



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

Appeal Number: IA/01452/2016

IA/01455/2016

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THE IMMIGRATION ACTS

**Heard at Field House
On 12 January 2018**

**Decision & Reasons Promulgated
On 16 January 2018**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SYED [B]

TAHIRA [A]

SYEDA [B]

Respondents

Representation:

For the Appellant:

Mr. T. Tarlow, Home Officer Presenting Officer

For the Respondent:

Mr. A. Chohan of counsel, instructed by S. Z. Solicitors

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The 1st Respondent was born on 18 March 1977. The 2nd Respondent was born on 6 January 1988 and the 3rd Respondent, who is their daughter, was born on [] 2008. They are all nationals of Pakistan. The 2nd and 3rd Respondents are dependent upon the 1st Respondent.
2. The 1st Appellant entered the United Kingdom on 28 August 2010 as a Tier 4 (General) Student Migrant with leave to remain until 30 January 2012. This leave was subsequently extended until 17 April 2012 and on 1 August 2012 he was granted leave to remain as a Tier 1 Post-Study Migrant until 1 August 2014.
3. He applied for leave to remain on human rights grounds on that same day but varied his application to that of Tier 2 (General) Migrant on 18 August 2014. His application was refused on 1 March 2016 on the basis that he had used deception when he submitted a TOEIC certificate when he applied for leave to remain on 20 December 2011. The Appellant also refused his application on the basis that the Certificate of Sponsorship on which he relied did not provide sufficient information to show that there was a genuine vacancy for him.
4. The 1st Appellant appealed on 15 March 2016 and his appeal was allowed by First-tier Tribunal Judge Rhys-Davies in a decision promulgated on 28 April 2017.

ERROR OF LAW HEARING

5. Both the Home Office Presenting Officer and counsel for the Respondents made oral submissions and I have referred to the content of these submissions, where relevant, in my decision below.

ERROR OF LAW DECISION

6. There are a number of general basis upon which leave to remain can be refused. One of them is found in paragraph 322(2) of the Immigration Rules and is based on the:

“the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave or in order to obtain documents from the Secretary of State or a third party required in support of the application for leave to enter or a previous variation of leave”.

7. In addition, paragraph 322(5) of the Immigration Rules is based on:

“the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security”;
8. The 1st Respondent did not dispute that he had attended Portsmouth International College on 16 November 2011 in order to sit his TOEIC tests.
9. The Appellant relied on a look out tool and an ETS Invalid Test Analysis Test Sheet which confirmed that the 1st Respondent had sat the tests that day. In the refusal letter, the Appellant also asserted that she had a copy of the 1st Respondent’s speaking test and that using voice verification software, ETS had been able to detect that a single proxy test taker had undertaken multiple tests. The Respondent had not provided a copy of this evidence or any report on the tests taken at Portsmouth International College.
10. In paragraph 22 of his decision, the First-tier Tribunal Judge accepted that, as found in *Shezhad and Chowdhury v Secretary of State for the Home Department* [2016] EWCA Civ 615 and *Majumder and Qadir v Secretary of State for the Home Department* [2016] EWCA Civ 1167, that the Secretary of State for the Home Department bears the initial burden of proof, which is deemed to be the “evidential burden”, of proving that deception had been used. He also accepted that the generic evidence in the form of statements by witnesses, Rebecca Collings and Peter Middleton, and the additional evidence from ETS was capable of meeting this evidential burden.
11. The First-tier Tribunal Judge also correctly noted that the burden of proof then passed to the 1st Respondent to show that he had not used deception. First-tier Tribunal Judge Rhys-Davies had the advantage of considering the 1st Respondent’s written statement and his oral evidence

at the hearing. In these he gave a detailed explanation of his journey to the test centre and explained that he had signed in and produced his identity documents on the day of the test. This was confirmed by the Look UpTool.

12. The First-tier Tribunal Judge also relied upon the fact that the 1st Respondent had been awarded a CMI Level 7 Diploma in Strategic Management and Leadership on 30 August 2011 and a Master of Business Administration in November 2012.
13. I have taken into account that there may be reasons why a person who is able to speak English to the required level would nonetheless cause or permit a proxy candidate to undertake an ETS test on their behalf. (See paragraph 57 of *MA (Nigeria) v Secretary of State for the Home Department* [2016] UKUT 450.) However, in this case the First-tier Tribunal Judge had taken into account the evidence before him and reached a cogent decision that the 1st Respondent had not used deception. Therefore, I find that there is no basis upon which to allow the Appellant's appeal on this basis.
14. However, the 1st Respondent's application had also been refused under paragraph 245HD(a) on the basis that his certificate of sponsorship did not provide sufficient information to show that the job he had been offered was a genuine vacancy. In the refusal letter, the Appellant accepted that if the Applicant had not been refused because of the ETS test, she would have sought further evidence about the vacancy before reaching a final decision on his application.
15. As a consequence, the 1st Respondent's application remains outstanding, as was accepted by First-tier Tribunal Judge Rhys-Davies. Therefore, given the date on which the application was made, the decision reached by the Appellant was not in accordance with the law as she had not followed her own policy and sought further evidence. Therefore, the finding reached by First-tier Tribunal Judge Rhys- Davies was also sustainable on this basis.
16. The Tier 2 application remains to be decided by the Appellant.

DECISION

- (1) The Appellant's appeal is refused on the basis that First-tier Tribunal Judge Rhys-Davies did not err in law when he found that the 1st Respondent had not used deception when he obtained his TOEIC test and that the decision reached about his substantive application was not in accordance with the law.

- (2) The Tier 2 application remains to be decided by the Appellant and she should seek further evidence about his proposed employment from the 1st Respondent forthwith so that she can make such a decision.

Nadine Finch

Signed

Date 12 January 2018

Upper Tribunal Judge Finch