



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/04780/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 9 July 2018

Decision & Reasons Promulgated  
On 12 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FARHAN ULLAH SIDDIQUI  
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Appellant: Ms A. Everett, Senior Home Office Presenting Officer  
For the Respondent/Claimant: Mr S. Bellara, Counsel, instructed by Legend Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Mailer sitting at Hatton Cross on 6 December 2017) allowing the claimant's appeal against the decision made on 4 December 2016 to refuse to grant him leave to remain as the partner of a settled person. The ground of refusal was that his presence in the UK was not conducive to the public good because he had obtained an ETS English language certificate by deception, and had relied on it in an application made in March 2012. At the hearing of the appeal, the Presenting Officer conceded that the "*evidential burden at the initial stage was not met*". In his subsequent decision, the Judge declared that the concession was properly made; that the appellant met the

suitability requirements under the Rules; and that the refusal decision was unlawful under the Human Rights Act 1998.

2. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant requires anonymity for these proceedings in the Upper Tribunal.

### **The Reasons for the Grant of Permission to Appeal**

3. On 2 May 2018 First-tier Tribunal Judge Lambert granted the Secretary of State permission to appeal for the following reasons:

“The grounds take issue with the judge’s finding that the primary evidential burden on the [SSHD] had not been met. They ignore the concession to this effect specifically recorded at paragraph 22 of the decision ... However it remained incumbent on the judge to consider whether that concession on behalf of the [SSHD] had been properly made. The finding at paragraph 24 to this effect is inadequately reasoned.”

### **The Error of Law Hearing**

4. At the outset of the hearing before me to determine whether an error of law was made out, Ms Everett withdrew the error of law challenge. She accepted that the Judge had given adequate reasons for finding that the Secretary of State had not discharged the burden of proving that the claimant had obtained his ETs language test results by deception. After a brief discussion with both representatives, I dismissed the Secretary of State’s appeal to the UT, with written reasons to follow.

### **Reasons for finding no error of law**

5. Before Judge Mailer, Mr Bellara relied on **Secretary of State for the Home Department and (1) Muhammad Shehzad and (2) MD Chowdhury [2016] EWCA Civ 615** where Beatson LJ, giving the leading judgment of the court, summarised the central issue which the court was addressing at paragraph [19]:

“These appeals are only concerned with whether their evidence (the generic evidence of Mr Millington and Ms Collings regarding ETS’s analysis of the spoken English component of the TOEIC test), *together with evidence that the tests of the individual under consideration have been assessed as ‘invalid’ rather than as ‘questionable’ because of problems at the test centre* (my emphasis), suffices to satisfy the evidential burden of showing dishonesty that lies on the Secretary of State and to impose an evidential burden on the individual to raise an innocent explanation. The question before us is thus not the ultimate reliability of the evidence or the ultimate disposition of the appeals.”

6. The fatal flaw in the evidence marshalled against the claimant in this appeal was that the test results in respect of the speaking and writing test purportedly undertaken by him at the London School of Scholars on 22 February 2012 were declared “*questionable*” by ETS, not “*invalid*”: see paragraph [10]. This meant that ETS were not satisfied that the claimant’s speaking test result had been achieved by the use of a proxy test taker. Accordingly, the burden did not shift to the claimant to provide an innocent explanation for his test results.
7. The Judge adequately explained why the Presenting Officer’s concession was correct, as he rehearsed the *ratio decidendi* of **Chowdhury and Shehzad** at paragraph [13] of his

decision, citing a passage in Beatson LJ's judgment about the consequences of a failure by the Home Office to serve evidence showing that an individual's test result has been categorised by ETS as "*invalid*".

8. The Judge also identified an additional reason as to why the concession was rightly given and the burden of proof was not discharged which was that, following an interview about the ETS test in 2016, the interviewing officer assessed the claimant as "*credible*": see paragraph [25].
9. For the above reasons, Ground 1 is not made out.
10. Ground 2 was that the Judge did not give adequate reasons for allowing the appeal outside the Rules. But this ground has no merit as the Judge did not purport to allow it outside the Rules. The appeal proceeded on the basis that the only issue under the Rules was whether the claimant met the suitability requirements. The Judge held at paragraph [35] that the relevant suitability and eligibility requirements under the Rules were met, and there is no challenge to this finding of fact beyond that contained in Ground 1.

#### **Notice of Decision**

11. The decision of the First-tier Tribunal did not contain an error of law and accordingly the decision stands. The Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

Date 10 July 2018

Deputy Upper Tribunal Judge Monson