



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/26873/2015  
IA/26875/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 7 July 2017

Decision & Reasons Promulgated  
On 13 July 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

MRS SANA FAIZAL+1  
(No anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Rehman of Counsel  
For the Respondent: Mr S Staunton, Senior Presenting Officer

**DECISION AND REASONS**

1. The appellant in this appeal is the Secretary of State for the Home Department. The respondent is Mrs Faisal. However, for the convenience, I shall continue to refer to Mrs Faisal as the appellant and the Secretary of State as the respondent which were the designations they had in the proceedings before the First-tier Tribunal.
2. The second appellant is the son of the first appellant who is a citizen of Pakistan. As the second appellant's appeal rests or falls with that of the first appellant I shall refer to her as "the appellant" and consider her appeal first.
3. The appellant appealed to the Upper Tribunal against the decision of the respondent dated 14 July 2015 for grant of leave under Appendix FM

paragraph 276 ADE and Article 8 of the European Convention on Human Rights.

4. First-tier Tribunal Judge Amin allowed the appellant's appeal pursuant to the Immigration Rules. Permission to appeal was granted to the respondent by first-tier Tribunal Judge Caruthers on 11 May 2017 stating that it is arguable that the respondent's complaint at paragraph 8 of the grounds of appeal are arguable. The Judge arguably failed to address the respondent's evidence relating to an interview undertaken with the first appellant on 25 June 2015.

#### **First-tier Tribunal Judge's findings**

5. The First-tier Tribunal allowed the appellant's appeal for the following reasons which I summarise.
6. The respondent alleges fraud and therefore the burden is on the respondent to provide cogent evidence to support that allegation, on a balance of probabilities. This is that the appellant used deception in order to obtain her TOEIC Certificate in 2014. Relying on the case of **SM and Qadir v SSHD (ETS - evidence - burden of proof) [2016] UKUT 00229 (IAC)** multiple phases from which the generic evidence was considered the respondent had failed to discharge the legal burden of proving dishonesty by the appellant.
7. In the present appeal, no voice recordings have been provided to the Tribunal or to the appellant. The respondent has failed to identify the proxy and no name has been provided for the proxy. The problem with the respondent's case is that there is no identified person as well as any original evidence to show that the proxy taker took the test for the appellant.
8. In response to the assertions made by the respondent, detailed and clear evidence was heard from the appellant as to how she went to the test centre; how long the test took place; the layout of the rooms; the number of candidates; the nature of the speaking test; the tools she was provided to take tests, et cetera. The appellant's husband also confirmed that he drove the appellant to the test centre in Hounslow and he waited some four hours for her to complete the tests. "I have to balance the appellant's clear oral and direct evidence about the background to the test, has spoken English. I conclude that the appellant's evidence carries more weight than the generic evidence of the respondent. I find the appellant's evidence to be credible and consistent.
9. Dr Harrison in **SM and Qadir** describe the evidence of Mr Millington to be insufficient. At paragraph 63 of that case, the Upper Tribunal criticised the evidence of Mr Millington and Miss Collings. These criticisms stand as far

as Mr Millington's evidence is concerned as the respondent has sought to rely on the same evidence in this appeal.

10. The respondent refused the appellant's appeal under paragraph S. LTRP.1.6 of Appendix FFM, namely that the presence of the applicant in the United Kingdom is not conducive to the public good because her conduct (including convictions which do not all within paragraph S-LTR. 1. 32 1. 5), character, associations or other reasons make it undesirable to allow her to remain in the United Kingdom.
11. The appellant's counsel that the respondent's Immigration Directorate Instructions entitled family life five year routes of August 2015 at section 7.3 which requires consideration to be given in any case involving S-LTR 1. 6 to the respondent's "criminality guidance in ECHR cases, implying that this section is focused on applicants who have criminal convictions. The appellant has no criminal convictions.
12. It is therefore not clear why the respondent has relied on this paragraph. Under paragraph 276 ADE of the Immigration Rules was therefore not in accordance with the law. Therefore S- LRT 1. 6 is not applicable to the appellant. In any event in considering the provisions of that section, a rounded assessment of all relevant circumstances is necessary including any reprehensible conduct, the circumstances surrounding it and the applicants good character otherwise and that the appellant's present would be undesirable irrespective of the conduct relied upon by the respondent. The respondent failed to take all the circumstances into consideration and on this basis the respondent's decision was not in accordance with the law.
13. The Judge then gave his notice of decision that the appellant's appeal succeeds on the grounds that the respondent decisions were not in accordance with the law and therefore valid decisions are outstanding.

### **Grounds of appeal**

14. The respondent in her grounds of appeal states the following which I set out in summary. The first-tier Tribunal Judge failed to give adequate reasons for findings on material matters. It is stated in the case of **SM and Qadir** that the respondent bears the evidential burden of proof and if it has been discharged that it is for the appellant to show credible evidence that he or she had passed the ETS test. This has not been adequately addressed. The Tribunal summarises the appellant's account of taking the test at paragraph 46 however, none of the information she provides at paragraph 15, 17 or 22 is detailed or specific to the contents of the test. None of the information given including the explanation that the appellant's husband drove her to the test at paragraph 17, 35, and 47 precludes the use of a proxy test taken during the test. It is also not clear

from the decision what her test involved as there is very little description of its contents and the appellant has not provided any evidence to support her version of events as being consistent with the TOEIC exam process.

15. The Tribunal refers to the IDI's on family life and states at paragraph 51 that consideration is to be given to the respondent's criminality guidance in the European Convention on Human Rights cases. This section does not only apply to criminals. The appellant does not meet the suitability requirements of S-LTR 1. 6 of Appendix FM of the Immigration Rules.
16. The Judge made a material misdirection of law in applying an impermissible high standard of proof in determining the deception issue. The decision notes that no voice recordings have been produced. The voice recordings are the property of ETS but in any case, it is submitted that the respondent does not need to produce such evidence to establish fraud. Equally, the respondent does not need to provide a name for the proxy test taker. The requisite standard of proof is the balance of probabilities, which was clearly discharged in this case.
17. Permission to appeal was granted on ground 8 which states that the Tribunal has failed to reconcile the conflict between the result of the appellant speaking test on 18 September 2012 and her requirement for an interpreter at interview on 25 June 2015. The appellant's explanation is not sufficient to discharge the evidential burden of proof order in this case. She has not provided any credible evidence that she passed the ETS test.

### **The hearing**

18. At the hearing, I heard submissions as to whether there is a material error of law in the decision of the First-tier Tribunal. Mr Rehman relied on his skeleton argument. Mr Stanton relied on the respondent's grounds of appeal.

### **Decision on error of law**

19. I have given anxious scrutiny to the decision of First-tier Tribunal Judge who allowed the appellant's appeal under the Immigration Rules for leave to remain in the United Kingdom as a spouse. The Judge essentially found that the respondent, on whom the burden lies, had not proved that the appellant's application was correctly refused under paragraph 321A of the Immigration Rules in respect of the English language test and as such, the respondent had not demonstrated that the appellant employed fraud.
20. This is the latest in a long line of cases arising from action taken by the Secretary of State in the wake of a BBC "Panorama" programme broadcast in February 2014. That programme revealed that there had been widespread fraud in the taking of language tests provided by an entity

called Educational Testing Services (ETS), a non-profit organisation based in the United States. The fraud principally consisted of the taking of tests by a person other than the person named on the certificate as subsequently issued. Following the programme ETS reviewed all of the tests taken at centres in the UK. The conclusion of the review process was that many thousands of tests had been taken by someone other than the person named on the certificate. ETS provided the results of its review to the Secretary of State. The appellant's test was one of those identified as fraudulent by ETS. Whether deception was used by the appellant in this case is a precedent fact for the Tribunal to determine because the very existence of the Secretary of State's power as exercised in this case depended on deception having been used.

21. The legal burden of proving that the appellant used deception lies on the Secretary of State albeit that there is a three-stage process. The Secretary of State first must adduce sufficient evidence to raise the issue of fraud. The appellant has then a burden of raising an innocent explanation which satisfies the minimum level of plausibility. If that burden is discharged, the Secretary of State must establish on a balance of probabilities that this innocent explanation is to be rejected.
22. There is one civil standard of proof to be applied. The seriousness of the consequences does not require a different standard of proof but flexibility in its application will involve consideration of the strength and quality of the evidence. The more serious the consequence, the stronger must be the evidence adduced for the necessary standard to be reached. The Judge correctly identified that the burden of proof is on the respondent and it is on a balance of probability. However, the Judge failed to take into account, certain evidence and to place sufficient emphasis on material evidence and this brought him into material error.
23. The generic evidence provided by the respondent was a statement from Mrs Rebecca Collings and Mr Peter Millington who stated that "ETS described that any test characterised as cancelled (which later became known as invalid) had the same voice for multiple test takes. witness statement of could not be relied on in respect of this particular appellant. Mr Peter Millington stated, "it is clear that in order to be characterised as 'invalid' on the spreadsheet provided to the Home Office the case has to have gone through a computer program analysing speech and then two independent voice analysts. If all three are in agreement that a proxy has been used then the test would be characterised as 'invalid'".
24. The respondent however had provided additional evidence and did not only rely on the generic evidence of Mr Peter Millington and Ms Rebecca Collins. This evidence was the interview record of the appellant in respect of her claim that her marriage is subsisting, which was the basis of her claim in that application. The Judge failed to consider that the appellant

gave evidence through an interpreter almost 3 years after she claimed to have passed her English language test with excellent results.

25. Mr Rehman in his submissions said that the appellant was not put on notice at the interview, that her English language skills were also being considered in the marriage interview. He added that although the appellant gave evidence through an interpreter, this should not be taken as an indicia of the appellant's English-language skills. The Judge did not consider additional evidence. The Judge made a material error in law by not considering the totality of the evidence produced by the respondent.
26. Furthermore, the Judge in his decision relied on the evidence of the appellant at her husband about the process of the test which he found to be "detailed and clear." The Judge found credible that the appellant could say how she travelled to the test centre, the layout of the rooms, the number of candidates in the room, and each candidate had his or her individual computers and headphones. She described the headphones that were given for listening and said that a small pencil was provided for writing or putting marks on the paper.
27. The Judge therefore relied on this peripheral evidence about the procedure of the English language tests but not about the contents of the tests themselves. The Judge at paragraph 48 stated that "I have to balance the appellant's clear oral and evidence about the background to the test, and her spoken English. The Judge failed to have regard to the fact that knowledge of the test procedure can be subsequently acquired by the appellant.
28. The Judge failed to consider that merely having this information about the procedure of the tests, does not necessarily mean that the appellant took the test. He failed to consider that the appellant could have acquired this information by any other means and it would not have been necessary for her to take the test to know the procedure at the test centre. The Judge also failed to consider that the appellant did not provide other evidence as to how she paid for the test, whether it was paid online or in cash.
29. The Judge stated, "I conclude that the appellant's evidence carries more weight than the generic evidence of the respondent.". This demonstrates that the Judge considered the evidence of the appellant and the generic evidence provided by the respondent. He made no mention of the additional evidence the respondent had provided which was the marriage interview record of the appellant and her dependent. Failure to consider this material evidence provided by the respondent led the Judge into material error.
30. The Judge at paragraph 52 said that the respondent's decision was not in accordance with the law and allowed her appeal on the grounds that the

respondent's decision is not in accordance with the law and a valid decision he is still outstanding.

31. Accordingly, I set aside the decision of the First-tier Tribunal allowing the appellant's appeal and remit it to the First-tier Tribunal to be heard again including the appellants Article 8 claim.

**DECISION**

I set aside the decision of the First-tier Tribunal allowing the appellants appeals and remit them to the First-tier Tribunal.

Dated this 10<sup>th</sup> day of July 2017

Signed by

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A Deputy Judge of the Upper Tribunal  
Mrs S Chana