



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/01124/2017**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 10 October 2018**

**Decision & Reasons Promulgated
On 1 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SALAH AHMED

(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr Z Khan, Universal Solicitors

DECISION AND REASONS

1. The appellant is the Secretary of State and the respondent is Mr Ahmed. For the purposes of this decision and reasons I refer to the parties as they were before the First-tier Tribunal where Mr Ahmed was the appellant.

Background

2. Mr Ahmed is a citizen of Bangladesh who appealed to the First-tier Tribunal against a decision of the respondent, dated 4 January 2017, to refuse his application for leave to remain in the United Kingdom as the spouse of a British citizen and the parent of a British citizen. In a decision, promulgated on 17 April 2018, Judge of the First-tier Tribunal Jerromes allowed the appellant's appeal. The Secretary of State appeals with permission, granted by First-tier Tribunal Judge Pickup.

3. The background to this appeal is that the appellant entered the UK in October 2009 as a Tier 4 Student with a visa valid until 20 October 2012. On 18 October 2011 the appellant claims he sat a TOEIC test at Aston College. The appellant applied for further leave to remain on 23 October 2012, submitting the TOEIC certificate and was granted further leave to remain on 16 February 2013 as a Tier 4 Student until 19 January 2015. The appellant married his wife on 28 April 2014. His leave was curtailed on 23 June 2014. The appellant applied for leave to remain as a spouse on 23 July 2014 and leave was granted until 23 January 2017. The appellant's eldest daughter was born on 28 December 2014 and his younger daughter was born on 5 February 2017. The appellant applied for further leave to remain on 4 January 2017 and the refusal of that application was the subject of the decision of the First-tier Tribunal.
4. The Secretary of State considered the appellant's application under Appendix FM and 276ADE(1) and outside the Immigration Rules. The respondent was not satisfied that the appellant met the requirements of R-LTRP.1.1(d)(i) as the Secretary of State was satisfied that the appellant had used deception in his previous application (although it was accepted that the appellant met the eligibility requirements of R-LTRP.1.1(d)(ii)). Although the Appellant's child is a British citizen (and at the time of the decision the appellant had only one daughter) the respondent was satisfied that the appellant did not meet the requirements of R-LTRPT.1.1(a)(ii)(d) for the same reasons.
5. The Secretary of State took into consideration that the appellant had claimed to sit a test at Aston College on 18 October 2011 and that ETS, having undertaken checks, concluded that the certificate that was issued was fraudulently obtained by the use of a proxy test taker and his scores were cancelled. The respondent was satisfied on the basis of this information that the certificate was fraudulently obtained and that the appellant had used deception. In terms of private life the Secretary of State considered that the appellant failed to meet the requirements of 276ADE(1)(i) as he did not meet the requirements of S-LTR.1.6 and further it was not accepted that there were very significant obstacles to his integration into Bangladesh under 276ADE(1)(vi). The Secretary of State concluded that there were no exceptional circumstances and that a grant of leave was not appropriate.

First-tier Tribunal

6. The judge considered the appeal and set out the grounds for refusal at [3] and the grounds of appeal at [4]. The judge went on to set out the issues at [6] identifying that the key issue was whether or not the appellant had employed deception and the judge was of the view this was a significant although not a determinative factor in the Article 8 proportionality assessment. At [7] the judge set out the burden and standard of proof and at [8] the Article 8 provisions. The judge recorded in summary the evidence was before her at [9] and the judge's findings of fact are set out from [11] to [17] with her conclusions from [18] to [20]. The judge directed herself, at [12], to the relevant jurisprudence of **SM and Qadir v**

SSHD [2016] UKUT 229 (IAC), **SSHD v Shehzad & Anor [2016] EWCA** and **MA (ETS - TOEIC testing) [2016] UKUT 00450 (IAC)** and reminded herself that the question of whether someone has engaged in fraud is intrinsically fact-sensitive'. The judge set out the evidence from the respondent. Mr Whitwell pointed out that Professor French's report came after the decision in **SM and Qadir**. In any event Mr Whitwell did not submit that anything turned on this.

7. The judge concluded, at [15], that the evidential burden of proof of deception is on the respondent as confirmed in **Shehzad and Chowdhury [2016] EWCA Civ 615** and that a screenshot of the results and the ETS look up tool where tests were categorised as invalid were sufficient to discharge this initial burden. The judge concluded, at [15], that the respondent had therefore discharged the initial evidential burden to show that the appellant procured the TOEIC certificate by dishonesty.
8. The judge went on to consider and conclude at [16] that the appellant had discharged the burden upon him to raise an innocent explanation. The judge went on to consider that the respondent had not discharged the legal burden therefore through dishonesty and concluded that the appellant did not use a proxy or otherwise cheat [17.3]. The judge concluded that the appellant met the requirements of the Immigration Rules but that this was not conclusive as the only ground was Article 8. The judge undertook a best interests' assessment and considered that the appellant's best interests lay in remaining in the UK as a family and concluded that it was not reasonable to expect the children to leave the UK. In summary, at [20.2], the judge concluded that the appellant met the requirements of Appendix FM and taking into consideration Sections 117B(6) the judge was satisfied that both the appellant's children were qualifying children and it would be unreasonable to expect them to leave the UK. This must be the answer to the public interest question and the appellant therefore succeeded.

Grounds of Appeal

9. The Secretary of State's grounds for appeal contend that although the Tribunal accepted the evidential burden fell upon the appellant to provide an innocent explanation this had not been adequately addressed and it was not clear why the evidence of the appellant would preclude the use of a proxy test taker and the appellant's evidence did not amount to an innocent explanation. It was further submitted that the judge had taken into consideration the appellant's English language ability at [16.2] but this was not the test and the respondent relied on **MA Nigeria [2016] UKUT 450** including at 57 where it is acknowledged that:

"Second we acknowledge the suggestion that the appellant had no reason to engage in deception which have found proven. However this has not deflected us in any way from reaching our main findings and conclusions. In the abstract of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time

and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere. We are not required to make the further finding of why the appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate this discrete matter.”

10. It was further contended that the Tribunal had erred in failing to give adequate reasons for holding that a person who speaks English would therefore have no reason to secure a test certificate by deception. In addition, it was submitted that maintenance of effective immigration controls is in the public interest and that the appellant does not meet the Immigration Rules and accordingly interference was justified and it was submitted that the First-tier Tribunal appeared to have elevated the children’s best interest from a primary consideration to the primary consideration. It was further asserted that there had been no consideration of whether it could be proportionate to expect the appellant to return to Bangladesh in light of those actions whilst leaving the choice to his family whether they wished to remain or return.

Submissions

11. As a preliminary matter, the appellant’s representatives submitted their Rule 24 response and skeleton argument. Although the appellant’s representative wished to rely on an unreported Upper Tribunal case it was accepted that the proper application and procedure to do so had not been followed and no further reference was made to this unreported case and I do not rely on it.
12. Mr Whitwell submitted that the judge’s assessment was flawed in relation to the innocent explanation and he relied on paragraph 5 of the grounds. In respect of paragraph [11.8] Mr Whitwell pointed out that the appellant and his wife own their home in Romford and he later added to this submission that there was no evidence to suggest the appellant had ever resided anywhere other than in Romford or the surrounding areas (as opposed to Birmingham where he took the test).
13. At [13.4] he pointed out that Professor French’s report postdates the decision in **SM and Qadir**. Mr Whitwell noted that at [14.1(v)] it was established that this was a case where the appellant’s test was found to be invalid and as noted above that the judge had found that the initial evidential burden had been discharged by the respondent. The main challenge therefore was to paragraph [16] of the decision. Mr Whitwell submitted that there was no basis for the judge’s conclusion at [16.1] that the appellant was a credible and truthful witness. Mr Whitwell pointed out that the tests were taken in Birmingham which was three hours away from where the appellant lived and it was not clear why this supported the appellant’s credibility.

14. At [16.2(iv)] it was noted that the appellant had tried to contact Aston College for evidence but they had not responded. Mr Whitwell submitted that this was a factor in favour of the Secretary of State's case not the appellant's.
15. At [16.2(v)] Mr Whitwell submitted that although the judge took into consideration that the appellant spoke English to a reasonable standard at the hearing, in March 2018, the test was taken on 18 October 2011 and it was difficult to see how his English language ability in 2018 was relevant. Although the judge found at [16.3] that the appellant had previously engaged "substantively and faultlessly" with the immigration process, Mr Whitwell submitted that this was to put the cart before the horse because if it was found that he had lodged a proxy test then he would not have had the immigration status that he did. Mr Whitwell submitted of the six points that the judge relied on there were inadequate findings in four of those points.
16. Mr Whitwell had nothing to add to paragraph 6 of the respondent's grounds, relying on **MA (Nigeria)**. In respect of paragraph 7 of the grounds and Article 8, if the appellant had used deception he would not meet the eligibility criteria of the Rules. Mr Whitwell pointed to the fact that the decision jumps straight to an assessment outside of the Immigration Rules but he conceded that there were no grounds on that before the Upper Tribunal. However, he submitted the public interest was heightened by the use of a false test. Mr Whitwell relied on [20.1(iii)] of the decision where the judge considered reasonableness. Mr Whitwell relied on page 73 of 106 of the respondent's current policy, dated 22 February 2018, and he pointed out that the judge had relied on an earlier version of that policy. That policy now states as follows:

"If the departure of the non-EEA national parent or carer would not result in the child being required to leave the UK because the child will (or is likely to) remain living here with another parent or primary carer, then the question of whether it is reasonable to expect the child to leave the UK will not arise. In these circumstances paragraph EX.1(a) does not apply."
17. Mr Whitwell submitted that the effect of a family split should have been considered in terms of the effect on the child and how that would disrupt the family relationship (as discussed at page 73 of the respondent's guidance). However Mr Whitwell conceded that again this was not in the respondent's grounds.
18. Mr Khan submitted that there was no error and that this was a disguised perversity challenge. Mr Khan relied on his Rule 24 response and noted at paragraph 15 that the judge had correctly directed himself as to the correct burden under **Shehzad and Chowdhury [2016] EWCA Civ 615** and that the judge had conceded that the evidence was sufficient to discharge the initial burden. Mr Khan relied on the Court of Appeal decision in **SM and Qadir v Secretary of State for the Home Department (ETS - evidence - burden of proof) [2016] UKUT 00229**

(IAC) at [57] as upheld by the Court of Appeal in **Majumder & Qadir v Secretary of State for the Home Department [2016] EWCA Civ 1167**.

19. The Court of Appeal at paragraph 18 found as follows:

“18. I have stated that the Upper Tribunal decided that the Secretary of State had discharged the evidential burden that lay on the Secretary of State so there was a burden, again an evidential one, and Mr Majumder and Mr Qadir of raising an innocent explanation. The UT accepted (at [69]) the submission on behalf of the Secretary of State, that in considering an allegation of dishonesty the relevant factors included the following: what the person accused had to gain from being dishonest; what he had to lose; what is known about his character; and the cultural environment in which he operated; how the individual accused of dishonesty performed under cross-examination, and whether the Tribunal’s assessment of that person’s English language proficiency is commensurate with his or her TOEIC scores; and whether his or her academic achievements are such that it was unnecessary or illogical for them to have cheated. There is no criticism in this court by Mr Kovats of that approach. (emphasis added)

19. After considering the evidence and considering the factors to which I have referred, the UT held that Messrs Majumder and Qadir had discharged the evidential burden of raising an innocent explanation of the prima facie indications of deceptions on their part in the Secretary of State's evidence. Their evidence was found to be plausible and truthful. There had been no suggestion that any of the documents relied on by Mr Majumder were falsified or forged (see [74] to [77]). Although the Tribunal regarded him as an unsatisfactory witness in certain respects, at [87] it ultimately concluded that he was telling the truth.”

20. Mr Khan submitted that although Mr Whitwell and the written grounds criticised the judge’s findings, this runs contrary to the factors that were identified including by the Secretary of State in **SM and Qadir** and that proficiency in English was one of the factors to be considered. Mr Khan submitted that the judge had not allowed the case merely because he had considered the appellant had sufficient English at the hearing.

21. At [16.2(v)] the judge also takes into account whether it was unnecessary for the appellant to have cheated and considered **MA** and that there was no motive for the appellant to use a proxy test taker. Mr Whitwell submitted that the judge was entitled to reach the finding he did that the appellant was a credible and truthful witness and submitted that the judge had reached this conclusion after hearing the appellant being cross-examined on his evidence.

22. At [16.3] the judge was correct to take into account that the appellant had previously substantively and faultlessly engaged with the immigration

process as this was one of the factors set out at paragraph 18 of **Majumder and Qadir** in the Court of Appeal. Mr Khan further submitted that it was irrelevant for Mr Whitwell to refer to the appellant's property being bought in 2018 when the test was in 2011 and it was the appellant's evidence that he had relatives in Birmingham in any event which the judge had accepted. It was not suggested that this was a perverse finding and it was open to the judge.

23. At [16.2(iv)] Mr Khan submitted that this was not a point in favour of the respondent as the appellant was not to blame for the fact that there had been no response from Aston College and it was for the judge to decide what weight he attached to the evidence. He submitted that the judge had conducted a multi-factored assessment as he was bound to do. The jurisprudence confirms that, in terms of providing an innocent explanation the appellant need only reach a minimal level of plausibility (see **SM and Qadir**). The judge's findings were nowhere near the test to show perversity. Mr Khan also relied on paragraph 19 of **Majumder and Qadir** and submitted that this was also a case where there was no suggestion that any of the documents relied on were falsified or forged.
24. Mr Khan took me to page 10 and following of the appellant's bundles and his City & Guilds tests which the judge had referred to specifically in his findings at [16.2(v)]. These tests were taken on 11 October 2013, just over two years after the impugned TOEIC test. Mr Khan submitted (and Mr Whitwell did not specifically dispute this) that the appellant had achieved first-class results and the judge took this into consideration at [16.2(v)]. Mr Khan submitted that paragraph 25 of **Majumder and Qadir** in the Court of Appeal addressed Mr Whitwell's point in relation to any error in the judge taking into consideration the appellant's English language ability at the date of the hearing.
25. At 25 of **Majumder and Qadir** the Court of Appeal held that the Upper Tribunal was entitled to conclude that Mr Majumder's college documents were a better gauge of his ability in English than his performance at the hearing some three years' later. Mr Khan submitted that the judge had not taken into consideration the appellant's English at the hearing as the sole factor when he considered all the factors including the level of the Appellant's English two years after the TOEIC test. Conversely if he had not made any findings in relation to his English language ability as at the date of the hearing that may well have been an error. The fact that he had mentioned this factor did not mean that the decision was flawed.
26. In relation to ground 2 Mr Khan submitted that there was no real challenge to the judge's best interests assessment and that the respondent's 2018 guidance in relation to family migration did not change the law on Section 117B(6) that the judge was entitled to find at [20.2] that public interest did not require the appellant's removal. Mr Khan pointed out that the judge was correct at [18] to direct himself of the fact that the appellant met the Rules was not enough and that he had to go on and consider Article 8 including Appendix FM and Article 8 outside of the Immigration Rules.

27. In reply Mr Whitwell argued that he was not submitting that the judge was wrong to undertake an holistic approach. However it was his submission that four of the six factors of the factors he considered were inadequately reasoned. In relation to the 2017 house in Romford that might have well been true but it was not suggested in the evidence before the First-tier Tribunal that the appellants had ever lived outside of the Romford area.

Error of Law Conclusions

28. The proper approach is as set out in the case of **SM and Qadir** considered by the Court of Appeal in **Shehzad and Another** and confirmed in **R (on the application of Nawaz) v Secretary of State for the Home Department (ETS: review standard/evidential basis) [2017] UKUT 00288 (IAC)**. It was not disputed before me that the burden is initially on the Secretary of State and if that evidential burden is satisfied it is incumbent on the appellants to provide an innocent explanation. The judge followed that correct approach, finding at [15] that the initial burden was discharged.
29. The judge set out all the evidence before her, including the undisputed findings of fact at [11] that the appellants speak and understand English and that in October 2013 he was awarded an ESOL certificate and went on to pass the Life in the UK test in 2014.
30. The judge's findings at [16] are detailed and evidence-based and sufficient to raise an innocent explanation as to his participation in the relevant test. Although Mr Whitwell disputed the finding at [16.2(i)] as to why the appellants would take the test in Birmingham the judge was entitled to accept the appellants' evidence that his grandmother and other family lived there and he visited frequently. That was a finding that was available to the judge which cannot be said to be irrational and such was not suggested by Mr Whitwell. It was more than adequately reasoned.
31. Equally there was no challenge to the judge's findings at [16.2(ii)] that he found that the appellants had attended the test in person and that he took two or three classes there before he took the test although he had not retained receipts. Mr Whitwell also made no submissions in relation to the third finding of the judge at [16.2(iii)] as to what happened on the day of the test including him being photographed, his ID checked, the security checks being carried out, where the exam room was, how full it was, how many students there were, how many desks there were with computers, who was present in the room, etc. The judge had the benefit of hearing the appellants' oral evidence on this matter and hearing the appellants cross-examined on that evidence (which the Court of Appeal has indicated is a relevant factor).
32. At [16.2(iv)] although Mr Whitwell suggested that the fact that the appellants had no response from Aston College was a factor in favour of the Secretary of State, the judge was entitled to find as he did that he accepted the appellants' evidence that he had tried to contact the college but had had no response. In the context of a wider credibility assessment

such a finding could not be said to be irrational and in the context of finding the appellant to be credible and truthful the reasoning is adequate and the finding was available to the judge.

33. At [16.2(v)] the judge found that there was no motive for the appellant to use a proxy and properly reminded himself of the guidance in **MA**. Although the judge noted the appellant's reasonable standard of English and that he gave evidence without an interpreter I agree with Mr Khan that this was not a decisive factor and that if he had not noted his current level of English that may have caused its own difficulties. This also had to be considered in the context of the judge's findings that there was no dispute that the appellant had subsequently passed the Life in the UK test and had obtained ESOL qualifications from Trinity College London City & Guilds, which is a much earlier verification of the appellant's level of English than at the hearing. There was no error in the judge taking this into consideration in the round and the judge reminded himself that this was not a decisive factor. Equally, the judge was entitled, and in fact was required, to take into account the appellant's wider credibility and that he had no other negative immigration history. Although Mr Whitwell submitted this was a cart before the horse argument, I do not agree as there are other elements of an individual's history, including possible criminal and immigration difficulties which could be a relevant factor. The judge was entitled to take into consideration that this was not an issue in this case.
34. Although the judge granting permission was of the view that it was arguable that the conclusion, that the Secretary of State had failed to demonstrate the appellant was dishonest, was inadequately reasoned if not rational, as identified above the judge gave more than adequate reasons (and Mr Whitwell confirmed that this was an adequacy challenge rather than one on perversity grounds). Accordingly the judge made no material error in her approach to the consideration and conclusion that the appellant had raised an innocent explanation. I am satisfied that the judge did consider all of the evidence in the appropriate manner and there was no error material or otherwise.
35. Although he produced the respondent's updated guidance as referred to above, Mr Whitwell did not rely with any force on the second ground in relation to Article 8. Although the judge might have structured her assessment differently, in terms of the consideration under Appendix FM, the findings, including the finding that it was in the best interests of the British citizen children to remain in the UK with their parents and that it was not reasonable to expect the appellant's children to leave the UK, are not materially flawed.
36. That is notwithstanding the more recent guidance of the Secretary of State which was not brought to the attention of the First-tier Tribunal. Section 117B(6) and similarly EX.1 of Appendix FM consider that where it would not be reasonable to expect a child to leave the United Kingdom, as is always the case where a British child is involved "the public interest does not require" the removal of the parent. That was the reasoned conclusion

of the Tribunal, at [18(iii)], prior to considering the respondent's policy and the judge considered that there had been no deception, or suggestion of criminality and no adverse factors 'which tip the balance the other way'. There was no error in the judge's adequately reasoned interpretation that where, as in this case, the children are 'qualifying children,' that is an answer to the public interest question.

37. There was no material error of law in the First-tier Tribunal's decision.

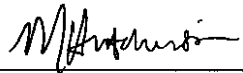
Notice of Decision

The decision of the First-tier Tribunal does not contain a material error of law and shall stand.

No anonymity direction was sought or is made.

Signed

Dated: 24 October 2018



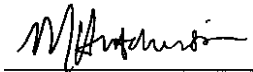
Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

I maintain the fee award made by the First-tier Tribunal.

Signed

Dated: 24 October 2018



Deputy Upper Tribunal Judge Hutchinson