



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/23216/2016

**THE IMMIGRATION ACTS**

Heard at Birmingham  
On 12 June 2018

Decision & Reasons Promulgated  
On 21 June 2018

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL McCARTHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JAGROUR SINGH  
(ANONYMITY ORDER NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr N Ahmed, instructed by Justmount & Co Solicitors

For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant Secretary of State appeals with the permission of UT Judge Kebede against the decision and reasons statement of FtT Judge Ghani that was issued on 23 August 2017.
2. Although the appellant's grounds of appeal are lengthy and somewhat convoluted, at their heart are two issues, which were clarified by Mr Mills. First, whether on the evidence it was open to Judge Ghani to find that the appellant had not discharged the

burden of proof in relation to the allegation that the respondent had fraudulently obtained an TOEIC certificate in a previous application. Second, whether Judge Ghani had properly assessed the public interest in expelling a person who has sought to abuse immigration control, and therefore had wrongly carried out the article 8 balancing exercise.

3. Mr Ahmed relied on his rule 24 response, submitted (somewhat late) on 11 June 2018. I admitted the response nevertheless because it assisted me in understanding the issues. The respondent's counter arguments are, in summary, that Judge Ghani's findings were open to him and are sound. In addition, given the appeal below was an appeal against the refusal of a human rights claim, the judge was right to give greater weight to the existence and nature of family life, which was conceded by the Secretary of State.
4. Neither representative seemed familiar with the Court of Appeal's judgment in *Ahsan and others v SSHD* [2017] EWCA Civ 2009, which was handed down on 5 December 2017, wherein from [22] to [33], Underhill LJ summarises the TOEIC litigation to date. Although that summary was not available to Judge Ghani in August 2017, it is useful to me in that it means I do not have to rehearse the same litany of cases which Mr Mills and Mr Ahmed referenced.
5. Of particular note, and as I mentioned during the hearing, are the comments of Underhill LJ at [33]. Mr Mills's submissions sought to make the same point.

33. Ms Giovannetti was concerned to emphasise the extent to which the forensic landscape had changed since the Secretary of State's initial, and frankly stumbling, steps in this litigation. The observations of the UT in *SM and Qadir* should not be regarded as the last word. Where the impugned test was taken at an established fraud factory such as Elizabeth College, and also where the voice-file does not record the applicant's voice (or no attempt has been made to obtain it), the case that he or she cheated will be hard to resist. We were not ourselves taken to any of the underlying evidence, but I am willing to accept that that appears to be a reasonable summary of the effect of the recent decisions to which we were referred. However, I am not prepared to accept – and I do not in fact understand Ms Giovannetti to have been contending – that even in such specially strong cases the observations in the earlier case-law to the effect that a decision whether the applicant or appellant has cheated is fact-specific are no longer applicable or that there is no prospect of their oral evidence affecting the outcome.

6. I am aware from the appeal file that in the appeal below the appellant Secretary of State provided a number of documents, including: (i) evidence that the respondent's ETS results from his tests taken on 22 May 2013 were invalidated, (ii) comparable results from Premier Language Training Centre showing the results of all those who took the tests on 22 May 2013, (iii) a Project Façade report into that training centre, (iv) witness statements from three Home Office employees (Mr Jagdev Singh (senior caseworker), Ms Rebecca Collings (Grade 6 Civil Servant) and Mr Peter Millington (Assistant Director)), and (v) an expert report from Professor Peter French.

7. The Tribunal's date stamp shows these documents were received and placed on the appeal file on 17 June 2017, the day before Judge Ghani heard the appeal. Yet Judge Ghani's decision and reasons statement does not refer to these documents. In light of the observations of Underhill LJ, such evidence would suggest Premier Language Training Centre was a "fraud factory". In such circumstances, as Mr Mills reminded me, it was not sufficient to rely on the appellant's account of travelling to the test centre, the layout of that centre and what happened. As Ms Collings states at paragraph 17 of her statement of 23 June 2014, registered candidates attended the test centre on the relevant date, logged in and then stood aside to let other people take the oral and written parts of the exams.
8. Analysing Judge Ghani's assessment of the evidence, I am satisfied that he failed to properly assess the Home Office's evidence. It is clear to me that Judge Ghani misdirected himself regarding the fact the respondent could describe the arrangements in place for taking the tests and the fact the respondent was fluent in English (having subsequently taken other approved tests). At [17], Judge Ghani refers to the respondent providing an "innocent explanation" and that the appellant Secretary of State had not discharged the burden of proof. In light of the detailed documentary evidence provided by the Home Office, I cannot accept that these findings were soundly made because there is no reference to or assessment of that evidence.
9. The failure to assess material evidence is an error of law, as is any misdirection that occurs as a result. The seriousness of such errors means the decision and reasons statement cannot stand.
10. For the sake of clarity, and because the issue was advanced by Mr Ahmed, I make the following additional findings. On the evidence before him, Judge Ghani's findings are ones that were not open to him to make. The appellant Secretary of State provided sufficient documentary evidence to discharge the initial burden of proof. The respondent failed to provide an innocent or other explanation, meaning the Secretary of State proved her case. The respondent did not seek or provide the voice files or any other objective evidence to provide an innocent explanation. I am satisfied in this case that the high threshold to conclude that the judicial findings made are legally perverse is passed because no person acting judicially and properly could come to the conclusions expressed by Judge Ghani that the respondent provided an innocent explanation.
11. There is one remaining issue to consider. Mr Ahmed submits that the fact the appellant Secretary of State has never taken any action to expel the respondent despite the accusation must be an indication that the respondent's actions are not deemed to be so serious a threat to the public interest as to require his expulsion. Mr Mills pointed out that Annex B to the reasons for refusal letter dated 6 October 2016 includes an information notice in which the respondent's liability for removal is described. I reject Mr Ahmed's argument because the Secretary of State would be acting prematurely to enforce the expulsion of the respondent prior to his appeal being determined.

12. I am satisfied that the errors are such as to require the decision and reasons statement of Judge Ghani to be set aside and I so do. The question arises, therefore, as to how the decision should be remade.
13. I remind myself and those reading this decision that the originating appeal is an appeal against a refusal of a human rights claim. The senior courts have reminded the Tribunal of its adjudicative role in a number of cases (e.g. *Hesham Ali (Iraq) v SSHD* [2016] UKSC 60, from [39]) and that the proper approach is to find a fair balance between the personal circumstances of an appellant and the public interest (e.g. *SSHD v Barry* [2018] EWCA Civ 790, from [17] and *TZ (Pakistan) and PG (India) v SSHD* [2018] EWCA Civ 1109, at [19] and [35]).
14. To carry out the necessary evaluative exercise first will require an assessment of the nature of the family life of the respondent. It is not sufficient to say that the respondent would otherwise satisfy the requirements of appendix FM to the immigration rules. Such a concession is a starting point, but as recognised in case law and in paragraph GEN.3.2(2) of appendix FM, in order to evaluate an article 8 claim it is necessary for the decision maker (including a Tribunal Judge) to consider what exceptional or compelling factors might exist.
15. Only once this assessment has been carried out can the necessary balancing exercise take place, where the personal circumstances of the appellant, including his family life, can be weighed against the public interest.
16. I have considered whether to retain this case in the Upper Tribunal, but because of the changing nature of the parties' arguments and circumstances, it is not appropriate to do so.
17. At the end of the hearing Mr Ahmed advised me that the respondent and his wife are expecting another child. This means it may be necessary to consider the best interests of the children who would be affected by the respondent's expulsion. In addition, I realise that the respondent may wish to obtain the voice recording to provide an innocent explanation as to why the appellant's Secretary of State's evidence of fraud is not sufficient to discharge the burden of proof. Because both sides accept the forensic landscape has changed significantly since *Qadir and SM*, and that was not clear when the appeal was heard below, I do not see how I can deny the respondent such opportunity should he wish to take it.
18. In addition, it would appear to be part of Mr Mills's submission that the Secretary of State considers the extension of leave granted to the respondent from 11 August 2013 to 30 April 2015 would not have been granted were the fraud to have been known. The Secretary of State would regard the respondent to be an overstayer when he applied for further leave to remain as a spouse. It follows that the Secretary of State seeks to argue in part that the respondent would not satisfy the requirements of appendix FM unless paragraph EX.1 was engaged. As is well known, the parameters

are wholly different under such provision, the issues of insurmountable obstacles and the reasonableness of expecting British citizen children to leave the UK would have to be examined.

19. With these legal requirements and practical matters in mind, I am satisfied the appeal must be remitted to the First-tier Tribunal for a fresh hearing before a judge other than Judge Ghani.

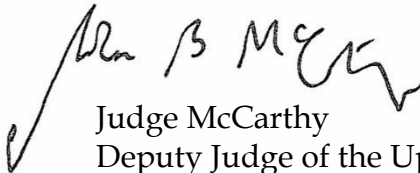
**Notice of Decision**

The respondent's appeal to the Upper Tribunal is allowed.

The decision of FtT Judge Ghani contains legal error and is set aside.

The appeal is remitted to the First-tier Tribunal for a fresh hearing. Nothing is preserved.

Signed



Date

18 June 2018

Judge McCarthy

Deputy Judge of the Upper Tribunal