



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

Appeal Numbers: HU/02642/2019
HU/03576/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 10 January 2020**

**Decision & Reasons Promulgated
On 24 January 2020**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS AISWARYA VISHWANATHAN (FIRST RESPONDENT)
MR MAHA DEVAN JAYAPAL (SECOND RESPONDENT)
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Ms Everett, Senior Home Office Presenting Officer

For the Respondents: Mr Bhebe, instructed by Njomane Immigration law practice

DECISION AND REASONS

1. The first respondent (whom I shall refer to as “the claimant”) is a citizen of India. The second respondent, who is the claimant’s husband, is also a citizen of India. The claimant and the second respondent have a son born in the UK in October 2016.

2. On 17 February 2017 the claimant, who has been in the UK since 2011, applied for leave to remain on the basis of her private and family life. On 22 January 2019 that application was refused.
3. One of the reasons the Secretary of State gave for refusing the application was that in a previous application made in July 2013 the claimant had relied on a fraudulently obtained TOEIC certificate. The Secretary of State's Reasons for Refusal Letter states that using voice recognition software it was confirmed the TOEIC certificate submitted by the claimant with the July 2013 application was invalid.
4. The claimant appealed to the First-tier Tribunal where the appeal came before First-tier Tribunal Judge Lawrence ("the judge"). In a decision promulgated on 5 September 2019 the judge allowed the appeal. The Secretary of State is now appealing against that decision.
5. The judge gave a self-direction as to the burden of proof at paragraph 7 of the decision where he stated:

"It is a three stage approach. First the respondent must adduce sufficient evidence to raise the issue of fraud. The applicant has then a burden of raising an innocent explanation which satisfies the minimum level of plausibility. If that burden is discharged the respondent must establish on a balance of probabilities that this innocent explanation is to be rejected".
6. The judge found that the Secretary of State had not satisfied the first of these three stages and therefore there was no need for the claimant to raise an innocent explanation. This is stated both at paragraphs 14 and 15 of the decision. At paragraph 14 the judge stated

"the evidential burden does not shift to the appellant to rebut anything".

At paragraph 15 he stated

"the evidential, the second stage, burden does not shifted to the first appellant to rebut anything".
7. The grounds of appeal submit that the judge failed to follow *SSHD v Shehzad* [2016] EWCA Civ 615.
8. At the hearing, Ms Everett argued that even if judge was correct in respect of the fraud issue, the judge had not, in any event, provided a reasoned basis for allowing the appeal on human rights grounds. She acknowledged that this was not raised specifically in the grounds of appeal. I declined to hear this argument as it had not been raised previously.
9. Mr Bhebhe argued that the document relied on by the Secretary of State to support the allegation of fraud (an extract from a spreadsheet headed ETS self source data which refers to the claimant's test as being invalid) is not of itself enough to meet the initial burden. He also argued that the

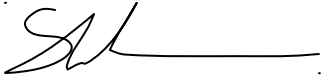
decision, read as a whole, shows that the judge considered the appellant's "innocent explanation" and accepted it.

10. In order to discharge the initial evidential burden in this case the Secretary of State submitted witness statements from three individuals that are not specific to the claimant (referred to by the judge at paragraph 11 as "generic witness statements"), along with an extract from a database referred to as the ETS self source data, referring to the claimant as having an "invalid" test. The judge made no reference to the ETS self source data document even though it was in the Secretary of State's bundle (at page 84). The impression formed from reading the decision, in particular paragraph 11, is that the judge entirely omitted this document from consideration.
11. In *Shehzad* it is made clear that the witness statements referred to by the judge as the generic witness statements taken together with the ETS self source data extract referring to the individual in question is ordinarily sufficient to shift the evidential burden. At paragraph 26 of *Shehzad* it is stated that:
"the in limine rejection of the Secretary of State's evidence as even sufficient to shift the evidential burden was an error of law."
12. The judge erred in law because had he followed *Shehzad*, as he was bound to do, he would have found that the Secretary of State had discharged the initial burden such that the burden shifted to the claimant to provide a plausible innocent explanation.
13. The judge has made several findings in the decision which show that he believed the claimant told the truth and which provide support for such a conclusion. However reading the decision as a whole it is plain that the judge, when reaching his final conclusion, gave significant weight to his conclusion, which is not consistent with *Shehzad*, that the Secretary of State had not even established the initial evidential burden. I am therefore of the view that the error was material.
14. Given that there will be a need for a judge to reach fresh conclusions on the evidence I consider this is a case that is appropriate for remittal to the First-tier Tribunal to be heard afresh before a different judge.

Notice of Decision

15. The decision of the First-tier Tribunal contains a material error of law and is set aside.
16. The appeal is remitted to the First-tier Tribunal to be heard afresh before a different judge.

Signed



Upper Tribunal Judge Sheridan

Dated: 20 January 2020