



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/05915/2015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 26 May 2017**

**Decision & Reasons  
Promulgated  
On 19 June 2017**

**Before**

**UPPER TRIBUNAL JUDGE O'CONNOR**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MEHEMET BALLI**

(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr Melvin, Senior Presenting Officer  
For the Respondent: Mr I Khan, instructed by SG Law

**DECISION AND REASONS**

(Delivered orally on 26 May 2017)

**Introduction**

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department ("SSHD"). The SSHD appeals against the decision of First-tier Tribunal Judge Rothwell, promulgated on 1 November 2016, allowing an appeal by Mr Balli (who I will call "the claimant" hereafter) under the Immigration Rules against a decision of the SSHD dated 8 September 2015. By that decision the SSHD refused to grant the claimant indefinite leave to remain as the spouse of a person settled in the United Kingdom.

2. I observe at the outset, although it was not a ground taken by the SSHD, that the First-tier Tribunal had no jurisdiction to allow the appeal under the Immigration Rules. The only relevant ground of appeal permitted by the amendment to the 2002 Act is to the effect that the SSHD's decision is unlawful as being breach of Section 6 of the Human Rights Act. In other words, in the context of this case, the SSHD's decision leads to a breach of Article 8 of the European Convention on Human Rights.
3. Although the FtT did not go on and deal specifically with the only permitted ground of appeal it is a rarity for the removal of an applicant who meets the requirements of the Immigration Rules to be proportionate to the legitimate aim of maintaining immigration control. As I have said, the SSHD did not take the point before the Upper Tribunal, which may be indicative of the SSHD's acceptance that such an error was not, of itself, material in this case.

### **Decision and Discussion**

4. To put this case in context, it falls within the category of cases that are commonly known as "ETS cases". It is asserted by the SSHD in this case, as it is in many other cases, that the claimant did not undertake the English language test relating to English language certificate which was used in support of an application for leave to remain. It is alleged that a proxy took the test on behalf the claimant.
5. There has been a substantial amount of case law relating to the decision-making process, and the evidence upon which the SSHD's decisions are made, in ETS case. I need do no more than refer to recent decisions in Saha [2017] UKUT 0017, MA [2016] UKUT 00450 and Mohibullah [2016] UKUT 561, in this regard.
6. The simple fact that ETS concluded that the claimant's test was invalid is not of itself sufficient for the SSHD to defeat a claimant's appeal. There is an initial evidential burden on the SSHD. If this has been met in any given case, then the burden shifts to an applicant to provide evidence upon which a conclusion can be founded that he did not commit the deception alleged.
7. Turning then to the instant case. The claimant is alleged to have used deception when producing a TOIEC certificate from ETS in his application for leave to remain as a spouse made in March 2013. It is said that ETS had undertaken a check of the claimant's test and that there was significant evidence to conclude that his certificate was fraudulently obtained. The claimant's ETS test result has been cancelled. This led to a later application made by the claimant being refused on 8 September 2015 in reliance, *inter alia*, on paragraph 322(2) of the Rules.
8. At the appeal hearing the SSHD provided evidence in support of her case – as listed in paragraph 5 of the FtT's decision. The FtT concluded, uncontroversially, that the SSHD had produced prima facie evidence of deception (paragraph 27).

9. By way of explanation, the claimant and his wife gave evidence to the FtT relating to the events that it is said occurred in 2013 when the claimant purports to have taken the language test at the Queensway test centre. Insofar as there were any inconsistencies between the witnesses the FtT concluded those to be irrelevant.

10. The rationale deployed by the FtT for allowing the claimant's appeal is summarised in the following terms in paragraph 38 of its decision:

"It is clear that 30% of the tests at Queensway were not invalid. Ms Leyshon (the Home Office Presenting Officer) submitted that there could be several reasons why the appellant did not take the test and I find that the appellant did attend at Queensway College and he did take the two English tests. I find this because he and his wife gave consistent evidence that he went there, he had no reason to use a 'proxy test taker' and he had just short of three weeks before sat the more complex Life in the UK test." (my emphasis)

11. It is plain from that paragraph, and indeed reading the decision as a whole, that there were three features of the claimant's case that led the FtT to conclude as it did. First, the consistency between the claimant and his wife as to the events that took place on the date that the claimant asserts he took the tests. This was undoubtedly something the FtT was entitled to place weight on.

12. There is a considerable degree of overlap between the second and third reasons relied upon by the FtT i.e. that the appellant had no reason to use a proxy test taker, and that just three weeks prior to allegedly taking the TOEIC test the claimant had sat (and passed) the more complex Life in the UK test.

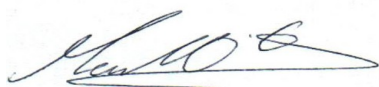
13. At the heart of the third reason given by the FtT is an assumption that it is necessary for the claimant to have attained a certain level of English language abilities in order to pass the Life in the UK test. There was, though, no evidence before the FtT going to this issue and, in particular, there was no evidence linking the ability to pass the Life in the UK test with the ability to speak and write the English language. This is unsurprising because it is accepted that there is no speaking element to the Life in the UK test. As to the written element, this involved no more than ticking one of a number of pre-written possible answers (a multiple-choice test). It is trite that the TOEIC test has a number of specified elements, including speaking and writing.

14. The rationale underpinning the second and third reasons provided by the FtT in paragraph 38 of its decision is not founded on evidence that was before the FtT, and thus the FtT erred in deploying such rationale. Alternatively, if the FtT proceeded on a correct understanding of the nature of the Life in the UK test it ought to have explained why, despite such test not having any speaking element and an elementary written element, it nevertheless relied on the results thereof in the manner set out in paragraph 38.

15. Mr Khan, who said all that can be said on behalf of this claimant, submitted that one must look at the FtT's decision in the round and that it is obvious from the decision that the FtT looked at the evidence holistically. I accept entirely that the FtT looked at the evidence holistically. The difficulty for the claimant is that as part of that holistic consideration the FtT took into account an immaterial matter. Looking at the circumstances holistically is not a substitute for either the requirement to take account only of material matters or for the provision of proper reasoning for the conclusions reached.
16. Mr Khan further submitted that the FtT treated the fact that the claimant had sat for, and passed, the Life in the UK test just three weeks before the TOEIC test as a peripheral matter, rather than one which went to the heart of its decision. This though, cannot be maintained in light of the terms of paragraph 30 of the FtT's decision, in which the following is said:

“He has produced the Pass Notification letter (and that relates to the Life in the UK test). I find that I can place considerable weight on this piece of evidence as he took it and passed it so close to the time of the ETS tests and it has not been disputed that it is much more complex. This is an indication to me that the appellant had a good level of English at that time.”  
(my emphasis)
17. In my conclusion, and for the reasons given above, it is clear that the FtT erred in law and that such error was material to its decision. As a consequence, I set aside the First-tier Tribunal's decision.
18. I now turn to what I should do next. Both parties sought to persuade me that the correct approach should be to remit this appeal to the First-tier Tribunal to be considered afresh. I see no reason why that should not be the appropriate order. I therefore remit the matter to the First-tier Tribunal for reconsideration afresh.

Signed:



Upper Tribunal Judge O'Connor

Date 26 May 2017