



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/15337/2016

**THE IMMIGRATION ACTS**

**Heard at Hill Street, Birmingham**

**Decision & Reasons**

**On 18 September 2018**

**Promulgated**

**On 15 October 2018**

**Before**

**UPPER TRIBUNAL JUDGE O'CONNOR**

**Between**

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

Appellant

**and**

**SANDEEP [K]  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant:

Mr D Mills, Senior Presenting Officer

For the Respondent:  
Ltd

Mr M Brooks, instructed by Super Immigration Services

**DECISION AND REASONS**

**Introduction**

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department. I shall refer to Sandeep [K] as the claimant herein.
2. The claimant is a citizen of India, born May 1978. She arrived in the United Kingdom on 21 September 2009 with leave to enter as a student,

valid until 09 April 2011. Thereafter she made an application for an extension of such leave, which was refused on 01 November 2012. A further application for leave to remain was made on the basis that requiring the claimant to leave the UK would breach her human rights. This application was refused in October 2013, with a subsequent application made on 02 October 2015 in the same vein being refused on 03 June 2016. It is this latter decision refusing the claimant's human rights application that was the subject of appeal to the First-tier Tribunal.

3. The foundation of the claimant's assertions centre on her relationship with [RS], a British Citizen whom she has lived with in a relationship akin to marriage. The appellant has unsuccessfully undertaken IVF treatment. Mr [S] has two British children from his first marriage. The claimant also cares for Mr [S]'s parents. They have been unable to register their marriage in the United Kingdom because the Secretary of State holds the claimant's passport and failed to return, even after being requested to do so.

### **Secretary of State's decision letter**

4. The Secretary of State initially concluded that the claimant did not meet the requirements of the Immigration Rules, finding as follows regarding the suitability requirements under the family route (found in paragraph R-LTRP.1.1.(d)(i) of Appendix FM to the Rules):

"On 22 August 2012, you purported to take a TOEIC speaking test with Educational Testing Service ("ETS") at Colwell College. This test was withdrawn by ETS, and declared Questionable on the grounds that widespread test fraud was known to have occurred at the centre where you sat the test. You were therefore asked to attend a further interview.

At the interview on 18 May 2016, the decision-maker

3 acting on behalf of the Secretary of State concluded that you had obtained your original ETS certificate by deception. This is because you required an interpreter to assist you with your interview. The TOEIC certificate was awarded at level B2 - on the Common European Framework of Reference for Languages (CEFR). The CEFR defines someone at B2 level as having "... a sufficient range of language to describe unpredictable situations, explain the main points in an idea or problem with reasonable precision and express thoughts on abstract or cultural topics such as music and films."

In addition to this during the interview on 18 May 2016 you were unable to give any specific details of what the test involved as evidenced by your answers to question 24. This is below the B2 level you have previously evidenced. It is not credible that having lived in the United Kingdom continuously since taking your TOEIC test, your English language proficiency would have deteriorated to the level displayed at interview on 18 May 2016. The Secretary of State is satisfied, on the basis of the information provided to her by ETS and your interview assessment, that your certificate was fraudulently obtained.

At the time you took your test, as you will have been aware, ETS was an approved provider of Secure English Language Tests (SELT) for UK immigration purposes. Its role as a SELT provider was to help ensure that those who seek to enter or remain in the United Kingdom are able to speak English. As recognised in para 117B(2) of the Nationality, Immigration and Asylum Act 2002, those who can speak English are less of a burden on taxpayers and are better able to integrate into society. Although you did not rely on your TOEIC certificate for the purposes of your application for leave to remain, your complicity in the fraud nonetheless contributed to an extremely serious attack on the maintenance of effective immigration controls and the public interest more generally.

Accordingly, I am satisfied that your presence in the UK is not conducive to the public good because your conduct makes it undesirable to allow you to remain the UK. Your application is therefore refused under paragraph S-LTR.1.6] of the Immigration Rules.”

5. It was also concluded that the claimant did not meet the eligibility requirements of the rule, as she was not a “partner” as defined in paragraph GEN.1.2. of Appendix FM; nor, it was said, were the requirements paragraph EX.1. of the Rules met.
6. Turning to the issue of private life under the Immigration Rules, it was concluded that the claimant did not meet the requirements of paragraph 276ADE thereof. The SSHD also concluded that the appellant’s removal would not lead to a breach of Article 8 ECHR.

### **Grounds of Appeal**

7. The FtT allowed the claimant’s appeal on Article ECHR grounds, finding that the Secretary of State had not made out the allegation that the claimant had committed a deception in obtaining the TOEIC certificate and that requiring her to leave the United Kingdom would be disproportionate in all the circumstances of the case.
8. The challenge brought by the Secretary of State in the pleaded grounds falls into two categories. First, there is a particularised challenge to the findings made in relation to the conclusion that the claimant had not undertaken deception in obtaining the TOEIC certificate. The second of the grounds brings a more general challenge to the conclusion that requiring the claimant to leave the United Kingdom would breach Article 8.
9. Taking these in turn, the first ground can be broken down into the following components:
  - (i) The FtT erred in failing to make a finding on whether the Secretary of State had discharged the evidential burden of proving that deception had occurred;
  - (ii) If the FtT accepted that the Secretary of State had discharged the evidential burden, then it erred in failing to make a finding on

whether the claimant had provided an innocent explanation, such that the burden shifted back to the Secretary of State:

- (iii) If the FtT made a finding that the appellant had discharged the burden upon her, it erred in failing to consider whether the Secretary of State had thereafter discharged the legal burden;
  - (iv) The FtT failed to take proper account of the fact that the claimant had requested the use of an interpreter for both her interview with the Home Office and for the hearing, a factor which should have been treated as a strong indication that she used a proxy test taker to undertake her English language examination, and thus committed deception;
  - (v) The FtT erred in requiring the Secretary of State to prove her case to a standard higher than the balance of probabilities.
10. As to the second ground, it was submitted that the FtT erred in concluding that the requirements of the Immigration Rules had been met and, in any event, had further erred in concluding that the claimant's removal would be disproportionate.

### **Oral Submissions**

11. At the hearing, Mr Mills properly accepted that this was not a case in which ETS had invalidated the claimant's test score but rather that the test result had been identified as questionable and had therefore been cancelled. This was on the basis that 42% of the tests taken on the same date at the same test centre as the claimant purportedly took hers, had been found to be invalid.
12. Mr Mills also clarified issues relating to the claimant's interview with the Home Office. The officer who had interviewed the claimant concluded, in writing, that the claimant came across as genuine in her attempts to recall what had happened on the day of the test and that she appeared credible. Below the typed notes of the interviewing officer a handwritten note is found which states "*found to be not credible - applicant used an interpreter and was unable to described what she had to do with her test Q24.*" Mr Mills confirmed that that hand-written note was written by the decision-maker who took the decision in June 2016, the interview having taken place on 8 January 2015.
13. Mr Mills further indicated that the Secretary of State accepted that ground 2 stood or fell with ground 1.
14. Mr Brooks was not called upon to make oral submissions.

### **Decision and Discussion**

15. I turn first to the FtT's consideration of the claimant's use of an interpreter at her interview in January 2015 and at the hearing before the FtT on 11

September 2017. As to the former, the claimant provided an explanation to the FtT which was considered and accepted ([20] and [22]). This was a path that the FtT was undoubtedly entitled to take. I note, in any event, that on the last page of the interview the interviewing officer answered in the affirmative the question *“Was the applicant able to answer the questions in basic English?”*. As to the use of an interpreter at the hearing before the FtT, the FtT clearly took this into account and observed that the claimant provided the majority of her responses in English [18].

16. Turning then to what is the core of the Secretary of State’s appeal, set out at paragraphs 9(i) to 9(iii) above. It is trite law that the Secretary of State has the initial evidential burden of proving that the TOEIC certificate has been procured by dishonestly. If the Secretary of State meets this burden, then it is for the claimant to provide an explanation in response. If that explanation is of sufficient calibre the burden shifts back to the Secretary of State.
17. I accept that the FtT’s decision does not explicitly refer to the shifting nature of the burden. Nevertheless, it is plain from the reading the decision as a whole that the FtT carried out the task required of it. Had it not accepted that the Secretary of State had met the initial evidential burden (by production of evidence from Rebecca Collins, Peter Millington and the report on the forensic speaker comparison tests undertaken by ETS - see paragraphs 14 and 15) then it would not have been required to go on and consider whether there was an innocent explanation. It did so having first said as follows:

“Thus, at the highest, the view is that this test is being questioned because widespread test fraud was known to have occurred at the centre at which the Appellant is said to have taken her test. I accept that this may provide initial grounds for the Respondent to investigate further.”
18. The claimant’s explanation and the evidence supporting it, including the evidence from the immigration officer who interviewed the claimant in 2015 to the effect that that officer believed the claimant, was then considered. A rational reading of the decision leads inexorably to the conclusion that the FtT accepted the explanation such that something more was required of the Secretary of State to discharge the legal burden on him.
19. The Secretary of State put nothing further forward other than the hand-written note at the bottom on the January 2015 interview, which the FtT concluded was added as an afterthought but, in fact, we now know was added by the decision-maker who had never met the claimant. Having looked at the entirety of the evidence, the FtT stated as follows in paragraph 22:

“... I therefore arrive at a conclusion that I cannot find even on a balance of probabilities that the Appellant has utilised fraud to obtain the certificate let alone the higher threshold that would be required for fraud or deception.”


20. This was a finding that the FtT was entitled to reach on the evidence available to it; indeed, it is the conclusion I would also have reached on the evidence available to the FtT.
21. As to the assertion that FtT erred in applying the wrong standard of proof, this is hopeless. One only needs to read the last sentence of paragraph 22 to identify the difficulty with this submission. Even if there is an error as claimed, it is not one which is capable of affecting the outcome of the appeal.
22. As to the second ground, as Mr Mills conceded that this ground stood or fell with the first ground. I have found against the Secretary of State on the first ground and, consequently, I conclude that the FtT's decision should not be set aside.

### **Notice of Decision**

The Secretary of State's appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed:

Date: 9 October 2018



Upper Tribunal Judge O'Connor