



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

Appeal Number: IA/26561/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 4<sup>th</sup> December 2017**

**Decision & Reasons  
Promulgated  
On 15<sup>th</sup> January 2018**

**Before**

**Upper Tribunal Judge Chalkley**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**REDWANUR RAH SUMON  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

*For the Appellant: Mr Tom Wilding, a Senior Home Office Presenting Officer*

*For the Respondent: In person*

**REASONS FOR FINDING AN ERROR OF LAW**

1. The appellant is the Secretary of State for the Home Department and to avoid confusion, I propose to refer to her as being “the claimant”.
2. The respondent is a 28 year old Bangladeshi man who was born on 22<sup>nd</sup> October 1988, and who arrived in the United Kingdom on 1<sup>st</sup> March 2011, with Tier 4 student leave valid until 2<sup>nd</sup> October 2012.
3. In preparation for an extension of his leave, the respondent was required to take an English Language test at London College of Social Studies on

18<sup>th</sup> April 2012, following which he was twice granted an extension of leave, first to 22<sup>nd</sup> April 2013 and then to 28<sup>th</sup> March 2015.

4. On 10<sup>th</sup> January 2015 the respondent married Leila Miah, a British citizen born on 28<sup>th</sup> January 1976. On 30<sup>th</sup> January 2105, the respondent applied for leave to remain in the United Kingdom as her spouse.
5. On 8<sup>th</sup> July 2015, the claimant refused the respondent's application for leave to remain as a spouse on the sole ground that, as a result of the test which the respondent had taken on 18<sup>th</sup> April 2012 had been shown to be invalid. The respondent was deemed to have used the services of a proxy taker and, therefore, to have used deception in a previous application and, therefore, failed to satisfy the suitability requirements under Appendix FM of HC 395 (as amended).
6. It was accepted that his wife had two British children, an 18 year old and a 9 year old from her previous marriage, and that the respondent's relationship with his wife was genuine and subsisting, but the claimant believed that it was not unreasonable for him to leave the United Kingdom in order to reapply. He did not have children himself to enable him to qualify under the parent route and did not satisfy the private life requirement under paragraph 276ADE of the Immigration Rules.
7. The claimant was satisfied that there were no exceptional circumstances relating to the respondent, which warranted her considering the grant of leave outside the Immigration Rules.
8. The respondent gave Notice of Appeal and his appeal came before First-tier Tribunal Judge M R Oliver on 6<sup>th</sup> February 2017, sitting at Hatton Cross. The judge heard oral evidence from the respondent and from the respondent's wife. He considered evidence submitted by the claimant and found that the claimant had satisfied the evidential burden to show a prima facie case of deception, but he then went on to find that the respondent had satisfied the burden on him.
9. The judge purported to allow the appeal under the Immigration Rules.
10. Addressing me, Mr Wilding submitted that the judge had failed, in paragraph 12 of the determination, to give adequate reasoning. He submitted that the evidence had not properly been analysed or reasoned. Having found that the Secretary of State had discharged the evidential burden to show a prima facie case of deception, the judge had failed to engage with the question as to whether or not the respondent obtained the test result as a result of deception. He said that the evidence in respect of him personally has not been particularised in detail. He accepted the evidence of the respondent that he scored well when required to sit his IELTS test in Bangladesh, having been taught there in English. He accepted that the respondent's familiarity with English could only improve during his time in the United Kingdom.

11. The judge appears to have made his own assessment of the respondent's ability to speak and understand English, because he said in paragraph 12 that he was able to see the immediacy of the respondent's understanding of all questions asked of him during the hearing and to reflect on his high degree of ability to express himself. The judge concluded by saying that the respondent properly made the point more than once that he would have had no reason to use a proxy, since he had confidence that he would pass the test himself. However, the judge appears to have ignored the point that the issue is, whether or not the respondent sat the test or used a proxy to take it in his place, not whether he can speak and understand English now. He may very well speak and understand English now, he may very well have been able to speak and understand English at the time he was supposed to have taken the test, but the issue before the judge was that it was asserted that the respondent had not personally taken the test, but had used a proxy,
12. I reserved my decision.
13. *SM and Qadir (ETS - Evidence - Burden of Proof)* [2016] UKUT 229 (IAC) makes it clear that the Secretary of State's generic evidence combined with evidence particular to an appellant did in fact discharged the evidential burden of proving that a TOEIC certificate had been procured by dishonesty. The two witness statements and the specific confirmation of the appellant's identity, provided both a clear explanation for the method used to detect the fraud, and documentary evidence of the [respondent's] test result had been identified as invalid by use of this method. The test is whether on the balance of probabilities the respondent employed deception. At paragraph 22 of the *Secretary of State for the Home Department v Shehzad and Another* [2016] EWCA Civ 615 Beatson LJ said:-

"As I have stated, the question in these appeals only concerns the initial stage and whether, with the evidence of Mr Millington and Ms Collings, the evidential burden on the Secretary of State is satisfied. If it is, then it is incumbent on the individual whose leave has been curtailed to provide evidence in response raising an innocent explanation."

In this case the evidence provided to the judge showed that the respondent's English Language test had been invalidated, because of evidence of fraud in the test taken by him. The claimant having discharged the evidential burden of proof in respect of the deception, the burden then shifts to the respondent as detailed at paragraph 68 of *SM and Qadir* to "raise an innocent explanation". If the judge accepts the explanation, then the burden shifts back to the claimant in order to address the legal burden.

14. In the present appeal at paragraph 12 the judge said this:-

"The [claimant] relied on the familiar statements of Rebecca Collings, Peter Millington and Professor French, particularised to the [respondent] to the usual limited extent by the statement of Lesley Singh. I have considered the evidence and find that the [claimant], from the "invalid" finding, has

satisfied the evidential burden to show a prima facie case of deception, but I equally find that the [respondent] has satisfied the burden on him. The evidence in respect of him personally has not been particularised in detail. It is idle to speculate on reasons why the college may have used the result of a competent proxy without his knowledge, if that is what they did. I accept the evidence of the [respondent] that he scored well when he acquired his IELTS test in Bangladesh, having been taught there in English. His familiarity in English can only have improved during his time here. His latest results show competence. I was able to see the immediacy of his understanding of all of the questions asked of him during the hearing and to reflect on his high degree of ability to express himself. He properly made the point more than once that he would have had no reason to use a proxy, since he had confidence that he would pass the test himself.”

It was on that basis that the judge purported to allow the appeal under the Immigration Rules.

15. **I find that the judge has erred in law.** I find that he has failed to give adequate reasoning for finding an innocent explanation. The judge appears to have relied on his own assessment of the respondent’s ability to understand English. As such, he found that the respondent had met the evidential burden. He placed weight on the fact that the respondent was able to recall details of the examination process, but this does not mean that the respondent personally took the test. There may be reasons why a person who is able to speak English to the required level would nonetheless cause or permit a proxy candidate to undertake an ILETS test on their behalf, or otherwise to cheat. The judge appears to have ignored this possibility.
16. The Secretary of State satisfied the evidential burden on her and there was, therefore, an evidential burden on the respondent to offer an innocent explanation. It is clear from the determination that the judge failed to appreciate that the evidential burden was met. Had he properly considered the evidence of deception he may very well have reached a different conclusion. The judge’s findings at paragraph 12 are inadequately reasoned. This has led to an error of law which is capable of being material.

### **Notice of Decision**

17. I have concluded that I must set aside the determination of First-tier Tribunal Judge M R Oliver. I believe, given the delays which are likely to occur were I to retain this appeal for a hearing before me in the Upper Tribunal, that the interest of justice require that I remit it for hearing afresh by a judge of the First-tier Tribunal other than Judge M R Oliver. Two hours should be allowed for the hearing of the appeal. No interpreter is required.

Date: 12<sup>th</sup> January 2018

***Richard Chalkley***

**Upper Tribunal Judge Chalkley**