



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

Appeal Number: HU/02871/2017

THE IMMIGRATION ACTS

Heard at Field House

On 8 November 2018

Decision & Reasons

Promulgated

On 28 November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

**MRS KIRANDEEP KAUR GREWAL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs, Counsel

For the Respondent: Ms A Fijiwala, HOPO

DECISION ON ERROR OF LAW

1. The appellant is a citizen of India born on 24 October 1990. She appeals against the decision of First-tier Tribunal Judge Chana dismissing her appeal against the respondent's refusal to grant her leave to remain in the UK as the spouse of a British citizen. The respondent claimed that the appellant produced a false English language ETS certificate document with her previous application for leave to remain.
2. The respondent had also refused the application on the basis that the appellant and her partner were not in a genuine and subsisting

relationship. This part of the decision was withdrawn by the Secretary of State.

3. Mr Biggs argued that in this case there was one clear obvious and unassailable point which was that the judge proceeded to analyse the ETS report on a fundamental misunderstanding of the Secretary of State's case. Mr Biggs referred to the judge's findings at paragraphs 23 to 25. They are as follows:

"23. There is no dispute that the appellant's test results were amongst the 10,000 test scores analysed and the appellant's test was deemed to be invalid. In that the ETS was certain that there was evidence of proxy test taking or impersonation in her case.

24. I take into account the generic evidence provided by the respondent. It is evident from this generic evidence that the ETS informed the Home Office that they were able to identify impersonation and proxy testing using voice recognition software. This evidence, provided by the respondent I find that the witness statements when read in conjunction with other details of the investigation undertaken by ETS has identified those tests found to be questionable or invalid. It is clear from the statements that ETS identified this appellant after a lengthy and systematic investigation with an error rate of only 3%. I find that the respondent has prima facie demonstrated an allegation of deception.

25. The Secretary of State having established a prima facie case against the appellant that she used deception it is now for the appellant to provide a plausible and innocent explanation. I must find the appellant's explanation is plausible and credible".

4. I find that the judge's analysis of the ETS test was wrong. The ETS had adjudged the appellant's test to be merely questionable and the judge failed to appreciate this.
5. It was apparent from the respondent's Reasons for Refusal Letter that the appellant was interviewed because of the questionable test result. The judge considered this evidence in addition to the evidence given by the appellant at the oral hearing and had found that the appellant was not credible and had fraudulently attempted to deceive the respondent.
6. I find that the judge's credibility findings were tainted by her decision at paragraphs 23 to 25. Consequently, the judge's decision cannot stand.
7. Mr Biggs relied on the Court of Appeal's decision in **Shehzad and Chowdhury [2016] EWCA Civ 615**. At paragraph 22 the Court of Appeal stated that the question in these appeals only concerns the initial stage and whether, the evidence of Mr Millington and Ms Collings, the evidential

burden on the Secretary of State is satisfied. If it is, it is then incumbent on the individual whose leave has been curtailed to provide evidence in response raising an innocent explanation.

8. The Court of Appeal held that the Tribunal might be open to criticism in its treatment of the Millington/Collings evidence at the initial stage. But, in circumstances where the generic evidence is not accompanied by evidence showing that the individual under consideration's test was categorised as "invalid", then the Secretary of State faces a difficulty in respect of the evidential burden at the initial stage.
9. In this particular case, the error was committed by the judge and not by the Secretary of State. The Secretary of State was clear in her Reasons for Refusal Letter that the ETS test result of the appellant had been assessed as questionable and that was why the Secretary of State invited the appellant for an interview. The error categorising her test as invalid was made by the judge. Therefore, I find that the decision in **Shehzad and Chowdhury** is not relevant to this case.
10. In any event, the appellant's credibility will have to be assessed by her questionable test result, her oral evidence and the interview she had with the Secretary of State. The burden of proof remains on the respondent to prove that the appellant obtained her ETS test result by deception, in turn impacts on the respondent's refusal to grant her leave to remain in the UK as the spouse of a British citizen.
11. The appellant's appeal is set aside in order to be re-made.
12. The appellant's appeal is remitted to Hatton Cross to be reheard by a judge other than First-tier Tribunal Judge Chana.

No anonymity direction is made.

Signed

Date: 23 November 2018

Deputy Upper Tribunal Judge Eshun