



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/05739/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 1 March 2018

Decision & Reasons Promulgated  
On 5 March 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

and

MRS BALJEET KAUR PAMA  
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Entry Clearance Officer: Ms A. Brocklesby-Weller, Senior Home Office  
Presenting Officer

For the Respondent/ Claimant: Mr I. Khan, Counsel instructed by MKV Legal  
Solicitors

DECISION AND REASONS

1. The Specialist Appeals Team appeals from the decision of the First-tier Tribunal (Judge C. Burns sitting at Birmingham on 6 June 2017), allowing on human rights grounds the claimant's appeal against the decision of an Entry Clearance Officer ("ECO") to refuse her entry clearance as a spouse of a British national. The Judge found that she had not previously contrived in a significant way to frustrate the intentions of the Rules; and that, although she had not provided an employment letter for her spouse which complied with Appendix FM-SE, the refusal was disproportionate because other evidence showed that her spouse was earning more

than £18,600 per annum and also there were insurmountable obstacles to family life being carried on in India because her spouse, *“lives with and cares for his mother who has various disabilities including a significant and enduring mental health problem”*.

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

### **Relevant Background**

3. The claimant is a national of India, whose date of birth is 25 October 1978. She came to the United Kingdom as a student migrant on 1 March 2011. Her leave ran until 18 July 2012. According to the refusal decision, she applied for leave to remain on 27 July 2012. The application was refused, but allowed on appeal, and she was given 60 days to find a new sponsor. On 8 October 2014 the appellant was refused leave to remain as she did not have a valid CAS.
4. For the purposes of the application for leave to remain made on 27 July 2012 or sometime later (the chronology is unclear), the claimant submitted a TOEIC certificate from ETS in respect of a speaking test purportedly undertaken at South Quay College on 22 August 2012.
5. On 27 February 2015 the claimant was issued with an IS15A notice for obtaining a previous grant of leave by deception. On 13 July 2015 the claimant voluntarily departed from the UK. On 9 February 2016 she applied for entry clearance as a spouse.
6. The application was refused on 16 February 2016 on suitability and financial grounds. She had submitted her TOEIC certificate to her sponsor to obtain a CAS. ETS had a record of her speaking test. Using voice verification software, ETS was able to detect when a single person was undertaking multiple tests. ETS had checked her test and had confirmed that there was significant evidence to conclude that the certificate was fraudulently obtained by the use of a proxy test taker. Her scores from the test taken on 22 August 2012 had now been cancelled by ETS. On the basis of the information provided by ETS, the Secretary of State was satisfied that her certificate was fraudulently obtained.

### **The Hearing Before, and the Decision of, the First-tier Tribunal**

7. Both parties were legally represented before Judge Burns. The ECO had not filed any evidence to support the case of deception. The Judge received oral evidence from the Appellant’s husband, and her attention was directed to **SM and Qadir (ETS-Evidence-Burden of Proof) [2018] UKUT 21 (IAC)**.
8. In her subsequent decision, she concluded at paragraph [24] that the ECO had not established on the balance of probabilities that deception had been employed by the claimant. She addressed the issue of the claimant’s overstaying at paragraphs [25] to [30], and she concluded at paragraphs [31] and [32] that the ECO had not shown that the claimant should be excluded on suitability grounds.

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

9. On 29 December 2017, Judge Ransley granted the ECO permission to appeal to the Upper Tribunal as it was arguable: (1) that the Judge failed to give adequate reasons for finding that the ECO had not discharged the burden of proof on the issue of deception; (2) that the Judge failed to give adequate weight to the claimant's inability to meet the requirements of Appendix FM-SE; and (3) that her findings on proportionality were tainted by her erroneous findings on the issue of deception.

### The Hearing in the Upper Tribunal

10. At the hearing to determine whether an error of law was made out, Ms Brocklesby-Weller developed the case put forward in the grounds. After hearing from Mr Khan and from Ms Brocklesby-Weller in reply, and after reviewing the evidence that was before the First-tier Tribunal, I was not persuaded that an error of law was made out. I gave my reasons for so finding orally, and my fuller reasons are set out below.

### Reasons for Finding No Error of Law

11. The *ratio decidendi* of **SM and Qadir** is that, despite the serious shortcomings in the evidence relied on by the Secretary of State, it was sufficient to discharge the evidential burden of raising a prima facie case, such that the evidential burden shifted to SM and Qadir to produce an innocent explanation for their test results being invalidated by ETS.
12. Of particular significance are the following passages in the decision:

68. As our analysis and conclusions in the immediately preceding section make clear, we have substantial reservations about the strength and quality of the Secretary of State's evidence. Its shortcomings are manifest. On the other hand, while bearing in mind that the context is one of alleged deception, we must be mindful of the comparatively modest threshold which an evidential burden entails. This calls for an evaluative assessment on the part of the tribunal. By an admittedly narrow margin we are satisfied that the Secretary of State has discharged this burden. The effect of this is that there is a burden, again an evidential one, on the Appellants of raising an innocent explanation.

...

78. The events of 2012 are of obvious significance. The TOEIC Certificate was, on its face, obtained by this Appellant [SM] after undergoing the necessary testing on two separate dates, 20 and 26 March 2012. We acknowledge that, in the abstract, his score in the modules of listening and reading is very high indeed, being 930 out of a possible 990 (circa 90%). In the modules of speaking and writing the scores recorded are also high, being 160/200 in each instance (circa 80%). Duly armed with his TOEIC Certificate, this Appellant applied for leave to remain in the United Kingdom. His application was refused, giving rise to a hearing before the First-tier Tribunal ("*FtT*") on 05 September 2012.

79. We consider this aspect of the evidence to be of some significance. From the Tribunal's determination one learns that this Appellant attended the hearing, gave evidence, was cross examined and was re-examined. No interpreter was required and there is no indication of the slightest difficulty in communication or

comprehension. We note further that during the period of (approximately) September 2010 to February 2012 this Appellant claims that he was pursuing courses at two colleges simultaneously, which we accept. We infer from this fact, coupled with the successful outcomes, that his mastery of English was of a high and progressively improving level.

80. We consider that in appeals of this nature evidence of this kind is likely to be of substantially greater force and cogency than the tribunal's own assessment of an appellant's English language proficiency based on performance at the appeal hearing. This is especially pertinent in the present case, given that some three years have elapsed since this Appellant claims to have secured his TOEIC certificate. In some of the FtT decisions in this field one finds observations concerning the appellant's apparent fluency in, and command of, the English language. We consider that Judges should be cautious in adopting this approach for at least three reasons. The first is the passage of time. The second is that Judges are not language testing or linguistics experts. The third is that, to date, there has been no expert linguistic evidence in any of these cases.

...

101. We have already held that the evidential burden of proof resting on the Secretary of State has been narrowly discharged. For the reasons which we have given, we are satisfied that both Appellants have discharged their burden of raising an innocent explanation of the *prima facie* indications of deception on their part in the Secretary of State's evidence. For the reasons elaborated, we conclude, without hesitation, that the Secretary of State has failed to establish, on the balance of probabilities, that the Appellants' *prima facie* innocent explanations are to be rejected. The legal burden of proof falling on the Secretary of State has not been discharged. The Appellants are clear winners.

13. In **Secretary of State for the Home Department and (1) Muhammad Shehzad and (2) MD Chowdhury [2016] EWCA Civ 615**, the finding by the Presidential panel at paragraph [68] was endorsed by higher and thus binding authority. 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 has been assessed as 'invalid' rather than as 'questionable' because of problems at the test centre, 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.

14. In Mr Chowdhury's case, discussed by Beatson LJ at paragraphs [24] and [25], the first instance judge held there was no evidence identifying Mr Chowdhury as a person whose test was invalid. But in fact, the evidence included a screenshot of the results which stated that this was the position. The same first instance judge held there could be multiple reasons for invalidation, some of which might not involve fraud or deception. Beatson LJ went on to hold that both the first instance judge and the Deputy Upper Tribunal Judge who dealt with the appeal to the

Upper Tribunal had misunderstood the nature of the evidence. Beatson LJ continued in paragraph [26]:

The reason for the misunderstandings by the Tribunals may be that the language used by Mr Millington and Ms Collings in their statements to explain a technical process is not altogether clear. But, whatever the reason, in these circumstances, in my judgment the *in limine* rejection of the Secretary of State's evidence as even sufficient to shift the evidential burden was an error of law.

15. The feature which distinguishes this appeal from the general run of ETS appeals is that the ECO failed to serve any evidence to support the allegation of deception. Not only was there no generic evidence from Mr Millington and Ms Collings but, crucially, there no specific evidence that ETS had assessed the claimant's test as invalid. So the ECO failed to satisfy the evidential burden of showing dishonesty.
16. The Judge did not decide the issue on the above basis, but assumed in the ECO's favour that there was an evidential onus on the claimant to provide an innocent explanation. She noted that the claimant had passed an English language test in 2011 (she achieved 5.0 in speaking, equivalent to level CEFR B1, in an IELTS test taken on 19 January 2011) and she accepted the claimant's evidence that she had subsequently sat and passed a more demanding English language test. (Included in the bundle before her was an IELTS test of 4 May 2016 in which the claimant had again achieved level CEFR B1 in speaking.) She concluded that the claimant had sufficient proficiency to pass the speaking test in August 2012, and she held that it was not "logical" for her to cheat given her proficiency.
17. Ms Brocklesby-Weller relies on **MA (Nigeria) -v- Secretary of State for the Home Department (ETS - TOEIC testing) [2016] UKUT 450 (IAC)** at [57], where the Upper Tribunal ("UT") held that there may be many reasons why persons proficient in English may engage in TOEIC fraud. The UT found that the claimant had not provided an innocent explanation, and that his case was a fabrication in all material respects: see paragraph [55]. At paragraph [57], the UT acknowledged the suggestion that MA had no reason to engage in the deception which they had found proven. However, this had not deflected them in any way from reaching their main findings and conclusions: "*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.*"
18. The UT found against MA because, although he was proficient in English, he did not give a credible account of actually sitting the disputed test. It does not follow from **MA** that, when evaluating a claimant's explanation, the Tribunal is debarred from taking into account the claimant's likely ability to pass the ETS speaking test without cheating - as shown by extrinsic evidence. Indeed, this is precisely the approach which was adopted by the Presidential panel in **SM and Qadir** at [79].
19. Accordingly, the Judge gave adequate reasons on the limited evidence that was before her - which did not include (a) evidence of the speaking score achieved in the ETS test, and its CEFR equivalent, or (b) specific evidence that the speaking score had

been declared invalid by ETS - for finding that the ECO had not discharged the burden of proving deception. Thus Grounds 1 and 3 fall away.

20. Ground 2 ignores the fact that the Judge's reasoning on proportionality included the highly material consideration that there were insurmountable obstacles to family life being carried on in India, and also that the public interest in immigration control had been promoted by the claimant voluntarily returning to India in order to regularise her status.
21. I consider that the Judge gave adequate reasons for holding that the refusal decision was disproportionate, and that Ground 2 is no more than an expression of disagreement with a conclusion that was reasonably open to her on the evidence.

### **Notice of Decision**

The decision of the First-tier Tribunal allowing this appeal on human rights grounds did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

### **Anonymity**

I make no anonymity direction.

Signed

Date 1 March 2018

Judge Monson  
Deputy Upper Tribunal Judge