



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal nos: HU/20835/2016
HU/20839/2016
HU/20843/2016

THE IMMIGRATION ACTS

At Field House
On 12 July 2018

Decision & Reason Promulgated
On 17 July 2018

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Mohd. MONIRUZZAMAN & 2 others

appellants

and

Secretary of State for the Home Department

respondent

Representation:

For the appellants: *Shashi Jaisri* (counsel instructed by Raffles Haig)

For the respondent: Mr C Howells

DECISION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Isaac Maka), sitting at Hatton Cross on 11 January, to allow an ETS/article 8 appeal by a citizen of Bangladesh, born 1981, and his dependants. The (main) appellant came as a student in 2009, and in 2012, when he was joined by his wife, got leave to remain till 2015: they had a son born here in 2013. The appellant's leave was 'curtailed' in 2014, and in 2015 he applied for leave to remain on the basis of his private and family life.

*NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.*

2. On 15 August 2016 that application was refused, partly on suitability grounds, as it was said the appellant had got his student leave to remain in 2012 by having an ETS test taken for him by a proxy. He denied that, but the judge said this at paragraph 45:

I accept the respondent has discharged the legal burden upon her by prima facie production of evidence relating to an ETS test sat by this appellant. I do not accept however, the respondent has discharged the evidential burden upon her to show this appellant's test score was questionable or that this appellant did not actually sit the test himself (which was not specifically suggested in the refusal letter).

3. Even if that conclusion was not spelt out at p 3 of the refusal letter, the implications of what it did say there were quite clear enough. The judge's understanding of the legal position on the burden of proof in such cases was unfortunately rather less clear, though he referred (without the full citation) to *SM and Qadir* (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC). That decision was made, for pragmatic reasons, on the evidence then available to the Home Office, without reaching a final view on the legal position. However, the judicial head-note illustrates quite clearly what is meant by the evidential and legal burdens on the respondent in such a case:

- (i) *The Secretary of State's generic evidence, combined with her evidence particular to these two appellants, sufficed to discharge the evidential burden of proving that their TOEIC certificates had been procured by dishonesty.*
- (ii) *However, given the multiple frailties from which this generic evidence was considered to suffer and, in the light of the evidence adduced by the appellants, the Secretary of State failed to discharge the legal burden of proving dishonesty on their part.*

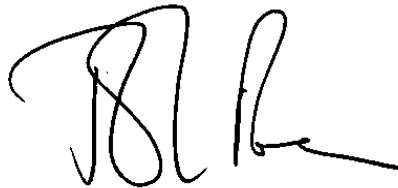
4. In short, what judges have to decide on an appeal of this kind is first, whether the respondent's evidence on its own satisfies the *evidential* burden of showing a *prima facie* case of deception against the appellant. If it does not, they need go no further; but, if it does, then they need to consider all the evidence, including any given by the appellant, in deciding whether it satisfies the *legal* burden on the respondent of showing deception was more likely than not to have been used.
5. The judge in this case may have got the two concepts the wrong way round; but the real reason why Mr Jaisri realistically had to concede that his decision could not be upheld was his failure to deal with all the evidence before him. The respondent's evidence now included very significant additions to what had been before the Upper Tribunal in *SM and Qadir*, in particular a report by Professor Peter French¹.
6. Professor French's evidence strengthens the respondent's position in cases of this kind very considerably. If not conceded, it will still be for individual judges to decide whether the evidential burden is satisfied; but it is hard to imagine circumstances where they would find that it was not. If it is, then in a statutory appeal they need to go on, and decide on all the evidence whether the legal burden has also been satisfied.

¹ Anyone interested can refer to my explanation in *Nawaz* [2017] UKUT 288 (IAC), and the unreported decision attached to the .pdf version.

7. That is what the judge will need to do at the fresh hearing which I am directing: they will then need to go on and consider the appellant's article 8 case. This judge's decision on that was also appealed; but I need say no more about that, as fresh consideration will be required in the light of the judge's conclusions on the ETS part of the case.

Respondent's appeal allowed: first-tier decision set aside

Fresh hearing of appellant's ETS and article 8 appeals in First-tier Tribunal at Hatton Cross, not before Judge Maka

A handwritten signature in black ink, appearing to be 'JBL' followed by a horizontal line.

(a judge of the Upper Tribunal)
12 July 2018