



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15903/2017

THE IMMIGRATION ACTS

Heard at Field House
On 2nd October 2018

Decision & Reasons Promulgated
On 25th October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

S M J K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss S Iqbal, Counsel
For the Respondent: Mr C Avery, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Herlihy promulgated on 24th May 2018 dismissing his appeal against the refusal of an

application for further leave to remain on the basis of his human rights. The Appellant appealed against that decision and was granted permission to appeal by Designated First-tier Tribunal Judge Macdonald in the following terms:

“The grounds of application state that the Home Office bundle was only produced on the morning of the hearing which stated that the Appellant’s results were ‘questionable’. It is said the Judge ignored evidence favourable to the Appellant in this regard and the Appellant was never offered a re-test. Furthermore, the family now has British citizenship which had effectively been ignored by the Judge.

While the Judge gave reasons for her decision and referred to well-known case law the grounds disclose arguable errors in law for reasons given therein.”

2. I was not provided with a Rule 24 response from the Respondent but was given the indication that the appeal was resisted.

Error of Law

3. At the close of the hearing I reserved my decision which I shall now give. I do find that there is a material error of law in the decision, such that it should be set aside. My reasons for so finding are as follows.

Ground 1: ETS / TOEIC

4. In terms of the grounds as they are framed, the first ground of appeal challenges the judge’s assessment of the allegation that the Appellant has shown that the Appellant has cheated in his English language test and therefore his presence in the UK is not conducive to the public good (see Immigration Rule S-LTR.1.6.).
5. In respect of this appeal, in my view it is important to bear in mind, as set out in the grant of permission above, that the Secretary of State’s bundles were only served on the morning of the hearing and the Secretary of State’s evidence crucially revealed that the Appellant’s results were merely “questionable”. Therefore this factor sets this appeal quite apart from and in a different category to those appeals where an appellant has had his ETS TOEIC test categorised as “invalid” and invalidated due to the presence of a proxy test taker. In fact, it is plain that on the Secretary of State’s evidence, the recordings of the Appellant’s test will not have been established the presence of a proxy test taker and thus the test will fall within the category of a questionable result (for one or another reason, which I shall turn to momentarily).
6. In my view the judge has fallen into error in failing to appreciate the nuanced nature of a “questionable” test result as opposed to an “invalid” one.
7. Looking at the Respondent’s bundle, at pages 27 and 28 of that bundle before the First-tier Tribunal, in paragraph 47 of the witness statement of Peter Millington states therein as follows:

“Where a match has not been identified and verified, an individual’s test result may still be invalidated on the basis of test administration irregularity including the fact that their test was taken at a UK testing centre where numerous other results have been invalidated on the basis of a ‘match’. In those cases the individual would usually be invited to take a free re-test. These cases are clearly distinguished by ETS in its spreadsheets provided to the Home Office from tests where there is substantial evidence of invalidity.”

8. In light of that evidence from Mr Millington, further mention was made of the distinction between an invalid and questionable test at paragraph 29 of Miss Collings witness statement [RB/35] which states as follows:

“ETS explained, at the time, that those categorised as questionable (as opposed to cancelled/invalid) were inconclusive in terms of being certain of impersonation/proxy test-taking. Following further communication with ETS they confirmed the definition of ‘questionable’ and this is set out in Peter Millington’s witness statement; it is where an individual’s test result was still cancelled on the basis of test administration irregularity including the fact that their test was taken at a UK testing centre where numerous other results have been invalidated on the basis of a ‘match’. ETS had analysed over 10,000 test scores at that point, of which the majority were cancelled as invalid, the remainder were cancelled as questionable.”

9. There was furthermore evidence before the First-tier Tribunal in the form of a Project Façade report concerning Synergy Business College London which stated at paragraph 5 [RB/56] as follows:

“Invalid and questionable TOEIC results are defined as follows:

- Invalid - where evidence exists of proxy test taking and/or impersonation
- Questionable - test takers who should re-test due to administrative irregularities”.

10. Thus, in light of the evidence provided by the Respondent before the First-tier Tribunal it is plain from the First-tier Tribunal’s decision that the basis of the result being questionable may not have been appreciated by the First-tier Tribunal Judge. In her analysis beginning at paragraph 19 of the decision, the judge correctly sets out the evidence before her and then turns to the authority of *SM & Qadir v Secretary of State for the Home Department* [2016] UKUT 229 (IAC), however she notes at paragraph 22 that “questionable” means that the assessment of scores must be considered “doubtful” (the judge’s words). That is an incorrect appraisal of how one should approach those with a “questionable” test result following ETS’ investigations.

11. I remind myself of the assessment by Lord Justice Beatson of the distinction between “invalid” and “questionable” test scores as summarised at [25] and [30] of *Secretary of*

State for the Home Department v Shehzad & Anor [2016] EWCA Civ 615 which state *inter alia* as follows:

“25. ...In "questionable" cases it was accepted that there may not have been deception. In "invalid" cases, this was not accepted. That was because the voice on the audio recording of the test under consideration...matched the voice of someone who had taken another test using a different name”.

“30. ...in circumstances where the generic evidence is not accompanied by evidence showing that the individual under consideration's test was categorised as "invalid", I consider that the Secretary of State faces a difficulty in respect of the evidential burden at the initial stage”.

12. Thus, it is plain from the judge’s decision that she did not appreciate the distinction between an “invalid” and a “questionable” test result, and the implications that distinction will have for the Secretary of State and the “difficulty” she would face in discharging even the initial evidential burden of proof. Thus, this error alone is a material one which warrants the decision be set aside. However, there is more argument that I feel requires analysis.
13. Returning to the judge’s assessment of the Secretary of State’s evidence, she notes at paragraph 23 that test takers should be “re-tested due to administrative irregularities” however that does not show an assessment of why that must follow nor is there an assessment of why it did not occur and the implications this had upon the Appellant.
14. Consequently, in my view, the judge has failed to place any weight upon the fact that the Respondent failed in her duty to permit the Appellant to re-sit his test in accordance with these materials. In my view it is unclear why the Secretary of State did not invite the Appellant to re-sit his TOEIC test given this is the approach that she has previously stated she would take, but instead invited him to attend an interview. There is no reason given for this variance in approach to a “questionable” test. On the one hand, where there is no evidence of a test taker having used a proxy test taker, permitting a test taker to re-sit his test seems fair and reasonable and would have the aim of testing the Appellant’s English ability, albeit belatedly and whenever the re-sit would be invited and called for. Whereas, an interview could only be for the purposes of assessing whether the Appellant has cheated in his test, as is plain from the content of the interview which the Appellant underwent and which can be seen at pages 29 to 31 of the Appellant’s bundle. Mr Avery in fact accepted this was the purpose of the interview.
15. As I say, it is unclear to me why the Appellant was not invited to re-sit his English language test given that there is no evidence of his having used a proxy test taker, but in any event it appears that the entirety of the Secretary of State’s case is based on the fact of the “questionable” outcome as stated by ETS and the Appellant’s answers given in interview, which he states (as is his case), were given as comprehensively as possible and according to his memory of events that occurred some five years earlier.

Thus, in my view the judge has erred in failing to give weight to the Secretary of State's position in failing to invite the Appellant to re-sit his test and the implications that that may have, given that there were *no* reasons given to distinguish him from other TOEIC test takers whose test results had been categorised as "questionable".

16. In the light of my analysis of the jurisprudence and evidence concerning ETS' designation of "invalid" test outcomes, as opposed to "questionable" outcomes, and in the light of the judge's failure to query and place weight upon the lack of reasons why the Appellant was not given the opportunity to re-sit his test, at paragraph 29 of the decision, in my view it is perverse for the First-tier Tribunal to find that the Respondent's evidence of a questionable test outcome (confirmed via the look up tool, the statements from various officials such as Miss Collings and Mr Millington and the contents of the supplementary bundle, the Project Façade report) alongside the answers given in interview and the evidence of the test being taken on two separate dates, was sufficient to discharge the initial evidentiary burden of proof in establishing deception in line with the first hurl of the 'boomerang of proof' as mentioned in *SM & Qadir* (citation *supra*). Against the evidence that I have set out carefully above, the Secretary of State's case is that migrants whose test scores have been designated as "questionable" have not been said to have used proxy test takers but have merely sat their tests at centres where others may have acted fraudulently. That is far removed from demonstrating deception on the part of this Appellant particularly where the voice algorithm from his test does not match that of any others that would indicate the use of a proxy which is why his test result was not categorised as "invalid".
17. Consequently, based on the evidence that was provided on the very morning of the hearing before the First-tier Tribunal, I find that there are material errors of law in the assessment of whether the initial evidentiary burden of proof was established by the Secretary of State on the balance of probabilities.
18. Equally, although it is not complained of by the Appellant's counsel, I do note that as that bundle was provided on the morning of the hearing before the First-tier Tribunal, consideration should have been given to the Appellant's ability to deal with the issues and the evidence raised by the Respondent given that the Respondent's bundle was not served in compliance with the First-tier Tribunal's directions.

Ground 2: Human Rights

19. Turning to Ground 2, I deal with this matter more succinctly in that it raises a classic error of law. The complaint is that the First-tier Tribunal has failed to take the previous determination of the First-tier Tribunal (promulgated in January 2016) as its starting point pursuant to the authority of *Devaseelan* [2002] UKIAT 00702*. The essence of this complaint is that at paragraphs 39 to 50, the judge in her assessment of Article 8 and the proportionality of the Appellant's removal, has failed to factor into her decision the previous finding of the First-tier Tribunal as her starting point, namely that the eldest child was granted leave by the Secretary of State on the basis

that the First-tier Tribunal had found that it would be “unreasonable” to expect that child to leave the United Kingdom. This matter might have been immaterial if the judge had taken the Appellant’s position as even higher and stronger, given that the Appellant’s wife and his three children are now all British citizens. As such, notwithstanding the previous finding that it would be unreasonable for the oldest child to leave the United Kingdom since January 2016, the judge should have also considered the Appendix FM 1.0b guidance published on 22nd February 2018 in respect of British children at pages 76 and 77 where the child is a British citizen. This guidance was published and in force at the time of the hearing before the First-tier Tribunal and states as follows:

Where the child is a British citizen

Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave the UK because, in practice, the child will not, or is not likely to, continue to live in the UK with another parent or primary carer, EX.1.(a) is likely to apply.

In particular circumstances, it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal, where the British citizen child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has or is being granted leave to remain. The circumstances envisaged include those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules.

If the decision maker is minded to refuse an application in circumstances in which the applicant would then be separated from a child in the UK, this decision should normally be discussed with a senior caseworker.

In every case, all the circumstances must be carefully considered in the round, with the best interests of the child constituting a primary (but not the only or paramount) consideration.

20. Thus, the long and short of that guidance is that the Secretary of State’s public position regarding British citizen children is that it is not reasonable to expect them to leave with a parent facing removal and if they would have to leave the UK with that parent, then EX.1.(a) will apply in that the child’s citizenship and potential removal with the parent would act as an insurmountable obstacle to the parent’s removal under the immigration rules (as opposed to outside the rules).
21. In light of that guidance, it is important to turn to the decision of the Vice-President of the Upper Tribunal in *SF and others (Guidance, post-2014 Act) Albania* [2017] UKUT

120(IAC) at paragraphs 7 to 12, where the guidance in its previous but largely similar form was considered. In that decision, the Upper Tribunal concluded if the Secretary of State were to make a decision in a person's favour on the basis of his guidance, the Tribunal would also need to make a decision on matters such as reasonableness consistent with decisions being made in favour of individuals by the Secretary of State where he does apply his guidance. On that basis, the Upper Tribunal found that the parent of a British citizen child should be granted a period of leave in order to enable the British citizen child to remain in the UK with them.

22. Mr Avery argued that the Appellant had been refused on the basis of S-LTR.1.6. and that his cheating on his ETS TOEIC test precluded him from a grant of leave. However, in my view, the error remains a material one in respect of the human rights assessment, as notwithstanding Mr Avery's complaint regarding the Appellant's alleged actions in using deception in his ETS TOEIC test, the unreasonableness of a British child's removal – as highlighted in the Appendix FM 1.0b guidance of 22nd February 2018 and as referred to in its previous form in *SF and others* – cannot automatically be made reasonable by virtue of an ETS TOEIC *allegation* alone as the guidance specifically asks for there to be “significant or persistent criminal offences falling below the thresholds for deportation” or that the migrant “has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules”.
23. By comparison, in the lesser context of whether it would be reasonable for a third country national child whom had resided in the United Kingdom for a continuous period of 7 years, to leave the United Kingdom along with its family, the recent decision of the Upper Tribunal in the Presidential Panel's decision in *MT and ET (child's best interests; ex tempore pilot) Nigeria* [2018] UKUT 88 (IAC) at [33] to [34] identifies that there would need to be “powerful reasons” for that removal to be reasonable. Albeit this finding is made in respect of the guidance concerning a child who is not British, even in this lesser scenario, when searching for “powerful reasons” the Panel were confronted with an Appellant who had abused the immigration laws of the UK and had at some stage received a community order for using a false document to obtain employment. However, even on those facts, and when faced with a non-citizen child, the panel found that that evidence was insufficient to form a “powerful reason” for the child and its family's removal. That is not dispositive of but may be relevant in the assessment of whether a British child's removal or that of their parent is reasonable where, implicitly, more than a “powerful reason” must surely be required.
24. As such, in light of the errors found in respect of the assessment of the ETS TOEIC assessment, the second ground identifies a material error, and even if the first ground were not made out, the decision fails to grapple with whether the removal of the British children, or separation from their father in the alternative, is reasonable in light of the Appendix FM 1.0b guidance which sets a high standard for demonstrating that reasonableness in the light of the children's citizenship.

25. As such, upon remittal, it will be necessary for the First-tier Tribunal to assess whether the ETS TOEIC allegation is proven, and if it is, whether it makes the removal of the British children and the Appellant reasonable, or whether it makes the separation of the Appellant from his wife and children in light of Appendix FM 1.0b reasonable (if that separation from the British wife and children is feasible in the first place).
26. In light of the above findings I set aside the decision of the First-tier Tribunal in its entirety.

Notice of Decision

27. The appeal to the Upper Tribunal is allowed.
28. The matter is to be remitted to the First-tier Tribunal to be heard by a differently constituted bench.

Directions

- (1) The appeal is to be remitted to Taylor House for further hearing.
- (2) No interpreter is required.
- (3) At present the Appellant and his spouse are expected to give evidence.
- (4) The appeal is estimated to last 2-3 hours.
- (5) No special directions are given.
- (6) Given that this appeal concerns children and that the decision will be published online, I make an anonymity direction in the following terms.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 20 October 2018

Deputy Upper Tribunal Judge Saini