Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17443/2018

THE IMMIGRATION ACTS

Heard at Manchester
On 31st May 2019

Decision & Reasons Promulgated
On 02 July 2019

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

XIAO [H]
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the appellant: Mr Tan, Senior Presenting Officer.
For the respondent: Miss G Patel, instructed by IWS Solicitors

DECISION AND REASONS

Introduction

1. Although it is the Secretary of State who is appealing in these proceedings, for convenience I will continue to refer to the parties hereinafter as in the First-tier Tribunal.

2. The appellant is a national of the Peoples Republic of China, born in July 1985. She is married to [MS], a British national. I will refer to him hereinafter as her sponsor.

3. She came to the United Kingdom in June 2008 as a student. She met her sponsor in May 2011. She left the United Kingdom in September 2014 and married her sponsor in China on 28 November 2014. She then returned to the United Kingdom on 12 February 2015 as his wife.

4. Her leave was to expire on 30 October 2017. On 2 October 2017 she applied for further leave to remain as his spouse. This was refused by the respondent on 8 August 2018.

5. The application had been considered under appendix FM and was refused on suitability grounds. This was because the respondent believed she had cheated in relation to an earlier application in an English language speaking test completed at Queensway College, London on 3 April 2013. Her test results had been cancelled by ETS on the basis the test was taken by proxy. The voice recording on the appellant's test was indicative of a man.

The First tier Tribunal.

6. Her appeal was heard by First-tier Tribunal Judge Turnock.A Mandarin interpreter was used.

7. The judge referred to the evidence produced by the respondent in support of the claimed cheating. Investigations into the Queensway College revealed that of 2793 tests taken between 2012 and 2014, 70% were declared invalid by ETS, with the balance considered questionable. The appellant's test result showed a speaking score of 160 and a writing score of 150.

8. The judge recorded the appellant's immigration history. The appellant attended College in November 2009 and the records showed she was progressing in her English studies. On 9 March 2013 she undertook an English language test in Manchester but did not achieve a good enough score in reading to progress. In April she travelled to London to take the test again, staying with a friend for two nights. She described the test centre and her friend give evidence of her staying. She produced a copy of her bank statement showing a withdrawal in London and payment for the train.

9. The judge accepted the respondent had established a prima facie case requiring an explanation. The judge pointed out that her presence of the test centre was inconclusive. The judge recognised that fear of failing again could be an incentive to use a proxy test taker.

10. The judge found her account of taking the test consistent and referred to the evidence of her attendance at English language courses over the years. The judge questioned why, if a proxy test taker was being used, a male would have been used. The judge concluded by finding the respondent had not met the legal burden of showing deception. As suitability was the only issue the judge found the appellant met the requirements of appendix FM.

11. The judge considered matters in the alternative. By the time of hearing the appellant had two children: Arthur, born on 11 January 2016 and Alice, born on 8 December 2018. Both children are entitled to British nationality. Her sponsor earns a salary of £63,395 per annum. The respondent accepted the appellant had a genuine and subsisting relationship with her partner and that her two children were qualifying children.

12. The judge referred to section 117 B and concluded it would be disproportionate to refuse to grant leave. The judge found it was in the children's best interests to be with both parents. To expect the family to relocate to China would mean her husband and her children relinquishing their rights as British citizens. The judge concluded it would not be reasonable to expect them to leave. Furthermore, the appellant at the time of hearing demonstrated she could speak English to the necessary standard and that the financial requirements were met.

The Upper Tribunal

13. Permission to appeal was granted on the basis it was arguable the judge did not properly assess the evidence.

14. Mr Tan started by pointing out that the appellant had used an interpreter at the appeal hearing. He acknowledged that there could be legitimate reasons for doing so but nevertheless the judge had not commented on this in any respect.

15. I was referred to paragraph 25 of the decision were the judge refers to a statement from Mr Adam Sewell, an analyst engaged to produce reports relating to various test centres. The judge stated there was no report attached to his statement and therefore the relevance of his evidence was not clear. Mr Tan submitted that the judge failed to appreciate that the report on Queensway College is contained at page 103 of the appeal bundle and was written by Mr Sewell.

16. Mr Tan pointed out that at paragraph 39 of the decision the appellant accepted the voice on the recording for her test was male. The judge referred to this at paragraph 51 and found the respondent had demonstrated prima facie evidence of deception. The judge recorded the appellant as simply suggesting there was an error on the part of the respondent. However, Mr

Tan submitted there was no evidence to support this. At its height, the appellant's evidence demonstrated she was in London at the time of the test. He said the judge had not indicated a consideration of the report from Prof French which indicated a very small percentage of possible false positives.

17. At paragraph 54 the judge commented that it was surprising the appellant's husband had not given evidence, stating that they were married at the time of the test. The judge also noted discrepancies between the evidence of the appellant and her friend as to when she stayed in London. Therefore, there were a number of issues going against the appellant yet at paragraph 62 the judge concluded she had raised an innocent explanation. Mr. Tan submitted there was no balancing of the issues raised.

18. Mr Tan then referred me to paragraph 78 where the judge considers matters in the alternative. He submitted that in doing so the judge failed to adequately have regard to the public interest involved in the widespread abuses that were taking place in relation to English testing. He submitted that the judge appeared to view the appellant's financial solvency and subsequent proficiency in English as positive factors whereas they should have been considered as neutral.

19. Miss Patel referred me to the rule 24 response. She submitted that the judge asked the right questions at paragraph 49 and submitted the respondent was simply disputing the judge's evaluation of the evidence. She questioned why, if the appellant were cheating, a male tester would be used. Whilst there was a high incidence of cheating at the college not all of the results were invalid. Prof. French had given an error margin of only 1% but she submitted when the numbers involved were considered that 1% was a substantial number of people. She submitted it was wrong of the respondent to take issue with the appellant's husband not giving evidence. Their relationship was not an issue and this was only raised in submissions. She said the judge was factually wrong in stating they were married at the time albeit they were in a relationship.

Conclusions

20. The appellant's application under the rules failed on suitability grounds. This was because the respondent believed she had cheated in an English language test. This in turn called into question her character. There has been widespread abuse at some English language testing centres. There is now a body of jurisprudence in relation to the typical evidence used and the legal assessment. Significantly in this case the college where the appellant took the test has a very poor history. There was a very high incidence of cheating.

21. The voice recording relating to the appellant was identified and it was accepted by all parties that the voice was male. The appellant's answer was

that there must have been some mistake but beyond that there has been no other explanation. The appellant at hearing gave evidence about travelling to London for the test. The judge commented on discrepancies between her account of her time in London and that of a witness. In any event, the judge made the observation that her presence at the test centre did not mean she took the test. Ms Patel argued that a 1% margin of error identified by Prof French represents a significant number of candidates. Nevertheless, on simple percentages the report indicates that the checks carried out using the voice recognition technology are very accurate.

22. The judge had recorded the appellant had taken courses in English at paragraph 31 and 32 and was demonstrating progress. However, there were significant issues for the appellant to answer. The context was in a college which was known to have permitted widespread abuses.

23. The judge was incorrect in the comments at para 25 made about Mr Sewell, the maker of the report on the college. At paragraph 51 the judge referred to the generic evidence and the lookup tool and found clearly detailed generic and specific prima facie evidence of deception. It was accepted the recording relating to the appellant was that of a male voice. All the appellant could say was that something must have gone wrong with the process. I appreciate in some situations this is all that can be said. Nevertheless, this was a significant issue for the judge to address.

24. The judge had referred to inconsistencies between her evidence and that of her friend. In any event her presence at the test centre was inconclusive. The judge referred to a range of reasons why someone with proficiency may engage a proxy test. At paragraph 59 the judge referred to the appellant having taken a test shortly before the contested test and being unsuccessful. At paragraph 60 the judge makes a generalised comment about the appellant's presentation at the hearing. She had also produced evidence about attendance at English courses.

25. It was suggested on behalf of the appellant that if she were cheating it would have been so foolish as to engage a male proxy. This overlooks the gross abuses identified at the test centres and what appears to have been a culture of impunity. The judge refers to it being strange that the proxy test taker would be male in terms of an audit trail. However, the judge does not explore this further in relation to the widespread abuses.

26. I would not place particular weight upon the fact the appellant used a Mandarin interpreter at the hearing. It is not apparent if this was put to her for comment at the hearing. The hearing itself is not meant to be a test of English and the appellant understandably would anxious. I also would not attach particular weight to the fact her husband did not give evidence. It was really a matter for the appellant's representatives to decide what witnesses to

call. The relationship was not challenged. Arguably he could have given evidence about her travelling to London take the test but evidence that had already been given.

27. The judge does ask the correct questions at paragraph 49. I am mindful that it was for the judge to reach findings of fact. However, those findings must be based upon a demonstrated appraisal of the evidence with reasons given. Looking at the decision as a whole I find the judge has not indicated why the appellant has discharged the burden. I am hesitant about interfering with factual findings. However, having regard to the issues raised by the respondent and the evidence produced at the hearing it is my conclusion that the judge did err in law in concluding the respondent had not shown she had used deception.

28. The judge did then consider matters beyond the rules. The appellant is married to a British national and they have 2 young children. They are qualifying children within the meaning of section 117 B (6). There is family life and the relationship with her husband was accepted. The judge acknowledged at paragraph 78 a strong public interest in refusing applicants by individuals who have used deception to circumvent the immigration rules. The judge refers to such actions seriously undermining immigration control. The judge found it was in the best interests of the children to remain with their parents. The judge referred to the possibility of the family relocating to China but this would mean the appellant's husband and children relinquishing their rights as British citizens. The judge accepted that the appellant now speaks English and was financially independent.

29. At the time of hearing the judge did not have the benefit of JG (s.117B(6) : "reasonable to leave" UK) Turkey [2019] UKUT 72. That decision supports the judge's conclusion in relation to the children and the application of section 117 B(6). It is my conclusion that any deficiencies in the assessment of the test taking do not affect the overall outcome. I find the assessment of the position of the children is sustainable. Therefore, I find no material error of law demonstrated.

Decision.

No material error of law has been established. Consequently, the decision of First-tier Tribunal Judge Turnock allowing the appeal shall stand.

Deputy Upper Tribunal Judge Farrelly.

30 June 2019