



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/34946/2015

THE IMMIGRATION ACTS

Heard at Birmingham
On 14th May 2018

Decision & Reasons Promulgated
On 22nd May 2018

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MD ZIAUL KARRIM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms Aboni, Senior Presenting Officer
For the Respondent: Mr Yusuf, Solicitor from Kingswood Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission, against the decision of the First-tier Tribunal (Judge Birk) who, in a determination promulgated on the 20th March 2017 allowed his appeal against the decision of the Respondent to refuse to vary leave to remain.
2. Whilst the Secretary of State is the Appellant, for the sake of convenience I intend to refer to the parties as they were before the First-tier Tribunal.
3. No anonymity direction was made by the First Tier-Tribunal and no application has been made on behalf of the Appellant or any grounds put forward to support such an application.

The background:

4. The Appellant, a citizen of Bangladesh, entered the United Kingdom on the 1st January 2010 on a Tier 4 student visa valid until the 30th April 2013.
5. His leave to remain as a Tier 4 student was extended until the 20th June 2013.
6. On the 5th July 2012 he submitted an application for leave to remain as a spouse of a person present and settled in the UK and he was granted leave on that basis from the 13th February 2013 – 13th February 2015 was granted on the 9th November 2013 (2 years leave).
7. On the 9th February 2015 he applied for leave to remain as a spouse of a person present and settled. That application was refused on the 17th November 2015.
8. The Respondent refused the application under paragraphs 322(2) and paragraph 289 with reference to 287(a) (vii) of the Immigration Rules on the basis that the Appellant had, in an earlier application for leave to remain on the 5th July 2012, submitted an English language test certificate from ETS which was false. The Respondent referred to the Appellant's test scores having been cancelled by ETS. As he had provided a certificate that was fraudulently obtained, the Respondent refused the application under Paragraph 322(2).
9. The Appellant appealed that decision on the 27th November 2015.
10. On the 8th March 2017 his appeal was heard by the First-tier Tribunal (Judge Birk). In a determination promulgated on the 20th March 2017 the judge allowed his appeal. In that determination he set out the Respondent's case at paragraphs 4 and 5 and the Appellant's case at paragraphs 6-9.
11. The judge's findings of fact are set out at paragraph 13-17. At paragraph 14 the judge considered the evidence provided by the Secretary of State and made reference to generic evidence which included a statement from Mary Morgan. He also made reference to the witness statements from Peter Millington and Rebecca Collings and that the test results which had been provided which stated were "questionable". The project façade report although in the index was not in the bundle before the FTTJ(and is not in the bundle in the Tribunal file). The bundle did have an extract from the test centre where 20% were questionable" and 80% invalid and this Appellant's test score by reference to his certificate no ending in 1260. The judge found the generic evidence was of sufficient evidential quality to discharge the burden of proof.
12. At paragraph 15 the judge made the following findings of fact:

“15. The Appellant has provided an account of his background in terms of his education and sitting English tests and the tests he sat on 6 November 2011. He was cross-examined about his evidence. I found that he was a credible and plausible witness because he was able to describe what happened on the test dates in some detail and I find that he has demonstrated that he has done a number of other English tests which show that he had acquired a certain level of English ability prior to doing the ELTS. He obtained an English speaking and listening certificate from Trinity College dated June 2011 and was enrolled onto a HND course in business studies and which he was able to study on.

16. I do not find that the Respondent has discharged the legal burden of establishing that the Appellant’s test was taken by a proxy test taker on his behalf. I do not find that the Appellant used deception to obtain his previous leave and I therefore find it was not lawful to be refused under paragraph 322 (1A).

17. I find that the Appellant therefore does not to be rejected under the general grounds of refusal under paragraph 287 either. I find that the Appellant does not fall for limited leave to remain as a partner with regards to being a person whose presence is not conducive to the public good. The decision to refuse therefore is not in accordance with the law and I allow the appeal. As he meets the Immigration Rules there is no need to consider the appeal on the alternative grounds of paragraph 276 ADE or Article 8 outside the Immigration Rules.”

The appeal:

13. The Secretary of State sought permission to appeal that decision. The grounds stated as follows:

1. In reaching the material finding, the judge relied on the Appellant’s English ability [15].
2. Plainly 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 ETS test on their behalf, or otherwise to cheat.
3. The FTT has materially erred by failing to give adequate reasons for holding that a person who clearly speaks English with therefore have no reason to secure a test certificate by deception.
4. The judgement of MA Nigeria [2016] UKUT 450 records at [57], “second, we acknowledge the suggestion that the Appellant had no reason to engage in deception which we have found proven. However this has not deflected any way from reaching our main findings and conclusions. In the abstract, of course, there is a range

of reasons why persons proficient in English may engage in TOEIC fraud. These include, in exhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations the deceitful conduct in the sphere. We are not required to make a further finding of why the Appellant engaged in deception and do this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter.”

5. It is submitted that the Secretary of State’s evidential burden was met and that the evidential burden fell upon the Appellant to offer an innocent explanation. The judge failed to give adequate reasons are finding that the Appellant provided an innocent explanation.
6. It is submitted that whilst the ETS verification system is not infallible, it is adequately robust and rigorous. In any event, the Secretary of State must rely on such information provided to by an applicant which has been certified as being true by third party. The third party withdraws the certificate, as here, and is no longer able to batch the validity of information, on the basis of leave is also removed.
7. The Respondent maintained that there were no compelling circumstances to justify the consideration of the Appellant’s case outside the immigration rules.
8. In any event there was nothing to prevent the Appellant returning to Bangladesh with the sponsor to continue their family of life there.

14. On the 12th July 2017 First-tier Tribunal Judge E.M Simpson granted permission for the following reasons:

“ (i) there appeared as asserted that where having considered para 322(1A) of the immigration rules, with reference to a TOEIC certificate declared invalid by ETS, and concluding that the Respondent discharged the initial evidential burden, that in a paragraph appearing altogether brief and absent of a critical evaluation of the Appellant’s evidence, that there appeared an inadequacy of reasoning in the decision, when concluding that the Appellant provided a plausible innocent explanation and the burden of proof not been discharged, and that the Respondent failed to show deception are being used, and a refusal under 322(1A) had thus been lawful;

(ii) though poorly articulated there appeared that upon the judge concluding that there had not been shown that the general grounds for refusal under 322(1A) applied and therefore 287(vii) also, in the absence of any indications on the part of the Respondent of concessions, that the judge allowing the appeal, at this

juncture, without having regard to matters remaining under contention, with reference to Appendix FM, more particularly under R-LTRP1.1 and paragraph EX1, and paragraph 276 ADE that arguably the judge fell into error;

(iii) there was not considered Article 8 either, by the judge, there appearing at the compelling circumstances threshold/barrier was to the fore, and though not raising the Respondent's grounds, because St was relied upon, as a matter of simple observation that the said threshold no longer remains good law *Agyarko and others* [2017] UKSC 11."

The hearing:

15. At the hearing, Ms Aboni relied upon the grounds as recorded above. She submitted that having found that the evidential burden was satisfied, it then shifted to the Appellant to provide an innocent explanation. She submitted that the judge had failed to give adequate consideration and reasons for this. She also submitted that there were no adequate reasoning or findings given at paragraph 15.
16. She further submitted that as paragraph 4 of the grounds set out, the judge made reference to the Appellant's ability to speak English but did not consider why he would have cheated (see MA at paragraph 57 as cited in the grounds). In this context she submitted that the judge failed to weigh up the relevant evidence and simply accepted that the Appellant had a sufficient level of English.
17. In addition, she submitted that even if the Tribunal found that the findings made by the judge on the issue of deception were open to the judge to make on the evidence, the judge failed to consider the substance of the immigration rules relating to Article 8 and is also failed to go on to consider Article 8 outside of the rules. She submitted that this was considered to be a human rights claim therefore the judge should have considered Article 8 through the prism of the Rules and should not just found that the rules were met.
18. Mr Yusuf relied upon his skeleton argument. In his oral submissions he stated that the judge had taken into account the Appellant's English language ability but not at the hearing itself but by reference to his past English ability in 2011 (the Trinity College certificate) and having been enrolled on the HND course which was a bridging course to degree level. He submitted that the Appellant had provided evidence before the judge as to what he could remember about the test in 2011 which was a long time ago.
19. He made reference to paragraph 9 of the judge's determination which is reference to a letter dated 6 February 2017 which was asking for documentary evidence which had not been received. He conceded that there had been no request made in the grounds for the recordings of further evidence but there had been a letter of 6 February which had asked for further proof in relation to the allegation of deception and would have asked for audio evidence.

20. He submitted that the only evidence provided was generic and that the report of Prof French was equally generic did not specifically make reference to this particular Appellant.
21. In relation to the alternative grounds relied upon by the Secretary of State (Article 8), he submitted that the judge did not need to consider whether there were insurmountable obstacles because he had met the substance of the Immigration Rules. Thus he submitted in the light of the judge finding that the Appellant had not used a fraudulent certificate to obtain his last period of leave, there was no requirement for the judge to consider Article 8 under the rules. Thus he submitted Article 8 was not an issue because it applied under the immigration rules and had provided an English-language certificate and has met the financial threshold).
22. Ms Aboni by way of reply did not accept that deception was the only ground for refusing the application. She submitted that there were other grounds for refusing the application. In this context she referred to EX1 under Appendix FM and the issue of insurmountable obstacles. The she submitted that these were issues that should have been considered by the judge. Even if the judge had found no deception, Article 8 needed to be considered and the judge failed to make findings in this respect.
23. During their submissions I asked the parties if they had given any consideration to the decision letter in the context of any of the transitional provisions. Neither advocate were able to provide submissions about the relevant transitional provisions although it was plain from their respective submissions that they did not agree as to how the judge should have approached this appeal in law.
24. At the conclusion of the hearing I reserved my decision

Decision on error of law:

25. There is no dispute between the parties of the correct approach that should be taken in cases involving the issue of deception. The key decisions relevant to determining whether the Appellant has used deception in this context are SM & Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 and Sharif Ahmed Majumder and Ihsan Qadir v Secretary of State for the Home Department [2016] EWCA Civ 1167. The Respondent's evidence in SM and Qadir was found by the Upper Tribunal to suffice to meet, albeit by a narrow margin, the initial evidential burden of showing deception. The burden then shifted to the Appellants to raise an innocent explanation. In the cases of Mr Majumder and Mr Qadir, in the context of the explanations and evidence given by them, the Respondent could not satisfy the legal burden to show that their TOEIC certificates were procured by dishonesty and so their appeals were allowed by the Upper Tribunal. The Respondent initially appealed to the Court of Appeal but then settled those appeals by consent.
26. I have therefore considered the grounds advanced by Ms Aboni as to whether the judge gave adequate reasons for reaching his overall conclusions which is the

substance of the submissions advanced in the written grounds and relied upon by Ms Aboni.

27. When looking at the decision of FTTJ Birk, I am satisfied that the judge approached the matter in the manner directed by the Court of Appeal in SM and Qadir [2016] EWCA Civ 1167. That involves considering, first, whether the Secretary of State has met the burden on her of identifying evidence that the TOEIC certificate was obtained by deception; second whether the claimant satisfies the evidential burden on him of raising an innocent explanation for the suggested deception; and third, if so, whether the Secretary of State can meet the legal burden of showing, on the balance of probabilities, that deception in fact took place.
28. There can be no dispute on the evidence before the judge that that the generic evidence taken together with the ETS spreadsheet providing specific details relating to the Appellant is sufficient to allow the Secretary State to discharge the evidential burden of the use of deception in the taking of an English language test. (see Shezhad and Chowdhury [2016] EWCA Civ 615 at [26],28] [43] and SM and Qadir [2016] EWCA Civ 1167 at [4]). The judge reached that conclusion at paragraph 15 of the determination having considered the particular evidence and did so by reference to the case law set out at paragraph 11 of his decision.
29. The next stage is where there is a burden, again an evidential one on the Appellant of raising an innocent explanation. Ms Aboni submits that the judge gave no adequate reasons finding that the Appellant had raised an innocent explanation.
30. Having considered the determination and the evidence that was before the judge, I do not accept that the judge failed to give adequate reasons in his determination in this respect at paragraph 15. When considering the innocent explanation given by an Appellant, it required the minimum level of plausibility. Thereafter the judge was required to consider whether the Respondent discharged the legal burden of proof in relation to dishonesty which remains with the Secretary of State. The judge returned to the Respondent's evidence at [16] but reached the conclusion that the Respondent had not discharged the overall burden.
31. As this was a statutory appeal, where the Appellant was present, the judge had the opportunity to hear the oral evidence of the Appellant and for that to be the subject of cross examination before him. The judge made express reference to this at paragraph 15.
32. It does not appear that there had been any factual evidence relied upon by the Respondent which related to the test undertaken by the Appellant so as to question his subjective recollection about the test nor was there any individual to verify that the Appellant failed to appear. What the judge did at paragraph 15 was to consider and weigh the evidence of the Appellant. He found him to be a credible and plausible witness. At paragraph 7 the judge set out the Appellant's evidence whereby he gave details as to how he sat the test on the day in question (16 November 2011). He did so by describing the nature of the examination, the time that each part of the examination took and also gave some details as to what was in the test albeit in brief terms. At

paragraph 8 the judge records his evidence relating to his previous English examinations and that he had taken the Trinity College test prior to the test at Charles Edward College. The Appellant provided a copy of the certificate in the bundle of documentation before the judge which showed that that test had been taken and passed in June 2011. He had also been awarded a higher National diploma in business from Whitechapel College in November 2011 (as supported by the document in the bundle and the notification document which accompanied it).

33. Whilst the Respondent submits that the judge failed to give adequate reasons in this respect it was open to the judge to accept his evidence as to his history of studying in the UK. This is expressly challenged in the grounds by the FTTJ failing to take account of paragraph 57 of MA (Nigeria) (as set out earlier). However that paragraph has to be read in the light of the evidence in that case. Whilst the Appellant had been cross examined it does not appear that it had it been explored in evidence as to why he would have a motive to engage in deception. The Appellant denied having used any deception and it is appears to be recorded in the determination that he would not have used deception as he would have lost his job and his house (see paragraph 7). Furthermore whilst the decision of MA made reference to reasons as to why some would use dishonest means, in my judgement it does not mean that a finding of someone's English language ability that is documented and is contemporaneous to the date of the test, should not be taken into account and given weight, as it makes it less likely that such an Appellant would have cheated in such an exam. In this case, the judge took into account that he had passed an English language test in June 2011 which was prior to the testing question in November 2011 and contemporaneous in November 2011 he had passed his HND examinations which the judge was entitled to take into account supported his evidence that he had not used a proxy test taker.
34. In reaching a decision on this issue and addressing the legal burden, the factors that the Upper Tribunal noted at paragraph 69 of their decision in SM and Qadir as being relevant to considering an allegation of dishonesty in this context: "include (in exhaustively, we would add) what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated. Mr Dunlop also highlighted the importance of three further considerations, namely how the Appellants performed under cross examination, whether the Tribunal's assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic achievements are such that it was unnecessary or illogical for them to have cheated."
35. The Court of Appeal in SM and Qadir [2016] EWCA Civ 1167 endorsed that approach. I am satisfied that they were the matters taken into account by the judge on the evidence as recorded in the determination.
36. At paragraph 89 the Upper Tribunal in SM and Qadir stated as follows

“The final question is whether the Secretary of State is discharge the legal burden of establishing on the balance of probabilities that this Appellant procured his TOEIC certificate by deceit. The answer to this question requires a balancing of all of the findings and the evaluative assessments rehearsed above.”

37. In this context findings of fact were necessary on the evidence given by the Appellant to demonstrate that he had not engaged in deception but had sat the test. The Appellant had given an account as to how he had sat the examination as recorded in the oral evidence set out at paragraph 6, 7 and 15. In the case of SM and Qadir, one of the Appellants had given details of how he sat the test (see paragraph 45) although I accept in impressive detail. Therefore the judge was required to consider that aspect of his account along with the other factors set out in paragraph 69 relevant to the issue of dishonesty; in this case what was known about the Appellant’s character, what he would have to lose by using deception along with his level of English (which the judge did consider) and any other relevant factors.
38. Therefore contrary to the grounds, it was open to the judge to make reference to the English-language certificates, and his educational background (both of which were supported by contemporaneous documentation) and the evidence as to the circumstances in which he sat the test.
39. Neither party referred me to the decision of the Court of Appeal in Ahsan [2017] EWCA Civ 2009 and the observations made by Underhill LJ which relate to the request for a copy of voice recordings. As set out in that decision, any Appellant faced with an adverse decision could apply for a copy of the voice recording to enable an expert to be instructed and that in a case where a voice file does not contain the Appellants voice or no attempt to be made to obtain the voice recording the case that he had cheated would be hard to resist. At paragraph 25 the decision makes reference to the availability of voice files. It seems that at least by the beginning of August 2016 (Ahsan at [29]), it was known that voice files could be obtained, although it is not clear from Ahsan how easy that process was at that time or how that mechanism worked. Paragraph 22 of SM and Qadir (ETS - Evidence - Burden of proof) [2016] UKUT 229 (IAC), heard between 5 February and 7 March 2016, records
- “..Mr Millington testified that to his knowledge the Home Office has at no time requested ETS to provide the voice recordings in respect of any individual. Nor, he added, has the Home Office ever asked for the software used by ETS. Mr Millington explained that during the one day meeting in the United States, ETS made clear its unwillingness to disclose the software on the ground that they considered it "confidential". We were informed mid-trial that ETS had communicated its unwillingness to provide any of the voice recordings, absent judicial compulsion to do so. “
40. It is unclear to me whether he had made any request and if he did if it had been undertaken by the Appellant in the time scale relating to his appeal however there is a reference paragraph 9 to a letter from his solicitors dated 6 February 2017 asking for documentary evidence. The letter referred to by the judge did not appear to be in the file and neither party had a copy. Mr Yusuf made reference to the letter requesting

evidence relating to the test. I am not able to resolve that any further but any event the point was not one taken by the respondent.

41. As the case law identifies (see Iqbal and Majumder; Iqbal [2017] EWHC 79 (Admin) and Majumder [2016] EWCA Civ 1167, in particular at [23], each case is fact sensitive and requires an evaluative assessment to be made and this is to be determined on all the evidence adduced by the parties (see SM and Qadir at paragraph 102 and Ahsan at [33]). The Secretary of State's challenge in the grounds and through submission related were advanced on the basis that the judge failed to give adequate reasons. Whilst it is right to observe that the judges' determination is brief, he gave adequate reasons in reaching the overall decision when considering whether the Appellant had produced a false certificate. The application had been refused under paragraph 322(2) on the basis that his presence in the UK was not conducive to the public good because of his conduct. The relevant conduct relied upon must be that relating to the English certificate. It is therefore also follows that the judge was right to reach the conclusion that the Respondent had also not demonstrated that the application fell for refusal under paragraph 287(a) (vii) of the Immigration Rules.
42. Consequently I am not satisfied that the grounds at paragraphs 2 – 8 are made out.
43. The remaining paragraphs relate to Article 8. I have set out earlier in this decision the grant of permission by Judge Simpson who makes reference to the Respondent's grounds at paragraphs 9 – 10 as "poorly articulated". Judge Simpson considered that those paragraphs in essence submitted that the judge erred in law by failing to have regard to Appendix M, R-RLTRP 1.1 and paragraph EX1 and 276ADE.
44. In her submissions Ms Aboni submitted that even if the Tribunal found that the Respondent's grounds were not made out in relation to the test certificate, the judge was in error by not considering Appendix FM and EX1, the issue of insurmountable obstacles and Article 8 outside of the rules.
45. As I have set out earlier neither party made any reference to the transitional provisions which may or may not have been applicable to this particular decision under challenge. I have therefore considered this issue when trying to resolve the dispute between the parties and whether judge Birk had made an error of law in allowing the appeal.
46. It is important to consider the chronology set out in the decision letter. The Appellant applied for leave on 5 July 2012 as the spouse of a person present and settled in the United Kingdom and was granted two years leave on this basis. It is common ground that he is married to a British citizen and they now have two children were both British citizens. He then applied for indefinite leave to remain as a spouse on 9 February 2015. It was this application that was refused in the decision letter which is the subject of this appeal.
47. Thus the Appellant had been granted leave previously under part 8 of the rules. As his application was made on 5 July 2012 (that is, before 9 July 2012) the transitional provisions applied under A280 (c) (i) by reference to paragraphs 287 -289. The

transitional provisions at A277 disapply Appendix FM to the Appellant and thus he is not the subject to Appendix FM and the minimum income threshold. That is why the decision letter, when considering the application made in 2015 applied Rule 287 of the Immigration Rules.

48. The only ground for refusal under paragraph 287 is that set out in the decision letter and it relates to paragraph 287(a) (vii) which states that one of the requirements for indefinite leave to remain for a spouse or civil partner of a person present and settled in the United Kingdom is that the application does not fall for refusal under the general grounds for refusal. The decision letter went on to state that the application was refused under paragraph 322 (2) of the general grounds for refusal, the application was therefore refused under paragraph 289 with reference to paragraph 287 (a) (vii) and paragraph 322 (2). Those paragraphs rely on the test certificate produced for the grant of the previous leave.
49. No other points are taken against the Appellant in relation to paragraph 287. I have considered the application form which was in the trial bundle and produced to the Respondent. At A10 he has knowledge of the English language (KOLL) and produced evidence to demonstrate adequate maintenance and accommodation at A17. As Appendix FM did not apply, he did not need to meet the minimum income threshold. There is no reference in the decision letter adverse to the Appellant on the basis that he could not meet the other requirements of paragraph 287 beyond that expressly identified as set out above.
50. Therefore, applying the facts as found by the judge in relation to paragraph 287(a) (vii) and Paragraph 322(2), which I have found were open to the judge to make on the evidence before him, the Appellant met the requirements of the Immigration Rules. Therefore the judge was correct at paragraph 17 to find that he met the Immigration Rules. However whilst the right of appeal against the decision was on the ground that the decision was unlawful under section 6 of the Human Rights Act 1998, it was open to the judge to reach the conclusion that by meeting the Rules under paragraph 287 it demonstrated that the decision to remove him would be disproportionate and against the public interest. Even if Appendix FM did apply, by reason of the findings of fact made by the judge he met the suitability requirements and therefore there was no requirement to demonstrate whether he met the provisions of EX1.

Decision:

The decision of the First-tier Tribunal did not involve the making of an error on a point of law; the appeal by the Secretary of State is dismissed.

Signed

Date: 16/5/2018

Upper Tribunal Judge Reeds