



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/03657/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 17 October 2018

Decision & Reasons Promulgated  
on 05 November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUDUSSAR HUSSAIN  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr I Jarvis, Home Office Presenting Officer

For the Respondent: Mr A Alam, Counsel, instructed by Law Lane Chambers

**DECISION AND REASONS**

1. The appellant in this case is the Secretary of State. However, for convenience I will refer to the parties as they were referred to in the First-tier Tribunal.
2. The appellant is a citizen of Pakistan born on 15 September 1986. On 16 February 2017 his application for leave to remain in the United Kingdom as the spouse of a UK citizen was refused by the respondent on the basis that there was significant evidence to conclude that he had used a proxy test taker in a TOEIC speaking test with

Educational Testing Service (ETS) on 14 December 2011 and therefore did not satisfy the suitability requirements under Appendix FM of the Immigration Rules.

### **Decision of the First-tier Tribunal**

3. The appellant appealed to the First-tier Tribunal where his appeal was heard by Judge of the First-tier Tribunal Phull. In a decision promulgated on 6 April 2018 Judge Phull allowed the appellant's appeal.
4. Before Judge Phull, the respondent relied upon a witness statement by a senior Home Office caseworker named Afshan Anwar-Tariq dated 7 March 2018 that refers to the appellant having a pending application for Tier 4 leave. The judge observed that this is incorrect as the appellant was applying for leave on the basis of his relationship with his spouse. The judge also noted that the statement of Afshan Anwar Tariq refers to witness statements of Rebecca Collings and Peter Millington but that neither of these statements, nor any expert evidence to substantiate the alleged deception, were submitted by the respondent.
5. Appended to the statement of Afshan Anwar Tariq is a printout from an "ETS TOEIC test centre lookup tool" stating that the test taken by the appellant had been found to be invalid. The judge found that because of this the respondent had satisfied the initial evidential burden of establishing deception such that the burden shifted to the appellant to provide a plausible innocent explanation.
6. The judge found that the appellant's explanation was plausible. At paragraph 21 the judge stated  

"I found the appellant to be a credible witness giving his evidence in a candid and frank manner. The Home Office interviewed the appellant on 15 July 2015 but failed to disclose the interview record and did not curtail the appellant's leave. I find he provides plausible evidence in cross-examination that prior to sitting the TOEIC test he had also undertaken the Pearson and IELTS test and had hoped to improve his test scores as supported by the certificates. There was no challenge to his evidence that he paid the fee in cash and sat the TOEIC test over two days. I accept his evidence in cross-examination that he chose to sit the TOEIC test at Alpha College because they gave him an early test date and because he had heard it was an easier test. His evidence is that he had hoped to get a better score than the Pearson or the IELTS test scores. In answer to my questions the appellant said that he secured a band score of 6.5 in speaking in the IELTS test which is equivalent to CEFRB2 level and 140 marks in speaking in the TOEIC test which is equivalent to CEFRB1. As the TOEIC mark was lower he did not rely on this certificate in any application. I find on balance that the appellant supports his scores with the copy certificates and has provided a plausible innocent explanation and therefore the burden shifts back to the Secretary of State."
7. The judge then at paragraphs 22 and 23 considered whether the Secretary of State discharged the legal burden and found that he did not. The judge stated at paragraph 23 that:

“Although the appellant was challenged about where and how he chose the test centre and taking the test I find on balance that the appellant gave a consistent and satisfactory explanation of the background to how the test was booked and personally attending and sitting the test at Alpha College.”

### **Grounds of Appeal and Submissions**

8. The Secretary of State is appealing against the decision of the First-tier Tribunal on the basis that the judge failed to adequately address the evidential burden on the appellant to put forward an innocent explanation. In the grounds of appeal it states that “it is not clear why the evidence of the appellant which the Tribunal relies upon would preclude the use of a proxy test taker during the test.”
9. The grounds take issue with the judge giving weight to the appellant recalling details of his journey to the test centre when this does not necessarily mean that he personally took the test and maintain that the judge erred by failing to give adequate reasons for finding that a person who clearly speaks English would have no reason to secure a test certificate by deception.
10. Before me, Mr Jarvis on behalf of the Secretary of State argued that the judge failed to appreciate the scale of deception. He referred to the evidence of Professor French that there is less than a 1% chance of a “false positive”. In response to my comment that there was no evidence from a Professor French before the First-tier Tribunal Mr Jarvis responded that the judge ought properly to have taken judicial notice of Professor French’s report given that it has been before multiple Tribunals in cases of this nature. He maintained that in any event the judgments in cases such as *MA (ETS – TOEIC testing)* [2016] UKUT 00450 (IAC) which bind the First-tier Tribunal find that the ETS process is robust.
11. Mr Jarvis maintained that the judge fell into error by failing to explore the multiple reasons why a person proficient in English might have engaged in fraud and by placing undue weight on the appellant’s proficiency, and exam success, in English. He relied on paragraph 57 of *MA*, which states:
 

“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. We are not required to make the further finding of why the appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter.”
12. The response of Mr Alam, on behalf of the appellant, was that the evidence of Mr French as well as that of Rebecca Collings and Peter Millington was not before the First-tier Tribunal and therefore the judge could not be expected to rely on such evidence. He noted that the only evidence before the Tribunal was the statement of Afshan Anwar-Tariq (to which was annexed the lookup tool results) and this statement inaccurately described the circumstances of the appellant’s application.

13. Mr Alam also argued that the judge gave sufficient reasons to justify the conclusion that the appellant's innocent explanation was plausible. He observed that the judge had correctly identified the burden of proof test and had given several reasons for finding the appellant's explanation plausible.

### Analysis

14. I am satisfied that the decision does not contain an error of law.
15. The judge correctly identified at paragraph 16 of the decision the three stage test in respect of the burden of proof, referred to as the "burden of proof boomerang" in *MA* and other cases.
16. Notwithstanding the paucity of evidence adduced by the respondent the judge found that the initial evidential burden on the respondent was satisfied.
17. The judge then proceeded, as he was required to do under the "boomerang approach," to consider the appellant's innocent explanation.
18. At paragraph 21 the judge explained that after hearing cross-examination of the appellant he reached the conclusion that the appellant was credible and accepted his explanation for why he chose to sit the test at the college he chose and why he took the test having taken other tests previously. At paragraph 23 the judge noted that the appellant gave a consistent and satisfactory explanation of the background of how the test was booked and personally attended.
19. The argument of the Secretary of State, in sum, is that the appellant's evidence was not sufficient to satisfy the evidential burden of showing a plausible innocent explanation. I disagree. It is for the First tier Tribunal judge to assess the credibility of the appellant's account, having regard to matters such as consistency, response to questions under cross-examination and whether the appellant is candid and frank. This is the analysis that the judge undertook. Having found the appellant to be credible, consistent and candid (and having given reasons to explain why this view was reached) it was open to the judge to accept his evidence.
20. Mr Jarvis sought to rely on paragraph 57 of *MA*, as cited above. However this paragraph cannot be read in isolation. The appellant in *MA* was found to have given evidence that was inconsistent and inadequate. At paragraph 48 of *MA* it is stated that there were significant gaps in the appellant's witness statement and discrepancies between his witness statement and the evidence at the hearing. It is also stated that there was an "abject failure to provide even the most basic description of the car journey which he claims to have undertaken" or "any physical features of the college." It is also said that there were "self-evident gaps and discrepancies in the account."
21. The difference between the appellant in *MA* and the appellant in this case is stark. In this appeal the judge has not found the appellant's evidence to contain gaps and discrepancies and there has been no finding that there is an inconsistency between

the oral and written witness evidence. On the contrary, the judge found the appellant to be a consistent and reliable witness. I am satisfied, therefore, that the judge's approach was not inconsistent with MA.

22. In light of the judge's findings as to the appellant's credibility he was entitled to accept the appellant's innocent explanation and to find that the respondent had not discharged the legal burden of proof. The appeal therefore cannot succeed.

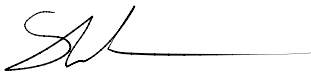
**Notice of Decision**

The appeal is dismissed.

The decision of the First-tier Tribunal does not contain a material error of law and stands.

No anonymity direction is made.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 24 October 2018