



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/00072/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 16<sup>th</sup> August 2018

Decision & Reasons Promulgated  
On 31<sup>st</sup> August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR RAJIV KUMAR SHRESTHA  
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Ms H Pettersen, Senior Home Office Presenting Officer  
For the Respondent: Mr R Sharma, Counsel instructed by Paul John & Co Solicitors

DECISION AND REASONS

1. For convenience purposes I shall employ the appellations “Appellant” and “Respondent” as at first instance. The Appellant is a Nepalese national who appealed against the decision of the Respondent dated 2<sup>nd</sup> October 2014 to give removal directions in accordance with Section 10 of the Immigration and Asylum Act 1999.
2. The appeal was heard by First-tier Tribunal Judge Adio and allowed on the basis that the Respondent’s decision was not in accordance with the law.
3. Grounds of application were lodged. The grounds of application submit that the judge failed to assess correctly the burden of proof in line with the case of **SM and Qadir** (ETS - evidence - burden of proof) [2016] and the judge failed to give adequate

reasons for holding that a person who speaks English would therefore have no reason to secure a test certificate by deception. It was submitted that the SSHD's evidential burden was met and the evidential burden then fell upon the Appellant to offer an innocent explanation; it was clear from the decision that the judge had not appreciated that the evidential burden was met. It was submitted that the decision should be set aside.

4. Permission to appeal was initially refused but was granted by Upper Tribunal Judge Gill on the basis that the judge had arguably failed to take into account the guidance given at paragraph 57 of **MA (Nigeria) [2016] UKUT 450**.
5. Thus, the appeal came before me on the above date.
6. Before me Ms Pettersen relied on the grounds of application and what was said in **MA (Nigeria)**. An individual assessment was required to be made and that had not been done by the judge in this case. As such I was asked to set the decision aside and dismiss the appeal.
7. For the Appellant, Mr Sharma said that the judge had given full reasons in paragraphs 8 to 10 inclusive in the decision. This was an appeal from out of country and the Appellant had provided a witness statement. He had explained how he came about taking the test and had stated why he decided to take the test in the centre where he took it as well as how he got there. Importantly his evidence was corroborated by his wife and as the judge said in paragraph 10 there was no challenge to the Appellant and his wife's evidence. He, Mr Sharma, had conducted the appeal at first instance and he confirmed that there was no cross-examination of the Appellant's wife. As such her evidence should be said to be unchallenged.
8. There was no breach of what was said in **MA** and no error in law. The decision should stand.
9. I reserved my decision.

### **Conclusions**

10. It seems to me that the judge did set out the matter very clearly in paragraphs 8 to 10 inclusive. He noted that the Appellant had made a witness statement explaining how he came about to take the test and the centre where he took it as well as how he got there. His evidence was corroborated by that of his wife who gave evidence before him. He noted in paragraph 8 that there was no cross-examination or tests of the evidence given by the Appellant in the statement or the oral evidence of his wife. Plainly the Appellant's evidence could not readily be tested because he was abroad at the time but it seems striking to me that there was no cross-examination of the evidence of the Appellant's wife who supported what the Appellant said. The judge was therefore entitled to accept that evidence and he found (paragraph 9) that the Secretary of State had failed to discharge the legal burden of proving dishonesty on the Appellant's part. The judge specifically referred to the lack of cross-examination or challenge of the evidence and he found that the evidence of the Respondent was not sufficient to discharge the specific evidence put forward by the Appellant. He referred

to **SM and Qadir**. The judge carried out an individual assessment as he was bound to do. What the former president, the Honourable Mr Justice McCloskey said in **MA** was that there could be a range of reasons why a person proficient in English may engage in TOEIC fraud – the judge’s findings do not conflict with anything said in **MA**.

11. In this particular case the judge gave clear evidence as to what evidence he was accepting and why he was accepting it. It is virtually fatal to the Respondent’s case that there was no challenge to the evidence of the Appellant’s wife. In any event it is clear that there is no error in law in the judge’s findings and therefore the decision must stand.

**Notice of Decision**

12. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
13. I do not set aside the decision.
14. No anonymity order is made.

Signed *JG Macdonald*

Date 23<sup>rd</sup> August 2018

Deputy Upper Tribunal Judge J G Macdonald