



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/01540/2016  
IA/01543/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 24<sup>th</sup> August 2018

Decision & Reasons Promulgated  
On 14<sup>th</sup> September 2018

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ROBERTS**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**and**

Appellant

**MR MD ANISUR RAHMAN  
MRS PIANA BEGUM  
(ANONYMITY DIRECTION NOT MADE)**

Respondents

**Representation:**

For the Appellants: Mr S Walker, Senior Home Office Presenting Officer  
For the Respondent: Mr Hakim, Counsel

**DECISION AND REASONS**

1. The Appellant in this appeal is the Secretary of State for the Home Department. The Respondents Mr Md Rahman and Mrs Piana Begum are husband and wife. For convenience however I shall refer to the Secretary of State as “the Respondent”, and to

Md Rahman as “the first Appellant” and Piana Begum as “the second Appellant” reflecting their respective positions as they were before the First-tier Tribunal.

2. The first and second Appellants are citizens of Bangladesh born on 15<sup>th</sup> February 1988 and 4<sup>th</sup> June 1994 respectively. They are husband and wife and the appeal of the second Appellant is dependent upon that of the first Appellant.
3. The first Appellant arrived in the UK on 9<sup>th</sup> January 2010 as a Tier 3 (General) Student Migrant. His wife entered on 10<sup>th</sup> August 2014 as his dependant and her leave has always been in line with his.
4. On 20<sup>th</sup> January 2012, the first Appellant was granted leave to remain as a Minister of Religion until 15<sup>th</sup> January 2015. On 16<sup>th</sup> December 2014 both Appellants applied for further leave to remain. In a decision dated 7<sup>th</sup> March 2016, the Respondent refused the applications. The first Appellant’s application was refused under the general Grounds of Refusal on the basis of his presence not being conducive to the public good. This was on account of the fact that when he applied for leave to remain as a Minister of Religion on 16<sup>th</sup> December 2011, he submitted a TOEIC certificate from Educational Testing Service (ETS) said to have been fraudulently obtained by using a proxy test-taker on 16<sup>th</sup> November 2011 at Westlink College. Accordingly, the application made for further leave to remain and dated 16<sup>th</sup> December 2014 was refused under paragraph 322(5) of the Immigration Rule as the Respondent was satisfied that deception had been used in making the application made in December 2011. The second Appellant’s application was refused in line with that of her husband.
5. The Appellants appealed against the Respondent’s refusal and their appeal came before the First-tier Tribunal (Judge Callow). In a determination promulgated on 30<sup>th</sup> August 2017, both appeals were allowed under the Immigration Rules.
6. Permission to appeal the decision was refused initially by the FtT but was granted by UTJ Gill on a renewed application made by the Secretary of State. The grant of permission is set out below:

“It is arguable that from the reasoning of Judge of the First-tier Tribunal Callow at paras 14 – 20 that he failed to appreciate that the Upper Tribunal in **SM and Qadir** found that the respondent’s evidence was sufficient to discharge the initial burden of proof. This notwithstanding that the judge specifically quoted the headnote in **SM and Qadir** at para 13.

It is also arguable that the judge’s reasoning at paras 21 – 22 shows that he was not aware of, or did not apply, the guidance in **MA (Nigeria) [2016] UKUT 450**.

All the grounds may be argued.”

7. Thus, the matter came before me to determine whether the First-tier Tribunal’s decision contained such error of law that it required it to be set aside and remade.

### **Error of Law Hearing**

8. Before me, Mr Walker appeared for the Respondent and Mr Hakim for the Appellants. A Rule 24 response had been served on behalf of the Appellants.
9. Mr Walker relied on the written grounds which, as he said, essentially set out that the burden of proof in assessing whether the first Appellant had used dishonesty to obtain his TOEIC certificate was not properly understood and applied by the First-tier Tribunal. The Respondent's case is that the generic evidence of the Secretary of State showed that the evidential burden was met. The evidence of the spreadsheet showed that the TOEIC test taken by the first Appellant was invalid.
10. The approach taken by the judge in not properly applying the burden of proof, had led him into error in his assessment of the first Appellant's evidence. There was no consideration given to the guidance set out in **MA (Nigeria) [2016] UKUT 450**. This meant that the FtTJ failed to give adequate reasons for finding that the first Appellant had rebutted the prima facie case of deception. Together these errors rendered the decision unsustainable. It should be set aside and remade
11. Mr Hakim in response submitted that the FtTJ had dealt with all aspects of the case adequately and had found that the Appellant was an honest witness. Whilst he acknowledged that the judge had not specifically mentioned **MA (Nigeria)**, nevertheless the judge had set out the head-note to **SM and Qadir (ETS - evidence - burden of proof) UKUT 229 (IAC) [13]**. It could not be said therefore that the judge had not kept in mind the applicable standard and burden of proof. The judge had kept to the principles set out in **SM and Qadir** and the grounds amounted to no more than a disagreement with the FtT's decision. The fact finding was adequate and therefore the decision should stand.
12. At the end of submissions I reserved my decision which I now give with my reasons.

### **Consideration**

13. I am satisfied that the decision of the FtT must be set aside for legal error for the following reasons.
14. I find that on a proper reading of the decision the FtTJ has failed, as the grant of permission points out, to show an appreciation that the Respondent's evidence clearly sets out that the test taken by the first Appellant was invalid. This was sufficient to discharge the evidential burden of establishing a prima facie case of deception. I find that the FtT has not explicitly taken account of the guidance decisions made by the Upper Tribunal and Court of Appeal in cases of this nature, that the generic evidence generally meets the evidential burden. I find therefore that there is a failure to place the examination of this issue in the context of the relevant case law and thus to take the correct legal steps in determining whether the Claimant was correctly refused under the general Grounds of Refusal.

15. Whilst Mr Hakim argues that any such failure is immaterial in any event because the judge followed the principles involved, I disagree. I look in particular at [20] of the decision. After setting out the relevant evidence which pointed clearly to the first Appellant's TOEIC certificate being invalidated, the judge says the following.

"Given uncertainty in the round, one must question whether the respondent has even succeeded in putting the first appellant to the proof of rebuttal."

16. He follows this up with the following line:

"Assuming such to be the case I proceed as follows."

I find that this gives an impression of a reluctance to keep an open mind when addressing the starting point of whether the objective evidence showed that the initial standard and burden of proof was met by the Respondent. This in turn has led to an erroneous approach to the analysis of the evidence put forward by the first Appellant in providing an innocent explanation.

17. I draw strength in coming to the above finding by an examination of [23] where the judge, after making findings on the first Appellant's evidence, says the following:

"In conclusion I find, *even if it be assumed* (my emphasis) that a prima facie case of deception has been established, the totality of the evidence, including the first appellant's evidence in rebuttal is such that the respondent has failed to discharge the burden that rests with her."

18. I find therefore that the whole approach undertaken by the judge to the evidence before him is tainted by a failure to appreciate the Respondent's evidence and analyse it as the starting point in his consideration.

19. This is reinforced by a lack of reference to **MA (Nigeria)**. I find that the FtT's assessment of the evidence and findings relating to the TOEIC taken on 16<sup>th</sup> November 2011 is sparse to say the least. At [21] the judge makes numerous findings concerning other tests taken by the first Appellant and then at [22] says, "The first appellant had no reason to jeopardise his career and future by cheating in the TOEIC 2011 tests on 16 November 2011; his account is plausible." That appears to disregard the guidance given in **MA (Nigeria)**.

20. I find therefore for these reasons that the decision of the FtT is unsustainable and I hereby set it aside.

21. No point was taken by Mr Walker on the fact that there was no Article 8 assessment undertaken in the decision, nor on the fact that the appeal was allowed "under the Rules." However so far as disposal is concerned I find that this is a matter which requires a fresh hearing. It is appropriate that this hearing be in the First-tier Tribunal. I therefore remit this matter to the First-tier Tribunal (not Judge Callow) for a fresh hearing with nothing preserved from the original decision.

**Notice of Decision**

22. The Secretary of State's appeal is allowed to the extent that the decision of the First-tier Tribunal promulgated on 30<sup>th</sup> August 2017 is set aside for material error. The matter is remitted to the First-tier Tribunal for that Tribunal to remake the decision. The re-hearing should be before a judge other than Judge Callow.
23. No anonymity direction is made.

Signed

C E Roberts

Date

12 September 2018

Deputy Upper Tribunal Judge Roberts