



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

Appeal Numbers: HU/07881/2016
HU/08228/2016

THE IMMIGRATION ACTS

Heard at Field House

On 17 April 2018

**Decision & Reasons
Promulgated
On 23 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS DHANESHREE WAHIB
MR ZAKI ZAKI ALI MOHMOUD WAHIB
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondents: Ms U Miszkiel, Counsel instructed by Kulendran Immigration

DECISION AND REASONS

Background

1. The appellant in this case is the Secretary of State the respondents are Mrs Dhaneshree Wahib and Mr Zaki Zaki Ali Mohmoud Wahib. For the purposes of this appeal I refer to the parties as they were before the First-tier Tribunal where Mrs Wahib and her son Mr Wahib were the appellants.

2. Mrs Wahib the first appellant is a citizen of Mauritius born on 3 February 1958. The first appellant applied for indefinite leave to remain on 17 September 2015. Her application was refused on 9 March 2016. The second appellant is the son of the first appellant, born on 8 April 1998, and also a citizen of Mauritius, who applied on the basis of family and private life as the dependant of the first appellant.
3. In a decision and reasons promulgated on 18 August 2017, First-tier Tribunal Judge Shaw allowed the appellant's appeals on the basis that the first appellant had satisfied the requirements of the ten-year residence route and the second appellant had therefore satisfied the requirements of Appendix FM.
4. The respondent appeals with permission on the basis that the rights of appeal were restricted to human rights grounds only by the Immigration Act 2014 as the application was made on or after 6 April 2015 and no proportionality assessment was carried out by the Tribunal. It was submitted that the respondent maintained the decision was proportionate and there were no compelling circumstances to justify the consideration of the appellant's case outside the Immigration Rules. And there was no finding of any private or family life such as to invoke Article 8. Permission was also granted on the ground that the judge had arguably made a procedural error by refusing to grant an adjournment. **SM and Qadir (ETS - Evidence - Burden of Proof): UTUK 21 April 2016** found that the Secretary of State's generic evidence combined with evidence particular to an appellant did discharge the initial evidential burden in relation to such cases. It was argued that had the respondent been allowed an adjournment to demonstrate deception had occurred, at least to the initial evidential burden, the burden of proof would then have shifted to the appellant.

Error of Law Discussion

5. Ms Everett initially established that neither the parties nor the Tribunal had ever received the respondent's bundle in relation to the ETS case; it being asserted in the Reasons for Refusal Letter that the first appellant had taken a TOEIC speaking test with the Educational Testing Service (ETS) on 27 June 2012 and that the certificate was fraudulently obtained. Although Ms Everett stated that the respondent's system indicated that a bundle was served on 3 July 2017, which was the date of hearing of the First-tier Tribunal, she conceded that she herself did not have that bundle and it was confirmed that neither the Tribunal nor the appellant's representatives had received such a bundle.
6. On the basis of that confirmation Ms Everett quite properly conceded the appeal. There can be no error of law on grounds of procedural unfairness: in the absence of any evidence, even at the date of the Upper Tribunal hearing, the Secretary of State cannot rely on any claimed procedural irregularity. The finding of the First-tier Tribunal, that the appellants' applications were made in September 2015, nearly two years prior to the

First-tier Tribunal hearing and meant that considering the overriding objective it was fair for the hearing to proceed, given the absence of any reasonable explanation for the absence of any such evidence, is not properly challengeable and Ms Everett did not seek to do so.

7. In respect of the second ground, Ms Everett conceded this ground, submitting that it would be disingenuous to suggest that the Home Office did not treat the appellants' application as human rights applications (and indeed the refusal letter indicates that the respondent considered the application as a "human rights application for indefinite leave to remain"). Given that the respondent had not established that the first appellant had been party to fraud and that the respondent accepted that the appellant met the requirements of the Immigration Rules but fell for refusal under the character, conduct and associations test, which fell away on the basis of the Tribunal's findings of fact that deception had not been proved, there was no error in the judge's approach, such that the decision should be set aside, in finding that no separate consideration was needed under Article 8 outside of the Immigration Rules.
8. Bearing in mind the concession of Ms Everett that the respondent's appeal could not succeed, I am satisfied that the decision of the First-tier Tribunal did not contain an error of law and shall stand. The Secretary of State's appeal is dismissed.

No anonymity direction was sought or nor are there any issues that might require such a direction and none is made.

Signed

Date: 23 April 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

I maintain the fee award made in the First-tier Tribunal.

Signed

Date: 23 April 2018

Deputy Upper Tribunal Judge Hutchinson