



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

Appeal Number: HU/09450/2018

THE IMMIGRATION ACTS

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

**Decision & Reasons
Promulgated
On 01 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**SARA ZAKY GIRGIS SALIB
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Farhat, Solicitor, Gulbenkian Andonian Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals on inadequate reasoning and/or procedural unfairness grounds from the decision of the First-tier Tribunal (Judge SH Smith sitting at Hatton Cross on 1 November 2018) dismissing her appeal against the decision of the Secretary of State for the Home Department ("the Department") to refuse to grant her leave to remain on human rights grounds following the refusal of her application for leave to remain as a Tier 1 (Entrepreneur) Migrant on 4 July 2016, a decision which was upheld on 9 August 2016 after the appellant had applied for administrative review. The First-tier Tribunal did not make an anonymity direction, and I

do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

Relevant Background

2. The appellant is a citizen of Egypt, who entered the UK on 25 August 2009 with valid entry clearance as a student. She was subsequently granted leave to remain as a Tier 1 (Entrepreneur) Migrant from 15 May 2013 to 15 May 2016. The appellant made an in-time application for further leave to remain as a Tier 1 Entrepreneur Migrant but, as previously stated, the application was refused and maintained following an administrative review.
3. On 5 September 2016 the appellant applied for leave to remain on human rights grounds. On 5 April 2018 the Department gave their reasons for refusing the application. In her application dated 5 September 2016, she had submitted a TOEIC certificate from ETS. ETS had undertaken a check of her test and confirmed with the Secretary of State that there was sufficient evidence to conclude that her certificate was fraudulently obtained by the use of a proxy test-taker. Her scores from the test taken on 16 May 2012 at Colwell College had now been cancelled by ETS. On the basis of information provided by ETS, the Department was satisfied that her certificate was fraudulently obtained and that she had used deception in her application of 16 October 2012. The attached printout entitled "*ETS Lookup*" linked her case to the use of an invalid certificate. Consequently, she failed to meet the suitability requirements of S-LTR 1.6. Her presence in the UK was not conducive to the public good because her conduct made it undesirable to allow her to remain in the UK.
4. She also did not meet the eligibility requirements for leave to remain on private life grounds under Rule 276ADE(1). She had visited Egypt for two weeks in 2015 and she had stated that she was able to speak Arabic as well as English. Her parents, sister, brothers, uncle and aunt continued to live in Egypt. So, they would be able to help her adjust to life in her home country once more.

The Hearing Before, and the Decision of, the First-tier Tribunal

5. Both parties were legally represented before Judge Smith. Mr Farhat appeared on behalf of the appellant.
6. In his subsequent decision, the Judge gave very detailed reasons for finding that the Department had not discharged the burden of proving that the appellant had used a proxy test-taker in order to achieve her speaking test result. As the result, he found that the suitability concerns raised in the refusal letter fell away.
7. But he agreed that the appellant did not meet the requirements of Rule 276ADE. She would not face very significant obstacles to her reintegration in Egypt. She had lived in Egypt until the age of 28. She spoke Arabic,

and she had had the opportunity to develop English language skills while living here. She had demonstrated business acumen in establishing a successful food business. She still had family in Egypt.

8. The Judge turned to consider an Article 8 claim outside the Rules. The crux of Mr Farhat's case was that, in the light of the historic wrong the appellant had suffered by virtue of the Department wrongly accusing her of engaging in deception, and therefore having refused her Tier 1 application on erroneous grounds, the private life which she had established through her business should be afforded significant weight when assessing the proportionality of her removal. In support of that contention, Mr Farhat had relied on **Onwuje and Onwuje -v- SSHD [2018] EWCA Civ 331**.
9. The Judge said at paragraph [41] that in principle he agreed with Mr Farhat's submissions. At paragraph [42], he held that if the sole reason for her early applications being refused was on the suitability ground which he had now found to have no merit, "*that would be historic wrong which would attract considerable, if not determinative, weight in the proportionality balancing exercise.*" However, he held that the difficulty for the appellant was that she had not provided a copy of the earlier Tier 1 refusal, or the administrative review which upheld it. Although she wrote in her statement that this was the sole basis on which it was refused, in the absence of confirmation in the form of the refusal letter - a document which should be readily available to her - he was unable to find that the sole reason for the appellant's earlier refusal was this historic wrong. The appellant had not applied to adjourn the proceedings to obtain such documentation. Indeed, in a letter to the Tribunal dated 29 October 2018, those representing the appellant had written that they had experienced considerable difficulties obtaining documents "*from her*".
10. The Judge went on to find that the reasons in favour of removal outweighed those in favour of the appellant remaining here. Although he accepted that the appellant had suffered an historical wrong, he had been unable to find that that was the sole factor in the earlier refusals of her applications for leave to remain. Taken in isolation, therefore, the Department's error in relation to the allegations of deception could not be determinative of the public interest on this occasion.

The Reasons for the Grant of Permission to Appeal

11. On 27 December 2018 First-tier Tribunal Judge PJM Hollingworth granted permission to appeal *inter alia* for the following reasons:

"The respondent did not appear at the hearing before the Judge. The Judge was not in a position to obtain help from any representative of the respondent. The appellant clarified the basis on which the application had been refused. It was submitted, on the appellant's behalf, that this assertion was sufficient. The Judge rejected that. The Judge went on to state at paragraph 43 of the decision the Tier 1 regime especially in relation to small businesses was extremely

complex and the matter could have been refused on any number of technical bases. The approach by the Judge was arguably wrong, leaving aside the question of unfairness. It is made clear in the permission application that the appellant had made a pleading of fact in her original application as this is described which was not contested or challenged at any stage in the process either in the application process or the appeals process. It is arguable, given the absence of any representative on the part of the respondent and the potentially central nature of the issue to the outcome of the proportionality exercise, that the Judge should have taken a different approach to the question of obtaining the original refusal letter or letters which were of concern.”

The Rule 24 Response

12. Christopher Bates of the Specialist Appeals Team settled a Rule 24 response opposing the appeal. In his response dated 30 January 2019, Mr Bates submitted that the Judge of the First-tier Tribunal had directed himself appropriately. The burden of proof lay on the appellant to make good the assertion that the allegation of deception was the only basis upon which her previous application had been refused. To assist the Court, a copy of the refusal of 4 July 2016 was now attached to the response. This made it clear that, far from suitability being the only basis for the refusal, there were in reality “*multiple failings*” in evidencing compliance with the Tier 1 application criteria.

The New Material that was not before the First-tier Tribunal

13. In the event, the Specialist Appeals Team provided both a copy of the refusal decision of 4 July 2016 and a copy of the administrative review of 9 August 2016.

The Hearing in the Upper Tribunal

14. At the hearing before me to determine whether an error of law was made out, Mr Farhat explained that he had received the Rule 24 response very late, and the copies of the two decisions of 2016 even later. As a consequence, he had only been able to take instructions today from his client on their contents. She now recalled that the refusals of 2016 had not been solely based upon an asserted failure to meet the suitability requirement, but she had been so upset that she had forgotten this, and the evidence which she had given to the First-tier Tribunal Judge had been given in good faith.
15. Although he acknowledged that the case he had put forward on her behalf before the First-tier Tribunal was mistaken, Mr Farhat submitted that nonetheless the Judge had erred in law for the reasons identified in the permission application. Having regard to the procedural history and the evidence that was before him, the Judge had erred in law in not accepting the case that was put to him. Alternatively, even if the Judge had been right to find that there were technical issues with the appellant’s Tier 1

application, there had been procedural unfairness because the Judge had not been able to perform a proper proportionality assessment in accordance with the guidance given by the Court of Appeal in the **Onwuje** case, without having sight of the detailed grounds of refusal and/or in the absence of assistance from a Presenting Officer.

Discussion

16. In **E&R -v- Secretary of State for the Home Department [2004] QB 1044**, Carnwath LJ said at paragraph [66]:

“In our view, the time has now come to accept a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in cooperating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of the *Criminal Injuries Compensation Board* case. First, there must have been a mistake as to the existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the factual evidence must have been “established”, in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisors) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal’s reasoning.”

17. Carnwath LJ went on to say in paragraph [68] that, assuming the relevance of showing a mistake of fact in the Tribunal’s decision, there may need to be evidence to prove it. The Court had discretion to admit new evidence, but it was normally exercised subject to **Ladd -v- Marshall** principles, raising in particular the issue of whether the material could and should have been made available before the decision.
18. In this case, the Tribunal is faced with a reverse situation. The First-Tier Judge was right on the facts, but it is argued that he ought to have decided the case on a factual basis which is now accepted to be false.
19. The fact that the Judge has been vindicated in his assessment of the facts - in particular in his refusal to take the appellant’s word for it that the refusal decisions of 2016 were solely based upon an allegation of deception - makes it difficult for the appellant to maintain the error of law challenge which is pleaded in the permission application.
20. But even if I put myself in the position of Judge Smith, who did not have sight of the refusals, I do not consider that his decision is vitiated by inadequate reasoning or by procedural unfairness.
21. The nub of the case advanced by Mr Gilbert is contained in paragraphs 19 and 20 of the permission application. The following are stated to be clearly sufficient for the Judge to have found in favour of the appellant: (a) an assertion in the original application (cover letter); (b) the assertion went unchallenged and was not disputed in the RFRL; (c) the respondent

formulated her bundle (i.e. her evidence) without disputing this assertion; (d) the respondent, despite having received the appellant's witness statement in advance, did not seek to challenge her witness statement.

22. I consider that Mr Gilbert's case breaks down at the first stage. The cover letter settled by Reiss Edwards did not contain an unequivocal assertion that the sole ground of refusal of the Tier 1 (Entrepreneur) migrant application made earlier in 2016 was a failure to meet the suitability requirement. It would have been surprising if it had done so, as Reiss Edwards were the legal representatives who had acted for the appellant in the Tier 1 (Entrepreneur) migrant application, and so they were well aware (as Mr Gilbert accepted) that the application had been refused on its merits as well as on the ground that the suitability requirement was not met.
23. The representation made in the cover letter was as follows: *"It is our submission that the evidence with this application is sufficient in showing that the applicant genuinely established her business which she is successfully running."*
24. It is apparent from the documents listed at the end of the cover letter that the representatives submitted with the private life application additional documentary evidence relating to the business that was not provided for the Tier 1 application. Thus, for example, the list of documents includes an SSE statement of account for the applicant dated 15 July 2016, and a Lloyds Bank statement for her covering the period 21 July 2016 through to 19 August 2016. This underscores the fact that the appellant was not representing in her current application that, absent the suitability issue, she had met all the relevant requirements for the grant of leave to remain as a Tier 1 (Entrepreneur) migrant - still less that the Department had previously conceded this fact. All that was being represented was that the evidence provided with the current application was sufficient to show that the appellant had genuinely established her business which she was successfully running.
25. Given this starting point, the appellant had no legitimate expectation that the refusal letter would engage with an assertion which had not been made in the first place. In addition, looking at the matter more broadly, the appellant had no legitimate expectation that the refusal letter would rehearse the reasons why her application for leave to remain as a Tier 1 (Entrepreneur) migrant had been refused. From the prospective of the Department, this was completely irrelevant. The only relevant issue that required to be addressed was whether the appellant qualified for leave to remain on private life grounds. Identical considerations apply to the formulation of the Home Office bundle.
26. I accept that, by serving the appellant's witness statement in advance of the hearing, the appellant's representatives put the Department on notice that the appellant was going to give evidence that the sole ground of refusal of her Tier 1 (Entrepreneur) migrant application was the allegation

of deception. But the burden of proof did not thereby shift to the Department to produce documentary evidence in rebuttal of what is now accepted to be a false assertion. As a general principle, he who asserts must prove. The burden of proof always rested with the appellant to prove any and all facts material to her case that were not conceded by the Department.

27. Accordingly, procedural fairness did not demand that the Judge should accept the appellant's unsupported assertion. Sitting as a Judge of a specialist Tribunal, it was open to him to be sceptical about her claim, applying his specialist knowledge of the difficulties faced by the applicants in satisfying the technical criteria for the grant of leave to remain as a Tier 1 Entrepreneur. It was also open to the Judge to find that the earlier refusal letter was a document which should be readily available to her, and that the fact that she had not produced it meant that she had not discharged the burden of proof.
28. Turning to Mr Gilbert's alternative case, the Judge recognised at paragraph [40] of his decision that **Onwuje** confirmed that in principle the private life limb of Article 8 can be engaged by an individual's ownership of, and involvement in, his or her business.
29. The Judge accepted that one dimension of private life the appellant had established in the UK was her business. He found that she ran it with her brother and that she interacted with large numbers of people on a daily basis. He accepted that she had invested a considerable amount of her own time and money in the business.
30. Later on, when compiling a balance sheet of factors in favour of her removal as against factors in favour of her remaining here, the Judge identified as the primary factor in favour of her remaining here the fact that she had established a business which was a going concern, and which relied for its day-to-day functioning on her personal involvement.
31. Accordingly, I do not consider that the appellant can be said to be the victim of procedural unfairness on the alternative basis put forward by Mr Gilbert. The Judge accepted that her private life claim was fortified by the evidence about her business, and the detailed reasons which underlay the refusal of the earlier Tier 1 application were not reasonably capable of making any difference to the outcome of the proportionality assessment.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed
2019

Date 23 February

Deputy Upper Tribunal Judge Monson