Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33423/2015

THE IMMIGRATION ACTS

Heard at HMCTS Employment Tribunals, Liverpool	**Decision & Reasons Promulgated**
On 12th January 2017	**On 12th July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR JIA WANG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Ahmed (Counsel)
For the Respondent: Mr G Harrison (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Clough, promulgated on 29th April 2016, following a hearing at Glasgow on 3rd February 2016. In the determination, the judge dismissed the appeal of Mr Jia Wang, whereupon he subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of China, who was born on 30th October 1982. He entered the UK as a work permit holder and on 11th December 2013 was granted leave to enter in line with his visa conditions. He has a spouse by the name of Chan He, and she was also granted entry clearance as a dependent spouse of a work permit holder and she entered the UK on 27th August 2009.

The Appellant's Claim

3. The Appellant's claim is that he has made an application for settlement on 26th November 2013 and the application was refused on 8th October 2015 on the basis that he had not met the requirements of paragraph 134(vi) because the TOEIC test submitted was withdrawn by the test provider and declared invalid on grounds that the voice recognition software detected the presence of a proxy tester in his case. The Secretary of State is of the view that the Appellant has obtained his original ETS certificate by deception because at interview he required an interpreter to assist him answer the questions put to him. His case, however, is that he is proficient in the English language but does not get many opportunities to use the English language because he is employed as a head chef and remains in the kitchen for most of the time and his work colleagues are mostly Chinese, and speak in Chinese to him. As a result of this, "his English language proficiency has deteriorated as displaced at the interview" (see paragraph 4 of the determination).

The Judge's Findings

4. The judge determined this appeal "on the papers" because, despite the Appellant being represented by legal representatives, a request had been made that the Appellant's appeal should be determined without an oral hearing. The judge had the benefit of Grounds of Appeal which were emailed on 26th October 2015, and at page 12 of the appeal bundle, it was stated that a full bundle of papers would be provided for. No such bundle was provided before the judge other than the Respondent's bundle. The judge went on to determine the appeal on the basis that there was "scant evidence" in relation to the Article 8 claim (paragraph 7). The judge concluded that the Appellant did produce an invalid TOIEC test in that the provider correctly identified the person who took the test as a proxy for the Appellant. There were no details of the Appellant or his dependent wife in terms of the Article 8 claim. Moreover, although there was a child in existence nothing had been raised in relation to the child's life in the UK. As a result of the limited evidence, the judge inevitably concluded that the appeal could not succeed.

Grounds of Application

5. The grounds of application place reliance upon the Tribunal determination of **SM and Qadir (ETS – Evidence – Burden of Proof) [2016] UKUAT** to suggest that the Secretary of State had failed to make out a case on the basis of an initial burden being upon her that deception had actually been

exercised. On 4th October 2016, permission to appeal was granted. On 20th October 2016, a Rule 24 response was entered to the effect that the Appellant had asked for a paper hearing and the Respondent was of the view that a proxy had been used to take the TOIEC test which was a matter that the Appellant could inevitably not rebut due to his absence at the hearing.

The Hearing

6. At the hearing before me, Mr Ahmed, appearing as Counsel on behalf of the Appellant submitted that he would place reliance, not just on the case of **SM and Qadir**, but on the more recent Court of Appeal judgment in **Shehzad and Chowdhary [2016] EWCA Civ 615**, where it had been stated at paragraph 30, that generic evidence must be accompanied by specific evidence if the Secretary of State is to discharge the initial burden of proof that is upon her. This was not the case here. What the Secretary of State should have done was to have produced a spreadsheet with the entry "invalid test" on it and since this had not been disclosed it was difficult to say whether the Appellant actually had used a proxy, or whether there had been a error on the part of the authorities, which error is now well-known to occur in certain cases, given the Tribunal decision in **SM and Qadir**. Second, the Appellant had been in the UK now for ten years and he was making an application for indefinite leave to remain and he also had a child and there had been no proper consideration of the "best interests" of the child before the judge came to his conclusion. There was no consideration of the Section 117 criteria.

7. For his part, Mr Harrison submitted that he had had to accept that no spreadsheet had been provided to give specific detail, other than the generic information that had been provided, showing that the Appellant indeed had used a proxy. However, the Appellant had asked for a paper hearing and he had been unable to rebut the allegation by not turning up at the hearing.

8. At the end of the Hearing I proceeded to write my decision which appears below.

Error of Law

9. I am satisfied that the making of the decision by the judge involved the making of an error on a point law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. This is despite the fact that the Appellant chose a paper hearing and it was inevitable that in such a scenario he would not be able to rebut any allegation of deception, especially given that a proper appeal bundle had not been submitted, as the judge very properly pointed out. Nevertheless, in terms of discharging the initial burden which is on the Secretary of State, Lord Justice Beatson was clear that "no material was put in front of the Tribunal to show that Mr Shehzad's TOEIC speaking English test had been judged to be 'invalid' as opposed to 'questionable'. All that the Tribunal had in front of it were his

results.". The judge went on to say that, "it thus appears that the documents before the FT did not identify Mr Shehzad's test as 'invalid'.

10. The rule that emerges from this Court of Appeal judgment is that, "in circumstances where the generic evidence is not accompanied by evidence showing that the individual under considerations test was categorised as 'invalid', I consider that the Secretary of State faces a difficulty in respect of the evidential burden at the initial stage (see Ber Lord Justice Beatson at paragraph 30). I consider this to be the situation here as well.

11. Accordingly, given that the initial evidential burden has not been discharged this appeal is allowed such that it is remitted back to the First-tier Tribunal, to be determined again de novo by a judge other than Judge Clough, by which time it is be hoped that the evidential burden would be discharged by the Secretary of State, and if it is not, then the matter will fall to be determined by a Judge of the First-tier Tribunal on the basis of the evidence as it stands from the Secretary of State. Needless to say, it will do the Appellant no harm whatsoever to attend the hearing and to have legal representation provided.

Notice of Decision

12. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is to be remitted back to a Judge of the First-tier Tribunal under Practice Statement 7.2 other than by Judge Clough.

13. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 10th July 2017