Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13387/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Determination Promulgated**
On 4th May 2017	**On 23rd May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS SHUKRIA BIBI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Trevelyan (Counsel)
For the Respondent: Mrs H Aboni (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Phull, promulgated on 11th October 2016, following a hearing at Birmingham Sheldon Court on 19th August 2016. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent

Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Pakistan who was born on 9th November 1982, and is a female. She appealed against the decision of the Respondent Secretary of State, dated 1st December 2015, refusing her application for leave to remain as the spouse of a person present and settled in the UK, because it is said that she has fraudulently put forward an ETS examination test result which was not undertaken by herself but by a proxy.

The Appellant's Claim

3. The Appellant's claim is that she entered the UK in 2005 to join her husband who was in the UK on a student visa. They lived in London. She gave birth to a second child, Zeenat, whilst in London. Two months later she returned to Pakistan with her children. In 2007, she gave birth to a third child, Noman, in Pakistan. Whilst in Pakistan, in 2009, she witnessed death and destruction following a suicide bombing attack in the main city of Peshawar, where she saw many casualties, which traumatised her. In February 2012, she returned to the UK with her children to rejoin her husband. On 3rd July 2013, she attended Biettec College in Birmingham to take the English language test. On the day that she attended the speaking element of the language test, she travelled there with her husband and baby on a bus to the main route. She walked to the college, a two storey building, and she walked into the reception, and reported there. She was directed to the waiting hall on the ground floor, where there were other candidates, and then a moderator came down with a list of names, and they all had to sign off their names and were escorted upstairs where there were computers set up in the room. Her husband and child were asked to wait outside in the canteen. She was directed to a seat in the examination room. The examiner was male. After the preliminaries, the test commenced. IJ Phull records, however, that "she does not recall the nature of the questions that were put to her" (paragraph 8). However, she does recall that she sat a six part test, which was over 45 minutes, and she spoke loudly into the microphone, and the test required her to describe a picture, and provide a short narrative, and there was a problem solving exercise which she also undertook. She took her speaking test on one day and listening and reading on another day. (See paragraph 8).

The Judge's Findings

4. At the hearing before the judge, the Appellant did not give evidence because of her traumatised condition. I noted at the hearing before me today also, that although she was in the courtroom at the start of the hearing, her Counsel asked for her to be released so that she could go and sit outside, because she found the proceedings traumatic and difficult to

countenance because she had been suffering from anxiety and depression, as a result of having seen the suicide bombing in Peshawar. I also noted in this context that, the judge at the hearing below stated that, "having considered the Appellant's evidence I accept on balance that she was unable to answer questions at her immigration interview because she found herself in a stressful situation and the GP letter supports her symptoms" (paragraph 37).

5. The judge then went on to say that she had considered the ETS test scoring for the speaking test (see page 39 of the Appellant's bundle), and that this

> "reveals that the Appellant's test results were not particularly good. There is criticism of her intonation and stress, and remarks upon errors in pronunciation, grammar and a limited range of vocabulary. The overall score for speaking is 140 over 200 with the proficiency level of 6. However she satisfied the speaking test" (see paragraph 38).

The judge then held that having considered the evidence in the round and on balance, she was satisfied that the Appellant's language certificate had not been obtained by fraudulent means (see paragraph 39).

6. The appeal was allowed.

Grounds of Application

7. The grounds of application state that the judge erred in her conclusions which were not in accordance with the case of **Shehzad [2016] EWCA Civ 615**. Moreover, the judge's assessment under Article 8 was flawed.

8. On 11th January 2017, permission to appeal was granted.

Submissions

9. At the hearing before me on 4th May 2017, Mrs Aboni, relied upon the grounds of application. First, she submitted that the Secretary of State had concerns about the English language test. However, she would have to accept that the evidence presented in support of the allegation of fraud was generic, and not specifically such that it referred to the Appellant herself. However, there was a specific report in relation to the Biettec Test Centre itself. Second, the Appellant could not recall the questions asked, and this suggested that she could not discharge the burden of proof when it shifted to her, to provide an innocent explanation that she did sit the test. Third, it is said that she remembered that the test was of six parts, that she was required to describe a picture, and that it was 45 minutes, but this is information that could just as easily have been provided prior to the students coming to sit the test, by the test centre itself. Fourth, the determination shows that the Appellant was called for an interview and she was unable to participate in the Home Office interview in June 2015, so that the first interview was aborted, and when it was set again, she was

stressed, and although she attended she felt dizzy with the onset of a severe headache "and could not bring her mind to answer the questions" (see paragraph 9 of the determination). Fifth, although her husband accompanied her to the test centre, all he could say at the hearing was that he had accompanied her and had been taken to a room, and then was required to go to the canteen with their children, but there is no evidence that she herself went into the test room and sat the test herself. Finally, Article 8 could only be used to allow the appeal in "exceptional circumstances" and these did not exist here.

10. For his part, Mr Trevelyan directed my attention to his skeleton argument and submitted that the jurisdiction of this Tribunal was supervisory only, and if the judge had made findings below that were sustainable on the evidence before her, the decision could not be upset. On that basis, this was nothing more than a quibble with the findings of the judge below. First, the Secretary of State was represented at the hearing before, and the HOPO did not cross-examine the husband on what he had said. Second, her medical condition was well documented (see paragraph 37), and if she could not attend the interview in July 2015, and was subsequently suffering from severe headache, sweating, and breathlessness, this was a matter that the judge properly heeded, and recognised as being her true medical condition (see paragraph 9). Third, the judge did consider the ETS test score and concluded that these scores were fairly average (whereas people who employ proxies generally tend to score much higher marks), so that she only just passed (see paragraph 38). Finally, there was a reliance upon a spreadsheet of a general nature but as the case of **SM and Qadir [2016] EWCA Civ 1167** made clear, this is nothing more than a "flimsy spreadsheet" which cannot suffice by way of making good an allegation of fraud against an applicant. The fact was that there was the absence of specific evidence in relation to the Appellant herself here. As far as Article 8 was concerned, the Appellant satisfied the partner Rule (see paragraph 57), and it was simply not true, as was being suggested, that the judge had waded into Article 8 considerations, because the judge had identified what the background facts were. The judge had also identified the public interest considerations (see paragraphs 47 to 52) and specifically referred to Section 117B(vi). The circumstances here were "exceptional" in that there were four British citizen children here, who could not relocate back to Pakistan with the Appellant for however short a period.

No Error of Law

11. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law. My reasons are as follows.

12. First, whereas at first blush, the fact that the Appellant did not give evidence, did not attend the Home Office interview, and even asked to be excused from the hearing today before the Upper Tribunal where she had no evidence to give at all, may be suspicious, her medical condition is not

in dispute. Nor, is the fact that there was a suicide bombing in Peshawar in 2009 which she witnessed, in dispute.

13. Second, whereas it is also the case that the Appellant could not recall the nature of the questions that were put to her (given that they arose some three years ago), she was able to provide evidence that she attended with her husband, travelling on bus with their baby, walking to the college, a two storey building, being received at the reception, being required to report, and then waiting in a waiting hall before being called in. She also described the nature of the test, including the reference to a specific picture, and a short narrative, together with problem solving exercises.

14. Third, the judge accepted that she was unable to answer questions at the immigration interview because she found herself in a stressful situation and the GP's letter confirmed this (paragraph 37).

15. Finally, the Appellant's test was one that resulted in average scores (see paragraph 38) and the judge gave proper consideration to this and found on balance that she satisfies the speaking test. What remains significant in this case, is that the Respondent only furnished generic evidence against the Appellant, the Appellant did provide an innocent explanation which was to "the minimum level of plausibility", and there was no further evidence at a legal standard which established on a balance of probabilities that the Appellant had cheated as claimed, but for the general spreadsheet. The judge did have proper regard to the compelling circumstances in relation to Article 8, and did highlight the exceptional circumstances in this case, without overlooking Section 117B(vi), so that on the whole, the decision cannot be regarded as being unsustainable and falling into error of law. I accordingly reject the appeal.

Notice of Decision

16. There is no material error of law in the original judge's decision. The determination shall stand.

17. No anonymity direction is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 22nd May 2017