



IAC-FH-CK-V1

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

Appeal Number: HU/05381/2017 ('V')

THE IMMIGRATION ACTS

**Heard at Field House
On 5th October 2020**

**Decision & Reasons Promulgated
On 14th October 2020**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS KHALEDA BEGUM
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the appellant:

Mr E Tufan, Senior Home Office Presenting Officer

For the appellant:

Mr Raza, Counsel, instructed by Charles Simmons Immigration Solicitors

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and written reasons which were given orally at the end of the hearing on 5th October 2020.

2. Both representatives attended the hearing via Skype and I attended the hearing in-person at Field House. The parties did not object to the hearing being via Skype and I was satisfied that the representatives were able to participate in the hearing.
3. The Secretary of State was the respondent before the First-tier Tribunal, while Mrs Begum was the appellant, appealing the refusal of her claim to remain in the UK on the basis of her human rights. To avoid confusion, I will refer to the Secretary of State by that name and Mrs Begum as the Claimant in this appeal.
4. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Herbert OBE, (the 'FtT'), promulgated on 25th of June 2018, by which he allowed the Claimant's appeal against the Secretary of State's refusal on 27th November 2016 of her application for leave to remain as the spouse of a settled person, on the basis that such refusal would breach her rights under article 8 of the European Convention on Human Rights ('ECHR').
5. In essence, the Claimant's claim involves the core issue of whether she had participated in deception by use of a proxy test taker for tests of proficiency in English (a so-called 'TOEIC' test), via a third party test provider, ETS, as a test centre in Dhaka in Bangladesh on 13th April 2013, prior to her initial entry to the UK. The Claimant's test result had been assessed under a "look up" tool as "questionable", as a result of which the Secretary of State subsequently interviewed the Claimant on 24th October 2016. As a result of her answers given at that interview, (particularly what was said to be the poor standard of her English) when combined with the ETS results, the Secretary of State concluded that the Claimant had used deception to obtain the TOEIC in 2013. The Secretary of State therefore refused the Claimant's application on 'suitability' grounds. The Secretary of State accepted that the Claimant met the 'eligibility' requirements of the Immigration Rules.

The FtT's decision

6. The FtT considered that where a TOEIC result was 'invalid', the Secretary of State met the initial evidential burden of proving deception, which then passed to the Claimant to provide an explanation. In the Claimant's case, where the TOEIC result was 'questionable', the Secretary of State had attempted to discharge the burden of proof with the TOEIC result and the interview analysis in combination. At §[23] to §[26] of his decision, the FtT then provided an analysis of the standard levels of English proficiency (the source of the evidence about those standards, and the FtT's expertise in those standards is unclear), compared with the questions posed to the Claimant during the 2016 interview. The FtT assessed the interview questions as being at a level higher than the Claimant's asserted 'A1' proficiency, based on his linguistic assessment. He noted the fact that the Claimant had nevertheless understood half of the questions; the TOEIC test had been taken some three years prior to the 2016 interview; and that her 2016 answers could be explained by her lack of notice that the purpose of the interview was to assess her English, and she was nervous; and he also took into account her relatively good proficiency in English before him. At §[27], the FtT then considered and applied section EX.2 of Appendix

FM of the Immigration Rules, concluding that there were insurmountable obstacles to the Claimant's family life with her husband continuing in Bangladesh, as he would be "forced to relinquish his British citizenship"; would lose the home in the UK which he rented and his UK job (§[27]).

7. Having considered the evidence as a whole, the FtT allowed the Claimant's appeal.

The grounds of appeal and grant of permission

8. The Secretary of State lodged grounds of appeal which are essentially as follows: the FtT had failed to consider that the initial burden of proof had been met. The FtT had erred in assessing the Claimant's English proficiency and the percentage of questions she had answered successfully during the 2016 interview and should instead have focused on whether she had engaged in deception. The FtT's assessment of the proportionality of the refusal of the Claimant's application had been influenced by his appraisal of her English proficiency, as the Claimant's circumstances were not exceptional.
9. First-tier Tribunal Judge Bulpitt granted permission on 20th April 2020, regarding the FtT's assessment of deception as arguably unclear and focused instead on an appraisal of the Claimant's English in 2016, rather than the guidance set out in SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC). While not limiting the scope of the grant of permission in the decision itself, in the reasons, he suggested that the second ground in relation to proportionality was misconceived, on the basis that the Claimant's application had only been refused on suitability grounds.

The Law

10. I noted not only the authority of SM and Qadir, but also the Court of Appeal decision of SSHD v Shehzad & Anor [2016] EWCA Civ 615, which was authority for the proposition that reliance on the so-called 'generic' evidence of ETS fraud, together with the results of a specific 'look up' tool, may be sufficient for the respondent to discharge the initial evidential burden of proving deception in an ETS case. Once this is met initially, the evidential burden then passes to the Claimant to provide an innocent explanation; the final question is and whether, on the balance of probabilities, the Secretary of State has discharged the legal burden of proving that the explanation should be rejected.
11. However, there are important caveats to those propositions. SM and Qadir distinguished between 'invalid' and 'questionable' results (§[16]). In that case, the initial evidential burden was described as 'comparatively modest' (§[68]), which called for an evaluative assessment on the part of the Tribunal. Shehzad was considering cases of 'invalid' results. Shehzad confirmed, at §[30]:

"But, in circumstances where the generic evidence is not accompanied by evidence showing that the individual under consideration's 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."

12. That is unsurprising, not least because, as the court in Shehzad recorded at §[25], *"In 'questionable' cases it was accepted that there may not have been deception."*

The hearing before me

13. The parties' representatives assisted me in narrowing down the issues in dispute. The only two issues were whether the FtT had erred in analysing the evidence and in applying the burden of proof in SM and Qadir and Shehzad, when concluding that that the Secretary of State had not discharged the initial burden of proof. Mr Tufan accepted that if there were no such error, nor an error in the subsequent analysis of an satisfactory explanation from the Claimant, then the Claimant's human rights appeal would succeed as she had only been refused on suitability grounds. A wider proportionality analysis, as conducted by the FtT, was unnecessary. An assessment of proportionality was only necessary if the Secretary of State had made out the case of TOEIC deception.

The Secretary of State's submissions

14. The Secretary of State was entitled to rely on a combination of the 'questionable' look up result and the Claimant's answers in the 2016 interview. The FtT had failed to consider the evidence adequately and in particular, the FtT had failed to explain why the Secretary of State had not met the initial evidence burden; or assess the adequacy of the Claimant's explanation. The flaws in the FtT's explanation extended to his analysis of the 2016 interview, in particular at §[23] of the decision, where the FtT compared the questions asked of the Claimant with the level of proficiency at level "A1".

The Claimant's submissions

15. Mr Raza accepted that a "questionable" look up result *may*, in combination with other satisfactory evidence, satisfy the initial evidential burden of proof on the Secretary of State. However, in this case, the FtT was entitled to conclude that she had not. Whilst the source of the evidential analysis and the FtT's expertise in comparing the 2016 interview questions with the TOEIC level 'A1' was unclear, they may have come from the Common European Framework of Reference for Languages or 'CEFR', which provided the sufficient context for the FtT's analysis. If instead, the FtT was being criticised for impermissibly adopting the role of an expert, without identifying his expertise or the source of the comparison between the TOEIC level of English and the 2016 interview questions, precisely the same could be said of the Secretary of State's decision letter dated 27th November 2016, at page [A11] of the Claimant's bundle. It comprised a brief excerpt of recorded questions and answers during the 2016 interview, with little more than a bare assertion that the Claimant's level of English was not at the standard that would have been expected. Indeed, the precise wording was in two, limited parts:

“On 24th October 2016 you attended the interview. However, you failed to understand the majority of the questions and your answers were unclear or irrelevant. The questions and your responses are below.” ...

“It is clear from the answers given that your understanding of the English language is limited and it was concluded by the interviewer that your spoken English and your understanding of English is poor and not to the standard required for the English language test you claim to have passed.”

16. That comprised the entirety of the Secretary of State’s analysis and reasoning. Any criticism of the FtT could similarly be levelled at the Secretary of State. In any event, the FtT had gone on to consider the Claimant’s innocent explanation, including her lack of awareness of the purpose of the 2016 interview, her nervousness and the quality of her English before the FtT, although noting that this was some years after the 2016 interview.

Discussion and conclusions

17. While briefly stated, I conclude that the FtT’s reference to the correct application of the initial evidential burden, as outlined above in SM and Qadir and Shehzad, is just about sufficiently clear. At §[21] and §[22], he noted:

“21. The burden of proof in cases where the test score is questionable rest [sic] on the respondent home office to establish that the appellant was not the test taker on a balance of probabilities. In cases where the test score are [sic] clearly said to be invalid the burden of proof moves to the appellant to establish that they were the test taker who had passed with the relevant score.

22. In the circumstances on the balance of probabilities, the interview conducted in the UK is evidence that the appellant relies upon together with the test score as to whether the original questionable test score to suggest the appellant was not the test taker in Dhaka.”

18. The reference at §[21] correctly draws the distinction between ‘questionable’ and ‘invalid’ look up results and correctly confirms that in the latter, the evidential burden passes to the Secretary of State. The reference in §[22] to the evidence “*relied on by the appellant*” must be a typographical error and must have intended to refer to the Secretary of State, as opposed to the Claimant. This can be the only logical reading of the sentence, as the interview evidence was clearly relied upon by the Secretary of State, rather than the Claimant and the FtT had noted, in the prior paragraph, that the burden (presumably the initial evidential burden) was on the Secretary of State.
19. Where the FtT did err was in how he then analysed the evidence. I accept the force of Mr Tufan’s submission that the FtT essentially adopted the role as his own expert, without explaining his expertise or knowledge about the TOEIC criteria for standards of English language proficiency. Instead, at §[23] to [25], he states:

"23. I find the analysis of the interview itself questionable because the definition of the common European frame maker [sic] for reference for languages under which the respondent operate [sic] is described as:

- *The test the appellant was taking as demonstrating A1, a basic ability to communicate and challenge information in a simple way. Example, "can ask simple questions about the menu and understand simple answers." It is called the "breakthrough test".*

20. The FtT then recites standards for levels 'A2' and 'B1', on the basis of entirely uncited or outsourced evidence, and concludes at §[24] that:

"24. Having read the interview, although the questions appear simple this is not of itself an English language test designed to test proficiency and the questions such as; "was the court recommended to you?" is not necessarily a straightforward question that calls for a basic ability to communicate and exchange information in a simple way."

21. This begs the question of how FtT knows what is in a test designed to test proficiency and how this would be inconsistent with the 2016 interview. The FtT's adoption of the role of expert is important, given that the interview record formed a core plank of the Secretary of State's evidence to discharge the initial evidential burden.

22. However, I accept Mr Raza's submission that precisely the same criticism can be levelled at the Secretary of State's reasoning in her letter dated 27th November 2016. The letter lists a brief excerpt of 13 questions, and then includes the assertion about the Claimant's answers being unclear or irrelevant; it finally states that it was concluded by the interviewer that the Claimant's spoken English and comprehension is not at the standard required for the test which the Claimant claimed to have passed. The decision letter provides no detail of the expertise and qualifications of the unnamed interviewer who reached the conclusion, or any analysis of whether the questions which were asked at the 2016 interview were appropriate to the TOEIC level with which the comparison was made. There is a bare assertion that a comparison was made, but with no explanation, for example, of acceptable questions for the specified standard. This becomes critical, when the very basis of the deception allegation is a *clear* failure, on the face of it, to reach a specified standard, following which an explanation by an individual is then required. If the standard by which an individual is assessed is never explained, and where there is a failure to explain the complexity of questions which a person at a certain standard can be expected to answer, it would be impossible for any First-tier Tribunal judge to reach a view that the nature of the questions were so simple that a Claimant must be expected to be able to answer the majority of them, or, in other words, or that there was such a *clear* failure.

23. In concluding that the FtT's decision should stand, just as the Secretary of State seeks to challenge the analysis by the FtT on the basis of unexplained expertise and reference to an unexplained standard, so precisely the same criticism can be made of the respondent's decision. In the circumstances, I conclude that the FtT was correct

in concluding that in reaching her decision, the Secretary of State had not discharged the initial evidential burden of proving that the Claimant was engaged in TOEIC decision. Having failed to discharge the burden, bearing in mind that the sole basis on which the Claimant's application was refused was on grounds of suitability, once that reason falls away, the Claimant met all other aspects of the Immigration Rules and Mr Tufan accepted that in those circumstances, the Claimant's human rights appeal would inevitably have succeeded.

Decision on error of law

24. Therefore, in the circumstances, although the FtT erred in law in his reasoning, there was simply insufficient evidence before him from which any Judge could have concluded that the initial evidential burden of proving deception had been met, so I do not set aside the FtT's decision.

Notice of Decision

25. The decision of the First-tier Tribunal stands. The Secretary of State's appeal fails and is dismissed.
26. No anonymity direction is made.

Signed *J Keith*

Date: 8th October 2020

Upper Tribunal Judge Keith