



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

Appeal Number: IA/36739/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 4<sup>th</sup> May 2016**

**Decision & Reasons  
Promulgated  
On 3<sup>rd</sup> June 2016**

**Before**

**Mr HJE LATTER  
(DEPUTY UPPER TRIBUNAL JUDGE)**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MD JIAUDDIN BABLU  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr L Tarlow, Home Office Presenting Officer  
For the Respondent: Mr M Biggs, Counsel

**DECISION AND REASONS**

1. This is an appeal against by the Secretary of State a decision of the First-tier Tribunal allowing the applicant's appeal to the extent that his application for leave remained before her for a lawful decision to be made.

In this decision I will refer to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Secretary of State as the respondent.

### Background

2. The appellant is a national of Bangladesh born on 12 December 1989. On 8 December 2010 he entered the UK with valid entry clearance as a Tier 4 Student valid from 24 November 2009 to 31 July 2012. On 27 July 2012 he submitted an application for further leave to remain as a student and this was granted until 30 June 2015. On 6 August 2014 he applied for an extension of stay as the partner of a person present and settled in the UK but this application was refused on 1 September 2014 for the reasons set out in the decision letter of the same date. The appellant was also served with notice of a person liable to removal on the basis that he had sought leave to remain in the UK by deception following information from the Education Testing Service (ETS) that on 25 April 2012 there was an anomaly with his speaking test score indicating the presence of a proxy test taker. As the English language test provided as part of his Tier 4 application was obtained through deception, it was considered that he had attempted to obtain leave through deception and his leave to remain was curtailed to expire on 1 September 2014 after which he had no valid leave to remain in the UK.
3. So far as the application for leave to remain as a partner was concerned, the respondent accepted that his partner was settled in the UK and that there was a genuine and subsisting relationship. However, it was not accepted that the appellant met the suitability requirements and in particular S-LTR2.2(a). The decision letter at para 15 records that the appellant did not meet the suitability requirements but if he did, the eligibility requirements would be met and additional consideration would be given to the criteria of para EX.1. On this issue the respondent was not satisfied that the appellant could meet the requirements of either para EX.1(a) or (b). The respondent went on to find that the appellant could not meet the requirements for leave to remain under private life or under Article 8.

### The Hearing Before the First-tier Tribunal Judge

4. The judge heard oral evidence from the appellant and his partner. She recorded at [39] that the respondent had not challenged the relationship or raised as an issue in the refusal the financial requirements in the Rules. She accepted that the appellant's wife met the definition of partner because they were married on 29 December 2013.
5. The judge then went on to consider the issues arising from the curtailment of the appellant's leave as someone who had sought leave to remain by deception by submitting an English language test taken by proxy rather than by himself. At [41]-[58] the judge dealt at length with the issue of

whether a proxy had been used to take the English language test. She found that the written evidence provided by ETS, whose methodology had been checked by the Home Office, was sufficient evidence to discharge the burden and onus of proof upon the respondent even if correctly stated as being at the high end of the balance of probability [52]. She was not persuaded by the appellant's evidence that his certificate had been incorrectly declared to be invalid, describing his evidence as not convincing and that the scores he claimed to have achieved seemed unfeasibly high, consistent with them being invalid. [53].

6. However, she held that the finding in relation to the ETS test result of 2012 was not sufficient to dispose of the appeal because the respondent had undertaken to consider all relevant factors including, for example, possible human rights grounds which might mean that removal would not be appropriate. She found that the respondent had not followed her own guidance as the decision to curtail should have been taken only after taking account of all relevant factors including human rights, whereas in para 37 of the decision letter it simply stated that returning the appellant to Bangladesh would not breach his human rights. The failure to consider discretion in relation to curtailment infected the decision as a whole. She further commented that on the face of the decision the respondent had sought to apply para S-LTR2.2(a) but that was only relevant to false information or representations submitted in relation to the application as opposed to any previous application. She said that this was an additional reason for finding that the respondent's decision was not in accordance with the law. The application should be returned to the respondent for a lawful decision to be made. Accordingly, the appeal was allowed to the extent that the application remained before the respondent for a lawful decision to be made.

#### The Grounds and Submissions

7. In the grounds the respondent argues that the judge was wrong to remit the matter to the respondent and had failed to note that the decision letter at paras 30 to 36 did consider the exercise of discretion. The grounds maintain that the appellant does not meet the suitability requirements of Appendix FM and that ETS had identified the appellant after a lengthy and systematic investigation.
8. The appellant submitted a rule 24 response dated 3 March 2016 arguing that the respondent's grounds raised no arguable error of law and that it was open to the judge to conclude that the respondent had failed to exercise her discretion before reaching her decision. It is further argued that the impugned English language test was submitted in relation to the previous variation application and not in relation to the application for leave to remain as a partner. The provisions of S-LTR2.2(a) mirrored the provisions of para 322(1A) of the Rules and that even if deception had been used to obtain the English language certificate, it would not fall within the provisions of S-LTR2.2.

9. The response raises a further issue in the light of the decision of the Upper Tribunal in SM and Qadir v Secretary of State (ETS - Evidence - Burden of Proof) [2016] UKUT 229 in support of an argument that the written evidence relied on by the judge did not provide a reasonable evidential foundation for the respondent's allegation of deception and, in consequence, the judge had erred in law by a finding that the respondent had discharged the burden of proving deception on the basis of the same generic evidence.
10. Mr Tarlow adopted his grounds arguing that there was no proper basis for the appeal to be remitted to the respondent. Mr Biggs submitted that the judge had failed to give adequate reasons for finding that the appellant had resorted to deception when taking the English language test but further submitted that this was immaterial to the outcome of the appeal insofar as it related to whether the appellant should be granted further leave to remain as a partner. However, he accepted that the issue was one of importance in relation to the curtailment decision and more generally to the appellant as he strenuously denied that the test had been taken by a proxy on his behalf.

#### Assessment of Whether the First-tier Tribunal Erred in Law

11. I am satisfied in the light of recent Tribunal decision in SM and Qadir that there are properly arguable issues relating to the way the judge dealt with the issues arising from the English language test and that it should be open to the appellant to challenge the judge's decision for the reasons set out in his response. If necessary, I treat the response as grounds of appeal and grant permission to appeal. No objection to this course was raised by Mr Tarlow.
12. I am satisfied that the judge erred in law as asserted in the respondent's grounds. The judge remitted the application to the respondent on the basis that she had not exercised any discretion in deciding what decision to make. However, the decision letter at paras 30 to 36 clearly indicates that the respondent did not simply state that returning the appellant to Bangladesh would not breach his human rights. I am satisfied that the respondent did take all relevant factors including human rights grounds into account before reaching her decision even though the appellant might disagree with that decision. There was therefore no basis on which the judge could properly have referred the appeal back to the respondent.
13. I also accept Mr Biggs' submission in the light of the decision in SM and Qadir that the judge failed to give adequate reasons for her finding that the information provided by ETS was sufficient evidence to discharge the burden and standard of proof or that she gave adequate reasons for rejecting the appellant's evidence that he had taken the test as opposed to it being taken by a proxy. I am therefore satisfied that the decision to remit the matter to the respondent should be set aside. Mr Biggs

submitted that in the light of the fact that the judge had found that it was not open to the respondent to rely on S-LTR2.2(a) it must follow that the appeal should have been allowed particularly in the light of the judge's comment at [39] that the respondent considered that if the suitability requirements were met, then the eligibility requirements were met. If the judge had taken that view it is difficult to see why she felt that any further decision needed to be made by the respondent. It may be because the judge took the view that there was an appeal against curtailment before her as well as refusal of leave: see the reference under Notice of Decision referring to "the appeal against curtailment and refusal is allowed ...".

14. I am also not satisfied that it can necessarily be inferred from the decision letter that even if S-LTR2.2(a) is not applicable that it is not open to the respondent to rely on the appellant's use of deception, if that is established, when considering suitability. It may be that this subparagraph was wrongly identified but prima facie it would be open to the respondent to argue that S-LTR1.6 is applicable.
15. This appeal cannot be resolved without further submissions as it was to all intents only part-heard before the First-tier Tribunal. The parties should have an opportunity of making further representations and, if appropriate, giving further evidence about the relevance of deception, if proved, to the application for leave to remain as a partner. Mr Tarlow and Mr Biggs both took the view that if the decision was to be re-made that should be by the First-tier Tribunal and that the appeal should be re-heard. I agree. This will give the parties the opportunity of clarifying their submissions both in respect of the appeal against the refusal of leave as a partner and its interrelation, if any, with the issues arising in respect of the decision to curtail the appellant's leave.

#### Decision

16. I am satisfied that the First-tier Tribunal erred in law and the decision is set aside. The appeal is remitted to the First-tier Tribunal for a full rehearing.

Signed H J E Latter

Date: 1 June 2016

Deputy Upper Tribunal Judge Latter