



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

Appeal Number: HU/02250/2019

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 15 October 2019**

**Decision & Reasons Promulgated  
On 18 October 2019**

**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**PALWINDER [S]  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Z Hussain, Counsel, instructed by Lawfields Solicitors  
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

This is a challenge by the Appellant against the decision of First-tier Tribunal Judge M A Khan (“the judge”), promulgated on 3 May 2019, by which he dismissed her appeal against the Respondent’s decision of 21 January 2019, refusing her human rights claim.

With reference to the application form and its covering letter, the human rights claim was put forward to the Respondent on the following basis. First, that the Appellant had entered into a marriage with an individual (whom I assume to

have been a British citizen) who had subsequently committed domestic violence against her over the course of time, and this, in conjunction with other matters, had led to her suffering from depression and anxiety. Second, it was said that the Appellant had established other ties whilst in the United Kingdom and that when her circumstances were taken as a whole, she should be granted limited leave to remain in the United Kingdom.

In refusing the human rights claim, the Respondent asserted that the Appellant had obtained a fraudulent English language test certificate and that as a result she had acted dishonestly and her claim fell to be refused with reference to S-LTR.1.6 of Appendix FM to the Immigration Rules. In addition, there were no other circumstances in her case which would create very significant obstacles to her reintegration into Indian society, nor were there exceptional circumstances.

### **The judge's decision**

The judge deals with the English language test certificate first. At a number of points in his decision he states that he did not find the Appellant to be a credible witness. He rejected her claim that her former college had booked the English language test, that she had never sat any test, and that she was not even aware that a certificate had been produced until the issue was raised by the Respondent. The judge found that the evidence produced by the Respondent for the appeal in the form of documents contained in the Respondent's appeal bundle were "more than sufficient" to establish that the Appellant had used a proxy test taker and had been dishonest when obtaining the test certificate. He found that the Appellant had failed to provide an explanation in respect of the Respondent's allegation against her.

The judge went on to conclude that inconsistent evidence had been given in respect of the Appellant's father's businesses in India and the ability of a witness at the hearing, Mr Singh, to financially support her were she to return to her home country.

The appeal was duly dismissed.

### **The grounds of appeal and grant of permission**

The grounds of appeal in essence assert that the judge had failed to give any or any adequate reasons in respect of the English language test certificate issue, had failed to approach the issue of the burden of proof on the English language test certificate correctly, and had failed to make any findings in respect of material matters, in particular the question of whether or not the Appellant was the victim of domestic violence and was suffering from mental health issues as a result.

Permission to appeal was granted in somewhat unclear terms by First-tier Tribunal Judge P J M Hollingworth on 22 July 2019.

### **The hearing**

At the hearing before me there was some discussion as to whether or not the Appellant had in fact ever used the English language test certificate when making an application to the Respondent. The Appellant has always claimed that she had not, a claim supported to an extent by information contained in a document at G1 of the Respondent's bundle. Having taken instructions in advance of the hearing, Ms Everett had received information indicating that the English language test certificate had been used in an application made on 25 June 2012.

In the event, this contentious issue does not play a material role in my error of law decision.

Mr Hussain relied on the grounds of appeal.

Ms Everett acknowledged that there were some potential shortcomings in the judge's decision, but any errors were unlikely to be material.

### **Decision on error of law**

When the various challenges mounted by the Appellant are taken together and notwithstanding a holistic and sensible reading of the judge's decision, I conclude that there are material errors of law. The errors are as follows.

In respect of the English language test certificate issue, the judge has clearly stated and restated his ultimate finding that the Appellant was not a credible witness. Whilst there is some merit in Ms Everett's submission that what is said in paragraph 25 may indicate a sufficient reason for the adverse credibility findings, overall and given the centrality of the issue in the appeal, I conclude that the reasons are inadequate. The restatement of the ultimate conclusion, namely that the Appellant was not truthful, does not of itself create sufficient reasons. The point stated by the judge at the beginning of paragraph 25 in respect of the Appellant's discussions with friends at college about the need to take ETS English tests, in my view, is not sufficient to support the overall conclusion that *none* of her evidence relating to this matter was credible.

The second error, connected in a sense to the first, relates to the issue of the burden of proof, which of course rested with the Respondent in respect of the allegation of dishonesty on the Appellant's part. The judge acknowledged that the information sheet at E2 of the Respondent's bundle was illegible, and that is clearly the case. He went on to find that all relevant information was in any event contained at the document at G1 of that bundle. In my view, the judge was wrong to have reached that conclusion. The information at G1 does not

replicate all of the relevant information that is contained in the familiar spreadsheet printouts that this Tribunal and representatives are used to seeing in ETS cases. Material information was missing.

Further, or in any event, the well-known generic evidence produced by the Respondent in the appeal was no doubt sufficient to discharge the evidential burden but not of itself sufficient to discharge the legal burden. However, in paragraphs 26, 27, and 28, the judge seems to have concluded that that evidence was “more than sufficient” to discharge the ultimate *legal* burden of showing that the Appellant had acted dishonestly. This conclusion is stated prior to the final sentence at paragraph 28, in which the judge states that there was an explanation required from the Appellant, which she had failed to provide. With respect, it appears as though a firm conclusion on the question of dishonesty had been arrived at prior to any assessment of whether a plausible explanation had been provided by the Appellant. In this regard too, the judge fails to state the threshold applicable to any explanation - it did not have to discharge any legal burden.

The third error, which can be separated from the previous two, relates to an absence of findings on material matters. It is clear from the evidence that the issues of domestic violence, mental health problems, and estrangement from her family were put forward by the Appellant both in respect of the application made to the Respondent and on appeal. However, the judge has failed to make any findings on this evidence whatsoever.

It is not entirely clear to what extent these issues were the subject of detailed submissions at the hearing, but nonetheless I am satisfied that the points were at least raised in the skeleton argument and by way of clear evidence in the form of GP letters and a detailed account set out by the organisation Southall Black Sisters.

Stepping back and considering whether these errors were individually or on a cumulative basis material, I conclude that they must be. The first error goes to the issue of the Appellant’s truthfulness and character, which was of course the underlying basis relied on by the Respondent in refusing the human rights claim in the first place. If this is combined with the error of relating to the approach to the burden of proof, then the materiality is all the clearer. The lack of findings on material matters is self-evidently of consequence to the overall outcome. In my view, it must be the case that the Appellant’s overall circumstances would be relevant not only to her credibility as regards the English language test certificate issue but, in any event, the question of whether her return to India would involve her facing very significant obstacles or whether there were exceptional circumstances in her case on an Article 8 assessment outside the context of the Rules.

In light of the above, the judge’s decision is set aside.

## **Disposal**

In respect of disposal, both representatives were agreed that this matter must be remitted to the First-tier Tribunal.

With reference to paragraph 7.2 of the Practice Statement, this must be the correct course of action. Not only is the Appellant's credibility an important aspect of the case, but there has been a distinct lack of factual findings by the judge in respect of relevant matters. Therefore, the significant extent of the fact-finding exercise is such that this matter must be looked at entirely afresh at the First-tier Tribunal.

## **Notice of Decision**

**The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**

**I set aside the decision of the First-tier Tribunal.**

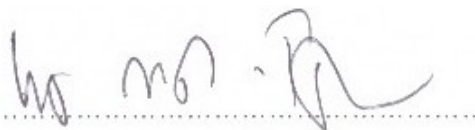
**I remit the case to the First-tier Tribunal.**

No anonymity direction is made.

## **Directions to the First-tier Tribunal**

- 1) This appeal is remitted to the First-tier Tribunal for a complete rehearing, with no findings preserved;**
- 2) The remitted appeal shall not be heard by First-tier Tribunal Judge M A Khan.**

Signed



Date: 16 October 2019

Upper Tribunal Judge Norton-Taylor