Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/22747/2015**
IA/22748/2015

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On Tuesday 8 August 2017	**On Tuesday 29 August 2017**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR XIAOBIN RONG
MRS LIMIN ZHOU

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Lam, Counsel instructed by AP solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was not granted by the First-tier Tribunal. There is no reason in this case to make an anonymity direction.

DECISION AND REASONS

Background

1. The Appellants appeal against the Respondent's decision dated 5 June 2015 refusing their application for indefinite leave to remain as a Tier 2 migrant and dependent and directing their removal to China under section 47 Immigration, Asylum and Nationality Act 2006. By my decision promulgated on 2 May 2017, I

set aside the decision of First-tier Tribunal Judge Beach dismissing their appeals. My earlier decision is appended to this decision for ease of reference. The appeals come before me for re-making of the decision.

2. The facts of these cases are set out at [2] of my earlier decision. The issues arising are at [3] of my earlier decision. I do not therefore need to repeat those matters.

3. The Respondent refused the Appellants' application for indefinite leave to remain as a Tier 2 migrant and dependent on the basis, first that she did not believe that the First Appellant's English language certificate was genuine. That is an Entry Level 3 Certificate in ESOL International (reading, writing and listening and spoke) (Achiever B1) issued following a course undertaken at Whitechapel College in 2011 ("the Certificate"). I note at this juncture, that this is not a TOEIC test and this is not therefore a so-called ETS case.

4. The Respondent did not believe the Certificate to be genuine as the First Appellant was only able to answer a limited number of questions at an interview undertaken in January 2015. She also refused the application for the further reason that the sponsor who had issued the First Appellant a certificate of sponsorship in relation to his last period of leave and who remained the First Appellant's sponsor at the date of the application had allowed its licence to lapse in February 2015 and had not renewed it.

5. The appeals proceed under the provisions of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") as in force prior to the amendments brought about by the Immigration Act 2014. The appeals are subject to the transitional arrangements based on the timing of the Appellants' application for indefinite leave to remain.

The hearing and evidence

6. The First Appellant gave evidence before me with the assistance of an interpreter. Although the interpreter spoke Chinese Mandarin and the First Appellant's first language is Chinese Cantonese, it was confirmed to me that the First Appellant and the interpreter understood each other.

7. As I indicated at [16] of my earlier decision, whether the First Appellant currently speaks English is not the issue. Although paragraph 245HF(f) requires the First Appellant to have sufficient knowledge of English (in the present tense), that is to be demonstrated "in accordance with Appendix KoLL". It is common ground that the Certificate meets the requirements of that Appendix if it is genuine. The issue therefore is whether the Certificate is genuine.

8. Due to the First Appellant's inability to answer questions about the English language test in 2011, the only evidence from the First Appellant about the course and the test is contained in his written witness statement. That is in quite general terms and lacks some details. I therefore asked the representatives if one of them

could put to the First Appellant in evidence the questions which were asked of him at interview in January 2015 so that I could assess his responses. Mr Lam agreed to do so as part of the First Appellant's evidence in chief.

9. As a result of the First Appellant's oral evidence coupled with his written statement dated 25 July 2017, I understand his evidence to be as follows. He took the test following a course which lasted three months. He attended Whitechapel College because he was introduced there by a friend. He attended the course two days per week.

10. He paid approximately £200 for the test and £350 for the course. He applied and paid for the test online. He was assisted in so doing by one of the teaching assistants at the college. He is unable to remember whether he paid for the course by cash or credit card. He has no documentary evidence as to attendance on the course or payment for that or the test. He says that he did not realise he could obtain such evidence. He no longer banks with the same bank and he assumed that they would not therefore supply him with any documents.

11. At the time of the course and test, the First Appellant says that he was working in Oxford Street and living in Chinatown. He says that Whitechapel College is located near Stratford. In order to get there, he took the Piccadilly Line and then changed to "the red line", he thinks at Oxford Circus although he cannot remember that exactly as it is a long time ago. That line took him to Stratford.

12. The First Appellant confirmed that the test took about two and half hours. It was spread over two days with a break of one week between the two. The examiner read some texts to him and there was then a question and answer discussion. He also remembers that he had to answer some questions on paper. He did not find the tests easy and he could not answer all the questions but he did his best and was relieved when he learnt he had passed the test.

13. He explained his inability to answer questions at interview as being because it was some time after his test. His English was at its best immediately after he took the test because he had studied in preparation and practised for the test. Since then, he had limited opportunity to practise English as all his colleagues are Chinese. He accepted that it would be better if he learnt English in order to integrate and would like to do so if permitted to stay. He did not think he could learn English using a book and teaching himself. He needs a good teacher.

14. The First Appellant says in his statement that he considers himself able to speak, listen and understand basic English. He says in relation to his inability to answer the questions at interview that he was "put in a nervous situation being in an immigration interview, facing unfamiliar words or jargons, combined with facing someone who had an accent" and that he "may not have expressed [himself] very well due to [his] nervousness".

15. The First Appellant said that the interviewer had quite a strong accent and he had difficulty understanding. He said he was unable to raise this at the time because the interviewer did not give him time to say this and he was nervous. Although he was represented by solicitors at the time, they did not attend the interview with him and he did not think to ask them to write afterwards to explain his failure to understand the interviewer. They simply told him to wait for news.

Decision and Reasons

The Certificate

16. Although Mr Lam started his submissions by referring to voice recordings, as I pointed out, those have no relevance in this case. As I have already noted, this is not an ETS case. However, cases such as SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) 2016] UKUT 00229 (IAC) and Muhandiramge (section S-LTR.1.7) [2015] UKUT 00675 (IAC) are relevant to the law in relation to burdens and standards of proof. I have already summarised the case law in that area (which is not in dispute between the parties) at [13] of my earlier decision and I do not repeat it.

17. I have no difficulty in finding that the Respondent has met the initial evidential burden in this case by reason of the First Appellant's failure to answer questions at interview in January 2015. The burden then switches to the First Appellant to explain that deficiency and provide evidence to show that he did take the test and obtain the Certificate.

18. I accept the First Appellant's evidence that his ability to speak English had suffered between 2011 and 2015 when he was interviewed because he was unable to practise his English. It is reasonable to expect a person who is about to take a test to study for it. The First Appellant is a dim sum chef. It is therefore a reasonable explanation that, working as he does with colleagues who are all Chinese nationals, he would not have the opportunity which might be open to staff who are "front of house", for example, to come into contact with English speakers.

19. I also accept that an interviewer in the Liverpool area might have a strong accent which might be difficult for a non-native speaker to understand, particularly one who has been living in London and not in that area. I also accept that the First Appellant is likely to have been nervous and his nervousness was no doubt accentuated when he realised that he was to be asked to answer questions without an interpreter.

20. I do not accept that at that time of the interview the First Appellant's English was even of a basic standard when one looks at the answers to the questions (insofar as he answered them at all). Nor do I accept that the interview questions were other than quite basic. If he spoke and understood basic English at that time,

there is no reason why he would not have been unable to answer them. As I have already pointed out, though, whilst a relevant factor, that is not the central issue.

21. The issue whether the Certificate is genuine depends on my assessment of the First Appellant's evidence as to the course and test and whether I find his evidence to be credible. I start by noting that the Appellants have failed to provide any documentary evidence in relation to the taking of the course, the sitting of the test or payment for either. I reject at this point, Mr Lam's submission that the Respondent ought to have made enquiries of Whitechapel College to check whether he took the course or sat the test and/or to have verified the Certificate. It is extremely doubtful that the college would have provided such information at least not without the First Appellant's consent. Of course, the Respondent could have obtained that consent. However, the Appellants have been represented throughout by solicitors and those solicitors could have been expected to make the necessary enquiries and to provide documents if those were available. I do accept Mr Lam's submission however that the Appellants should not be held responsible for the failure of their solicitors in this regard.

22. Turning then to the First Appellant's evidence as to the taking of the course and test, I accept that evidence as reasonably likely to be true (at least to the standard which applies). Although the First Appellant said that, understandably, given the passage of time, he cannot remember much detail about the course and test, he was able to give an indication about the cost of both, the timescales involved and the basic outline of the test. His account of where he was living and working in relation to the location of the college is plausible and his account of how he travelled from where he lived to the college is also broadly correct. I accept therefore that the First Appellant has discharged the burden which switched to him.

23. Since the Respondent has not provided any documentary evidence relating to the Certificate, having accepted the First Appellant's evidence, I accept that the Certificate is genuine. I accept that the First Appellant's English is not now up to the standard reflected by the Certificate. However, having regard to the evidential requirements which underlie the requirement in paragraph 245HF(f) of the Rules in relation to the English language abilities which are only that the applicant provide a relevant test certificate, and since there is no dispute that the Certificate, if genuine, satisfies this requirement, I find that the First Appellant does meet paragraph 245HF(f) of the Rules.

The Sponsor Licence

24. That though, as I have noted, is not the only reason why the Appellants' application failed under the Rules. Paragraph 245HF(d) of the Rules provides as follows:-

> "The Sponsor that issued the Certificate of Sponsorship that lead to the applicant's last grant of leave must:

(i) still hold, or have applied for a renewal of a Tier 2 Sponsor licence in the relevant category; and
(ii) certify in writing that:
(1) he still requires the applicant for the employment in question, and
(2) in the case of a Tier 2 (General) Migrant applying for settlement, the applicant is paid at or above the appropriate rate for the job as stated in the Codes of Practice in Appendix J…."

25. It is common ground that although the First Appellant's certificate of sponsorship was valid when he made the application, it was not valid at the date of the Respondent's decision and that the reason it was not valid is that the First Appellant's sponsor allowed its licence to lapse in February 2015 and did not renew it.

26. The Appellants' answer to this places reliance on the case of Patel (revocation of sponsor licence – fairness) India [2011] UKUT 00211 (IAC) ("Patel"). The relevant part of the headnote in that case reads as follows:-

> "(1) Immigration Judges have jurisdiction to determine whether decisions on variation of leave applications are in accordance with the law, where issues of fairness arise.
> (2) Where a sponsor licence has been revoked by the Secretary of state during an application for variation of leave and the applicant is both unaware of the revocation and not party to any reason why the licence has been revoked, the Secretary of State should afford an applicant a reasonable opportunity to vary the application by identifying a new sponsor before the application is determined.
> (3) It would be unfair to refuse an application without opportunity being given to vary it under s.3C(5) Immigration Act 1971.
> (4) …
> (5) Where the Tribunal allows an appeal on the ground that the decision was not taken fairly and therefore not in accordance with the law, it may be sufficient to direct that any fresh decision is not to be made for a period of sixty days from the date of the reasoned decision being transmitted to the parties, in order to give the appellant a reasonable opportunity to vary his application.
> (6) By analogy with the present UKBA policy on curtailment of leave where a sponsor licence is revoked a 60 day period to amend the application would provide such a fair opportunity."

27. In directions given as part of my earlier decision, I required both parties to provide "any policy or guidance issued by the Respondent dealing with her practice where a Tier 2 sponsor's licence is revoked or not renewed whilst an application is outstanding and where that sponsor is relied upon in an application for indefinite leave to remain as a Tier 2 migrant. That shall encompass also any policy or guidance relating to the practice (if any) of granting a Tier 2 migrant in those latter circumstances a period to find another sponsor or a lesser period of leave".

28. The Appellants rely on a policy entitled "Tier 2 of the Points Based System – Policy Guidance (Version 04/17)" ("the Policy"). The Policy is expressed to apply to all Tier 2 applications made on or after 6 April 2017. It is therefore not the

Policy in force at the date of the application in this case. However, I heard argument, without demur from Mr Melvin, on the basis that the same or a similar policy would have been in force at the relevant time.

29. Mr Lam drew my attention to [242] and [243] of the Policy which read, so far as relevant as follows:-

> "[242] We will curtail your leave in the following circumstances:
> - If you fail to start working for your sponsor; …
>
> [243] We may curtail your leave if:
> - Your sponsor ceases to have a sponsor licence (for whatever reason)…"

30. Those paragraphs have no application though to the current case. At the time of the Respondent's decision, the Appellants had no leave save that which continued by reason of section 3C Immigration Act 1971. There was therefore nothing to curtail.

31. Mr Lam was unable to point me to any provision of the Policy which requires the Respondent to put an application on hold in cases such as this. The closest one comes is a provision at [A303] that if a sponsor's licence is suspended by the Respondent, the application will be put on hold until that action is finalised with revocation or reinstatement. The Policy goes on to say, however, at [A305] that if an applicant does not have a valid certificate of sponsorship, the Respondent will not put the application on hold whilst one is obtained.

32. Mr Lam says that Patel applies by analogy. He says therefore that the Respondent is required to allow the Appellants a period to find another sponsor. There are a number of difficulties in the way of the Appellants in this regard. The first is that Patel applies to Tier 4 migrants. The relationship between college and student is a very different one to that between employer and employee. Whilst it is often the case that a student may be unaware of the operations of his/her college and therefore unaware of revocation, the same ought not to be true of an employee's knowledge of his employer, not least because once the licence ceases, the employer ought not to continue with the employment.

33. I do take into account though that the First Appellant says that he was unaware that his employer's licence had lapsed until he received the Respondent's decision. This though leads to the second problem, namely that, as the Respondent points out, the First Appellant could not succeed in relation to his application once the sponsor's licence had lapsed. This is due to the wording of paragraph 245HF(d) which I set out at [24] above. The First Appellant was required to be sponsored by the same sponsor as sponsored him in relation to his last period of leave. Once that sponsor no longer held a licence, his application was bound to fail.

34. Even without that provision, I would not have accepted that the Respondent was required to put the application on hold and permit the Appellants to make other arrangements in order to make an application, if necessary on some other basis.

The Respondent did not of course do so because she considered the Certificate to be false and, as she says, would not have done so in any event because of the provisions of paragraph 245HF(d). As the Respondent also points out, though, any unfairness in this case is not procedural in terms of her decision-making process or in any way due to action by the Respondent. The Respondent draws my attention to what is said in the case of Marghia (procedural fairness) [2014] UKUT 00366 (IAC) as follows:-

> "The common law duty of fairness is essentially about procedural fairness. There is no absolute duty at common law to make decisions which are substantively "fair". The Court will not interfere with decisions which are objected to as being substantively unfair, except the decision in question falls foul of the Wednesbury test i.e. that no reasonable decision-maker or public body could have arrived at such a decision.
>
> It is a matter for the Secretary of State whether she exercises her residual discretion. The exercise of such residual discretion, which does not appear in the Immigration Rules, is absolutely a matter for the Secretary of State and nobody else, including the Tribunal – Abdi [1996] Imm AR 148."

35. As the Respondent points out, the reason why these Appellants cannot meet the Rules has nothing to do with any procedural action taken by the Respondent. The reason their application fails is because the First Appellant's sponsor had permitted its licence to lapse without renewing it for whatever reason. That is very similar to the scenario under consideration in Marghia. Further, as the Respondent points out, there would be little point in permitting the Appellants to seek out another sponsor in circumstances where their application would be bound to fail in any event because of the operation of paragraph 245HF(d). It was not therefore procedurally unfair for the Respondent not to put the application on hold for a period to permit the Appellants to find another sponsor.

36. For those reasons, and in spite of my finding that the Certificate was genuine and the Appellants therefore meet paragraph 245HF(f), they still fail to meet the requirements of paragraph 245HF by reason of paragraph 245HF(d). Their appeals under the Rules therefore fail.

Article 8 ECHR

37. The remaining issue which I am required to decide concerns the appeal on human rights grounds. Although permission to appeal was not granted on this ground, I set aside the First-tier decision without preserving any of the findings and I am therefore required to consider whether the decision to remove the Appellants to China breaches their human rights.

38. I begin by noting that the Appellants do not meet the Rules in relation to their private and family life. Mr Lam did not suggest that they did and he was right not to do so. Both Appellants are Chinese nationals as is their child. Neither partner nor child is British or settled. Appendix FM to the Rules has no application. The Appellants have not been in the UK for twenty years. It is not suggested that there are any very significant obstacles or indeed any obstacles to

their return to China. They cannot meet paragraph 276ADE of the Rules. They have not been lawfully resident for a continuous period of ten years. They cannot meet paragraph 276B of the Rules.

39. I am left therefore with an Article 8 claim outside the Rules. The only evidence I have on this issue appears in the First Appellant's statement as follows:-

> "[20] I have been living in the UK for 8 years. I live here with my wife and we have also recently had a baby, born in the UK on 21 June 2016. Our baby's name is [O].
>
> [21] Our baby has brought us a lot of joy. He is the best thing in our life. We have also been making a lot of new friends with other parents with children and babies of similar ages. We socialise together and let the children play and meet new friends. We are very happy to be raising our child in this country where we intend to settle and live the rest of our lives."

I accept that, following a period of residence of eight years, the decision to remove will interfere with their private lives to a sufficient degree that Article 8 is engaged and the interference falls to be justified by the Respondent as being in the public interest. The issue in this case is justification for and proportionality of the interference.

40. I begin by considering the best interests of the Appellants' child. Those are a primary consideration but not the primary consideration and are capable of being outweighed by other considerations. [O] is aged a little over one year. There is little evidence about him other than his birth certificate. That is unsurprising since at that young age, his life will revolve around his parents. I accept the evidence that he probably enjoys playing with children of a similar age but is not in the position as yet to form close friendships. It is also likely given the First Appellant's evidence about his reasons for not speaking good English that the Appellants socialise with people from their own community and that [O] similarly plays with children from that background. That may be speculative but even if that is not so [O] is not of an age where there is likely to be disruption to his life caused by taking him away from his playmates. His life is with his parents and his best interests at his tender age are to remain with them wherever they live.

41. I accept that during the time that the Appellants have lived in the UK, they will have formed friendships with others. There is a lack of evidence about such friendships and given the First Appellant's level of English, I again surmise that most of their friends are likely to be within their own community. I was not told whether the Second Appellant speaks English but it is unlikely that she does as, if that were so, the First Appellant would have said so as it would be relevant to his ability to practise English with her at home.

42. I accept that the Appellants have not remained in the UK in breach of any immigration laws and that they came here with the expectation and hope that they would be able to settle. Their status was however precarious and dependent on them continuing to meet the Rules. I recognise that they are in no way to

blame for their inability now to meet the Rules to remain as a worker and dependent but the precariousness of their status is relevant to the weight I can give to their private lives (insofar as I have been provided with evidence about those in any event).

43. I am bound to have regard to section 117B of the 2002 Act. I take into account in the Appellants' favour that, at least until the lapsing of the First Appellant's sponsor's licence, the First Appellant was able to maintain his family and that they were financially independent. I take into account as adverse to the Appellants the First Appellant's inability to speak English. As I note, I think it unlikely that the Second Appellant speaks English either. It is clear, however, from the First Appellant's oral evidence that the family has not integrated into the UK because he has been working alongside other Chinese nationals and has therefore lost the ability to express himself in English. The reason that an ability to speak English is considered to be important to the public interest relates to the ability to integrate. I do however recognise that the First Appellant says that, if he were permitted to stay, he would like to study English again to help him to integrate.

44. By far the weightiest factor adverse to the Appellants though is the maintenance of immigration control. I have found that they are unable to meet paragraph 245HF of the Rules. There is no other basis for them to stay under the Rules. As I have also concluded, they are unable to succeed under the Rules in relation to their family and private lives. As the Supreme Court makes clear in Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11 at [60], where an applicant is unable to meet the Rules, it is only where there are exceptional circumstances, in the sense of unjustifiably harsh consequences for an applicant, that the case can succeed outside the Rules on the basis that removal is disproportionate. Here, there is nothing of that level. I have scant evidence as to the private lives they have formed in the UK and with which removal will interfere. The Appellants are all nationals of China and can return there together. It is reasonable to expect them to do so. As nationals of that country, they will be permitted to live and work there. Their family life can continue unabated in that country. I am satisfied that interference with their private lives by the decision to remove is in the public interest and proportionate.

DECISION

The appeals of the Appellants are dismissed under the Rules
The appeals of the Appellants are dismissed on human rights grounds.

Signed

Upper Tribunal Judge Smith Dated: 29 August 2017

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA227472015
IA227482015

THE IMMIGRATION ACTS

Heard at Field House
On Wednesday 26 April 2017

Determination Promulgated

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Before
UPPER TRIBUNAL JUDGE SMITH

Between

MR XIAOBIN RONG
MRS LIMIN ZHOU

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Lam, Counsel instructed by AP solicitors
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was not granted by the First-tier Tribunal. There is no reason in this case to make an anonymity direction.

DECISION AND REASONS

Background

45. The Appellants appeal against a decision of First-Tier Tribunal Judge Beach promulgated on 20 September 2016 ("the Decision") dismissing the Appellants'

appeals against the Secretary of State's decision dated 5 June 2015 refusing their application for indefinite leave to remain as a Tier 2 migrant and dependent and directing their removal to China under section 47 Immigration, Asylum and Nationality Act 2006.

46. The Appellants are nationals of China. The First Appellant entered the UK on 7 June 2009 with leave as a work permit holder. He was later granted leave to remain as a Tier 2 migrant with leave to remain until 4 March 2015. On 1 May 2014, he applied for indefinite leave to remain in that category. His wife is his dependent.

47. The Respondent gave two reasons for refusing his application. The First Appellant produced ESol certificates dated October 2011 to show that he had sufficient knowledge of English. However, the First Appellant was interviewed in relation to his application on 22 January 2015 concerning the test and was unable to answer the majority of the questions. For that reason, the Respondent concluded that the First Appellant had made false representations in support of his application and refused it under general grounds (paragraph 322(1A)) of the Immigration Rules ("the Rules"). The application was therefore refused under paragraph 245HF(b) on the basis that the First Appellant fell for refusal under the general grounds for refusal. The Respondent was also not therefore satisfied that the First Appellant met paragraph 245HF(f) of the Rules in relation to his ability to speak English. Further, the First Appellant's Tier 2 sponsor's licence had expired and the sponsor had not applied to renew. Accordingly, the Respondent also refused the application under paragraph 245HF(d) of the Rules.

48. The First-tier Tribunal Judge dismissed the appeal under the Rules and also on human rights grounds. Permission was granted by Upper Tribunal Judge Rintoul on 14 March 2017 for the following reasons:-

> " "It is arguable that First-tier Tribunal Judge Beach erred in her approach to the evidential and legal burden with respect to the impugned English language certificates, as is averred in grounds 1 and 2 of the original grounds. If that decision was incorrect, it is not clear how the judge was able to conclude that the English language requirement was not met, given what is averred in the renewed grounds.
> It is also, just, arguable that the respondent acted unfairly in not allowing the appellant to obtain another sponsor.
> The parties are expected to be able to address how the impugned tests, if genuine, met the requirements of paragraphs 245HF, and Appendices KoLL and O."

49. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

The grounds and submissions

50. Mr Lam's grounds and submissions can be reduced to the following propositions:-

(1) The Judge has arguably erred in considering whether the certificates were fraudulent by improperly applying the relevant burdens and standards of proof. If the Judge had properly considered the evidence, she could not have found that the Respondent who holds the legal burden of proving deception has met that burden. Mr Lam pointed out that there is no verification report in relation to the certificates.
(2) If the Judge was not entitled to or did not reach a clear finding that the certificates were fraudulent, it was not then open to the Judge to find that the First Appellant was not able to satisfy the requirement in paragraph 245HF(f) as to the sufficiency of his English language skills. Mr Lam pointed out that the certificates meet the requirement in Appendix KoLL. He drew an analogy with a driving test where a person has to demonstrate an ability at a particular point in time but does not need to prove that ability on an ongoing basis.
(3) If the Appellants succeed in relation to the foregoing propositions, then the Respondent was obliged to give the First Appellant a period to find an alternative sponsor. The refusal under paragraph 245HF(d) cannot therefore be determinative or, put another way, the Respondent's argument that the first error is not material for that reason must fail.

51. The Respondent's rule 24 statement accepts that the Judge's finding that the First Appellant's English language abilities may have deteriorated in the period between 2011 and 2015 was not relevant, particularly since the refusal in relation to the certificates depends on paragraph 322(1A). However, she asserts that the Judge has not improperly applied the burdens and standards of proof in relation to whether the certificates are fraudulent (or the First Appellant has exercised deception in some way in obtaining them). Although Mr Duffy accepted that it might be said that the Judge failed to use the correct terminology, the effect of [26] and [27] of the Decision was that the Respondent satisfied the evidential burden and that the explanation put forward by the First Appellant was insufficient to discharge the evidential burden on him.

52. In relation to paragraph 245HF(d), Mr Duffy pointed out that this sub-rule is in a different form to that relating to a grant of further leave to remain. It requires the applicant to have sponsorship from the same sponsor as at the time of the last grant of leave. That presumably has the aim of ensuring that the employment covered by the sponsorship is secure. Mr Duffy pointed out that the case of Patel (revocation of sponsor licence – fairness) India [2011] UKUT 00211 (IAC) concerns grants of leave to Tier 4 students and not Tier 2 migrants. He was unsure whether there was a similar policy in relation to Tier 2 migrants. He also indicated in response to a question from me that he was unsure whether there was a policy to grant a further period of leave to remain rather than indefinite leave to remain to an applicant deprived of indefinite leave only on the basis that his last sponsor no longer held a licence. Mr Lam was unable to point me to any policy in either regard but made the submission that if there were not such a policy, then the refusal would be unlawful as unfair based on the ratio in Patel.

53. I indicated that, if I were persuaded by the first ground (covered by proposition (1) and (2) at [6] above), I would not find that any error was not material on this basis and I would give the parties the opportunity to produce any policies or guidance on this point and would allow Mr Lam to develop his submissions as to unfairness in the event that no policy or guidance exists.

54. I reserved my decision in relation to whether there is an error of law in the Decision. In discussion with the representatives, I indicated that, if I find an error of law in relation to the certificates point, I would resume the hearing in this Tribunal. Although I accept that the issue of whether the certificates are genuine or whether deception has been exercised in their procurement depends on the credibility of the First Appellant, Mr Lam was content that the appeal should not be remitted.

Discussion and conclusions

55. Dealing with the grounds in order, I begin with the Judge's findings as to the certificates. Those are as follows:-

> "[26] It is correct to state that the burden lies on the respondent to show that the appellant has made false representations or submitted fraudulent documents. However, the passage of time may well make it difficult to obtain such evidence. The respondent had legitimate concerns regarding the 1st appellant's English language ability given the fact that the 1st appellant was only able to answer 3 questions at interview and this was enough, in my view, to raise extremely strong suspicions that the 1st appellant had even taken the tests. I find that, in those circumstances, the burden then shifted to the 1st appellant to show that he had, in fact, undertaken those tests.
>
> [27] As outlined above, the evidence of this is sparse. The 1st appellant's witness statement is extremely limited. The 1st appellant gave evidence in Mandarin rather than English suggesting an inability to express himself in English or to understand questions (although I find this to be a relatively neutral factor given that appellants naturally often feel more comfortable giving evidence in their first language). The 1st appellant gave no explanation within his witness statement for being unable to answer the questions and his explanation changed during his oral evidence with the 1st appellant firstly stating that he did not understand the interviewing officer's accent and then that he can understand English but finds it hard to express himself. If he did not understand the interviewer's accent, he failed to state this at interview at any stage and did not raise it afterwards or write to the respondent outlining his concerns about the interview and requesting a further interview. I find that the 1st appellant's explanation has been inconsistent and that it is not credible that if he truly did not understand the interviewer's accent he would not have raised this at interview or at least straight after the interview in writing.
>
> [28] I find that the evidence strongly suggests that the 1st appellant did not, in fact, take the English language tests as claimed. In any event, even if he did take the tests at that time, his English has now deteriorated to such an extent that it is questionable whether he fulfils the requirements for ILR in any event. Paragraph 245HF(i) states that an applicant must demonstrate sufficient knowledge of the English knowledge [sic]. This is a present requirement ie at the time that the applicant makes the application he must demonstrate this knowledge. It is clear from the interview, however, that the 1st appellant did not have a sufficient

> knowledge of English shortly after the date of his application suggesting that he does not fulfil that requirement of the Immigration Rules."

56. I begin with the Judge's finding in the last sentence of [28] of the Decision since that is not impacted upon by the burdens and standards of proof which apply to the certificates. As already noted and as Mr Duffy accepted in submissions, the point is made at [4] of the Respondent's rule 24 statement that the Judge's consideration of whether the First Appellant's English had deteriorated was not material. I agree with that submission. What is required by the relevant part of rule 245HF (which is at (f) and not (i)) is as follows:-

> "(f) The applicant must have sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL."

Although the Judge is right to observe that the requirement to show a sufficient knowledge of English is a present one, that has to be read in the context of what follows which requires compliance with Appendix KoLL. The relevant part of Appendix KoLL as at the date of the Respondent's decision required production of a certificate. The certificates produced in this case appear on their face to comply with that requirement.

57. I then turn to deal with the issue of deception. Mr Lam relies upon the cases of SM and Qadir v Secretary of State for the Home Department (ETS- Evidence – Burden of Proof) [2016] UKUT 00229 (IAC) and Muhandiramge (section S-LTR.1.7) [2015] UKUT 00675 (IAC). In the former case at [57] and with some minor qualification, the Tribunal cited with approval from the latter case at [10]. As canvassed in the course of submissions and agreed by both representatives, the legal position is as follows. The burden is on the Respondent to prove deception to, at least, a standard of balance of probabilities. However, this is a three stage process. The Respondent bears the initial evidential burden of making a prima facie case that the Appellant has exercised deception. If she discharges that burden, there is then an evidential burden on the Appellant to raise an innocent explanation to show that he did not exercise deception. Again, if he is able to satisfy that burden, the legal burden shifts back to the Respondent to show that on the balance of probabilities the Appellant did exercise deception.

58. Although it is not crucial for Judges to express themselves in precisely that way, the Judge is required to show that this is the exercise undertaken. In this case I am satisfied that the Judge erred in law when considering this issue for the following reasons. First, although the Judge correctly directs herself at [26] of the Decision that the burden lies on the Respondent (see also [7] of the Decision), the last sentence of [26] appears incompatible with that analysis. In that sentence, she appears to place the burden on the Appellant to a higher standard than would at that juncture be required. Conversely, in the first sentence of [28] she places too lower a burden on the Respondent if in fact her finding is that the Appellant has satisfied the evidential burden on him.

59. That leads me on to the second reason for finding an error of law as there is no clear finding that the Appellant did exercise deception. In order so to find, the Judge either had to refuse to accept that the Appellant had discharged the burden on him to provide "an innocent explanation" or, having found that the legal burden was then on the Respondent to prove the deception to the standard of a balance of probabilities, she had to show that the Respondent's evidence satisfied that burden.

60. Third, there is an issue in relation to what it was that the Judge considered when looking at whether deception had been exercised. As the Judge rightly observed in the last sentence of [26] of the Decision, the issue was whether the Appellant had undertaken the tests which the certificates showed he had. However, what the Judge considers at [27] of the Decision is the Appellant's ability to speak English and his explanation for not performing to a sufficient standard in interview. Whilst that is relevant to the issue whether the Appellant obtained the certificates on which he relied, the central issue is whether the Appellant took the tests and genuinely obtained the certificates.

61. The interview conducted by the Respondent was in fact to ascertain the circumstances surrounding the taking of the test, no doubt because the Respondent was not satisfied for whatever reason that the certificates were genuine. Unfortunately, the interview record assists very little with that issue because the Appellant was unable to understand or answer the questions. However, that issue remained to be explored at the appeal hearing. It does not appear however to have been the subject of the oral evidence and little is said about it in the Appellant's witness statement. The Judge's reference to the Appellant's evidence about the test recorded at [22] and [23] of the Decision appears to relate to the Appellant's answers in interview but of course the Appellant was unable to answer the questions and so the answers are not a failure to explain those matters but a failure to give any evidence because he could not understand what he was being asked. Those were therefore matters which should have been explored in evidence at the hearing if they were to be relied upon adversely to the Appellant.

62. For those reasons, I am satisfied that the Decision discloses an error of law. I set aside the Decision. I have given directions below for the re-making of the Decision.

DECISION

I am satisfied that the Decision contains material errors of law. The decision of First-tier Tribunal Judge Beach promulgated on 20 September 2016 is set aside. I make the following directions for the re-making of the Decision:-

1. **Within 28 days from the date when this decision is promulgated, the parties shall file with the Tribunal and serve on the other party the following:-**

(1) Any further evidence on which they rely relating to the issue of deception/genuineness of the certificates;
(2) Any policy or guidance issued by the Respondent dealing with her practice where a Tier 2 sponsor's licence is revoked or not renewed whilst an application is outstanding and where that sponsor is relied upon in an application for indefinite leave to remain as a Tier 2 migrant. That shall encompass also any policy or guidance relating to the practice (if any) of granting a Tier 2 migrant in those latter circumstances a period to find another sponsor or a lesser period of leave.

2. **Within 14 days from the service of evidence under [1] above, the parties may file with the Tribunal and serve on the other party any evidence in reply.**
3. **Within 28 days from the service of evidence under [1] above, the Appellants are to file with the Tribunal and serve on the Respondent a skeleton argument setting out their position in relation to the issues in this appeal. By the same date, they are to file with the Tribunal and serve on the Respondent a paginated bundle containing all relevant material (including evidence served in accordance with [1] and [2] above).**
4. **Within 14 days from the service of the Appellants' skeleton argument, the Respondent is to file with the Tribunal and serve on the Appellants her skeleton argument in response.**
5. **Any legal authorities relied upon by either party shall be filed with the Tribunal (in bundle form if necessary) and served on the opposing party no later than 7 days prior to the date listed for the resumed hearing.**
6. **The resumed hearing shall be listed before UTJ Smith on the first available date after 12 weeks from the date when this decision is sent. If the Appellants require an interpreter for the hearing, they must inform the Tribunal office no later than 14 days before the date listed for the resumed hearing. Time estimate 2 hours.**

Signed

Upper Tribunal Judge Smith Dated: 27 April 2017