



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/02228/2016  
IA/02229/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 8 June 2018

Decision & Reasons Promulgated  
On 30 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE APLEYARD

Between

MRS SMISHA POTTACKAL VARKEY  
MR SHIBOY SCARIA RENGITH  
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Ballara, Counsel.  
For the Respondent: Ms S Kiss, Home Office Presenting Officer.

DECISION AND REASONS

1. The first Appellant is a citizen of India and the Second Appellant is her dependant. The first Appellant appealed against a decision refusing her application for leave to remain in the United Kingdom as a Tier 4 (General) Student. She appealed and following a hearing, and in a decision promulgated on 5 February 2018, Judge of the First-tier Tribunal J Bartlett dismissed the Appellants' appeal.
2. The Appellants sought permission to appeal which was initially refused. However, the renewed application to the Upper Tribunal was granted by Upper Tribunal Judge Perkins on 23 April 2018. He gave permission on each ground.

3. Those grounds, as expanded by Mr Ballara in his submissions, assert that the Judge failed to apply the relevant test in relation to the burden of proof as the Respondent had alleged deception in its refusal letter. She failed to assess the quality of the evidence in light of relevant case law. For example, in **SM Qadir [2016] UK UT 229** and **SSHD v Shehzad & Choudhry [2016] EWCA Civ 615**. Further the Judge has inadequately reasoned her decision.
4. Ms Kiss asserted that the Respondent had discharged his burden and that there was no speculation within the Judge's decision which was adequately reasoned and came to a conclusion that was open to be made on the evidence. The Appellant had been called in for interview where when questioned she was "vague". Having discharged the Respondent's burden it is the Appellant who has failed to "answer it". Mr Ballara assisted me further by indicating that the Appellant has now, in any event, completed her course and that the relief he was seeking on her behalf was for the finding in the relation to deception to be overturned but he was nonetheless conceding that the appeal would inevitably fall to be dismissed as the Appellant could not succeed on Article 8 private life grounds.
5. I find that the Judge has erred in her assessment of the evidence causing her to conclude that the Appellant had acted by way of deception. This error though is not material and I will dismiss the appeal as conceded by Mr Ballara on behalf of the Appellants.
6. This was an unusual decision in that the Respondent did not reject the Appellant's application via the usual route under the Immigration Rules when alleging deception. The Respondent maintained the first Appellant was not a genuine student.
7. Paragraph 30 of **Shehzad** states: -

"30. It appears that no material was put in front of the tribunal to show that Mr Shehzad's TOEIC speaking English test had been adjudged to be "invalid" as opposed to "questionable". All that the tribunal had in front of it were his results. The document at B1 of the bundle referred to by the tribunal (a screenshot) was partial in not showing the tab at the bottom which indicated that it was from the page of tests which were assessed as "invalid". That tab is also not on the extract from the "ETS Lookup Tool" attached to an email dated 4 April 2014 although the email states that the extract is "of test takers whose results have been invalidated". It thus appears that the documents before the FtT did not identify Mr Shehzad's test as "invalid". Ms Giovenetti accepted that there were problems with the way the material about Mr Shehzad had been put in front of the tribunal by the Secretary of State. She stated Mr Shehzad's case was one of the earliest cases and that matters were now handled very differently. 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", I consider that the Secretary of State faces a difficulty in respect of the evidential burden at the initial stage."

In this appeal the Appellants' TOEIC speaking English test had been adjudged to be "questionable" rather than "invalid". On the evidence that was before the Judge I find

that she has erred, albeit not in a material way, in coming to the conclusion that deception had been utilised by the Appellant in her TOEIC speaking English test.

8. That being the case this is an appeal which still stands to be dismissed given that the Appellant cannot succeed, as conceded, under Article 8. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law. That said, for the avoidance of doubt, the appeal is dismissed on Article 8 grounds. This was a student who on entry to the United Kingdom only ever had limited leave and can have had no expectation of being able to remain thereafter.

### **Decision**

The appeal is dismissed on human rights grounds.

No anonymity direction is made.

Signed

Date 23 July 2018.

Deputy Upper Tribunal Judge Appleyard

### **TO THE RESPONDENT** **FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 23 July 2018.

Deputy Upper Tribunal Judge Appleyard