



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/14936/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 12 December 2017

Decision & Reasons Promulgated  
On 12 January 2018

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SYED NURUL ISLAM  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Ms A Fijiwala, Presenting Officer

For the Respondent: Mr I Khan of Counsel

**DECISION AND REASONS**

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of Bangladesh born on 24 December 1989, as the appellant herein. He arrived in this country in 2009 on a Tier 4 Student visa. He made an application on 19 February 2016 for leave to remain on the basis of his family and private life. That application was refused on 23 May 2016 as it was said that he had failed to meet the requirements of Appendix FM of the Immigration Rules because he had obtained an English language certificate following a test on 20 March 2012 by fraud. The test certificate had been cancelled by Educational Testing Service (ETS).

2. The appellant appealed against the decision and his appeal was heard by a First-tier Judge on 9 March 2017.
3. At that hearing the appellant and his wife gave evidence. The appellant did not use an interpreter.
4. While it was accepted by the Secretary of State that the appellant met the other eligibility requirements as a partner under Appendix FM the application had been refused on suitability grounds and there were no exceptional circumstances to grant the appellant leave to remain outside the Immigration Rules.
5. The judge acknowledged that the appellant's rights of appeal were restricted and she could not consider as a freestanding ground whether the appellant met the provisions of the Rules. She could only consider whether the Secretary of State's decision breached the appellant's human rights. The evidence before the First-tier Judge was summarised as follows:
  - "6. The Respondent seeks to rely on the witness statements of Rebecca Collings, Peter Millington and Mary Morgan, in addition to a spreadsheet of invalid test results. The Home Office report into West Link College confirms that between 18<sup>th</sup> October 2011 and 18<sup>th</sup> April 2012 West Link College undertook 915 English language tests of which Educational Testing Services (ETS) identified that 72% were in valid. ETS used voice recognition software to identify that the person taking the test had taken multiple tests on behalf of numerous candidates.
  7. Mary Morgan in her witness statement dated 27<sup>th</sup> February 2017 confirmed that she was a senior caseworker and that her statement was to assist the Tribunal to understand the process by which the Appellant was identified as a person who fraudulently obtained an English language test certificate provided by ETS. She confirms that the test result had been cancelled by ETS on the basis of its own analysis and that the Home Office were notified by way of an entry on a spreadsheet. She highlights those paragraphs of the witness statements of Rebecca Collings and Peter Millington that deal with the process of identifying individual fraudulent results.
  8. I have also been provided with a witness statement from Professor Peter French dated 20<sup>th</sup> April 2016 where he recognises that voice recognition software can lead to errors in reporting invalid tests. He was unable to assess the likely number of errors but recognised that the pilot tests themselves identified an error rate of approximately 2%. He estimated that the number of false positives would be very substantially less than 1% because of the quality of the listeners and the speech available to them for analysis".
6. The appellant referred to evidence of his English language ability – he had obtained a certificate from the Chartered Institute of Management Accountants in 2013 and had taken an English language test in March 2014 obtaining an overall band score of 6.5. He had also completed a Master of Arts qualification from Anglia Ruskin University in July 2014. The judge also had the benefit of a document prepared by Professor

Peter Sommer in which he had raised concerns about the processes that led to the conclusion that there had been fraud.

7. The determination concludes as follows:

- “15. The experts cannot agree upon the accuracy of the voice recognition process and the probability of false positive reports. Professor French indicates that the risk of false results is very slim. Dr Harrison gave evidence to the Upper Tribunal, but not at this appeal hearing, and Prof Sommer expressed grave concerns at the procedures for identifying dishonesty. I have to conclude that there is a risk of false fraud reporting although I am unable to determine the scale of likely errors. I take notice however that criticisms have been made of the procedures that ETS applied.
16. The Appellant was cross-examined during the appeal hearing. He was specifically asked about what action he had taken upon becoming aware that the Respondent alleged fraud. He said he had not taken any action to discuss the results with ETS. The Appellant had only become aware of the allegation of fraud in 2016 when his immigration application was refused. At that time the Respondent did not seek to interview the Appellant. Whilst the Appellant was no doubt shocked to find that his test results had been cancelled, I am unable to find an adverse credibility finding because he did not contact ETS directly.
17. At the time the Appellant took his Master’s degree, CIMA certificate and subsequent English language test, he was not aware that his 2012 test would be declared invalid. On that basis, I am unable to conclude that those assessments were undertaken to bolster his claim that he had proficiency in the English language. At that stage, his test was still valid.
18. The Appellant allowed himself to be cross-examined about the circumstances of the English language test, notwithstanding that the test was taken almost 5 years ago. He was able to recall the components of the test and gave approximate timescales for how long they took to complete. His evidence was not challenged on this point.
19. Considering all the evidence in the round, I am not satisfied on the balance, that the Appellant procured his English language certificate by fraud. I have noted the risk of error in the procedures and the Appellant has given credible evidence about the test that he took and additional evidence about his proficiency in English. Taking those issues together, I cannot be satisfied that it is more probable than not that the Appellant obtained his English language certificate by deception. Accordingly, he did not fall foul of the suitability requirements and therefore was eligible for leave to remain under the partner route of Appendix FM. The Appellant’s appeal could not succeed on that point alone because his grounds of appeal are restricted by the Immigration Act 2014. However, noting that I have decided that the decision of the Respondent was not in accordance with the Immigration Rules, that factor will weigh heavily on the balance when I consider the proportionality of the Respondent’s decision.

20. The Respondent has not disputed that the Appellant was married or that he had a young child. His wife was a British citizen and all her family live in the UK. The decision of the Respondent impacts upon the Appellant's ability to enjoy his family life with his partner and child, and therefore engages article 8 of the European Convention on Human Rights. Such rights are not absolute, they may be interfered with by the authorities where necessary and proportional. I have to consider whether the decision strikes a fair balance between the Appellant's rights and the public interest.
  21. The child is young and dependant on his parents. It is in the child's best interests to have a beneficial relationship with both parents.
  22. I remind myself that it is in the public interest to maintain firm immigration control. This Appellant appears to speak English well but does not appear to be financially independent. The Appellant talks about his ability to work albeit he appears to be dependent on his wife. He met his wife in 2013 and married her at a time when he believed that his immigration status was lawful. He became aware of the refusal decision in May 2016.
  23. Having concluded that the Respondent was unable to satisfy me that the Appellant procured his English language certificate by fraud, and therefore unfairly refused his application under Appendix FM, I am bound to also conclude that the decision of the Respondent is not proportional in all the circumstances. It does not strike a fair balance because the Appellant did meet the Immigration Rules. The competing public interest to remove him is not strong. On that basis, I allow the Appellant's appeal under article 8 of the European Convention on Human Rights".
8. The Secretary of State applied for permission to appeal referring to **SM and Qadir (ETS - evidence - burden of proof) [2016] UKUT 229**. It was submitted that sufficient evidence that the appellant had employed deception had been provided. It was clear in the light of **Secretary of State v Shehzad [2016] EWCA Civ 615** that the evidence would discharge the evidential burden on the Secretary of State and it was then incumbent on the appellant to provide evidence in response raising an innocent explanation.
  9. It was argued that the First-tier Judge had misinterpreted the evidence. Reference was made to the evidential burden of proof. If an innocent explanation had been raised the burden would shift back to the Secretary of State in order to address the legal burden. It was submitted that the judge had failed to give adequate reasoning why the Secretary of State had not met the legal burden and had similarly erred on the issue of innocent explanation. The judge had erred in failing to give adequate reasons for holding that a person who clearly spoke English would have no reason to secure a test certificate by deception.
  10. The Secretary of State had met the evidential burden and it was clear from the determination that the First-tier Judge had not appreciated that the evidential burden had been met. While not infallible, the ETS verification system was adequately robust and rigorous.

11. In relation to Article 8 the findings had been coloured by the issue of deception. More had to be shown that relocation abroad would cause difficulty or hardship and there was no finding that family life could not continue in Bangladesh. There was nothing to prevent the appellant returning to Bangladesh in order to apply for the correct entry clearance. Any separation would be temporary and proportionate in the interests of an effective immigration control.
12. Permission to appeal was granted by the First-tier Tribunal on 26 September 2017.
13. Ms Fijiwala referred to **Ahsan v Secretary of State [2017] EWCA Civ 2009** and the summary of the jurisprudence in paragraphs 26 ff. The generic evidence was sufficient to transfer the evidential burden whereupon it was necessary for the appellant to provide an innocent explanation. In paragraph 27 there was reference to **Shehzad and Chowdhury [2016] EWCA Civ 615** where the appeal in Mr Chowdhury's case had been allowed because the Tribunal had wrongly held that the Secretary of State's evidence did not establish a prima facie case. The appeal was remitted for a hearing to consider Mr Chowdhury's evidence in answer.
14. In paragraph 31 there was reference to a case where the impugned test had been taken at Elizabeth College and the Secretary of State had relied in particular on the Project Façade report and on Mr Sewell's report. It had been common ground that the evidence raised a case to answer and the Upper Tribunal Judge had found that the applicant's oral evidence which had been "riddled with implausibilities" was insufficient to shift the burden on him.
15. The First-tier Judge in the instant appeal had had similar material and the look-up tool and the Project Façade report. The judge had not made a finding that the evidential burden had been discharged and seemed to have skipped to the third stage without going through the first two steps. Matters would have been different if the judge had analysed the evidence correctly.
16. In relation to Article 8 the issue of deception was relevant in relation to Appendix FM and outside the Rules. Appendix EX.1. had not been referred to. There had been no proper balancing exercise outside the Rules.
17. I heard from Mr Khan that the appellant and his wife had had a son since the Secretary of State's decision who was some 11 months old. At the time of the decision reference had been made to the appellant's partner's brother who had a special needs child. He submitted that it had been open to the judge to decide the case as she had done. The judge had set out all the evidence relied upon by the respondent. A proportion of the test results had been valid. The judge had gone through the evidence before her properly and had considered the appellant's oral evidence and the witness statements. An innocent explanation had been provided which had shifted the burden back to the Secretary of State. She had referred to Professor Sommer's report. The Secretary of State's evidence had been unreliable.

When the determination was read as a whole, Counsel submitted that the judge had gone through the three stage test. The judge had not erred in taking into account the appellant's English language ability – one could contrast the case mentioned at paragraph 31 of Ahsan where the evidence had been riddled with implausibilities.

18. In relation to Article 8 Counsel acknowledged that Appendix EX.1. had not been mentioned but the error was not material. There was a policy that applied in relation to British children.
19. In reply Ms Fijiwala submitted that the judge had erred in failing to assess the evidence going to the evidential burden. In relation to the Article 8 issues she referred to Agyarko v Secretary of State [2017] UKSC 11. The case had to be considered under the Rules; if the Rules were met the Article 8 case would succeed. The Rules were relevant. The judge had not considered EX.1. or Section 117B(6). The issue of reasonableness had not been addressed.
20. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the decision of the First-tier Judge if it was materially flawed in law.
21. The process of deciding cases such as this is not simple. However unless the processes are adhered to with some care there is a risk of misdirection. The judge in this case does not appear to have gone through the proper three stage process as is submitted by Ms Fijiwala. Counsel argues that the judge went carefully through the material but having given the determination as sympathetic a reading as I can I do not find that the Secretary of State's central complaint is addressed.
22. The judge reached her conclusion in relation to Article 8 in the light of his assessment of the evidence in relation to the English language test. It is, moreover, accepted by Counsel that the judge did not deal with the Article 8 issues satisfactorily. There was no reference to paragraph EX.1. The Article 8 issues were reached following the judge's analysis of the fraud issue which I have found to be in error.
23. At the hearing Counsel acknowledged that an updating bundle had not been lodged since the decision of the First-tier Judge.
24. In the circumstances and having regard to the need for the degree of fact-finding required, I am satisfied that it is appropriate in this case for the appeal to be remitted for a fresh hearing before a different First-tier Judge.
25. The appeal is allowed to the extent indicated.

### Anonymity Order

26. The First-tier Judge made no anonymity order and I make none.

**TO THE RESPONDENT**  
**FEE AWARD**

The First-tier Judge made no fee award and at this stage a fee award is inappropriate.

Signed  
G Warr, Judge of the Upper Tribunal

Date 11 January 2018