



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

Appeal Number: OA/01057/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 18 July 2016**

**Decision & Reasons
Promulgated
On 22 July 2016**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

**SALEHA BEGUM + 2
(ANONYMITY DIRECTION NOT MADE)**

Appellant

-and-

ENTRY CLEARANCE OFFICER - DHAKA

Respondent

Representation:

For the Appellant: Mr. S. Karim, of counsel, instructed by SG Law Solicitors
For the Respondent: Mr. Norton, Home Office Presenting Officer

DECISION AND REASONS

1. The 1st Appellant, who was born on 29 January 1975, is a national of Bangladesh. The 2nd and 3rd Appellants are her daughters; Fatema Jannath Rumi, who was born on 20 March 1997, and Saddika Jannath Asha, who was born on 21 April 1998. They are also nationals of Bangladesh.
2. On 5 May 1995, the 1st Appellant married Hafizur Rahman and the 2nd and 3rd Appellants were subsequently born in Bangladesh. The 1st Appellant's husband and sponsor came to the United Kingdom in 2006 on a work permit and he returned to Bangladesh to visit the Appellants in December 2009. He was granted indefinite leave to remain here on 25 March 2011 and visited the Appellants in Bangladesh in March/April 2011.
3. The sponsor became a naturalised British citizen on 12 April 2012 and was issued with a British passport on 21 August 2013.
4. The Appellants applied for entry clearance as his dependents on 26 September 2013 but their applications were refused on 15 December 2013. They appealed against this decision on 9 January 2014 and First-tier Tribunal Judge Lucas dismissed their appeal in a determination promulgated on 30 September 2015. The Appellants appealed against this decision on 19 October 2015 and they were granted them permission to appeal by the First-tier Tribunal on 22 March 2016. The Respondent then filed a Rule 24 response on 21 April 2016.

Error of Law Hearing

5. Counsel for the Appellant submitted that the burden of proof in relation to the 1st Appellant's ability to speak English lay on the Respondent, as he had made an allegation of deception. He also sought to distinguish the case of *SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof)* [2016] UKUT 00229 (IAC) on the basis as these cases related to ETS tests sat in the United Kingdom. He also submitted that the evidence relied on was not relevant to the application for entry clearance made by the 1st Appellant .
6. Counsel for the Appellant also submitted that there was no evidence of the conversation said to have taken place between the 1st Appellant and the Entry Clearance Officer and that First-tier Tribunal Judge Lucas had failed to make the necessary findings in relation to credibility in relation to the 1st Appellant and her sponsor. In addition, he relied on *Goudey (subsisting marriage - evidence) Sudan* [2012] 00041 (IAC) and *GA ("Subsisting" marriage) Ghana** [2006] UKAIT 00046.
7. In response the Home Office Presenting Officer submitted that there was sufficient evidence to show that the 1st Appellant had obtained her English language certificate by deception. He also submitted that the Immigration Rules had changed since *Goudey* was determined. In addition, he said

that, even though First-tier Tribunal Judge Lucas' decision was not the most detailed he had seen, it dealt with the salient points. He also relied on the section in the refusal letter which dealt with financial requirements to be fulfilled as a spouse. He added that there was no reason to doubt that the Entry Clearance Officer had tried to speak with the 1st Appellant over the telephone.

Error of Law

8. The findings made by First-tier Tribunal Judge Lucas were brief.
9. In paragraph 27 of his decision First-tier Tribunal Judge Lucas found that he was satisfied that the 1st Appellant can or does not meet the English language requirement set out in E-ECP.4.2. This was that she had passed an English language test in speaking and listening at a minimum of level A1 of the Common European Framework of Reference. The 1st Appellant had submitted certificates in speaking and listening for ETS tests taken in Dhaka. On the speaking test it is explained that "most of the time, test takers at Level 6 can answer questions and give basic information. However, sometimes their responses are difficult to understand or interpret". The listening certificate notes that she scored under 200 and that those doing so may not consistently understand short (single sentence) descriptions of a photograph. Clearly those at A1 level are not proficient in the English language.
10. The Entry Clearance Officer asserted that when telephoned the 1st Appellant was unable to answer basic questions regarding her test and eventually disconnected the call and would not answer any further calls. He did not give any details of who made the calls or when they were made and no records of the calls have been submitted. Therefore, it remains a bare assertion and First-tier Tribunal Judge Lucas should have noted this when coming to any decision about the 1st Appellants ability to speak English at the required level.
11. In her witness statement the 1st Appellant confirmed that she "participated in TOEIC test on 08.09.2013 at the test centre in Dhaka, Bangladesh". First-tier Tribunal Judge Lucas did not take her evidence into account and, in the alternative, did not reach any adverse findings in relation to her credibility. Instead, he relied on generic evidence provided by the Respondent at the appeal hearing before him. There was a witness statement by Mona Shah, s senior caseworker at the Home Office. However, at paragraph 6 of her witness statements she states that "the decision [for] leave to remain was refused in this case in light of the cancellation of an English language test certificate by ETS". The 1st Appellant had not made an application for leave to remain. She then relies on Rebecca Collings' witness statement. This in turn deals with the revelations made by the BBC about Eden College and Universal Training College in the United Kingdom.

12. At paragraph 20 of her witness statement, Rebecca Collings also noted that “testing outside the UK...was allowed to continue” and it was ETS centres in the UK which were suspended. The witness statement by John Millington also only refers to tests taken within the United Kingdom. Therefore, there was no basis for the apparent finding in paragraph 15 of First-tier Tribunal Judge Lucas’ decision that the effect of Mona Shah’s “witness statement is that the English test certificate provided by the Appellant is invalid because it had “been obtained via the use of proxy tester”.
13. At paragraph 28 First-tier Tribunal Judge Lucas also found that it was “the responsibility of the Appellant to provide evidence to show” that her test was valid. This would only have been the case in the light of *SM and Qadir* if the Respondent had discharged the evidential burden which he has not done in this case. As a consequence, I find that First-tier Tribunal Judge Lucas erred in law when finding that the 1st Appellant had not submitted genuine English language certificates.
14. First-tier Tribunal Judge Lucas also found that the relationship between the 1st Appellant and her sponsor was no longer subsisting. In particular, he submitted in paragraph 33 that “calling cards do not prove a subsisting relationship in themselves”. I accept that this is the case but in *Goudey* the Upper Tribunal found that “evidence of telephone cards is capable of being corroborative of the contention of the parties that they communicate by telephone, even if such data cannot confirm the particular number the sponsor was calling in the country in question.” The Upper Tribunal also found that “it is not a requirement that the parties also write or text each other”. Therefore, some weight should have been given to these cards.
15. In *Goudey* the Upper Tribunal also confirmed that finding in *GA* that although “the matrimonial relationship must continue at the relevant time rather than just the formality of marriage....it does not require the production of particular evidence of mutual devotion before entry clearance can be granted”. In the current case the sponsor’s evidence in his witness statement was that according to his “culture and religion, marriage is a pure bondage between the husband and wife” and that the main reason for him coming to the UK was “to give his family a better and happy family life”. This is consistent with him coming here on his own on a work permit and working here until he was naturalised as a British citizen. In this context it was not unreasonable for him to only pay two visits back to Bangladesh and also for him only to be able to send remittances once he was more established here.
16. First-tier Tribunal Judge Lucas made no adverse findings of credibility in relation to the sponsor and, therefore, he should have taken these cultural factors into account when considering whether the relationship between the 1st Respondent and her sponsor was still subsisting. This approach is consistent with *Goudey* where the Upper Tribunal also found that “where

there are no countervailing factors generating suspicion as to the intentions of the parties, [evidence such as calling cards] may be sufficient to discharge the burden of proof on the claimant". As a consequence, I find that First-tier Tribunal Judge Lucas erred in law in relation to the subsistence of the relationship between the 1st Appellant and her sponsor.

17. Neither the Entry Clearance Officer nor First-tier Tribunal Judge Lucas reached findings in relation to whether or not the Appellants met the financial requirements of the Immigration Rules.

Decision

1. I allow the Appellants' appeals.
2. The appeals are remitted to the First-tier Tribunal to be heard *de novo* before a First-tier Tribunal Judge, other than First-tier Tribunal Judge Lucas.

Signed

Date: 21 July 2016

Nadine Finch

Upper Tribunal Judge Finch