



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/00060/2018  
IA/00061/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 24 October 2018**

**Decision & Reasons Promulgated  
On 21 November 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MONIRUL ISLAM  
SRITI AKTAR  
(ANONYMITY DIRECTIONS NOT MADE)**

Respondents

**Representation:**

For the Appellant: Ms J Isherwood, Home Office Presenting Officer

For the Respondents: Mr P Sainiof Counsel, instructed by Shah Jalal Solicitors

**DECISION AND REASONS**

1. These are linked appeals against the decisions of First-tier Tribunal Judge Freer promulgated on 11 June 2018.
2. Although before me Mr Islam and Ms Aktar are the respondents and the Secretary of State for the Home Department is the appellant, for the sake of consistency with the proceedings before the First-tier Tribunal I shall

hereafter refer to Mr Islam and Ms Aktar as the Appellants and the Secretary of State as the Respondent.

3. The Appellants are citizens of Bangladesh, husband and wife, born respectively on 23 December 1984 and 10 September 1986. They entered the United Kingdom pursuant to entry clearance as a Tier 4 migrant and the dependant of a Tier 4 migrant on 11 February 2011 with leave until 31 December 2012. On 30 December 2012 an application was made for further leave to remain in the same capacity. The application was granted on 27 February 2013 with leave being extended until 15 November 2014. On 16 June 2014 a curtailment decision was made to take effect from 18 August 2014.
4. On 18 August 2014 further applications for leave to remain were made on the basis of the First Appellant's study - with his wife, the Second Appellant, again being included as his dependant. The First Appellant submitted a Confirmation of Acceptance for Studies ('CAS') from Alpha Omega College (Annex E of the Respondent's bundle before the First-tier Tribunal).
5. The Appellants' applications were not decided until February 2018. The applications were refused for reasons set out in a combined Notice of Immigration Decision and 'reasons for refusal' letter dated 28 February 2018. A decision was also made to issue removal directions pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.
6. The primary reason for refusing the applications was that it was considered that the First Appellant had relied on a TOEIC certificate from ETS dated 17 July 2012 following tests at the London College of Media and Technology in support of his application for further leave to remain made in December 2012. In short, analysis on the part of the Respondent had led to a conclusion that the First Appellant had used a proxy tester for the speaking test element.
7. It should also be noted that by the time of the decisions the Alpha Omega College was no longer on the register of Tier 4 approved sponsors, and accordingly the CAS was not valid. In the ordinary course of events the Appellants might have been allowed a 60 day period of grace to obtain a new CAS, but in circumstances where the Respondent considered that the applications failed for other reasons - in relation to the alleged deception - the Appellants were not granted that period of grace.
8. The Appellants appealed to the IAC.

9. Because of the timing of the Appellants' applications their appeals fell for consideration under the regime prior to the amendments to the Nationality, Immigration and Asylum Act 2002 introduced by the Immigration Act 2014: accordingly the Appellants were entitled to appeal on the ground, *inter alia*, that the decisions were not in accordance with the Immigration Rules, as well as on human rights grounds.
10. Indeed, the First-tier Tribunal Judge allowed the appeals under the Immigration Rules, but dismissed the appeals on human rights grounds.
11. The Secretary of State for the Home Department now challenges the basis for allowing the appeals under the Rules. The focus of the challenge, developed before me, is on the standard of proof applied by the First-tier Tribunal Judge, and the Judge's consideration and application of the guidance set out in **SM and Qadir v Secretary of State for the Home Department [2016] UKUT 229 (IAC)**.
12. In respect of 'standard of proof', the following passages in the decision of the First-tier Tribunal are germane.
  - (i) Under the heading 'The Procedure': *"The burden of proof upon the respondent is to a higher standard, the criminal standard of proof not the civil standard."* (paragraph 11).
  - (ii) *"The burden of proof is on the appellant and the standard of proof required is a reasonable likelihood or a serious possibility"* (paragraph 16).
13. Both of those self-directions are wrong. The burden of proof on the Secretary of State with regard to any allegation of fraud is to the civil standard of a balance of probabilities, not the higher criminal standard. The burden of proof on the Appellants in respect of the Immigration Rules is also to the civil standard of proof of a balance of probabilities, not the 'reasonable likelihood' standard that applies in protection cases.
14. The plain errors of misdirection are also manifest within the body of the decision. At paragraph 45 the Judge refers to a report amongst the 'generic evidence' relied upon by the Respondent wherein it is concluded *"that the TOEIC system attributing a genuine test taker's recording to a different candidate would be very unlikely"*, before making the following observation

*"I am entitled to rely upon the legal presumption of innocence of the party until proved guilty. While I find the phrase 'very unlikely' is a standard higher than the civil standard I find that it is not the criminal standard since it does not extinguish all reasonable doubt."* (paragraph 46).

15. The Judge continues at paragraph 47

*"In the absence of a criminal conviction against this Appellant, the respondent is in some difficulty in meeting his burden of proof with its high standard against the Appellant, so the burden almost inevitably shifts to the Appellant to rebut the accusation to the civil standard. I find in this case the Respondent has failed to satisfy me to the high standard."*

16. This latter passage not only indicates that the Judge was seeking to impose the criminal standard of proof upon the Respondent, but is also indicative of confusion in respect of the shifting evidential burden. If the Judge thought the Respondent failed in the first instance that would be determinative and the burden would not then shift to the Appellants.
17. Mr Saini on behalf of the Appellants did not dispute the difficult nature of the passages set out above, and did not seek to defend the Judge's self-directions; rather he sought to argue that such errors could be disregarded as immaterial.
18. In respect of **SM and Qadir**, notwithstanding the confusing application of principle at paragraph 47 (see above), the Judge correctly identified the three stages, paraphrasing them in these terms:

*"The three stages mentioned are in my own words: (1) where the respondent alleges deception, the evidential burden is on the respondent Secretary of State, (2) where sufficient evidence is raised on a fact in issue the applicant has the burden of raising an innocent explanation, and then (3) the burden returns to the respondent to show that the apparently innocent explanation is to be rejected."* (paragraph 19).

19. However what the Judge appears to have failed to do is to identify that the guidance also indicates that the generic evidence relied upon by the Secretary of State is enough to satisfy the evidential burden at the first stage. Even if that were not the case, the Judge appears ultimately to overlook the fact that the parties agreed that the voice recording of the English language test was not that of the First Appellant's voice. Whilst the

Judge records this agreement at paragraph 41, he nowhere subsequently acknowledges that this meant that the Respondent had discharged the evidential burden, but becomes 'distracted' by seeking to consider and apply the criminal standard of proof - to what was in any event a conceded fact.

20. For the avoidance of any doubt, before me Mr Saini did not seek to urge any different approach to the generic evidence than that identified in **SM and Qadir**, and accepted that the concession that the voice recording was not that of the First Appellant's voice was sufficient to discharge the evidential burden on the Secretary of State.
21. However, the First-tier Tribunal Judge appears in substance to have disregarded both the effect of **SM and Qadir** and the concession on the facts of the Appellants' cases in concluding that *"the Appellant...has succeeded in each of the three stages of transfer of proof burdens."* (paragraph 61).
22. On the basis of the foregoing it is plain that the Judge was in serious and fundamental error in his conclusion in respect of the first of the three stages. Mr Saini did not seek to support this aspect of the Judge's decision or otherwise defend it; he sought to resist the Respondent's challenge on the basis of materiality, submitting that the Judge had assessed and evaluated the second stage adequately.
23. I do not accept that such a conclusion can safely be drawn in circumstances where the Judge has so clearly fallen into error on fundamental aspects of his analysis. Indeed the Judge appears to have elided the first two stages rather than looking at them discretely. I have already noted the seeming confusion in one passage from paragraph 47; this follows on from the Judge seemingly evaluating the First Appellant's 'innocent explanation' by detailed consideration of the generic evidence (paragraphs 42-46).
24. In the circumstances in my judgement the errors of the First-tier Tribunal Judge are so fundamental as to render the decision unsafe such that it requires to be set aside.
25. Mr Saini invited consideration of whether any findings of the First-tier Tribunal could be preserved for the purposes of remaking the decisions in the appeals. However, given the context of the Judge's erroneous self-directions on standard of proof and confused approach to discrete issues, I rule that that is inappropriate.

26. Moreover -notwithstanding that it was not the express subject of challenge - it is to be observed that much of the Judge's acceptance of credibility was seemingly based on matters of demeanour. The Judge makes references to the First Appellant being "*level headed*", "*sober and professional*", appearing "*genuinely bewildered*", and also that he had "*consistently appeared to be a witness of truth*". Whilst perhaps not always wholly irrelevant, a considerable degree of caution needs to be exercised in being influenced by demeanour in evaluating credibility. It is not clear that such caution was exercised here. All issues in the appeal need to be revisited afresh.
  
27. In this context I note that there has been no Rule 24 response or cross-appeal challenging the First-tier Tribunal Judge's assessment of human rights. Mr Saini suggested that perhaps there was no more to be said on the Appellants' behalves in this regard - and indeed nothing further has been filed before the Upper Tribunal in respect of their circumstances in the United Kingdom. It may be that in such circumstances no further arguments will be pursued in this regard. However, bearing mind that the appeals are to be reconsidered, and to ensure that there is not an unnecessary multiplicity of applications and appeals it seems to me prudent to permit the Appellants the opportunity of raising any up-to-date matters in respect of Article 8.
  
28. Finally I observe that if the Appellants do succeed on the issue in relation to ETS testing, it does not follow that they satisfy the requirement of the Immigration Rules because the Respondent's decisions were also based on the absence of a current CAS. The issue would then become the appropriateness of extending to the Appellants a period of grace in which the First Appellant could seek to obtain a new CAS.

### **Notice of Decisions**

29. The decision of the First-tier Tribunal contained material errors of law and are set aside.
  
30. The decisions in the appeals are to be remade before the First-tier Tribunal by any judge other than First-tier Tribunal Judge Freer with all issues at large.
  
31. No anonymity directions are sought or made.

Signed:

Date: **19 November 2018**

**Deputy Upper Tribunal Judge I A Lewis**