Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33716/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24th August 2017	**On 6 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

MR MOTIUR RAHMAN SUMAN
(ANONYMITY DIRECTION NOT MADE)

Claimant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant in the Upper Tribunal

Representation:
For the Claimant: Mr Alam of Counsel
For the Secretary of State: Mr Staunton, the Home Office Presenting Officer

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Cameron promulgated on 21st December 2016, in which he allowed the Claimant's appeal against the Respondent's decision to reject the Claimant's application for indefinite leave to remain in the United Kingdom as a spouse of a person present and settled in the United Kingdom.

2. Within the decision, Judge Cameron did not upheld the refusal under paragraph 322(2) of the Immigration Rules and then went on to allow the appeal under the

Immigration Rules under paragraph 287. However, he has dismissed the appeal under Appendix FM and paragraph 276ADE and then gone on to dismiss the appeal under Article 8 of the ECHR.

3. At the appeal hearing before me the Claimant has been represented by Mr Alam of Counsel and the Secretary of State has been represented by Mr Staunton the Home Office Presenting Officer.

4. Within the Grounds of Appeal, two Grounds of Appeal were argued. Firstly it is argued that the First-tier Tribunal Judge acted unfairly refusing to adjourn the appeal following a request for an adjournment by the Home Office Presenting Officer on the day to allow the Secretary of State to obtain further evidence to support the allegation of deception which it is said to include the report from Professor French and the relevant spreadsheet extract to show that the Claimant's English language test had been declared to be invalid. It is argued that those documents were of such a fundamental nature that justice could not have been done without them and Professor French's report responded to the criticisms of ETS testing by Dr Harrison contained in the case of **SM and Qadir**. It is argued that Professor French is the most experienced audiologist in the UK and that he had taken account of technical information about ETS's methodology and processes which had not been previously available. That was evidence said to undermine the conclusions of **SM and Qadir** and it is argued that evidence would have made difference to the outcome.

5. In the second Ground of Appeal it is argued that although the Tribunal accepted the Respondent met the initial evidential burden upon it, the Tribunal went on to find the Claimant's English language was not of the highest standard, but accepted that the Claimant had in fact taken the test, but in so doing relied upon the Claimant's English language ability in that regard.

6. It is argued that there may be reasons why a person who is able to speak English may still utilise a proxy test speaker and that the judge has failed to appreciate that there may have been a reason why a proxy may have been utilised and deception employed in the case. The Secretary of State relies upon the Upper Tribunal decision in the case of **MA (Nigeria)** [2016] UKUT 450 in that regard in which case it was accepted that a proxy test taker had been utilised and it was found that there may be many reasons why a proxy test taker may have been utilised even by someone who speaks English including a lack of confidence, fear of failure, a lack of time and commitment or contempt for the immigration system.

7. Permission to appeal has been granted by First-tier Tribunal Judge Brunnen on 7th July 2017 who found that the Grounds of Appeal were arguable and further found that it was also arguable although not being a point raised in the grounds that it was arguable as a **Robinson** obvious point that the judge erred by allowing the appeal under the Immigration Rules since the only available Ground of Appeal under Section 84(2) of the Nationality, Immigration and Asylum Act 2002 was that the Respondent's decision was unlawful under Section 6 of the Human Rights Act 1998, when in fact the judge dismissed the appeal on human rights grounds.

8. I am grateful for the submissions of both Mr Staunton behalf of the Secretary of State and Mr Alam on behalf of the Claimant which I have fully taken account of them and which I have recorded within my Record of Proceedings.

9. Regarding the first Ground of Appeal in regard to whether or not the First-tier Tribunal Judge acted unfairly in refusing to allow the adjournment sought by Ms Davies on behalf of the Secretary of State at the First-tier Tribunal. When giving reasons for rejecting the adjournment request Judge Cameron noted that the matter had been originally listed on 13th July 2016 and the Respondent had time to prepare and submit any relevant evidence. He did not consider in the interest of justice to adjourn the matter further, but did give Ms Davies time to consider the Claimant's bundle a copy of which was given to her at the appeal hearing, which had not been previously given to her.

10. In that regard the evidence which was sought to be submitted on behalf of the Secretary of State is said to comprise the report from Professor French who has produced a somewhat generic report and was not specific to the appeal of Mr Suman which was often relied upon by the Secretary of State to substantiate the criticisms of the ETS language testing system and which dealt with the evidence of Dr Harrison which is considered in the **SM and Qadir** case. The Secretary of State also says that she would have produced the copy of the relevant spreadsheet extract in order to show that the Claimant's test had been invalidated.

11. The evidence in fact relied upon by the Secretary of State at these ETS appeals in terms of the statements of Peter Millington and Rebecca Collings and also the report of Professor French are generic statements and are sought to be relied upon in the majority, if not all of the appeals in ETS cases. None of those witnesses would actually be in court to give evidence and it not a case therefore in which it was being argued that the witnesses could not attend to give evidence on that particular date and that therefore the adjournment was necessary in order to allow them to give evidence. I was told by Mr Staunton that the report of Professor French was dated 28th April 2016.

12. The appeal in this case, although it was on a float list and therefore was not before any specific judge was actually listed to be heard on Tuesday 29th November 2016 at 10am at Taylor House in the notice of hearing which was sent out, back on 13th July 2016. Therefore, although the name of the judge who will be hearing the appeal was not specified, the date, time and place of the appeal was specified within that notice of hearing. It was not the case that the Secretary of State would not have known when the appeal was to take place or where it was to take place.

13. Despite the appeal having been listed back in July the directions given at that time were that the Respondent must send copies of all the documents to the Tribunal and to the other party, which were to include a copy of the notice of decision together with any Statements of Evidence, application form, record of interview or any other unpublished documents upon which she intended to rely, to arrive before 10th August 2016. The Secretary of State on the morning of the Appeal on the 29th

November 2016, sought the adjournment in order to produce documents that they had not produced and disclosed in accordance with the previous directions given by the Tribunal. The judgment of Judge Cameron does not show that any explanation was advanced as to why those documents have not been served in accordance with the direction. It was simply a case that they had not been and that the Secretary of State was seeking the adjournment to allow that evidence to be adduced.

14. Given that Professor French's report is a generic report criticising the ETS methodology in testing and seeking to argue that the error rate is extremely small, and was written in April 2016, it could and should have disclosed in accordance with directions and not simply on the morning of the appeal. The directions from the Tribunal are made for a purpose and are designed to allow all the parties to know the evidence which is being sought to relied upon in advance, and the parties can properly prepare.

15. In respect of the spreadsheet although the judge noted at paragraph 34 of the judgment that there was no direct evidence provided other than the statement the Claimant's test had been cancelled, the judge noted the Claimant himself did not dispute that ETS had cancelled his test scores. In that regard, therefore, the spreadsheet would not have taken the matter any further forward because the Claimant himself at the appeal hearing did not dispute that his test certificate had been declared invalid by ETS.

16. The judge in fact went on to accept that the initial evidential burden on the Secretary of State was met and then went on to consider whether or not an explanation had been provided by the Claimant in that regard. The judge then went on to consider all the evidence in the round in determining whether or not the Claimant actually did sit the test. Although clearly the First-tier Tribunal Judge having a duty to act fairly, in circumstances where the previous directions had not been complied with by the Secretary of State, where the case had been listed since July and directions were made that the documents should be disclosed by a date in August given that the appeal hearing was not until 29th November, I do not consider that the judge acted unfairly in failing to grant an adjournment for the Secretary of State to adduce documents which could and should have been produced in accordance with the original directions. There seems to be no valid reason as to why those documents could not have been available in accordance with directions, but even if that could not have been done for any reason, no explanation was given as to why they were not available on the date of the appeal. It was for the Secretary of State to make sure that all the relevant evidence was before the Tribunal.

17. The second Ground of Appeal seeks to argue in effect that the judge had sought to rely purely upon the English language ability as seen by him at the appeal hearing and that the judge had failed to take account of the fact that there may be reasons as to why someone who otherwise may be considered to be able to speak English may exercise deception and to utilise the services of a proxy test taker as was the case in the Upper Tribunal decision of **MA (Nigeria) [2016] UKUT 450** in which the Upper Tribunal noted that there may well be reasons why someone could exercise

deception even if they spoke English by using a proxy test taker, including but not exhaustively, a lack of confidence, fear of failure, lack of time or commitment, or contempt for the immigration system.

18. However, when one looks at the decision of First-tier Tribunal Judge Cameron, following the case of **SM and Qadir v Secretary of State for the Home Department (ETS evidence burden of proof) [2016] UKUT 00229**,he properly considered the evidence that had been produced by the Secretary of State and found that the initial evidential burden on the Respondent had been met, based on the generic evidence actually before him and went on to consider the evidence of the Claimant when considering the evidence in the round and considering whether or not a valid explanation had been given and as to whether or not the Claimant took the test. Having considered all of the evidence in the round the Judge accepted that the Claimant in fact had taken the test and had not exercised deception.

19. Although at paragraph 43 the judge noted that the Claimant did have a sufficient level of English language, the judge has not simply relied upon that as the only basis for finding that the Claimant did take the test. At paragraph 38 he noted the explanation given by the Claimant that he had been living in Bethnal Green at the time, and that the college in Whitechapel was about one and a half miles away. The judge noted the Claimant said the college had been Home Office approved and he had taken the test there because it was faster to get the certificate from there. The judge accepted the reasons given as to why the Claimant utilised that particular test centre and went on to consider the other documentary evidence which indicate the Claimant could speak English.

20. Although a judge clearly cannot simply rely upon the Claimant's own English language ability before him in considering whether or not a Claimant actually did take the test, the fact that someone can give evidence in English is a matter that he can take into account, but he has not simply relied upon that evidence. The judge has also taken account of the previous courses undertaken by the Claimant in English and considered all the evidence including the location of the test centre and why it was he booked in there. The judge accepted the evidence of the Claimant and that he was an honest and credible witness, and found that he had actually undertaken the test.

21. Although it is argued by the Respondent that the judge has not taken account of the fact there may be other reasons why someone who can seemingly speak English may have utilised a proxy test taker, having considered the Record of Proceedings those arguments were not actually arguments specifically put before the judge by the Home Office Presenting Officer at the time of the appeal. It was not argued before the judge that he may still utilised a proxy test taker down to lack of confidence, fear of failure, lack of time or commitment and he seemingly was not challenged on those grounds at the First-tier hearing.

22. In that regard the judge is not under a duty to consider arguments that were not actually raised before him at the First-tier Tribunal hearing.

23. I find that on the evidence presented that, although other judges may well have reached a different conclusion, the judge has given adequate and sufficient reasons for the decision that he reached and the reasons are sufficiently clear to enable the losing party to know why they have lost. In such circumstances, I do not consider that the judge either acted in any way unfairly in this case or that the decision in fact with regards to the English language test involves any material error of law.

24. The judge then went on, having accepted the Claimant had properly undertaken the English language test, to find that the refusal could not be upheld under paragraph 322(2) of the Immigration Rules regarding deception and then went on to consider paragraph 278 of the Immigration Rules in respect of the question as to whether or not indefinite leave to remain should be granted. Between paragraphs 45 and 48 inclusive the judge noted that the only reason for refusal in the refusal notice under paragraph 287 was the fact that his application fell under the general Grounds for Refusal on the basis that he provided a false certificate. The judge found that the Claimant and his wife were in a genuine and subsisting relationship and there was an intention to live together permanently and that they had adequate accommodation and that they were able to maintain themselves without recourse to public funds. The judge was therefore entitled to find that the Claimant had met the requirements of paragraph 287 of the Immigration Rules.

25. However as this was an appeal heard at Taylor House on 29th November 2016 in respect of a refusal which was dated 21st October 2015, given the changes to the grounds and rights of appeal introduced by the Immigration Act 2014 the previous Ground of Appeal that the decision was not in accordance with the Immigration Rules was no longer an applicable Ground of Appeal upon which the judge was either entitled to allow or dismiss the appeal at the appeal hearing before him.

26. As is rightly stated by Judge Brunnen in the grant of permission to appeal as at the date of the appeal hearing the only basis upon which this appeal could either have been allowed or dismissed was in terms of whether or not in this case the decision was unlawful as being contrary to Section 6 of the Human Rights Act as being in breach of the Claimant's Article 8 rights under the ECHR. The findings of Judge Cameron in that regard in allowing the appeal under paragraph 287 and then dismissing the appeal under Appendix FM and paragraph 276ADE and then dismissing it under Article 8 in that regard, seems to be somewhat inconsistent and contradictory. The judge clearly did not have power to allow the appeal under paragraph 287 as at the date of the appeal hearing before him.

27. Clearly, however, the fact that the judge did consider that the requirements of paragraph 287 were met was a relevant consideration for the judge in considering the Article 8 claim and that was a matter which could and should have been taken into account by the judge in considering the Article 8 claim.

28. Further having considered that the Claimant did meet the requirements of paragraph 287 of the Immigration Rules regarding indefinite leave to remain the judge was then wrong to proceed to consider it under the leave to remain as a partner provisions of

Appendix FM, as those are a separate set of provisions which were not relevant as far as the Claimant was concerned. Had the judge found that the requirements of paragraph 287 were not met. then the judge would be entitled to go on to consider it under Appendix FM when looking at the Article 8 case through the lens or through the prism of the Immigration Rules, but in circumstances where he found that paragraph 287 were met that was all the judge needed to consider in terms of his analysis of the Rules as far as the family life provisions of Article 8 were concerned. The judge clearly was entitled to consider paragraph 276ADE in respect of private life. As far as family life was concerned he was wrong then to go on to consider Appendix FM and whether or not paragraph EX.1 was met and whether or not there will be insurmountable obstacles to a family continuing family life outside of the UK in Bangladesh.

29. I therefore do find that the question as to whether or not the judge had erred by allowing the appeal under the Immigration Rules is a **Robinson** obvious point which although not raised within the Grounds of Appeal is such an obvious point that it should be considered by me and for the reasons I have just enunciated I do find that in fact given that there was no longer a Ground of Appeal that the decision was not in accordance with the Immigration Rules as at the date of the hearing before First-tier Tribunal Judge Cameron, he did materially err in allowing the decision under the Immigration Rules, but then going on to consider it under Appendix FM and then dismissing it under Article 8 on the basis that he concluded that there would have to be compelling circumstances for the case of **SS (Congo)** were a case be allowed under Article 8 outside the Rules, when he considered that the requirements of paragraph 287 were met.

30. I therefore do set aside the decision of First-tier Tribunal Judge Cameron but I do preserve his analysis and findings of fact and credibility between paragraphs 27 and 48 inclusive of the decision and I preserve the judge's findings that the Claimant had actually taken the English language test himself and that he had not exercised deception and the judge's findings thereafter that the Claimant when looking at the Article 8 claim through the prism of the Immigration Rules met the requirements of paragraph 287.

31. In such circumstances as properly conceded by Mr Staunton on behalf of the Secretary of State, if the judge had not erred in his analysis of the evidence presented by the Secretary of State in terms of the question as to whether or not the Claimant had exercised deception and whether or not the adjournment should have been granted, the appeal should have been allowed under Article 8.

32. Clearly the fact that the Claimant met the requirements of paragraph 287 for indefinite leave to remain is a relevant consideration when considering the Article 8 claim. I do, as I must consider the statutory criteria under Sections 117A-D of the Nationality, Immigration and Asylum Act 2002. I do bear in mind that the maintenance of an effective immigration control is in the public interest and that it is in the public interest that people who seek leave to remain are both able to speak English and are financially independent. In that regard the findings preserved from

Judge Cameron and the findings that I make are the fact that the Claimant is able to speak English and that he was and is financially independent.

33. I also bear in mind that little weight should be attached to a relationship formed at a time when the Claimant was in the UK illegally, but I do find that in this case the Claimant was not illegally in the UK when the relationship was formed and although little weight should be attached to a private life formed at a time when the Claimant was in the UK precariously, that does not adversely affect the Claimant in respect of his family life in this case, rather than his private life.

34. As properly conceded by Mr Staunton given the fact that the requirements of the Rules are met under paragraph 287 and there is no illegality otherwise on the part of the Claimant I do find that the decision of the Secretary of State is disproportionate to the legitimate public end sought to be achieved. I do accept applying the five stage **Razgar** test that the Claimant does have a family life in the UK with his wife which is life interfered with by the decision under appeal and that the interference is of sufficient magnitude to engage Article 8. I further do find that the decision taken was in accordance with the law and is necessary in a democratic society for the protection of the rights and interests of others.

35. However, for the reasons set out above I do find that the decision is disproportionate to the legitimate public aim sought to be achieved and I therefore do allow the appeal on Article 8 grounds.

Notice of Decision

The decision of First-tier Tribunal Judge Cameron does reveal a material error of law and is set aside.
I remake the decision allowing the Claimant's appeal on human rights grounds under Article 8 of the ECHR the decisions being unlawful and contrary to Section 6 of the Human Rights Act 1988.

No anonymity direction is made.

Signed Dated 5th September 2017

RFMcGinty

Deputy Upper Tribunal Judge McGinty

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, the fee paid by the Claimant of £140 is to be repaid to him in full.

Signed Dated 5th September 2017

Deputy Upper Tribunal Judge McGinty