Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07911/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 October 2018	**On 1 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YAMUNA HIROSHIMALA MAWATTHA WIDANALAGE
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr I Jarvis (Senior Home Office Presenting Officer)
For the Respondent: Mr J Rene (counsel for Toltops Solicitors)

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal of 13 July 2018 allowing the appeal of Yamuna Hiroshimala Mawattha Widanalage, a citizen of Sri Lanka born 11 September 1986, itself brought against the refusal of a human rights claim of 12 March 2018.

2. The immigration history provided for the Respondent is that she was granted leave to enter as a student on 18 October 2010, that being extended until 19 October 2015; she was served with notice of removability on 15 September 2014 (which, if the chronology is accurate, would imply that her leave had by then been curtailed) and applied for leave outside the Rules on 16 October 2015. On 22 June 2016 she made the application leading to the present proceedings, based on her relationship with her Sponsor Janaka Mudiyanselage.

3. Ms Widanalage's application for leave was refused on "general refusal" grounds on the basis that her English language test results on 19 March 2013 at New London College had been procured dishonestly, a conclusion to which the Secretary of State had come following information received from the testing body, ETS. The decision maker did not accept any exceptional circumstances were present, because she would not face unjustifiably harsh consequences in Sri Lanka: it was not accepted she would face any significant shame due to her family's attitude towards her, and in any event such difficulties should be advanced via an asylum claim if at all.

4. The Appellant provided evidence of English language proficiency via various other certificates and achievements: an IELTS result which she believed to be 5.0 before travelling to the UK, and her studies in English: a BSC in Information Technology in 2011/2012, ACCA examinations thereafter, a Masters in Marketing and Innovation from Anglia Ruskin University.

5. The First-tier Tribunal gave a very full decision on the appeal. It noted the evidence given in *SM and Qadir* as to the search of New London College's Directors' home addresses in July 2014 which had produced the names of candidates who had engaged proxy testers, and the latter's identity. There was no such evidence produced in the instant appeal and there was no evidence of the rates of invalidity identified at the relevant time the Appellant sat her test.

6. The Judge then went on to accept that the generic evidence put forward by the Secretary of State was sufficient to discharge the initial burden of proof to put the Appellant's credibility in issue. He then examined the rebuttal evidence of Ms Widanalage and found it wanting in a number of respects.

7. Then the Judge returned to an analysis of the Secretary of State's evidence. It found that the weaknesses identified by the Tribunal vis-á-vis the Home Office case in the earlier authorities remained relevant here, including a lack of witness statements evidencing relevant assertions, the generic nature of those statements that were provided, the lack of evidence of any comparison of speech and speech patterns of Ms Widanalage and the alleged proxy, or indeed analysis of Ms Widanalage's voice record, and the lack of any explanation of how it was that a proxy had been identified in this particular case. There was no evidence from an appropriately qualified acoustic engineer who had been able to analyse an appropriate sample of ETS decisions and who might foreseeably have been able to devise a suitable test to check the testing system's probity. Absent cogent evidence such as this, it was not legitimate, satisfactory or fair to find that Ms Widanalage had engaged in fraud, even though the Judge identified some concerns with her oral evidence and noted that the qualifications that she put forwards did not clearly establish English language proficiency at the level claimed.

8. Thus the Tribunal below concluded that the Secretary of State had not established that the general refusal reason was made out. That left Ms Widanalage's substantive ground of appeal to determine, ie the merits of her human rights claim based on her relationship with her husband, which he accepted was a genuine and

subsisting one. The Judge did not accept that her parents would insist that she lived with them in the future, and so they would not be in a position to prevent her from pursuing her current relationship. Nor did he accept that they would face insurmountable obstacles to life in Sri Lanka, a country which was now generally at peace and in which they had both lived for much of their lives and where her husband could presumably find work.

9. The Judge noted the submission put to him that he should consider the case under the five-year route which did not require the identification of insurmountable obstacles, but found that this was effectively a new matter that required the Home Office's consent to advance; and before him, consent was expressly denied. In any event, inadequate "specified evidence" was before him to make good the claimed earnings.

10. However, he did accept that there were unjustifiably harsh consequences in play, because the Appellant was party to a genuine relationship that had now exceeded four years in duration over a period during which she enjoyed valid leave. The backstop consideration in Article 8 appeals was essentially whether the refusal was disproportionate. The Tribunal concluded that the decision here was indeed disproportionate, given that it was the wrongful belief in the use of a proxy tester that had primarily motivated the decision to refuse her. Furthermore, additional time and expense would be incurred by a repeat application, and the Sponsor might well lose his job in the meantime so preventing the couple from meeting the Rules by the time an application from abroad was feasible. Thus there was no sensible reason to justify their return to Sri Lanka.

11. The Secretary of State appealed on the basis that

(a) Vis-á-vis the general refusal reason based on English language fraud:

- The First-tier Tribunal should have found on the basis of Professor French's evidence that the ETS identification of fraud was reliable;
- No consideration was given to issues such as the Appellant's recollection of events on the day of the test;
- An "impermissibly high standard of proof" had been applied;

(b) As to the substantive appeal, the section 117B factors had been overlooked.

12. Permission to appeal was granted by the First-tier Tribunal on 22 August 2018 on the basis that all those grounds were arguable.

13. Before me, Mr Jarvis concentrated his submissions on the overlooking of the statutory proportionality factors under section 117B of the Nationality Immigration and Asylum Act 2002, and the approach taken to the evidence of English language testing fraud. As to the latter, he argued that this was a case where the First-tier Tribunal had erred in law by failing to appreciate that, having found the Home Office had discharged the burden of proof so as to put Ms Widanalage's credibility in issue, it was then necessary to evaluate whether the evidence provided by her rebutted the allegation of fraud. A series of well known Upper Tribunal authorities had demonstrated that the Home Office case required reasoned engagement by a migrant accused of English language test fraud

following an ETS investigation. However here, in reality, the Judge had found that the very same material which had been repeatedly accepted as requiring such engagement simply did not get off the ground as a tenable deception allegation.

Findings and reasons

14. It will be helpful to the next Judge to confront this appeal to set out some of the well-trodden ground in relation to English language test fraud allegations. The President explains in *Muhandiramge* [2015] UKUT 675 (IAC), that decisions in General Refusal reasons cases involve a "moderately complex exercise" in which "the evidential pendulum swings three times and in three different directions". To quote further from that decision:

> "(a) First, where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue: for example, by producing the completed application which is prima facie deceitful in some material fashion.
>
> (b) The spotlight thereby switches to the applicant. If he discharges the burden - again, an evidential one - of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.
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> (c) Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's prima facie innocent explanation is to be rejected.
>
> A veritable burden of proof boomerang!"

15. The Upper Tribunal cites expert evidence deployed by a litigant seeking to cast doubt upon the validity testing process used by ETS in *Gazi* (IJR) [2015] UKUT 327 (IAC):

> "Dr Harrison also examines, with accompanying critique and commentary, the discrete issues of factors affecting performance; the typical performance of human verification; the definition of thresholds; the explicit acknowledgement of human errors; the lack of testing of the performance of analysts; the dubious touchstone of "confidence" (see Mr Millington's witness statement); the dearth of information about the actual analysis methodology; the lack of detail about the experience and knowledge of both the recruited analysts and their supervisors; the indication that any training of the newly recruited analysts was hurried; the shortcomings in Mr Millington's speech recognition averments; and the clear acknowledgement on the part of ETS that false identifications (viz false positive results) have occurred. One passage relating to the human verification process is especially noteworthy:
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> > "… although the analysts only verified matches where they had no doubt about their validity – ie where they were certain about their judgments – this should not be taken as a reliable indicator of the

accuracy of those judgments. This approach does not remove the risk of false positive results."

Dr Harrison also highlights that both the automatic system and the human analysts are capable of false positive errors. The Secretary of State's evidence does not disclose either the percentage or the volume of such errors."

16. No findings were made on that evidence in *Gazi*. However in the subsequent appeal of *Qadir* [2016] UKUT 229 (IAC) the Upper Tribunal concluded that the Home Office evidence had significant shortcomings, in particular at [63], a lack of qualifications or expertise of the officials who visited ETS and produced witness statements based on their visit to ETS, during which ETS was the sole arbiter of the information disclosed and assertions made, undue Home Office dependency on the information from ETS when ETS had put forward no witness or indeed any other evidence whatsoever of their own, the lack of any expert evidence backing up the opinion of the staff who visited ETS, and the fact that voice recording files had never been put forward pertaining to the appellants themselves. Accordingly the Tribunal accepted that the methods used by ETS were not necessarily guaranteed to avoid the occasional false positive whereby an innocent student is wrongly identified as having cheated in their test.

17. In *MA (Nigeria)* [2016] UKUT 450 (IAC) the Upper Tribunal stated that

"we acknowledge the suggestion that the Appellant had no reason to engage in the deception which we have found proven. However, this has not deflected us in any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere."

18. As noted by the Tribunal in *Nawaz* [2017] UKUT 288 (IAC), the training by ETS for its staff called to assist in the programme reviewing potentially suspect tests fell well short of what would have been received by an expert language analyst; however they were trained in relevant areas, and this was not an exclusively technical subject area in which only true experts could perform to a reasonably reliable standard. Their lack of note-taking, at least in any form available for subsequent analysis, was one deficiency that would need to be factored into judicial decisions. Professor French's evidence recognised that false positives could occur in the review process, albeit that in his opinion at a significantly lesser level than might have been inferred from the earlier criticisms of ETS's processes in *Gazi* and *Qadir*.

Error of law regarding evaluation of Secretary of State's evidence

19. This line of authority clearly establishes a number of proposition. Firstly, whilst the ultimate legal burden of proof rests firmly on the Secretary of State throughout a General Refusal allegation, the evidential pendulum may swing between the parties. Secondly, as shown by *Gazi* and *Qadir*, there are numerous problems with the generic evidence relied on by the Secretary of State, such that individual

challenges may succeed in overturning the decision appealed, notwithstanding the fact that the Home Office has chosen to accept the result of the ETS enquiry. Thirdly, a migrant accused of such fraud will need to put forward an evidence-backed case in order to rebut the *prima facie* suspicion that the ETS enquiry has raised. Fourthly, the most recent evidence relied upon by the Secretary of State, from Professor French, indicates that the identified flaws in the ETS methodology are foreseeably relatively rare. Thus a migrant accused of ETS fraud must put forward cogent and persuasive material before it can be accepted that their evidence-backed case is truly of the substance required to seriously challenge the Secretary of State's ability to discharge the ultimate burden.

20. In this appeal, despite the detailed consideration it gave to the issue, the First-tier Tribunal went astray. It was correct to find that the material relied upon by the Secretary of State constituted a *prima facie* case for Ms Widanalage to answer. However, it then found that her responses were unpersuasive. If her answers were unpersuasive, then the Secretary of State should have been accepted as having discharged the ultimate as well as the initial burden that was upon him. Instead, however, the Judge concluded that the nature of the evidence relied upon was simply insufficient to discharge the ultimate burden. That conclusion ran flatly contrary to the various authorities cited above, which demonstrate that these cases are to be determined via an evaluation of the appropriate evidence, not simply via any presumption as to the general inadequacy of the Home Office case.

21. I note Mr Rene's reference to Ms Widanalage having given oral evidence below on the issues identified in cases such as *MA (Nigeria*) as being relevant to the proper conduct of the enquiry in hand; Mr Jarvis did not challenge this assertion. This aspect of her evidence escaped the First-tier Tribunal's attention. Were it not for this feature of the case, this appeal might have fallen to be allowed outright in the Secretary of State's favour.

22. However, as that evidence seems to have been overlooked, and as the Judge directed his attention to the wrong issues, and given the importance of a lawful assessment of a person's honesty, this matter must be re-heard.

The Chikwamba principle

23. As the question of whether the Secretary of State has established that Ms Widanalage acted dishonestly awaits lawful determination, the appropriate weight to be given the public interest in her departure from the UK remains moot. So it is unnecessary to comment on the Home Office grounds of appeal vis-á-vis section 117B, as the proportionality balance will be heavily influenced by the result of that enquiry. Given the arguments that have so far emerged in the appeal, it is expedient to make some observations.

24. The Judge below was impressed by the so-called *Chikwamba* argument. Before me Mr Jarvis contended that the public policy position had fundamentally changed in recent years via the introduction of Appendix FM. However, over time decisions such as *Hayat* [2012] EWCA Civ 1054, *Chen* (IJR) [2015] UKUT 189 (IAC) and *Kaur* [2018] EWCA Civ 1423 show that *Chikwamba* thinking remains pertinent. Those

decisions all demonstrate that there needs to be some a "sensible reason" present before a family is forced to separate for a significant period in order to enforce the procedural norm of seeking entry clearance from abroad. Indeed Sales LJ in *Agyarko* considered this scenario §31:

> "It is possible to envisage a *Chikwamba* type case arising in which Article 8 might require that leave to remain be granted outside the Rules, even though it could not be said that there were insurmountable obstacles to the applicant and their spouse or partner continuing their family life overseas. But in a case involving precarious family life, it would be necessary to establish that there were exceptional circumstances to warrant such a conclusion."

25. Where the application presently being refused is identical to that which might be made from abroad, then it will be all the more appropriate to finally determine the issue via the present, rather than some future, proceedings. See Hickinbottom LJ in *Tikka* [2018] EWCA Civ 642 §25-26:

> "The Secretary of State has already considered her discretion in that regard, and determined that the Appellant should not remain in the United Kingdom. There is no reason to suppose that, on the same material and applying the same criteria, an Entry Clearance Officer on her behalf will come to a different view; indeed, there is every reason to consider that he will come to the same view. That refusal will be the subject of an appeal that will raise exactly the same issues as the appeal to the tribunal in this case, i.e. whether the interference with the article 8 rights of the Appellant and his wife that a permanent separation would entail is justified … That … only underscores the futility of removing the Appellant without determining, once and for all, the underlying article 8 issue …"

26. In the proceedings below, Ms Widanalage sought to raise the argument that she now met the Immigration Rules for the "five year" route – ie that she satisfied the full financial requirements by the relevant specified evidence. The Judge considered that this was a "new matter" (having regard to section 85 of NIAA 2002) which required consent; and as none was forthcoming, he declined jurisdiction to consider the issue directly. However, he subsequently went on to consider the Appellant's earnings indirectly, as her ability to meet the financial requirements was relevant to his conclusion on the *Chikwamba* point.

27. The Upper Tribunal has considered the proper interpretation of sub-sections 85(5)-(6) in *Mahmud* [2017] UKUT 488 (IAC). The headnote states:

> "2. A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal.
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> 3. In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an

appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive."

28. As I understand the history leading to this appeal, the Appellant was an overstayer when she applied for leave to remain. Accordingly she was excluded from qualification from the five-year Partner route under Appendix FM. She had to put a case for meeting the Ex.1 exception on "insurmountable obstacles" grounds. Where Ex.1 is satisfied, it is unnecessary to meet the financial requirements, so one would not have expected her to put a case that she did in fact meet those requirements at the relevant date (ie the period leading up to the date of application).

29. It would therefore seem likely that any claim that in fact she met the financial requirements would indeed be "a factual matrix which has not previously been considered by the Secretary of State".

30. However, if her argument is simply that she met the spirit, if not the letter, of the Rules because she had sufficient earnings available at the date of hearing rather than the application date, then of course section 117B NIAA 2002 requires that the question of financial independence be considered as part of the proportionality exercise, and the *Chikwamba* enquiry necessarily posits the question as to whether she would be able to satisfy the Rules in the future, not simply in the past. One can then see an argument that this is not a "new matter": rather it is just one facet of the case outside the Rules that was originally put to the Secretary of State and rejected.

31. The Secretary of State could usefully assist in cutting this Gordian knot, to avoid unnecessary argument and uncertainty, by given serious consideration to consenting to the question of the available earnings and whether they meet the financial requirements now being raised in advance of the re-hearing in the First-tier Tribunal. Indeed the published Home Office Guidance on the giving of consent indicates that all issues should be considered in a single set of appeal proceedings where that is reasonably achievable. It is difficult to see that the *Chikwamba* enquiry can otherwise be given the effect that the authorities require. It is not for the Upper Tribunal to make directions for case management in the First-tier Tribunal, but consideration should nevertheless be given to this possibility by the parties.

Conclusion

32. The decision of the First-tier Tribunal contains a material error of law. As there are no lawful relevant findings upon which to build, the matter is suitable for re-hearing in the First-tier Tribunal. I accordingly remit the appeal to that forum with no findings preserved.

Decision:

The appeal is remitted for re-hearing afresh in the First-tier Tribunal.

Signed: Date: 23 October 2018

Deputy Upper Tribunal Judge Symes