



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/20293/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 5 June 2018

Decision & Reasons Promulgated  
On 14 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MR A F M MAHMUDUL HASAN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss R Popal, Counsel instructed by J Stifford Law Solicitors  
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a citizen of Bangladesh who appealed to the First-tier Tribunal against a decision of the respondent dated 11 August 2016 to refuse his application for indefinite leave to remain on the basis of ten years' lawful residence. The application was refused under paragraphs 322(5) and 276B of the Immigration Rules. In a decision promulgated on 13 November 2017, Judge of the First-tier Tribunal R L Walker dismissed the appellant's appeal on human rights grounds.
2. The appellant appeals with permission on the grounds that:

- (1) the judge had insufficient evidence, following the test laid out in **Secretary of State for the Home Department v Shehzad and Chowdhury [2016] EWCA Civ 615**, to demonstrate that the test results were invalid given that the respondent's case was at best very questionable;
  - (2) misapplication of the test in **Shehzad and SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC)**;
  - (3) internally inconsistent findings.
3. The respondent in his Rule 24 response indicated that the appellant's application was not opposed on the basis the judge failed to consider the appellant's explanation and why this amounted to an innocent explanation and that the Tribunal was invited to determine the appeal with a fresh oral hearing.
  4. Before me Mr Bramble and Ms Popal agreed that there was no need to hear oral evidence and Mr Bramble had no submissions to make other than the fact that the appellant's evidence, including his witness statement and the documents submitted, demonstrated that he had a high level of English prior to the test which he was alleged not to have taken. Although, therefore, Mr Bramble did not specifically concede the substantive appeal, it was evident that he was not opposing the appellant's case with any force or enthusiasm.

### **Remaking the Decision**

5. Paragraph 322(5) of the Immigration Rules, provides one of the grounds on which leave should normally be refused as follows:

'(5) the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322 (1C)), character or associations or the fact that he represents a threat to national security;'
6. The conduct relied on but he respondent was that the appellant 'purported to take a TOEIC speaking test which the respondent was satisfied was 'fraudulently obtained'. However, the Judge of the First-tier Tribunal failed to adequately engage with the appellant's individual circumstances including that his test was designated to be questionable rather than invalid.
7. The respondent in the Reasons for Refusal Letter, dated 11 August 2016, specifically conceded that the appellant had not relied on the disputed TOEIC certificate for the purposes of the application for leave to remain; the respondent asserted that the appellant's "complicity in the fraud" contributed to an extremely serious attack on the maintenance of effective immigration controls and the public interest generally. It was submitted on behalf of the appellant that in order to commit such fraud the appellant must have made representations with a view to deceiving the Home Office and to gaining entry into the UK by making false representations. It is not disputed that the appellant did not rely on the certificate for the purposes of his application.

8. Although the statement of Ms Chandrika Mindelsohn which was before the First-tier Tribunal stated that the appellant relied upon the certificate for the purposes of an application, Mr Bramble did not dispute, and it was not disputed before the First-tier Tribunal, that the impugned TOEIC certificate had not been relied upon by the appellant in any application to the respondent. There is no evidence therefore that the appellant has, by virtue of dishonesty, attempted to gain an advantage for the purposes of his immigration status.
9. In Shehzad and Chowdhury [2016] EWCA Civ 615 1 All ER Lord Justice Beatson confirmed that the Secretary of State bears the initial burden of furnishing proof of deception and that if such prima facie evidence is provided the burden then shifts to the individual to provide a plausible innocent explanation. The burden then shifts back to the Secretary of State if such a plausible explanation is provided.
10. I take into consideration what was said at paragraph 30 by Lord Justice Beatson:

“in circumstances where the generic evidence is not accompanied by evidence showing that the individual under consideration’s test was categorised as ‘invalid’, I consider that the Secretary of State faces a difficulty in respect of the evidential burden at the initial stage.”
11. The respondent had provided two generic witness statements from 2014 which were not specific to the appellant. There was a further witness statement from Chandrika Mindelsohn dated 30 November 2017 which, although it purported to deal with the appellant’s circumstances, was largely generic and as already noted contained an error in relation to asserting that the appellant had relied on the certificate in an application to the respondent, when it is accepted by all the parties that he had not. The witness statement contained an Appendix including the Look Up Tool, which contained the appellant’s details and cited his certificate as ‘questionable’.
12. In the absence of specific evidence from the respondent characterising the appellant’s test as invalid, or any other specific evidence which might discharge the respondent’s burden, I am not satisfied that the respondent has discharged that initial burden as highlighted in SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC). Therefore the respondent has failed to demonstrate that paragraph 322(5) applies in this case.
13. In the alternative that I am wrong and the burden of proof shifted to the appellant, as effectively conceded by Mr Bramble I am satisfied that the appellant has more than discharged that burden of demonstrating an innocent explanation. I take into consideration that the First-tier Tribunal Judge accepted that the appellant’s English skills were good as was evidenced by his IELTS results and the evidence he gave at the First-tier Tribunal hearing in English. I preserve those findings. If the burden of proof does revert to the appellant, it is for the appellant to provide an innocent explanation which is plausible. As highlighted in SM and Qadir in reliance on Muhandiramge (section S-LTR.1.7) [2015] UKUT 675 (IAC) at [9] to [11], if the burden shifts to the appellant it is for the appellant then to raise an innocent

explanation “namely an account which satisfies the minimum level of plausibility” and if so the burden shifts back to the respondent.

14. As identified by Mr Bramble himself, the appellant had provided witness statements in addition to general documentation in support of his case. The appellant explained that he arrived in the UK in March 2006 with entry clearance as a student and that this was subsequently extended ultimately until 30 January 2016 as a result of multiple internal applications as a Tier 4 (General) Student. The appellant successfully completed his BSc Honours in Business Studies from the University of Ulster followed by other courses. The appellant denied any allegation that he had obtained the TOEIC test results fraudulently. The appellant confirmed that he had taken the speaking test (along with the other tests himself) and he did not use a proxy and that in particular he had no reason to use a proxy taker as he was very competent, at the time of the test as he is now, in English language skills.
15. The appellant explained why he had taken the TOEIC test and why he did not use this test: with his original entry clearance application he submitted his IELTS report dated 18 February 2006 in which he scored 6.0 in speaking with an overall band score of 6.0 and that this was his level of competency in English before he even entered the UK. The IELTS guidance confirms that band 6 denotes a competent user of the English language. The appellant explained that as of 29 December 2011 he submitted another IELTS certificate dated 15 December 2011 with a score of 6.5 in speaking with an overall band score of 6.0. The appellant was also assessed in 2015 with an equivalent IELTS score of 7.
16. The appellant’s evidence indicates that he was due to complete his IELTS including a speaking test on 3 December 2011. However, the relevant authority transferred the speaking test from 3 December until 10 December without prior notice. The appellant explained in his witness statement, and such is not contested by Mr Bramble, that the unexpected delay frightened the appellant and he was concerned that he might not receive his IELTS certificate in time for him to make his application to the Home Office (as his leave was due to expire on 31 December 2011). The appellant therefore took the TOEIC test on 14 December 2011 (which was then an approved provider and the appellant at that stage could not anticipate any problem with that provider) as a back-up plan to safeguard him in case his IELTS result was delayed. He had researched and found that ETS could provide much quicker test dates and results in comparison to other providers such as IELTS.
17. However, having taken the test it was the appellant’s consistent evidence, which was uncontested before me and which I accept, that he then eventually received his IELTS certificate in time to make his application and did not therefore have to use his TOEIC certificate for any purpose. The appellant went on to deny any involvement directly or indirectly in deception and in particular found it humiliating that he would be attacked in this way and his integrity questioned; in his view he was an innocent victim. The appellant highlighted that he had obtained a Bachelor degree in the UK and highlighted his private life in the UK. All of the appellant’s evidence was supported by the relevant test scores including from IELTS and evidence of his completion of his BSc from the University of Ulster.

18. I am satisfied therefore that the appellant has discharged the burden to provide an innocent explanation, even if I were satisfied that the respondent had shifted the initial burden of proof. I am further satisfied that the respondent has failed to discharge the ultimate burden to show that the appellant's prima facie innocent explanation is to be rejected and no such arguments were forthcoming from Mr Bramble.
19. The respondent's contention in the refusal letter was that the appellant was of poor character. Given that I am not satisfied that it has been demonstrated that the appellant used a proxy test taker or that he used deception in any way, I am not satisfied that it has been demonstrated that the appellant was of poor character. The appellant's argument that paragraph 322 is not made out, must succeed.
20. I therefore go on to consider the appellant's appeal against the decision of the respondent to refuse his application under paragraph 276B of the Immigration Rules. It was not disputed by the respondent at any stage that the appellant has resided in the UK for ten years' lawfully. The respondent did not raise any additional grounds for refusal under paragraph 276B and I am satisfied that the appellant meets all the relevant requirements.
21. It is no longer possible for the Tribunal to allow an appeal on the grounds that a decision is not in accordance with the law and the appeal can only be determined through the provisions of the ECHR (see **Charles (human rights appeal: scope) [2018] UKUT 00089 (IAC)**). I have therefore considered the five stage test in **Razgar [2004] UKHL 27**. The first four questions are uncontroversial in this case and can be answered in the affirmative. The ultimate question to be resolved is the proportionality question. As already indicated the appellant has demonstrated that he meets the requirements of the relevant Immigration Rules (paragraph 276B); that is a significant and weighty factor in the appellant's favour. I accept that the appellant has built up a longstanding and lawful private life in the UK
22. I have considered as I must 'public interest' test within the meaning of Section 117 of the 2002 Act. I have considered the factors set out at section 117B. The public interest in the maintenance of immigration control is not met as in the absence of any dishonesty on the appellant's part, he meets the requirements of paragraph 276B. The appellant does not infringe the English language requirement for the reasons already given and it was not argued that he was not financially independent. I must attach limited weight to the appellant's private life as it was established at a time when his immigration status was precarious. However, little weight does not mean no weight. Applying the balance sheet approach approved in **Hesham Ali [2016] UKSC 60** I am satisfied that the interference with the appellant's private life is disproportionate.

### **Notice of Decision**

23. The decision of the First tier Tribunal contains an error of law and is set aside. I remake the decision allowing the appellant's appeal on human rights grounds.

No anonymity direction was sought or is made.

Signed

Date: 13 June 2018

Deputy Upper Tribunal Judge Hutchinson

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a full fee award

Signed

Date: 13 June 2018

Deputy Upper Tribunal Judge Hutchinson