appellant's Article 8 rights, the judge failed to make any finding on this potentially critical issue. At paragraph 34, he effectively side-stepped the issue:

"Even if the Appellant had provided a false English language certificate in 2013 (before he met his partner and her children), that is not a factor strong enough to prevail over the strong expectation that it is the interests of these two young children that they remain in the United Kingdom with both parents and it is he, the Appellant, who could be seen as and is acting as their father."
7. The Grounds of Appeal complain that the judge failed to make any finding at all in relation to the question of whether the Appellant had employed deception in July 2013. In considering this complaint, it is appropriate to recall that the First-tier Tribunal is first and foremost a fact-finding Tribunal. It is therefore incumbent upon it to make findings of fact in relation to every potentially relevant factual issue in the appeal. In the present case, it was unfair not only to the Secretary of State but also to the Appellant for a serious allegation of fraud to be left unresolved. The Appellant protested his innocence at the hearing. If the judge believed him, then it was only right and proper that he should have acquitted the Appellant of this particular charge. Conversely, had the judge found the charge proved by cogent evidence, then the Secretary of State was entitled to expect a clear finding to this effect. The proper course is always for the First-tier Tribunal to begin by finding the facts. Only then can it consider the application of the law to those facts and exercise any judgment that may be called for in respect of them. Even if the status of the appellant's English language test ultimately proved immaterial to the outcome of the instant appeal, it may yet prove material to some future application. It was thus an error of law for the Tribunal to base its decision upon hypothetical facts.

8. The question for me is whether I ought to exercise my discretion in favour of setting aside the First-tier Tribunal's decision due to the clear error of law in failing to make potentially material findings of fact. There is a respectable argument for saying that given the weight attaching to the public interest in deterring fraudulent immigration applications it would have been perverse to allow the appeal had it been proved that this was what the Appellant had done. That is not however a ground that has been raised by the Secretary of State. Rather, the grounds simply assert that had the Tribunal made an adverse finding in relation to this issue it "may" have come to a different conclusion. However, it is clear from paragraph 34 of the decision (cited above) that if the judge had not made an error of law in this regard he would nevertheless have come to the same conclusion. I therefore have no hesitation in saying that the Secretary of State's appeal should be dismissed.

### **Notice of Decision**

9. The appeal is dismissed.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 26<sup>th</sup> February 2018

Deputy Upper Tribunal Judge Kelly