Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/47201/2014
IA/47202/2014
IA/47203/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 August 2017	**On 19 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMED [J] (FIRST APPELLANT)
ZAKKIYA [P] (SECOND APPELLANT)
[H N] (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr L Tarlow, a Senior Home Office Presenting Officer
For the Respondents: Mr Z Hussain, Reza Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Abebrese. I shall refer to the Secretary of State as that throughout and to the appellants before the First-tier Tribunal as the claimants to avoid confusion.

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2. The first claimant is a citizen of Sri Lanka who was born on [ ] 1971. The second claimant is a citizen of Sri Lanka who was born on [ ] 1985. The third claimant is their daughter, who was born on [ ] 2007, who is also a citizen of Sri Lanka. On 28 July 2006 the first claimant married the second claimant in Sri Lanka. On 5 October 2006 the second claimant entered the United Kingdom with a student dependant entry clearance which was valid until 31 January 2009. The third claimant was born in the United Kingdom on [ ] 2007. The first claimant entered the United Kingdom with entry clearance as a student on 9 November 2004. Further applications for leave to remain in the UK as a student were made him. Those applications resulted in leave to remain as a student until 30 January 2014. On 30 January 2014 the first claimant applied for leave to remain in the UK as a Tier 4 Student, naming his wife as a dependant. On 24 September 2014 the claimant submitted a family and private life application for leave to remain in the United Kingdom with his wife and eldest daughter named as dependants. That application was refused by the Secretary of State on 10 November 2014.

3. The Secretary of State refused the application because she considered that the first claimant had fraudulently obtained his TOEIC certificate and had therefore used deception in his application. The first claimant was therefore unsuitable and failed to meet the suitability requirements. The Secretary of State considered the first claimant’s application outside the Immigration Rules but did not consider that there were any reasons to grant leave to remain outside the Immigration Rules. The Secretary of State also considered the second claimant’s application and did not consider that there would be very significant obstacles to her integration into Sri Lanka if she were required to leave the UK and consequently that she failed to meet the requirements of the Immigration Rules. The respondent considered the third claimant’s application and considered that it would not be unreasonable to expect her to leave the United Kingdom and therefore she did not satisfy the requirements of the Immigration Rules.

The appeal to the First-tier Tribunal

4. The claimants appealed against the respondent’s decision to the First-tier Tribunal. In a decision promulgated on 29 November 2016 First-tier Tribunal Judge Abebrese allowed the claimants’ appeals. The claimants at the time of the hearing before the First-tier Tribunal had two other children who were not included in the application for leave to remain.

5. The judge found that the first claimant had not obtained his TOEIC certificate fraudulently.

6. The First-tier Tribunal found that the first claimant did not meet the requirements of the Immigration Rules because he could reasonably be expected to re-integrate back into life in Sri Lanka. However, in relation to the third claimant the judge found that it would be unreasonable to expect her to leave the United Kingdom and therefore that she satisfied

paragraph 276ADE(1)(iv). The Secretary of State applied for permission to appeal against the First-tier Tribunal's decision. On 31 May 2017 First-tier Tribunal Judge Osborne refused the Secretary of State permission to appeal. The Secretary of State renewed the application for permission to appeal and on 10 July 2017 Upper Tribunal Judge Gill granted the Secretary of State permission to appeal.

The appeal before the Upper Tribunal

7. The grounds of appeal argue that the First-tier Tribunal has erred in law by failing to consider the judgment of **Secretary of State for the Home Department v Shehzad & Anor [2016] EWCA Civ 615** at paragraph 55 where the court held:

> "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, it is then incumbent on the individual whose leave has been curtailed to provide evidence in response raising an innocent explanation."

8. It is asserted that in **Shehzad** the court held that it is an error of law to reject the Secretary of State's evidence as even sufficient to shift the evidential burden. The witness statements and the spreadsheet extract showed the claimant's English language test has been invalidated because of evidence of fraud. The Secretary of State's evidential burden was met and so the evidential burden fell upon the claimant to offer an innocent explanation. It is asserted that the latter has not been adequately addressed. It is not clear why the evidence from the claimant which the Tribunal relies upon at paragraph 34 would preclude the use of a proxy test taker during the test. In reaching the material finding the First-tier Tribunal relied on the claimant's English ability. Reference is made to paragraph 34 where the judge found that the claimant has already proven himself to be a person who can speak the English language and has also shown that he can pass a test in the English language. It is asserted that 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. The First-tier Tribunal has materially erred by failing to give adequate reasons for holding that a person who clearly speaks English would therefore have no reason to secure a test certificate by deception. Reference is made to the case of **MA (Nigeria) [2016] UKUT 450** at paragraph 57.

9. It is asserted that the Tribunal has not adequately explained its finding at paragraph 38 that the claimants' daughter would be unable to adjust to life in Sri Lanka. No reasons have been given.

10. In oral submissions Mr Tarlow submitted that the evidential burden of proof on the Secretary of State had been met and therefore the burden shifted to the claimant to provide an innocent explanation. He referred to paragraph 34 where the judge sets out that the claimants were not able to cross-examine the witnesses. He submitted that this amounts to an error

of law as the documents in themselves are sufficient to meet the evidential burden. This was a material error of law because it reflected in the manner in which the rest of the appeal was dealt with. The fact that the claimants can speak English heavily influenced the judge. However, this is contrary to the case of **MA**. The judge did not consider that, nonetheless, an appellant might not take the test despite his language ability.

11. In relation to the claimants' daughter he referred to paragraph 38 where the judge set out that she would have difficulty in acclimatising in Sri Lanka. He submitted that there was no explanation whatsoever as to why she would have difficulty in acclimatising and why that led to a finding that it would be unreasonable to expect her to leave the United Kingdom. He submitted that there were no particular circumstances relevant to this claimant that might make her situation particularly difficult.

12. Mr Hussain provided a skeleton argument. He referred to paragraph 34 of the First-tier Tribunal's decision and drew attention to the final sentence where the judge made an explicit finding that the claimant's evidence could only have been made by a person who did indeed take that test. He submitted that although the generic statements shift the evidential burden they do not shift the legal burden, which remains on the Secretary of State to prove fraud. The judge found the claimant to have been a credible and consistent witness. The judge found the claimant credible in relation to the evidence regarding the processes of the TOEIC examination and remarked on the consistency of the claimant's evidence in this regard. The finding based on the evidence that he had been given and that the only evidence that an appellant in these circumstances can give is where he attended to take the test, why he attended at that particular centre etc. He submitted that the judge considered all that evidence and set out an explanation. The claimant had explained why he had chosen that specific test centre. The judge confirmed that the claimant was cross-examined and sets out his responses including the claimant's explanation that he did not feel that he needed to contact the ETS centre and that he had not observed any cheating or behaviour that he thought was out of the normal. It is clear that the judge had taken all this evidence into account in arriving at the conclusions.

13. With regard to relocation to Sri Lanka he submitted that the reasoning of the judge was not limited to paragraph 38. The judge sets out in paragraph 39 the evidence in relation to the third claimant's schooling and the excellent progress that had been made. He submitted that paragraph 39 gives enough information for the respondent to be satisfied as to the reasons why the judge made the findings. The judge based the finding on the educational background of the claimant and the lack of knowledge of Sri Lanka and of the culture of Sri Lanka. Importantly the judge had not ignored the fact that the parents would be able to assist her before arriving at his conclusions. He referred to the case of **Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 (IAC)** and submitted that although there is a duty to give a brief explanation the

reasons need not be extensive if the decision as a whole makes sense. He submitted that the first test in **Shizad** was satisfied. However, if I were to find that there were insufficient reasons if there is no misdirection of law or mistake in the fact-finding then, as set out in **Shizad**, the Upper Tribunal should not normally set aside the decision.

14. Mr Tarlow in reply referred to paragraph 39 and submitted that the judge appears to be directing towards the best interest considerations rather than whether or not it is reasonable to expect the child to leave the United Kingdom.

Discussion

15. The judge has not considered correctly the position of the generic evidence together with the source data and spreadsheet relied on by the Secretary of State. In **Shehzad** the court held that '*the in limine rejection of the Secretary of State's evidence as even sufficient to shift the evidential burden was an error of law.'* The judge has also failed to take into account the case of **MA (Nigeria)** where it was held that an ability to speak English is not necessarily relevant as there may be many reasons as to why a claimant might seek to obtain his certificate by deception. There is no specific finding by the judge that the Secretary of State has failed to meet the evidential burden. The judge has clearly been influenced by the appellant's ability to speak English. However, I do not consider these errors of law to be material because the judge's findings on the appellant's evidence are sufficient to displace the evidential burden on the appellant to provide an innocent explanation. What the judge found was:

> 34...The test which he took in 2013 was challenged but I have found no sound basis for this challenge to be upheld in this appeal for the following reasons. The appellant has already proven himself to be a person who can speak the English language and has shown also that he can pass a test in the English language. I accept his evidence that the reason why he took the test in 2013 was so he could satisfy a requirement of the particular course. The appellant has not had the opportunity to cross examine any of the experts who are being relied upon by the respondent and the claims made by the respondent are of a general nature in relation to the pool of test results which have been held to be invalid. In this particular instance I do find the appellant was credible with regard to the evidence that he gave in relation to the processes which apply to the test and also in relation to the consistency of his evidence with regard to aspects of the test and his knowledge of those aspects which I find could only have been made by a person who did indeed take the test in 2013.

16. This is a very positive finding and is sufficient to displace any burden on the appellant even if the judge did not approach the evidence of the Secretary of State correctly. Therefore there was no material error of law in the First-tier Tribunal decision regarding the TOEIC certificate.

17. The judge found that the first appellant did not satisfy paragraph 276ADE of the Immigration Rules. With regard to the finding that the third

appellant satisfied paragraph 276ADE(1)(iv) I set out in full the judge's reasons:

> 38. I however also make a finding that the appellant's eldest daughter is now 9 and was 7 years old when the application was initially made by the appellants. She has never visited Sri Lanka and she would in my view have difficulties in acclimatising to the culture and society in Sri Lanka due to her presence in the United Kingdom for all her life. I therefore form the view that the appellant's eldest daughter [HN] is able on the evidence to satisfy paragraph 276ADE(1)(iv) because she is under the age of 18 and has lived continuously in the UK for at least seven years and that it would not be reasonable to expect her to leave the United Kingdom at this stage of her life.
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> 39. In coming to this conclusion I have taken into account evidence in respect of all the children of the appellants but in particular that in relation to [HN] and note the following. She is attending a school which is cited as being an Islamic school in East London. I have had sight of her progress reports and in particular that which was made in the springtime of 2016 and she appears to be progressing well in respect of the national curriculum. I have also had sight and taken into account her academic report dated 2013 to 2014. All of the reports indicate she is making excellent progress and in my view on balance it would not be in her best interests for her to be removed from the United Kingdom based on the length of time that she has been here, her lack of knowledge of Sri Lanka and also the adjustment which she would have to make even bearing in mind the fact that she would have her parents to assist her in making that adjustment.'

18. The judge has not given adequate reasons for the finding on reasonableness. The judge appears to simply say that because the third appellant has been in the UK all her life (9 years) and has never visited Sri Lanka inevitably she would have difficulties in acclimatising and that makes it unreasonable to expect her to leave the UK. There was no identification or analysis of what those difficulties might be or how they made it unreasonable to expect her to leave the UK. The judge has not identified any particular factors that would make it unreasonable for the third appellant to leave the UK. Further, the judge has failed to take into account, as held in **MA (Pakistan) and others v Secretary of State for the Home Department [2016] EWCA Civ 705** the correct approach to assessing reasonableness - the wider public interest and other factors are relevant when assessing reasonableness. At paragraph 22 the court held that the test was the same in paragraph 276ADE as it is under s117B(6).

> *The application of the reasonableness concept*
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> 22. The critical issue in these cases, therefore, is how the court should approach the question of reasonableness. What factors is a court or tribunal entitled to take into account when applying the reasonableness test? As I have said, the answer to that question must be the same for paragraph 276ADE.

19. I therefore find that the judge made a material error of law.

20. I considered whether or not I could re-make the decision myself. I considered the Practice Statement concerning transfer of proceedings. I am satisfied that the nature and extent of judicial fact finding that is necessary in order for the decision in the appeal to be re-made is such, having regard to the overriding objective, that it is appropriate to remit the matter to the First-tier Tribunal.

21. The findings on the use of deception in respect of the TOEIC test certificate are preserved as are the finding that the first appellant does not meet the requirements of paragraph 276ADE of the Immigration Rules.

22. I remit the case to the First-tier Tribunal for the case to be heard at the First-tier Tribunal at Taylor House before any judge other than Judge Abebrese pursuant to section 12(2)(b) and 12(3)(a) of the TCEA. A new hearing will be fixed at the next available date.

23. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Notice of Decision

The appeal is allowed in respect of the findings regarding the third appellant. The case is remitted to the First-tier Tribunal at Taylor House on the next available date to be heard by any judge other than Judge Abebrese.

Signed P M Ramshaw Date 18 September 2017

Deputy Upper Tribunal Judge Ramshaw