



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

Appeal Numbers: IA/33886/2015
IA/33887/2015

THE IMMIGRATION ACTS

**Heard at Liverpool
On 1 September 2017**

**Decision & Reasons Promulgated
On 10 October 2017**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**YUQING CHEN (FIRST APPELLANT)
LING YANG (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr Bates, Senior Home Office Presenting Officer
For the Respondents: Mr Karnik, instructed by Knightbridge Solicitors

DECISION AND REASONS

1. I shall refer to the appellant as the respondent and the respondents as the appellants as they appeared respectively before the First-tier Tribunal. The appellants, Yuqing Chen and Ling Yang, are mother and daughter and citizens of China born on 12 November 1976 and 5 December 1997

respectively. They appealed against decisions of the respondent dated 27 October 2015 to refuse to grant them indefinite leave to remain in the United Kingdom on the basis of the first appellant's marriage to a British citizen (Zuhaua Yang). The First-tier Tribunal (Judge Birrell) in a decision promulgated in December 2016, allowed the appeals on Article 8 ECHR grounds. The Secretary of State now appeals, with permission, to the Upper Tribunal. I shall hereafter refer to the first appellant as the 'the appellant'.

2. The appeal turned on whether the appellant had cheated in a TOEIC English language test. The grounds of appeal first complained that the fact that the appellant had been able to describe the test process meant that she had not taken the test herself necessarily. The grounds refer to the fact that the appellant in *MA (ETS - TOEIC testing)* [2016] UKUT 00450 (IAC) had attended the test centre and had provided a photograph there but had still been found to have cheated and not taken the test himself. Secondly, the grounds refer to the fact that the test centre attended by the first appellant, 77% of the test results were found to be "invalid" and 23% had been found to be "questionable". The appellant's own result had been found to be "questionable" by the respondent. It is asserted the judge failed to take into account that the appellant had taken her "questionable" test at a time when a large number of invalid tests had been taken at the same test centre. Thirdly, the judge had found that the appellant had completed a City and Guilds test at the Academy of Oriental Cuisine but had failed to take into account that this ETS test had been taken after the qualification which had been disputed and therefore was not evidence of her English language ability at the relevant time. The fact the appellant could now speak English should not be determinative of the appeal.
3. The judge stated [24] that she had taken the whole evidence into account before reaching a decision. She observed [36] the 77/23% findings of the report into the test centre to which the respondent has referred in the grounds of appeal. The judge also observed [38] that, "the striking feature in this case is that the first appellant having realised that she had not taken a valid test on 5 February 2014, relatively soon after on 16 August 2014 took a City and Guilds test ..." She noted that these latter test providers had not been the subject of any enquiry or challenge by the respondent. The judge was alert to the fact [40] that a later demonstration of proficiency in English was not something to which she should attach particular weight. However, she observed the relatively short gap between the February and August 2014 tests and to the fact that the August 2014 test had not been challenged at all by the respondent and observed that, given that she was able to pass the test in August 2014, she had little motive to cheat in February 2014.
4. Mr Bates, for the respondent, submitted that the judge had failed to take account of the fact that, in *MA* (see above), the Tribunal had found that an individual might have a number of different motives for cheating in a test even including in circumstances where he or she had a proficiency in

English. Whilst I acknowledge that may be the case, I asked Mr Bates whether he considered Judge Birrell's decision to be perverse given the facts which were before her. He said that he did not consider it to be perverse.

5. I considered the submissions of both representatives carefully before deciding that Judge Birrell did not err in law such that her decision falls to be set aside. I have reached that conclusion for the following reasons. First, I agree with Mr Karnik's submission that the grounds of appeal appear to suggest that the 23% of test results at the centre which were "questionable" should be considered as equivalent to invalid results. The judge has had regard to the percentage of invalid and questionable results at the centre but she was not obliged to assume, as the respondent appears to suggest, that the appellant had cheated because her result was declared "questionable". It was open to Judge Birrell to conclude that the questionable nature of the appellant's test result as neither detrimental nor supportive of her case. Secondly, the judge has found that other evidence indicates that the appellant had no incentive to cheat in February 2014 given that she was able to pass an English language test only a few months later in August the same year. Likewise, the judge did not err in law at [40] by concluding that the appellant's performance in English at an interview with the Home Office a year after she had taken the language test was not something upon which she had to place great weight. As she observed, "Firstly (*sic*) I am satisfied that in the same way the Upper Tribunal has indicated to me that I should not place great weight on the appellant's language proficiency before me if this hearing comes sometime after the language test being challenged by the same analogy I am satisfied that the appellant's performance at an interview with the Home Office one year after she passed the language test is not something I can place great weight on". Given that Judge Birrell's decision is not, as Mr Bates confirmed, being challenged on the basis that it is perverse, the only question is whether she reached her decision by an incorrect application of the relevant law or a flawed assessment methodology. For the reasons I have given above, I am not satisfied that the judge inaccurately applied the relevant law. Further, I find that her assessment of the evidence was fair and even-handed; she reached findings which were open to her on the evidence. In the circumstances, the Secretary of State's appeal is dismissed.

Notice of Decision

6. This appeal is dismissed.
7. No anonymity direction is made.

Signed

Date 28 September 2017

Upper Tribunal Judge Clive Lane