



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

Appeal Number: HU/14084/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 21 August 2017**

**Decision & Reasons Promulgated  
On 8 September 2017**

**Before**

**DR H H STOREY  
JUDGE OF THE UPPER TRIBUNAL**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MRS FATHIMA SHAMILA ISHAN  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms J Isherwood, Home Office Presenting Officer

For the Respondent: Ms V Miszkiel, Counsel, instructed by Jein Solicitors

**DECISION AND REASONS**

1. The appellant (hereafter the Secretary of State or SSHD) has permission to challenge the decision of First-tier Tribunal Judge (FtT) Judge Eban allowing on human rights grounds the appeal of the respondent (hereafter the claimant) against the decision made by the SSHD on 15 December 2015 refusing to vary the claimant's leave to remain under the ten year partner route. The SSHD accepted that the claimant met all the requirements of the relevant Immigration Rules save for that concerned with suitability. The SSHD deemed that requirement not met because she was satisfied that the claimant had obtained a TOEIC certificate in 2011 by fraudulent

means. The FtT Judge was not satisfied that the judge addressed the fraud issue with proper regard to the case law on ETS/TOEIC.

2. The SSHD's first ground of challenge was that the judge had failed to assess correctly the burden of proof in line with **SM and Qadir (ETS - Evidence - Burden of Proof)** and **Shehzad & Anor [2016] EWCA Civ 615**. It was submitted that the judge failed to give adequate reasoning why the SSHD had not met the legal burden "nor that there is an innocent explanation".
3. Dealing first with the grounds generally, the author gets off to an unpromising start in referring more than once to the claimant's test results as "invalid". They were found to be "questionable", not invalid.
4. As regards this first ground, it is true that in one passage the judge appears to conclude that the generic evidence was not sufficient to discharge the evidential burden of proof. At paragraph 17 the judge stated:

"17. All I have is generic evidence about voice testing. I find that this alone is not sufficient to discharge the burden of proof on the respondent to show that the appellant did not take her English test herself but instead used a 'proxy' test taker to take the speaking test on her behalf particularly where her test was categorised as *questionable* rather than *invalid* and where both she and her husband have been able to give me an account of her attending herself".

5. However, whilst this paragraph contains arguable error, I do not see that it was at all material. First, the judge correctly identified, both earlier (in paragraph 10) and later (in paragraph 19), that the legal burden of proving fraud rested on the SSHD.
6. Second, it is clear that the judge properly sought to weigh in the balance the fact that the SSHD's specific evidence (as opposed to the generic evidence) was particularly weak. For one thing the TOEIC test results had been analysed by ETS to be not invalid but "questionable". As pointed out by the judge at 15:

"15. As to ETS' findings the spread sheet at RB/C1 refers to the appellant by name and under the heading '*Inv/Quest*' the entry is '*Questionable*'. This is not therefore an appellant whose test has been categorised as '*Invalid*'. There is no further explanation from ETS as to how or why, in the appellant's case, this finding was made. There is no evidence of the 'batch analysis' or of the 'human verification' process, described in Mr Peter Millington's statement at paragraphs 38 and 41, in respect of this appellant".

7. For another thing, the SSHD had not produced the audio material from the claimant's tests. Given that the ETS analysis was that the test was

“questionable”, the judge was entitled to view the absence of such evidence as adverse to the SSHD. The SSHD’s grounds appear to argue that according to the generic evidence a finding of “questionable” is still a very negative finding, in light of what Rebecca Collings said at paragraph 29 of her witness statement, namely that those found to be questionable were cancelled on the basis of “test administration irregularity”. Yet Ms Isherwood accepted that in this context irregularity related simply to the bona fides of the test centre, not to any mala fides by test takers. If this finding was a negative finding, it was a very weak negative.

8. A third feature significantly weakening the SSHD’s specific evidence was that it relied in part on an interview with the appellant on 4 December 2015. The transcript of the interview disclosed that the questions were all directed at a test taken by the appellant in September 2015. Despite the claimant stating at this interview that he had taken another test in 2011 – the only one in respect of which the SSHD alleged fraud – the interviewer only asked questions about the 2015 test. Further, the interviewer recorded that the claimant demonstrated fluency in English and did not appear to be coached. The only adverse comments made by the interviewer concerned what the appellant had said about taking the 2015 test.
9. I am bound to say that even if the judge should have found that the generic evidence on its own discharged the evidential burden (a matter which is not necessarily established given that the generic evidence was not primarily directed at ‘questionable’ results), the SSHD’s generic and specific evidence taken together clearly did not.
10. A further reason why I do not consider any error (if there was one) at all material is because it is entirely clear from the decision that the judge was satisfied that the claimant was able to provide an innocent explanation for the test result. At paragraph 18 the judge stated:
 

“I note that the appellant gave evidence before me without the assistance of an interpreter and that before the TOEIC test the appellant took an ESOL – Skills for Life Entry 1 Level test in October 2010 [AB43-45], and after the TOEIC test she took a Trinity College London Grade 2 Spoken English Entry Level Certificate in ESOL International (Speaking and Listening) (Entry 1) CEFR Level A1 in which she obtained with Distinction in August 2015 [AB42]. This raises the question why she would have asked someone to sit the test for her”.
11. In this paragraph the judge identified several factors that went to the innocence of the claimant’s explanation. In reply to questions from me, Ms Isherwood was not able to identify any other factors that the judge should have considered in this context but failed to.
12. In the written text of ground 1, as amplified by Ms Isherwood, the further point is made by reference to **MA (Nigeria) [2016] UKUT 450** that

judges must be alive to there being a range of reasons why persons proficient in English may engage in TOEIC fraud. However, as the Tribunal observed in **MA** the range of possible reasons were stated in the abstract. The Tribunal did not assert that they should be assumed to obtain in any particular case without some evidential basis. I fail to see that there was any basis for the judge considering such reasons (e.g. lack of confidence, fear of failure, lack of time and commitment, contempt for the immigration system) to arise in the claimant's case.

13. The SSHD's second ground challenged the fact that the judge had allowed the appeal on human rights grounds without conducting a proportionality assessment. That contention in my judgment mischaracterises what the judge in fact did. At paragraphs 19 and 20 the judge concluded:

"19. Having considered all the evidence in the round, I find that the respondent has not discharged the burden of proof and accordingly I find that S-LTR 1.6 does not apply.

20. The respondent raised no other issues under Appendix FM as to why the appellant does not meet the requirements of the Rules to remain under the 10-year partner route. In the circumstances as the appellant meets the requirements of the Immigration Rules, I find that refusal of her application for further leave would result in unjustifiably harsh consequences for the appellant and her family and would interfere disproportionately with her article 8 rights, with reference to the test set out in Razgar [2004] UKHL 27, Beoku-Betts v SSHD [2008] UKHL 39, EB (Kosovo) [2008] UKHL 41 and section 117 of the Nationality, Immigration and Asylum Act 2002".

14. The judge's assessment quite properly built on the fact that in the Reasons for Refusal Letter the only reason given by the SSHD for refusing the claimant under the ten year route was suitability, which in turn was only found to count against her because of the alleged TOEIC fraud. It was entirely open to the judge, therefore, to conclude that where on the judge's findings, the relevant requirements of the Immigration Rules were met (the ten-year Rule), there could no longer be said to be any public interest to outweigh the claimant's Article 8 right to respect for private and family life.
15. For the above reasons, the SSHD's grounds are not made out. The FtT Judge did not materially err in law. Accordingly the FtT Judge's decision shall stand.

No anonymity direction is made.

Signed

Date: 7 September 2017

A handwritten signature in black ink that reads "H H Storey". The letters are cursive and connected, with a distinct loop at the end of the word "Storey".

Dr H H Storey  
Judge of the Upper Tribunal