



**Upper Tribunal  
(Immigration and Asylum Chamber)    Appeal Numbers: HU/02693/2019  
& HU/02696/2019**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 10 November 2021**

**Decision    &    Reasons  
Promulgated  
On 25 November 2021**

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

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

Appellant

**and**

**MR KARIM ASIF  
MRS GHULAM AYESHA  
(ANONYMITY DIRECTION NOT MADE)**

Respondents

**Representation:**

For the Appellant:    Mr Whitwell, Home Office Presenting Officer  
For the Respondents:    No appearance

**NOTICE OF ABANDONMENT IN RESPECT OF THE FIRST RESPONDENT  
(HU/02693/2019) PURSUANT TO RULE 17A**

**DECISION AND REASONS IN RESPECT OF THE SECOND RESPONDENT**

The Secretary of State appeals with permission against a decision of First-tier Tribunal Judge Sweet promulgated on 5 November 2019 in which he allowed the appeals of both respondents against the decision of the Secretary of State

to refuse their application for further leave to remain in the United Kingdom on family and private life grounds.

There is a significant procedural history to this case, perhaps inevitable in the two years since it was decided by Judge Sweet. It is, in my view, sufficient to record here that the first respondent has now been granted indefinite leave to remain. On that basis by operation of Section 104(4A) of the 2002 Act.

The Upper Tribunal must therefore issue a notice pursuant to rule 17A (2) informing the parties that the appeal is being treated as abandoned. This is a Notice pursuant to rule 17A (2) to inform the parties that the appellant's case is deemed abandoned.

The effect of the respondent's case being deemed abandoned is that the proceedings before the Upper Tribunal are at an end

That then leaves the position of the second respondent, who is the first appellant's wife. The respondents' solicitors have made submissions served on 9 November 2021 pursuant to the Memorandum and Directions which I handed down on 2 August 2021. The deemed abandonment of the first respondent's appeal does not affect the second respondent's appeal.

In brief, it is recorded that the second respondent has made an application for indefinite leave to remain as a dependant of her husband which, I am told, was made on 2 February 2021 and is still pending. It is also said and I have no reason to doubt this that this grant of indefinite leave to remain to the husband is a new matter for the purposes of Section 85 of the 2002 Act but obviously those are matters with which I need concern myself only after I have concluded whether there is an error of law in the First-tier Tribunal as averred by the Secretary of State.

The respondents make no submissions in their most recent submissions regarding whether or not the decision of the First-tier Tribunal did involve the making of an error of law.

It is important to consider first the nature of the application which was made and the nature of Judge Sweet's decision. The decision of the Secretary of State in respect of the first respondent, Mr Asif Karim, was to refuse him leave to remain on a number of bases but it needs to be recalled that the application made on 22 December 2017 which gave rise to this appeal was made after an application for further leave made on 30 July 2016 had been refused and certified as clearly unfounded on 19 September 2017 and thus it fell outside the Rules.

The Secretary of State refused the application on the basis that the first respondent had used deception in the submission of a TOEIC certificate from ETS which had been obtained by deception. On that basis, the Secretary of State refused the application for leave to remain and the second respondent was refused leave to remain in line.

In his decision Judge Sweet considered the evidence relating to the ETS tests and found that the first respondent had not used deception. The judge then went on to allow the appeal in brief terms, stating in paragraph 33:

“For all these reasons and taking into account the considerable difficulties which the appellants will have on return due to lack of support from their respective families and disapproval of their marriage state I am satisfied that their appeal should succeed and the application should not have been refused.”

There are, as Mr Whitwell submitted, three grounds of appeal, first, that the judge had failed to give adequate reasons for his findings in respect of the TOEIC certificate and in finding that there had not been a deception, second, that he had made a mistake as to a material fact and thirdly, that he had failed completely to carry out any proportionality exercise, the application being made outside the Rules and being refused on the basis of suitability and eligibility. It is further averred that it is simply unclear from paragraph 33 if the appeal has been allowed on the basis that there are very significant obstacles as set out in paragraph 276ADE(vi), the judge failing to direct himself to the broad assessment as in **Kamara**.

I am satisfied that the judge did materially misdirect himself in law in respect of the approach to proportionality. There are simply no proper findings of fact or any analysis in respect of proportionality nor is it clear as to whether it was allowed under paragraph 276ADE(vi) or through some other basis, for example in respect of GEN.3.2 of Appendix FM. On that basis alone, the decision needs to be set aside and I then turn to the other two grounds of appeal.

The difficulty I face is that it is now difficult to see how any error in respect of that could be material, given the grant of indefinite leave to remain to the first respondent and as his appeal has been abandoned. I bear in mind that I am considering a challenge to a finding of fact which is relevant to the wife's appeal although it is difficult to separate that from the husband's appeal, I conclude that insofar as there is any error in the fact-finding exercise in respect of deception it is not material and in the circumstances, it is unnecessary for me to make any finding as to whether that finding is preserved or not because I have no jurisdiction to set aside that finding of fact now that the appeal is deemed abandoned.

I consider also that having found an error of law in respect of the proportionality exercise and given the substantial changes in circumstances in that there is clearly a new matter, we are now two years on and there has been a significant change in circumstances, that the appropriate course of action is to remit this decision to the First-tier Tribunal. In doing so, I have to consider whether the findings of fact made in an appeal which is now statutorily abandoned should be retained. I bear in mind also that I can only remit the appeal of the wife, the second appellant.

Accordingly, for these reasons I remit the appeal to the First-tier Tribunal but the finding that there has been no exercise of deception has to be preserved as it cannot be set aside.

### **Notice of Decision**

1. The appeal of the first respondent is deemed abandoned.

The appeal of the second respondent involved the making of an error of law and I set it aside.

I remit the appeal to the First-tier Tribunal to be remade, but on the basis that the finding of fact that there was no deception used is preserved.

No anonymity direction is made.

Judge Rintoul

Date 22 November 2021