



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

Appeal Number: IA/49332/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 18 July 2016**

**Decision & Reasons Promulgated  
On 21 July 2016**

**Before**

**UPPER TRIBUNAL JUDGE KAMARA**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR KHONDOKER MAHBUBUL AHSAN  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer

For the Respondent: Mr Z Khan, solicitor, Universal Solicitors

**DECISION AND REASONS**

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Rayner promulgated on 24 November 2015, in which he allowed the respondent's appeal against a decision to remove him from the United Kingdom.

2. Permission to appeal was granted by Upper Tribunal Judge Kebede on 2 June 2016.

### Anonymity

3. No direction has been made previously, and there is no reason for one now

### Background

4. The respondent is a national of Bangladesh, born on 2 January 1985. He entered the United Kingdom during the year 2010 with leave to enter as a Tier 4 migrant until 30 November 2012. Following a successful appeal, the respondent was granted further leave to remain in the same capacity until 30 September 2014. On 28 April 2014, he underwent a civil marriage ceremony with his wife and on 19 August 2014, the respondent sought further leave to remain in the United Kingdom as a partner and step-father to her children from a previous relationship.
5. The Secretary of State refused the application, concluding that the respondent failed to satisfy the suitability requirements of Appendix FM owing to his conduct in obtaining leave to remain by deception. It was said that a recording of the tests taken at Synergy Business College on 18 September 2012 indicated the presence of a proxy test taker. Some doubt was also cast on the genuineness of the relationship with his partner and mention was made of the fact that the children of the marriage were not his biological children. In relation to paragraph 276ADE, none of the requirements of the Rules were said to be met and it was noted that the respondent had resided in Bangladesh for the vast majority of his life. The Secretary of State did not accept that there were any exceptional circumstances, which meant the respondent's removal from the United Kingdom would no longer be appropriate and it was said that no evidence had been provided to show that the respondent assisted in the day to day care of his wife's children.

### The hearing before the First-tier Tribunal

6. Judge Rayner concluded that the Secretary of State had failed to discharge the burden of proving the allegation of deception to the required standard. He proceeded to allow the appeal under EX.1(a), having found that the income requirements were not met. With regard to the EX.1(b), the judge considered there were no insurmountable obstacles to family life between the respondent and his partner continuing in Bangladesh.

### The grounds of appeal

7. In essence, the grounds argue that the judge failed to give adequate reasons in relation to a material matter. Reference was made to the judge's view that the respondent's evidence was far from compelling and the fact that a witness statement from Peter Millington was available, contrary to what the judge found. It was also said that the judge failed to

take into account the ETS look-up tool which showed that the respondent's test result was invalid.

**8.** Permission to appeal was granted for the following reasons:

*"There is arguable merit in the assertion in the grounds that the judge had failed to provide adequate reasoning as to why he preferred the appellant's evidence over the respondent's and why he considered that the respondent had failed to discharge the burden of proof, when considering the adverse findings he otherwise made at [27]. The respondent's grounds are fortified by the subsequent, and recent, decision in SM and Qadir V SSHD 9ETS - Evidence - Burden of Proof) [2016] UKUT 00229. "*

The hearing

- 9.** I advised the parties that the witness statement of Peter Millington was not on the case file and was not included in a small bundle of documents submitted by the Secretary of State to the First-tier Tribunal.
- 10.** Mr Khan informed me that no Rule 24 response had been produced.
- 11.** Mr Melvin relied on the decision in *SM and Qadir* as well as *SSHD v Shehzad & Anor* [2016] EWCA Civ 61. He argued that the judge should have found that the Secretary of State had discharged the burden of proof on the basis of the evidence before him and thereafter the burden would have been on the respondent to show that deception had not taken place. He drew my attention to [28] of the decision and submitted that that the error in question was material in that the judge raised numerous concerns with the evidence given by the respondent during cross-examination. Mr Melvin argued that the respondent's rebuttal of the burden was insufficient. The judge therefore erred in finding that EX.1(a) was met.
- 12.** In reply, Mr Khan declined to engage with the above-mentioned authorities but raised a new issue which had not been raised hitherto, that is that the specific provision relied upon by the Secretary of State did not apply in this case. In essence, the respondent was relying upon S-LTR 2.2(a) which refers to false information, representations or documents being submitted with the present application, whereas the disputed TOEIC certificate was submitted with a previous application. He further submitted that the appeal under the Rules ought to have been allowed under the Rules for this reason alone, or alternatively outside the Rules.
- 13.** Mr Melvin raised no objection to the new matter raised by Mr Khan. He merely responded by pointing to the plethora of reasons provided by the judge at [28] for finding the respondent's evidence "*far from compelling.*"
- 14.** At the end of the hearing, I reserved my decision as to error of law.

Decision on error of law

- 15.** *SM and Qadir* was heard some considerable time after this matter was considered by Judge Rayner. At [68] of that decision, the following was said;

“As our analysis and conclusions in the immediately preceding section make clear, we have substantial reservations about the strength and quality of the Secretary of State's evidence. Its shortcomings are manifest. On the other hand, while bearing in mind that the context is one of alleged deception, we must be mindful of the comparatively modest threshold which an evidential burden entails. The calls for an evaluative assessment on the part of the tribunal. By an admittedly narrow margin we are satisfied that the Secretary of State has discharged this burden. The effect of this is that there is a burden, again an evidential one, on the Appellants of raising an innocent explanation.”

- 16.** The judge therefore inadvertently erred in finding that the evidence provided by the Secretary of State, consisting of the evidence of Mona Shah, Rebecca Collings and the ETS look-up tool spreadsheet, was insufficient to discharge the burden of proving that the respondent carried out deception. Furthermore, the judge erred in not appreciating that the burden shifted to the respondent in this case. This is all the more crucial given the considerable concerns the judge had regarding the respondent's vague recollection of the test process, the fact that he had not booked his own test, that he could not remember many aspects of the test or even when he had received notification of the accusation that a proxy test taker was used.
- 17.** Notwithstanding my above findings, I have considered whether the judge's errors were material for the reasons put forward by Mr Khan.
- 18.** As rightly identified by Mr Khan, the decision in question relied on S-LTR2.2(a); which states that leave will normally be refuse on grounds of suitability if, whether or not to the applicant's knowledge, “false information, representations or documents have been submitted in relation to the application.”(my emphasis) At [7] of the decision, the following is said:

“Your client submitted an application for further leave to remain, FLR(O), on 19 August 2014. However, following identification that the English language test score submitted on a previous application (my emphasis) had been obtained by deception, the FLR(O) application has been refused and further consideration has

been given to your client's Human Rights under the ECHR. Enclosed is Home Office notice IS151a informing your client of his immigration status and liability to detention and removal from the UK."

19. It is abundantly clear from reading the aforementioned extract from the decision, that the Secretary of State is not saying that the English language test score which was submitted with the instant application for further leave to remain was obtained by deception but is relying on a document submitted with a previous application.
20. While it would appear that the Secretary of State's reliance on S-LTR.2.2(a) may be erroneous, this is not a complete answer to the appeal under the Rules.
21. The respondent relies on EX.1(a) because there are other aspects of the Rules he cannot meet. In *MA (Pakistan)*, it was established that the reasonableness of expecting a child to leave the United Kingdom, as referred to in EX.1(a) of Appendix FM to the Immigration Rules, paragraph 276ADE(iv) of the Rules and section 117B(6) of the 2002 Act should be approached in the same way. Furthermore, Elias LJ was persuaded to follow the approach taken in *MM (Uganda)* as follows;  
  
"But the critical point is that section 117C(5) is in substance a free-standing provision in the same way as section 117B(6) and even so the court in *MM (Uganda)* held that wider public interest considerations must be taken into account when applying the "unduly harsh" criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in section 117B(6)."
22. Having considered what is said in *MA (Pakistan)* about decision makers taking into consideration wider public interests considerations, it follows that the issue of the allegation of deception requires consideration by itself, irrespective of whether the specific suitability Rule in question is made out or not.
23. I conclude that the errors made by the judge were material and I therefore set his decision aside in its entirety. I have decided to remit the matter as opposed to re-making the matter out of fairness to the respondent who may well wish to rely on further evidence and submissions.

## **Decision**

**The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.**

**The decision of the First-tier Tribunal is set aside.**

**The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Taylor House, with a time estimate of 2 hours.**

Signed  
T Kamara  
Judge of the Upper Tribunal

Date: 19 July 2016