



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/25897/2016

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre  
On 11<sup>th</sup> July 2018

Decision & Reasons Promulgated  
On 2<sup>nd</sup> August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

MUHAMMAD TAHIR  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Wilkins of Counsel, instructed by Knightbridge Solicitors  
For the Respondent: Ms Aboni, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. I had originally considered this matter at the hearing on 14<sup>th</sup> May 2018. I had found that there was an error of law in the First-tier Tribunal decision and I had set that decision aside. I could not continue with the hearing because there were significant legal and other issues but Counsel for the Appellant had been taken ill and therefore, in the interests of fairness, I had acceded to the Appellant's solicitors' application to adjourn the matter for this resumed hearing.

2. The fuller background to the matter is set out in my error of law decision and I refer to it, but in short, the position is as follows. The Appellant had made an application to remain in the United Kingdom on 29<sup>th</sup> July 2016 and by way of a decision dated 8<sup>th</sup> November 2016 the Secretary of State had rejected that application. In summary, it was said by the Secretary of State in the refusal letter as follows:

“I am satisfied that your presence in the UK is not conducive to the public good because your conduct makes it undesirable to allow you to remain in the UK. Your application is therefore refused under paragraph S-LTR.1.6 of the Immigration Rules.”

3. The basis of the Secretary of State’s refusal was connected to an English language test that the Appellant said he had undertaken. In summary, the Secretary of State concluded that fraud had been employed by the Appellant. The Secretary of State said as follows:

“In your Tier 4 (General) application dated 06 June 2013 you submitted a TOEIC certificate from Educational Testing Services (‘ETS’). You were interviewed by an officer on 29 July 2016 when you were asked: ‘Where did you take the test?’, ‘how long did the test take?’ and ‘what did the test involve?’. The Secretary of State does not consider your responses credible. In your Tier 4 (General) application dated 06 June 2013 you submitted a TOEIC certificate from Educational Testing Services (‘ETS’). ETS has a record of your speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS has via the use of computerised voice recognition software and a further human review by anti-fraud staff (each of whom has determined that a proxy was useful) undertaken a check of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker. Your scores from the test taken on 01 May 2013 at Innovative Learning Centre have now been cancelled by ETS. On the basis of the information provided to her by ETS, the SSHD is satisfied that your certificate was fraudulently obtained and that you used deception in your application of 06 June 2013...”

4. It is worth saying at this stage that in all other respects the Secretary of State was satisfied that the Appellant met the requirements for leave to remain as a partner. It was this aspect, namely (c)(i), which was the issue, and that states: “The applicant must not fall for refusal under Section S-LTR: Suitability leave to remain.”
5. At the hearing today the parties indicated to me that they had had a discussion prior to the case commencing and Ms Aboni on behalf of the Secretary of State indicated that she was not able to concede in relation to the deception issues but that in respect of Article 8 she said in view of the British children she accepted that there were compelling circumstances (which she later clarified to mean in respect of the third child) that leave could be granted outside of the Rules.

6. Miss Wilkins expressed her gratitude for the approach taken by Ms Aboni but, having considered the matter with the Appellant, said that the deception issue remaining would deprive the Appellant of a number of benefits in relation to future applications for leave to remain including for indefinite leave to remain and indeed any application for naturalisation. She said that in the circumstances a positive case would be advanced to deal with the deception issues. I therefore heard evidence on behalf of the Appellant from the Appellant himself and although his wife was in attendance, in view of the concession in relation to the Article 8 aspects it was unnecessary, said Counsel on behalf of the Appellant, for me to hear from the Appellant's wife.
7. The documentation was not in the best order but the documents I was invited to consider were in the following bundles:
  - (1) Home Office bundle under cover of a letter of 4<sup>th</sup> July 2017;
  - (2) the Appellant's bundle used at the FtT under cover of a letter of 5<sup>th</sup> July 2017;
  - (3) a new bundle from the Appellant dated yesterday, 10<sup>th</sup> July 2018 comprising 128 pages; and
  - (4) a fourth bundle from the Home Office under cover of a letter of April 2017 but which neither party had but which was in the Tribunal file. I therefore arranged for that to be copied for each of the parties and sufficient time was given to them to take instructions upon it.
8. When giving evidence the Appellant adopted his witness statement at page A2 of the bundle and which he also signed today. The witness statement, in reality, deals with the family life aspects but he also adopted his previous witness statement and that was the one which he provided to the First-tier Tribunal in 2017. Within that he had set out in some detail the way in which he had come to take his English language test.
9. The Appellant said between paragraphs 17 and 23 the following: that the reading test had three parts and he explained what those were, the speaking test had eleven questions and he describes that and the duration of it. He said the exam was for two days and he said that he genuinely took the test and that he wants to Home Office "to provide the evidence in relation to the allegations". He said when he was interviewed by the Home Office

"The interviewer spoke with a Scouse accent and I could not understand everything. I had asked repeatedly to repeat the questions. The Home Office did not record the interview despite requesting. ... No evidence was provided regarding their allegations. I am concerned as to why they replied ETS allegation on me. ..."

10. It is relevant to say that insofar as the Home Office interview is concerned that a copy of that had been provided to me in a typed form. The interview took place on 29<sup>th</sup> July 2016 and at question 2 he had asked the following: "Can you hear me clearly/are you able to understand me/do you require an interpreter?" There is no reply recorded whereas for all of the other questions I can see that there is.
11. In his oral evidence before me the Appellant explained that he has undertaken other English language tests. He had first undertaken an IELTS test in 2007, a Trinity College test in respect of his spouse visa in 2013 and indeed this test also in that year. He said he had also undertaken security training. An English test in 2010 and an NVQ Level 2 for his taxi licence. He said to me that he had undertaken his education in Pakistan where he had undertaken his studies in English. The originals of all those relevant certificates were available for inspection at court today.
12. Insofar as the impugned test is concerned the Appellant said he went to the Initiative Learning test centre in Manchester. He said it was located on a street off Dickinson Road. He said by way of cross-examination that he went to that test centre because it was the closest to him and he lived in Greater Manchester. He said when he himself was a student here in the UK at college. There were other students who had gone to this test centre as well and he, as I understood his evidence, therefore followed suit. Indeed, his own research, looking at the internet, was that this was really the only centre that he could attend.
13. He described when undertaking the tests, the number of people who were there. He said there seven, eight or nine people, albeit he said it was some five years ago and thereby his memory may not be as clear. He was asked how long the speaking test was and he said it was about twenty minutes and that there were various types of questions that were asked. He described the layout of the room, where the other people were and he explained that there were the candidates, the examiner and indeed a security guard. Before one could enter there was a receptionist who would then, it appears to me, electronically unlock the door. He protested he just did not understand why the Home Office was saying he was not at the test centre when he was. Indeed, he said that there was CCTV and that the Home Office could have got hold of that and he said indeed that the doors were locked and operated via reception. He again insisted that he was there at the test centre.
14. The Appellant was asked whether he had made any attempt to contact ETS or the test centre and he accepted that the solicitor had indeed contacted the test centre but it had closed down in 2016. He was only checking in 2016 because that was when he got his refusal letter. Insofar as the contact with ETS is concerned he explained that an email had been sent by his solicitor but there had been no reply. At that stage the Appellant through his Counsel was able to produce a copy of that email, which was outwith the other bundles that I referred to earlier, and indeed, it is an email not challenged as to its authenticity. It is clear that the Appellant's solicitor had indeed

emailed as claimed and I will only refer to her first name in case of privacy matters to somebody called Angèle at etsglobal.org with a correct email address.

15. There was no re-examination and I then moved on to hearing submissions. Ms Aboni said that she relied on the reasons for refusal letter and the documents in the supplementary April 2017 bundle. She submitted that the Secretary of State has discharged the initial burden regarding the allegation of the English test and therefore the burden was upon the Appellant to give an innocent explanation that the results could be relied upon. Ms Aboni took me to the April bundle and to the document Annex A and she said that it was clear that the source data indicated that the result was “questionable” relating to this Appellant. She took me to Annex B, being an ETS TOEIC Test Centre Lookup Tool, which showed that 100% of the ten tests taken on the day were questionable.
16. Ms Aboni also took me to the Home Office document headed “Project Façade – criminal enquiry into abuse of the TOEIC” and this related specifically to the Innovative Learning Centre in Manchester and Ms Aboni explained that at paragraph 5 there were invalid and questionable TOEIC results which were identified and indeed at paragraph 13 it was clear to see that when two audits were conducted, one, by way of example, on 14<sup>th</sup> May 2013. Indeed, days after the Appellant’s own test, sixteen individuals were taking the test in two rooms, other individuals standing next to them whilst the test was being taken. In one case a person of Asian appearance was taking the test but the ID provided was for a Chinese national. During the audit a suspicious power cut took place during which time individuals changed places with each other in the test rooms. The conclusion was that pilots (imposters) were taking the test on behalf of the candidates. Putting it to one side, my understanding is that “Chinese” includes “Asian” but I think the drafter probably meant Asian meaning from India, Pakistan, Bangladesh as opposed to China but in any event, I understand what is being said in that document.
17. Ms Aboni continued with her submissions to say that there might be all sorts of reasons why even a competent English language speaker might use a proxy. It might simply be nervousness in taking tests or something similar. It was submitted that the Appellant had failed to discharge the burden upon him and that deception had been proved but, again, very fairly, Ms Aboni said that even if that was the case and the Immigration Rules were not satisfied the Appellant’s appeal should succeed because of the British children, in particular the compelling circumstances relating to the third child, who was not born at the time of the hearing before the First-tier Tribunal.
18. I then heard detailed submissions from Miss Wilkins. She said she relied upon her skeleton argument, which set out in some detail the factual and legal position in respect of the family and wider Article 8 issues and also in respect of the Immigration Rules aspect. Miss Wilkins took me to various parts of the documents which were submitted by both parties and ultimately she said that I should conclude that the evidential burden had not been satisfied by the Secretary of State but that even if it had the position was that the Appellant had more than made out his case

and this was not a deception case but if I was against her on that as well that in any event there is a discretion which applies and that this was a case in which I ought to conclude that the discretionary application of the adverse findings should not apply against this Appellant.

19. Looking to the findings which I have to make, I of course have seen and heard the Appellant and I take into account what he said in his written documentation to me. Although I had set this out already at the error of law hearing, I shall briefly deal with the legal analysis in respect of this area of the law. I start with the judgment of the Upper Tribunal in **SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC)**. The Upper Tribunal referred to case law itself and it was made clear at paragraph 57 that the applicable principles and jurisprudence included the following:

“This decision is illustrative of the moderately complex exercise required of Tribunals from time to time. Here the Upper Tribunal held, in harmony with established principle, that in certain contexts the evidential pendulum swings three times and in three different directions:

- (a) First, where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue: for example, by producing the completed application which is *prima facie* deceitful in some material fashion.
- (b) The spotlight thereby switches to the applicant. If he discharges the burden - again, an evidential one - of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.
- (c) Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant’s *prima facie* innocent explanation is to be rejected.

A veritable burden of proof boomerang!”

20. I refer then to the way in which the case law continued to develop thereafter, including the judgment of Lord Justice Beatson in **Shehzad v Secretary of State for the Home Department [2016] EWCA Civ 615**, which I had referred to in my error of law hearing at paragraph 30.
21. I then turn to the factual matrix of this particular case. Firstly, is there evidence from the Secretary of State of a specific nature dealing with this Appellant? Prior to the hearing commencing it appeared that neither party had the Home Office bundle of 27<sup>th</sup> April 2017.

22. Miss Wilkins submits that insofar as the evidential burden on the Secretary of State is concerned this is a case in which the evidential burden is not satisfied and she relies on three particular aspects to make good that submission. She said firstly, in fact, there are four different aspects. Firstly, if one looks to Annex A, which I referred to earlier, it says no more than that the test was “questionable”. She says Annex B also says no more than “questionable” as opposed to “invalid” and then if one looks to Rebecca Collings’ statement, which, she submitted to the Tribunal, will be shown to the parties as well. At paragraph 29 it said as follows, in relation to this questionable/invalid Ms Collings said:

“ETS explained, at the time, that those categorised as questionable (as opposed to cancelled/invalid) were inconclusive in terms of being certain of impersonation/proxy test taking. Following further communication with ETS they confirmed the definition of ‘questionable’ and this is set out in Peter Millington’s witness statement; it is where an individual’s test result was still cancelled on the basis of test administration irregularity including the fact that their test was taken at a UK testing centre where numerous other results have been invalidated on the basis of a ‘match’. ETS had analysed over 10,000 test scores at that point, of which the majority were cancelled as invalid, the remainder were cancelled as questionable.”

Miss Wilkins also referred to paragraph 35 of that statement, which referred to invalid test result and she said this was further room for at the very least confusion of the different terms.

23. Mr Millington’s statement at paragraphs 46 and 47 was referred to and he had said as follows:

“46. ETS have identified thousands of cases where speech samples display marked similarities, leading OTI to believe an imposter was involved, and in such cases, scores will be cancelled. Within the tests analysed the OTI has identified many instances where the speech sample indicates the same individual has taken tests in place of numerous candidates. Where a match has been identified their approach is to invalidate the rest result. As set out in the witness statement of Rebecca Collings, ETS has informed the Home Office that there was evidence of invalidity in those cases.

47. Where a match has not been identified and verified, an individual’s test result may still be invalidated on the basis of test administration irregularity including the fact that their test was taken at a UK testing centre where numerous other results have been invalidated on the basis of a ‘match’. In these cases, the individual would usually be invited to take a free re-test. ...”

24. Insofar as the Project Façade report is concerned Miss Wilkins said at paragraph 5 one needs to look at the definition which is applied there to invalid and questionable.

- Invalid is referred to as being “where evidence exists of proxy test taking and/or impersonation”.
- Questionable: “Test takers who should re-test due to administrative irregularities.”

In short, she said, well, why did that not happen here? and she says for those reasons the evidential burden placed on the Secretary of State has not been discharged.

25. Considering that submission in my judgment, Miss Wilkins has made good her submission. I am not persuaded that the Secretary of State has discharged the evidential burden. This, at best, was a case in which the evidence shows there was something “questionable” about the test centre and about the matters which were pertaining to it. It was never a case of an “invalid” test. So, although specific evidence has been provided by the Secretary of State, in my judgment, the evidential burden has not been met. That would lead to the Appellant’s appeal succeeding.

26. However, in view of the importance of this case to the Appellant and his family and in view of the number of these cases I will go on to consider matters further. In my judgment even if I had not been persuaded as to the evidential burden, then it would be necessary to consider the following. The case law directs that I should consider this aspect by taking into account the Appellant’s evidence. In my judgment, the Appellant’s evidence is very significant. Not only does it include the Appellant’s ability to speak English here today before me during his evidence without an interpreter, but much other evidence well before this hearing. In 2007 and therefore years before the Appellant had arrived in the United Kingdom he had undertaken an English language tests and passed. Well before he arrived in the United Kingdom he had undertaken various subjects at school and other institutions in English, which he had passed, and indeed, in the same year as this test he had undertaken a different test for his spouse visa, which he was also successful in, and there have been other, as it were, post-test English examinations such as his taxi test, which he has also passed.

27. So, all of that falls for assessment and consideration. In my judgment, that evidential burden is also satisfied by the Appellant. The real crux of the concern by the Secretary of State (and the case law) is that there are instances where people who can speak English to a competent level and who can pass the test but who nonetheless engage a proxy. That may be because they are not confident. Perhaps they are nervous or simply lazy and indeed, it is right to refer to MA and the case law in respect of it. In my judgment, there has to be a case by case consideration of whether such facts can apply. In this Appellant’s case, where there is detailed, clear, relevant evidence of the Appellant having undertaken so many different tests well before this one and indeed a test very shortly at the time that this one was taken and many



subsequent tests, it all indicates to me that there is no reason why for this particular test the Appellant would have been nervous, apprehensive or the like so as to use a proxy. Indeed, nothing indicates to me why he would have been “lazy” in taking the test close to where he lived, where all of his fellow students had also undertaken the test, and I simply cannot ignore that the Appellant was very close to getting the number of people at the test centre correct. The Secretary of State said there were ten persons tested on the day. The Appellant says he recalled seeing seven to nine others on the day, and that evidence was served well after the Appellant gave his interview but he got it right, and, in my judgment, that also indicates that he really was at the test centre at the time. The details of the test centre from the Appellant therefore all suggest he really did attend.

27. As for the issues in respect of the interview, which took place in Liverpool, I do accept the Appellant’s evidence that he struggled with the accent of the interviewer. In my judgment, in this particular case, the way in which that was described from the outset and because the interview itself does not note whether or not the Appellant and the interviewer understood each other at the start, resonates with what the Appellant himself has told me in his written and other evidence.
28. So, in the circumstances, even if I was with the Secretary of State in relation to the evidential burden and the pendulum shifting to the Appellant, in my judgment, it clearly shows that the burden would then revert to the Secretary of State. I am more than satisfied to the required standard that the Appellant did take his own English language test and, in the circumstances, the Appellant did meet the requirements of the Immigration Rules and I therefore allow the Appellant’s appeal.

### **Notice of Decision**

**The decision of the First-tier Tribunal Judge contained a material error of law.**

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

**I remake the decision and allow the Appellant’s human rights appeal.**

No anonymity direction is made.

Signed: A Mahmood

Date: 11 July 2018

Deputy Upper Tribunal Judge Mahmood