



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/20043/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 13 April 2018

Decision & Reasons Promulgated  
On 27 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ZOKHIDA BOYMANTOVA  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr T Lindsay, Home Office Presenting Officer

For the Respondent: Ms J Norman, of Counsel instructed by Sterling & Law Associates

**DECISION AND REASONS**

**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 Obhi, promulgated on 31 August 2017, allowing an appeal by Ms Boymantova (who I will call “the claimant” hereafter) on human rights grounds against a decision of the SSHD dated 4 August 2016. By that decision the SSHD refused to grant the claimant leave to remain as the spouse of a person settled in the United Kingdom (UK).

## **Background**

2. 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 that the applicant did not undertake the English language test relating to a TOEIC English language certificate which was used in support of an application for leave to remain. It is alleged that a proxy was used to take the test on behalf of the applicant.
3. 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 cases. I need do no more than refer to recent decisions in Saha [2017] UKUT 0017, MA [2016] UKUT 00450 and Mohibullah [2016] UKUT 561 and Gaogalalwe, R (on the application of) v Secretary of State for the Home Department [2017] EWHC 1709 in this regard.
4. The simple fact that ETS concluded that an applicant’s test was invalid is not of itself sufficient for the SSHD to defeat an appeal made by the applicant. 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. If an applicant is capable of shifting that burden that the SSHD bears the burden of discharging the legal burden.
5. Turning then to the instant case. It has a somewhat protracted history. The claimant entered the UK lawfully as a student in 2006. She had leave in that capacity through successful applications for leave to remain until 6 April 2013. The claimant’s last application for further leave to remain as a student was however refused on 16 May 2013. The claimant’s appeal against that decision was successful to the extent that the decision was found to be unlawful and it fell to the SSHD to reconsider the application. The reconsideration resulted in a further refusal with no right of appeal.
6. Subsequently a removal decision was issued against the claimant and representations were made to the SSHD by her then representatives setting out the circumstances of her private and family life. On 6 November 2014 the SSHD withdrew the removal notice but issued another on grounds that the claimant had used deception by submitting a TOEIC English language certificate from ETS in her application for leave to remain as a student made on 23 November 2011. It was 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.
7. The claimant successfully appealed against that decision in a decision promulgated by First-tier Tribunal Judge Lloyd on 24 February 2015. Judge Lloyd noted the unacceptable late service (on the date of hearing) of the SSHD’s evidence relating to the allegation of deception including witness statements of Rebecca Collings and “Peter Islington” (likely to be stated in error and should be “Peter Millington”), widely referred to as “generic evidence” and a database entry showing that the claimant’s test scores had been marked as “invalid”. Judge Lloyd found that the denial by the claimant of the allegation that she used a proxy test taker was credible and consistent and ruled that the SSHD had failed to discharge the burden on her to prove deception. Accordingly, the appeal was allowed.

8. I pause here to note that Judge Lloyd observed that on 27 October 2014 the claimant submitted a fresh application for leave to remain as a spouse of her partner. The outcome was pending. At [27] Judge Lloyd noted in respect of that application:

“If the Respondent decides the Appellant’s fresh spousal application before the instant matter is resolved, she should still observe my findings in this appeal as there is a clear factual overlap.”
9. The SSHD was successful in securing permission to appeal claiming the decision was inadequately reasoned, but that challenge was not upheld by a former President panel of this tribunal in a decision promulgated on 17 March 2016. The tribunal further observed that the pending application was not associated with the appeal before the First-tier Tribunal or itself; the outcome of which was essentially a matter for the primary decision-maker.
10. On 27 October 2014 the pending application was refused in a decision dated 4 August 2016. It does not appear that the observation made by Judge Lloyd was considered. The application was refused inter alia because the SSHD considered the evidence demonstrated that the claimant had sought to obtain leave to remain by deception by submitting a false TOEIC English Language test certificate.
11. It is the claimant’s appeal against this decision that came before Judge Obhi. At the appeal hearing the SSHD provided the generic evidence and a schedule confirming that ETS had invalidated the claimant’s test result. The judge did not accept the claimant’s submission that the allegation of deception was *res judicata*. The judge noted the history of the appeal and concluded in reference to Judge Lloyd’s decision that the “findings in relation to the allegation that the appellant had used deception in her test stand” [20], but noted that there was “now new information” before her and that the appeal was “entirely new” on the basis of that information. The judge summarised the evidence of Peter Millington and Rebecca Collings and referred to the ETS evidence confirming that the test result had been invalidated. That evidence was however before Judge Lloyd. The “new information” the judge appears to be referring to is the report of Professor Peter French.
12. The judge concluded that the SSHD had produced prima facie evidence of deception [26] & [29].
13. The claimant gave evidence relating to the events that she said occurred in 2011 when she purports to have taken the English language test. Giving brief reasons, the judge was struck by the claimant’s failure to be precise about why she took the test at the college in question and concluded that she was using deflection rather than addressing the questions and the issues in the case. Accordingly, the judge concluded that the claimant had used a proxy test taker [30].
14. The rationale deployed by the judge for allowing the claimant’s appeal outside of the Rules can be summarised as follows:
  - (i) that as the claimant employed deception in a previous application for leave to remain, she could not meet the suitability requirements of Appendix FM of the Rules.

- (ii) Notwithstanding the deception, the claimant's removal would be a disproportionate interference with her family life as her spouse would face insurmountable obstacles if he had to relocate to Uzbekistan.
15. Permission to appeal was granted to the SSHD on the basis that it was arguable the judge erred in her assessment of proportionality and in concluding that there were exceptional or compelling circumstances which justified such a conclusion. The SSHD invited the tribunal to set aside the judge's decision.
  16. The claimant filed a Rule 24 response. Therein it was conceded that the judge erred in law as pleaded in the SSHD's grounds and called inter alia for the decision to be set aside. The claimant further raised additional matters also said to amount to errors of law central to the judge's consideration of the deception issue.
  17. The Rule 24 response was a matter of some contention at the hearing. Mr Lindsay submitted that the claimant did not have permission to argue a cross appeal citing the authority of EG and NG (UT Rule 17: withdrawal; Rule 24; Scope) Ethiopia [2013] UKUT 00143 (IAC) (albeit not produced before me). He invited me to set aside the judge's decision but preserve the judge's findings in relation to the deception issue. Ms Norman submitted that it was her understanding that the Rule 24 response could stand as a cross appeal and she invited me to set aside the decision with no preserved findings. In the alternative, Ms Norman invited the tribunal to treat the Rule 24 response as an application for permission to appeal. I indicated to the parties that I would consider their respective submissions in due course, and both representatives dealt with the matters raised in the Rule 24 response, if I decide that the position adopted by Ms Norman is correct.
  18. There is no dispute between the parties that the judge erred in law in the manner put forth by the SSHD in the grounds. The errors I find are clear on the face of the decision. The judge's assessment of the question of proportionality is flawed by reference to the test of "insurmountable obstacles" a requirement which it is accepted is not the benchmark in this case. Nor did the judge factor into her assessment whether it was proportionate to expect the claimant to apply for entry clearance. In the face of clear errors, material to the outcome, I set aside the decision of the First-tier Tribunal.
  19. The representatives' submissions centred around the scope of a rehearing. Mr Lindsay called for the deception findings to be preserved and Ms Norman argued for the contrary.
  20. I find that the appropriate course is to set aside the decision with no findings preserved. My reasons are as follows.
  21. First, s.12 (2) of the Tribunals, Courts and Enforcement Act 2007 provides that the tribunal may (but need not) set aside the decision of the First-tier Tribunal, and either remit the case to the First-tier Tribunal with directions for its reconsideration or re-make the decision. The question of whether findings should be preserved is not laid down by statute and Mr Lindsay was not able to identify where if any such power lies. I take the view therefore that once the tribunal has exercised its discretion to set aside a decision of the First-tier Tribunal, then the whole of the decision falls to be set aside.

22. Second, notwithstanding the above, I go on to consider the purported cross appeal by the claimant. I do not agree with Mr Lindsay's contention that the claimant is raising points that she is not allowed to raise in a Rule 24 response. The claimant succeeded before the First-tier Tribunal. She was under no obligation to raise anything in any kind of appeal. As was made clear in EG and NG, a party to an appeal does not need permission to raise points in reply unless that party "seeks to persuade the Upper Tribunal to replace a decision of the First-tier Tribunal with a decision that would make a material difference to one of the parties". Here, I am not being asked to replace a decision by one party as both parties agree that the decision cannot stand.
23. While, I take the view, therefore, that I should accordingly set aside the decision with no findings preserved, I have considered the alternative position, namely, that if the Rule 24 response does raise a cross appeal, does the claimant require permission to appeal? The answer to that question is clear cut. In EG and NG, the tribunal confirmed that the Upper Tribunal cannot entertain an application purporting to be made under rule 24 for permission to appeal until the First-tier Tribunal has been asked in writing for permission to appeal and has either refused it or declined. In this instance, no application has been made, but Ms Norman sought to do so at the hearing. While I have borne in mind that the application is late, the challenge set out in the Rule 24 response in respect of the judge's handling of the deception issue identify obvious and troubling errors in her approach.
24. Pursuant to s. 4(1) (c) of the Tribunals Courts and Enforcement Act 2007, I am also a First-tier Tribunal Judge and may 'reconstitute' myself as a First-tier Tribunal Judge although also sitting in an Upper Tribunal capacity: see ZEI and others (Decision withdrawn - FtT Rule 17 - considerations) Palestine [2017] UKUT 00292 (IAC) at [8]. Therefore, as an initial stage, acting in a First-tier Tribunal Judge capacity, I considered whether permission should be granted to the claimant on the grounds identified.
25. I find that it is arguable that the judge erred in her approach to the consideration of the ETS evidence/issues and as such I grant permission. I find that the grounds are plainly made out as the judge failed to attribute any weight in her assessment to the finding of Judge Lloyd, upheld by the Upper Tribunal, that the claimant had provided a credible explanation in response to the generic evidence and that the allegation of deception was not proven. While it may not have been the case that this previous finding was determinative of the issue in view of the "new information" before the judge, she was required to consider that evidence by reference to the findings of Judge Lloyd. That I find she failed to do.
26. It was recognised in SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC)103 that the SSHD may seek to adduce further evidence in future appeals but emphasised, all appeals will be decided on the basis of the evidence actually adduced. The "new information" the judge was referring to in this case appears to be expert in nature, namely, the report of Professor French. The judge further erred however in failing to address the expert evidence and provide sufficient reasons as to why that evidence, which was not specific to the

claimant, was sufficient inter alia to discharge the legal burden in this case. The very brief reference to the report at [27] does not discharge that duty.

27. These errors in my view reinforce my conclusion that the appropriate course, given the gravity of the consequences in deception cases, that no findings should be preserved.
28. I therefore find that the First-tier Tribunal erred in law. I remit the case to the First-tier Tribunal for a rehearing on all issues by a different judge in accordance with paragraph 7.2 of the Practice Statements for the Immigration and Asylum Chamber of the Upper Tribunal pursuant to s.12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007. To be clear, in the particular circumstances of this case, none of the findings of First-tier Tribunal Judge Obhi are preserved.

Signed:

Deputy Upper Tribunal Judge Bagral

Date 13 June 2018