



**Upper Tribunal  
(Immigration and Asylum Chamber)  
IA/00923/2016**

**Appeal Numbers:**

**IA/00924/2016**

**IA/00925/2016**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 15 February 2018**

**Decision & Reasons  
Promulgated  
On 27 April 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MURRAY**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MS ZHANG HAO  
MR YI LING HAO  
ZHIBO LI**

**(ANONYMITY DIRECTION NOT MADE)**

Respondents

**Representation:**

For the Appellant: Mr Tufan, Home Office Presenting Officer

For the Respondent: Mr Mak, Solicitor, Lisa's Law Solicitors, London

**DECISION AND REASONS**

1. The appellant in these proceedings is the Secretary of State however for convenience I shall now refer to the parties as they were before the First-Tier Tribunal.
2. The appellants are citizens of China born on 22 September 1975, 2 October 1978 and 13 April 2010 respectively. The first appellant is the

wife of the second appellant and the third appellant is their son. They are appealing against the decision of the respondent dated 1 February 2016 refusing the first appellant leave to remain in the UK under the Tier 1 points based system route. The second and third appellants are her dependents. The refusal was also based on human rights issues.

3. Their appeals were heard by Judge of the First-Tier Tribunal Wright on 26 May 2017 and allowed in a decision promulgated on 19 July 2017.
4. An application for permission to appeal was lodged by the respondent and permission was granted by Judge of the First-Tier Tribunal Martin on 5 January 2018. The permission states that the first appellant's application was refused on the basis that the respondent found that she had cheated in an English language test. The Judge allowed the appeal on the basis that the respondent had not satisfied the burden of proof relating to this as she had failed to follow the guidance in ***SM & Qadir*** [2016] UKUT 00229 (IAC) now amended by the Court of Appeal in ***SM & Qadir*** [2016] EWCA Civ 1167. The permission states that arguably the Judge ought to have found the burden shifted to the appellant to proffer an innocent explanation for the respondent's finding.
5. There is no Rule 24 response.
6. As the first appellant was accused of deception in her English language test the burden was on the respondent and the standard of proof, the balance of probabilities, however it was then up to the appellant to give an innocent explanation. If the Judge accepts this the legal burden goes back to the respondent to be addressed. The first appellant's certificate has also been withdrawn so the basis of leave has been removed.

### **The Hearing**

7. The Presenting Officer submitted that he is relying on the grounds of application. He referred to the burden of proof shifting to the appellant who, when the accusation was made against her, should have given an innocent explanation and did not do so.
8. He submitted that the Judge referred to a statement by Mona Shah who is a member of the Presenting Officers' Unit but the Judge does not refer to the supplementary bundle that was before him, in which there were two statements and an expert report from Professor French relating to many reported cases where deception was used in an English language test. The Judge made no reference to any of these and the Presenting Officer submitted that this is significant and that the appellant's test results were found to be invalid.
9. I was referred to the case of ***MA*** [2016] UKUT 00450 (IAC) which refers to the Excel spreadsheet listing thousands of test certificates and he

submitted that the ETS assessment of the score recorded by the first appellant is that it is invalid.

10. He submitted that what was before the Judge should have satisfied her that this assessment was reliable but the Judge ignored this.
11. I was then referred to Professor French's report and the said case of **MA**, the case of **Nawaz** [2017] UKUT 00288 (IAC) and Professor French's conclusion therein at paragraphs 37 and 38. I was also referred to the case of **Veronica Gaogalalwe** [2017] EWHC 1709 (Admin) at paragraph 34, which deals with whether the Secretary of State can meet the legal burden of showing, on the balance of probabilities, that deception in fact took place. He submitted that the respondent has met this burden and the Judge has not taken this into account at all. I was also referred to paragraphs 44 and 45 of the said case of **Gaogalalwe** which refer to the powerful evidence provided by the Secretary of State pointing to a conclusion that the claimant's test result was obtained by fraud against the weak evidence provided by the claimant that her English language skills would have been sufficient to make cheating unnecessary. It goes on to state that the Secretary of State's argument is irresistible and that the Secretary of State has made out her case that the claimant used fraud to obtain leave to remain.
12. He referred to the said case of **Nawaz** and head-note (e). This states "Evidence obtained by use of the "look up tool" and subject to the human verification procedure is an adequate basis for the Secretary of State's deception finding in these cases in the light of **Flynn & Another** [2008] EWCA Crim 970 and the evidence of both Dr Harrison and Professor French." The Presenting Officer submitted that the Judge has ignored all of this and has not given proper reasons for believing the appellant over the respondent. He submitted that this case is of the same type as these other cases referred to herein and there must be material errors of law in the Judge's decision as she did not consider the Country Guidance caselaw and other evidence properly.
13. With regard to the third appellant being aged 7 and, according to the appellant being entitled to remain in the United Kingdom, he submitted that this does not come into play if it is found that the first appellant cheated.
14. I was referred to Section 117B (vi). The Presenting Officer submitted that when the 7 year old child is considered his parents' history also comes into his claim and he submitted that the fact that the first appellant cheated in her English exam outweighs the child's rights.
15. I was asked to find that there are material errors of law in the Judge's decision and I was asked to overturn it.

16. The appellant's representative made his submissions. I was referred to the generic evidence and the particular evidence of the test taker. I was referred in particular to paragraph 24 of the First-Tier Judge's decision. This states that the only evidence relied on by the respondent is an entry on a spreadsheet referred to in paragraph 6 of the witness statement of Mona Shah at Annex A. The Judge then goes on to refer to the limited evidence from the respondent in respect of the actual test taken by this appellant. She states that the burden of proof has not been discharged by the respondent. The representative submitted that the Judge has found that the evidential burden has been discharged by the appellant and there has been no deception by the appellant.
17. The representative submitted that on the day the test was taken, 70% of the test-takers used a proxy and 30% did not and he submitted that there is nothing to indicate that our appellant did not form part of the 30%.
18. The Presenting Officer broke in to submit that that is not accurate. 70% used a proxy and 30% were questionable. He submitted that the Judge refers to the supplementary bundle and must have seen the respondent's evidence but she does not appear to have looked at the two statements from the Civil Service employees or Professor French. The Presenting Officer submitted that had the Judge considered these she would have found that the respondent had discharged the legal burden.
19. The representative submitted that the Judge has accepted the appellant's innocent explanation and at paragraph 10 of the decision makes reference to the said case of ***SM & Qadir*** and that when the respondent states that it is not credible that the appellant was unaware of any cheating going on, this is only an opinion, nothing more.
20. He submitted that the Judge found the legal burden had not been discharged by the respondent and he submitted that because some of the evidence is not mentioned in her decision, this does not mean that the Judge did not consider it. At paragraph 24 of the decision the Judge refers to there being limited evidence from the respondent in respect of the actual test taken by the appellant and because of this limited evidence, the burden of proof has not been discharged. He submitted that there are no errors of law in the First-Tier Tribunal's Judge's decision and because there may be one or two immaterial errors, this does not mean that the whole decision is incorrect.
21. He submitted that with regard to Section 117B of the 2002 Act the Judge finds that there has been no deception and if there has been no deception then the fact that the child is 7 years old and has always been in the United Kingdom must be relevant, and it cannot be proportionate to remove the appellant and her family from the United Kingdom.
22. The representative submitted that there are no errors in the Judge's decision relating to Article 8.

23. The Presenting Officer again submitted that relating to the English test results, 70% were found to be invalid and 30% were found to be questionable. I was referred to page 4 of the supplementary bundle which breaks down the test results as 70% invalid, 30% questionable and 0% valid. He submitted that the appellant's representative has referred to the legal burden on the respondent not being discharged but I was asked to look at paragraph 24 of the decision in which there is no mention of the word 'legal'. He submitted that paragraph 24 of the decision is wrong as there was not limited evidence from the Home Office. The issue is that the Judge did not consider all the evidence provided by the respondent.
24. He submitted that if there was deception, although the child has been in the United Kingdom for seven years, the parents' immigration history has to be taken into account and if there has been deception there can only be one outcome and that is that the appeal is dismissed.

### **Decision and Reasons**

25. I have noted all the evidence that was before the First-Tier Tribunal Judge about the first appellant's deception relating to her English test. It is clear from the decision that the Judge had all of the respondent's documentation before him which included the witness statement of Rebecca Collings and the witness statement of Peter Millington. It is also clear from the decision that the Judge saw Mona Shah's statement, the ETS results and Professor Peter French's report. The conclusions in the report refer to the stringent criteria for verification by trained listeners and the wide range of speech features on which to base their decisions other than just vocal tract resonances. He estimates the number of false positives emanating from the overall process of ASR analysis followed by assessment by two trained listeners, to be very small.
26. The appellant's representative submitted that of the pupils who took the test at the same time as the appellant 70% of the tests were found to be invalid. What the representative does not appear to have taken into account is the fact that the other 30% were found to be questionable and 0% were found to be valid. This has not been considered properly by the Judge although she did have the relevant evidence before her.
27. The said case of **SM & Qadir** makes it clear that the SSHD generic evidence, combined with evidence particular to an appellant, discharges the evidential burden of proving a TOEIC certificate has been procured by dishonesty. Reference is made in that case to the two statements of Ms Collings and Mr Millington and based on what was before the Judge, on the balance of probabilities, this appellant employed deception. At paragraph 24 of the decision the Judge refers to the limited evidence from the respondent in respect of the actual test taken by the appellant and states that the only evidence relied on by the respondent is an entry on a

spreadsheet referred to in paragraph 6 of the witness statement of Mona Shah. It is clear from this that the Judge has not considered all the evidence before her or has misinterpreted it. He has not properly considered the relevant case law. This appellant's English language test has been invalidated.

28. The situation therefore is that the respondent has discharged the evidential burden of proof in respect of deception and the burden then shifts to the appellant to give an innocent explanation. There has been no innocent explanation given by the appellant. The Judge has failed to give proper reasons for preferring the appellant's evidence over that of the respondent.
29. The First-Tier Judge also refers to having had difficulty understanding the appellant and yet her English language ability score was 190 out of 200.
30. The evidential burden fell on the appellant to offer an innocent explanation and it is clear that this has not been satisfied and had the Judge properly considered the evidence produced by the Home Office relating to deception, the Judge would have reached a different conclusion. In this case the certificate has been withdrawn so the basis of the leave is removed.
31. I find that the Judge has made material errors of law relating to the first appellant using deception in her English test and when human rights are considered, because of this, although the third appellant is 7 years old and has been in the United Kingdom for over 7 years, the claim cannot succeed on a human rights basis because of this deception. When proportionality is assessed public interest must succeed. The three appellants can return to China as a family unit.

### **Notice of Decision**

There are material errors of law in the First-Tier Judge's decision and I direct that the decision of the First-Tier Tribunal is set aside.

I remake the decision. The appeals of all three appellants are dismissed.

Anonymity has not been directed.

Signed

Date

Deputy Upper Tribunal Judge Murray