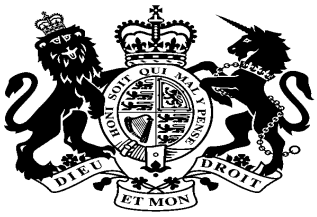

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: HU/12085/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 October 2018	**On 9 November 2018**

Before

Upper Tribunal Judge Gill

Between

The Secretary of State for the Home Department — Appellant

And

Respondent

A T
(ANONYMITY ORDER MADE)

Anonymity

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the original appellant as any such identification may lead to identification of his son who is a vulnerable minor child. No report of these proceedings shall directly or indirectly identify the original appellant and his child. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings.
The parties at liberty to apply to discharge this order, with reasons.

Representation:

For the appellant: Ms. A Holmes, Senior Presenting Officer.
For the respondent: Ms S Ferguson, of Counsel, instructed by Londonium Solicitors.

Decision and Reasons

1. The Secretary of State has been granted permission to appeal the decision of Judge of the First-tier Tribunal Samimi (hereafter the "judge" unless otherwise stated) who, in a decision promulgated on 19 July 2018 following a hearing on 12 July 2018, allowed the appeal of A. T. (hereafter the “claimant”), a national of Bangladesh born on 20 January 1985, against a decision of the respondent of 27 September 2017 to refuse his human rights claim of 16 December 2016.

2. In relation to the Immigration Rules, the Secretary of State refused the application on the ground that the claimant did not meet the suitability requirement in S-LTR 4.2 of Appendix FM of the Immigration Rules. The Secretary of State considered that, in his application of 20 April 2011 for leave to remain, the claimant had used a TOEIC certificate that had been fraudulently obtained. The TOEIC certificate had been issued by Educational Testing Service ("ETS") following a test supposed to have been taken by the claimant on 14 December 2011 at Opal College. It was concluded that a the claimant's certificate had been obtained by the use of a proxy test taker. As a result, the claimant's scores from the test taken on 14 December 2011 at Opal college had been cancelled by ETS.

3. As a result of the fact that the claimant did not meet the suitability requirement, the Secretary of State considered that the applicant could not succeed under EX.1(a) or EX.1(b) of Appendix FM of the Immigration Rules or under para 276ADE of the Immigration Rules. In relation to his Article 8 claim, the Secretary of State considered that, given the fact that the claimant had used deception to gain leave to remain in the United Kingdom, it was proportionate to expect him to relocate to Bangladesh to enjoy family life there or, in the alternative, for him to return to Bangladesh and make an entry clearance application.

4. The judge's decision did not deal with the claimant's private life claim. The claimant did not file a cross-appeal and no issue was taken before me in relation to the judge's failure to decide the Article 8 private life claim.

5. In dealing with the claimant's Article 8 family life claim, the judge dealt exclusively with the claimant's relationship with his son, born on 28 March 2015. The child was born to the claimant and his wife. They were married on 12 April 2014. The child is a British citizen and is autistic. As at the date of the hearing before the judge, the claimant and his wife had been separated for 3 years 1 month. There was evidence before the judge that the claimant had made repeated applications to the family court in order to resume contact with his son.

6. The judge's decision dealt with the claimant's claim that he enjoyed family life with his son. Although I will need to quote from the judge's decision later in my decision, it suffices to say, for present purposes, that the judge found as follows:

   (i) (paras 8-10(a) of her decision) that the claimant had not practised deception in obtaining his TOEIC certificate from ETS;

   (ii) that he had taken, and intended to continue to take, an active role in his son's upbringing and that he had a genuine and subsisting relationship with his son.

The judge therefore purported to allow the appeal under the Immigration Rules.

(iii) The judge also said that she allowed "*the appeal under Article 8 of ECHR grounds*". This followed her assessment of the Article 8 claim outside the Immigration Rules. She found that removal would be a disproportionate interference with the claimant's right to his family life with his son.

The Secretary of State's grounds and submissions

7. There are three grounds. They challenge both the judge's conclusion that the claimant had not obtained his TOEIC certificate by deception (grounds 1 and 2) as well as her decision to allow the appeal under the Immigration Rules by reference to Appendix FM (ground 3).

8. The grounds may be summarised as follows:

(i) (Ground 1) In stating that the respondent had not produced any specific evidence relating to the claimant's TOEIC certificate, the judge had overlooked considering the Secretary of State's bundle of documents (the "*Secretary of State's bundle*") submitted under cover of a letter dated 4 July 2018 in advance of the hearing and which contained such specific evidence, namely, the ETS 'look up tool' showing that the results of the claimant's test had been cancelled by ETS and a second 'look up tool' which provided a breakdown of the results for the tests taken on the day of the claimant's test and which stated the number and percentage of the tests that were invalid and that were questionable. The judge's failure to consider this evidence meant that the Secretary of State had not had a fair hearing.

(ii) (Ground 2) The judge had misapplied the burden of proof when considering the deception issue. She was wrong to find that the initial evidential burden had not been met as the Tribunal's decision in SM and Qadir v SSHD (ETS - Evidence - Burden of proof) [2016] UKUT 00229 (IAC) makes it clear that the Secretary of State's evidence does meet the initial evidential burden. The judge erred by failing to consider whether the claimant had provided an innocent explanation and therefore erred in concluding that the Secretary of State had not discharged the overall legal burden of proof.

(iii) (Ground 3) The judge materially erred in law in reaching her decision on the Article 8 claim irrespective of any errors in relation to the deception issue. The grounds contend that the judge materially erred in law in reaching her finding that the claimant had a genuine and subsisting relationship with his son. The grounds contend that the claimant did not satisfy the requirements of Appendix FM given that he had neither access to nor a genuine parental relationship with his son and that the family contact order that he had managed to obtain required him to complete a course on how to manage and parent an autistic child before he is allowed unsupervised access to his son. The grounds state that it should be noted that it was the claimant who had abandoned his wife and autistic child in May 2017 only to seek contact as a means of remaining in the United Kingdom. It is contended that the judge failed to consider the context in which the family contact order was obtained and that this failure infected the finding that there was a genuine and subsisting relationship with a British child.

9. I shall dealt with the parties' submissions in the course of my assessment.

Assessment

10. On page 11 of her decision, in the section under the heading "*Notice of decision*", the judge said:

> "I allow the Appeal under Immigration Rules.
> I allow the appeal under Article 8 of ECHR grounds".

11. However, the decision was dated 27 September 2017, i.e. after s.82 of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") had been amended with effect from 20 October 2014 by the Immigration Act 2014 so as to abolish rights of appeal against decisions made under the Immigration Rules and the ground of appeal that the decision was not in accordance with the Immigration Rules. The Tribunal's duty, as set out in s.86, was also amended with effect from 20 October 2014 by the Immigration Act 2014.

12. By virtue of the amended version of s.82 of the 2002 Act, a right of appeal only arises where the Secretary of State has decided to refuse an individual's protection claim or a human rights claim or has decided to revoke an individual's protection claim. By virtue of the amended version of s.84 of the 2002 Act, the grounds of appeal are similarly restricted. Insofar as relevant to this appeal, the amended version of s.84 does not permit an individual to bring an appeal on the ground that the relevant decision is not in accordance with the Immigration Rules. Under the amended version of s.86, the Upper Tribunal must determine, inter alia, any matter raised as a ground of appeal. Since the amended version of s.84 restricted the grounds of appeal so that it is not possible to appeal on the ground that the decision is not in accordance with the Immigration Rules, it follows that the amended version of s.86 does not permit judges to allow an appeal under the Immigration Rules.

13. In the instant case, the claimant's human rights claim was made on 16 December 2016 and the decision was made on 27 September 2017, i.e. after ss. 82, 84 and 86 had been amended by the Immigration Act 2014. Accordingly, the current versions of ss.82, 84 and 86, as amended by the Immigration Act 2014, applied.

14. It follows that the judge had no jurisdiction to *"… allow the appeal under Immigration Rules".* It was only possible for the judge to allow the appeal on human rights grounds.

15. Nonetheless, it is generally understood that, if any relevant criteria set out in Appendix FM of the Immigration Rules are satisfied so that an appeal would have been allowed under the Immigration Rules if that right of appeal and ground of appeal were still available, the decision to refuse the individual's human rights claim would be disproportionate *for that reason alone*, when assessing the Article 8 claim of the individual. In that event, it would not be necessary to conduct a wider examination of the individual's Article 8 claim outside the Rules. If the criteria set out under Appendix FM of the Immigration Rules are not satisfied but the individual satisfies, for example, s.117B(6) of the 2002 Act, then the decision to refuse the individual's human rights claim would be disproportionate *for that reason alone*.

Again, in that event, it would not be necessary to conduct a wider examination of the individual's Article 8 claim.

16. Following the amendments of ss.82, 84 and 86 of the 2002 Act, it does not make sense for judges to say that they allow an Article 8 claim under the Immigration Rules, for the simple reason that they no longer have jurisdiction to allow any appeals under the Immigration Rules. Nor does it make sense to say that the appeal is allowed under Article 8 outside the Immigration Rules, for the simple reason that the ground of appeal is that the decision is in breach of the individual's human rights, without there being any concept of any Article 8 claim under the Immigration Rules or outside the Rules.

17. I shall therefore construe the judge's decision, as set out at my para 10 above, as a decision to allow the claimant's appeal on human rights grounds:

    (i) by reference to the Immigration Rules because she found that the claimant satisfied the suitability requirement and: (x) that he had access rights to his son and he was taking and intended to continue to take an active role in his son's upbringing; and/or (y) that he had a genuine and subsisting parental relationship with his son, a qualifying child, and that it was unreasonable for the child to leave the United Kingdom.

    In relation to (x), the relevant provisions are R-LTRPT.1.1. (c) and E-ECPT.2.4(a)(ii) and (b).

    In relation to (y), the relevant provisions are R-LTRPT.1.1. (d) and EX.1(a).

    These provisions are set out in the Annex to this decision, for ease of reference.

    (ii) by reference to s.117B(6) of the 2002 Act (para 23 of the judge's decision) because she found that he had a genuine and subsisting parental relationship with his son, a qualifying child, and that it was unreasonable for the child to leave the United Kingdom (para 15 of the judge's decision).

        Section 117B(6) of the 2002 Act reads:

        > "In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
        >
        > (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
        >
        > (b) it would not be reasonable to expect the child to leave the United Kingdom.

    (iii) by reference to the balancing exercise carried out in the wider analysis of the claimant's Article 8 claim involving consideration of all of the circumstances of the claimant and the weight to be given to the public interest in the balancing exercise.

18. If the judge materially erred in law in reaching her decision on whether the claimant satisfied the suitability requirement, which turned on whether she erred in law in her consideration of whether the Secretary of State had established that the claimant had

used deception in his previous application for leave to remain, this would be material to her decision to allow the Article 8 claim by reference to the Immigration Rules and also by reference to the balancing exercise in the wider analysis of the applicant's Article 8 claim. However, any such error in relation to the suitability requirement would not affect her decision to allow the appeal by reference to s.117B(6) of the 2002 Act because the claimant does not need to satisfy the suitability requirement in order to succeed in his appeal on human rights grounds for it to be allowed by reference to s.117B(6).

19. There is no dispute that the claimant's son is a qualifying child because he is a British citizen. Ms Holmes accepted that, in the particular circumstances of this case, it would be unreasonable to expect the claimant's son to leave the United Kingdom. It follows that she accepts that the judge did not err in law in reaching that finding.

20. Accordingly, Ms Ferguson and Ms Holmes agreed that, if I were to decide that the judge did not materially err in law in reaching her finding that the claimant has a genuine and subsisting parental relationship with his son, then this would be determinative of the Secretary of State's appeal before the Upper Tribunal. They agreed that, in that event, any error of law in relation to grounds 1 and 2 would not be material to the outcome of this appeal because the judge would have been entitled to allow the appeal in any event by reference to s.117B(6) of the 2002 Act.

21. I therefore turn to consider ground 3, i.e. whether the judge materially erred in law in reaching her decision that the claimant had a genuine and subsisting parental relationship with his son.

Ground 3

22. The judge considered this aspect of the case at paras 16-25 of her decision. In addition, her reasoning, at paras 11-15, in relation to whether the claimant had taken and intended to continue to take, an active role in his son's upbringing is also relevant to the issue of whether he has a genuine and subsisting parental relationship with his son. Omitting quotations from decided cases and other material that she considered relevant, paras 11-25 of the judge's decision read:

> "11. The [claimant] married his British wife on 12.4.2014. The couple had a child namely […] on 28.3.2015. The [claimant] and his wife have now separated, and the [claimant] has made repeated applications to the family court in order to resume contact with his son. The [claimant] has been granted supervised contact (once every two weeks) from 15.00 to 16.00 at a contact centre. In answer to questions put by me, the [claimant] confirmed that prior to the separation he had lived with his wife for 3 years and one month and that during that time he had played an extremely active role in his son's care and upbringing. It has not been disputed that the [claimant] is the biological *[sic]* of a British child. The [Secretary of State] has found however, that in order to meet the requirements of Paragraph R-LTRPT.2.4.(b), the [claimant] must show that he is taking and intends to continue to take an active role in their child's upbringing.
>
> 12. I find that the [claimant's] evidence relating to the nature of his relationship, and in particular the repeated efforts made by him to resume and extend the nature and duration of his contact with his son are matters that I attach considerable weight to. The CAFCAS report dated 1.6.2018 provides:
>
> > After four weeks, [the claimant's son] should be able to manage a little more time and the [claimant] could introduce an activity familiar to [the claimant's son] such

> as visiting a café at [xxx] shopping centre, which he says they used to do together. ... After four sessions like this, the [claimant] should be able to spend time with [his son] unsupervised. It is important that he completes a course for parents of children with ASD before commencing with unsupervised arrangements so that both he and [the claimant's ex-wife] can be confident about his ability to manage [his son] alone.
>
> Following two or three sessions like this, [the claimant's son] should be able to spend the afternoon with his father, up to four hours. This leaves room for a meal and an activity. the [claimant] should inform [his ex-wife] at least three days prior to where he intends to go so that she can prepare [his son], for example by showing him pictures of the location, as she has admirably done already with the contact centre. Eventually [his son] should be able to spend a full day with the [claimant] at weekends to include going to his home".

13. In this context, I have regard to the Upper Tribunal's findings in JA (Meaning of "access rights) India [20151 UKUT 00225 (IAC):

> "…"

14. The [claimant] has confirmed in oral evidence before me, that he has every intention to continue to proceed with full hearing in order to determine the increased level of direct contact with his son and that he hopes he will soon be able to spend weekends and holidays with his son, and that his job as a security guard does enable him to do this.

15. I find that I accept [the claimant's] oral and documentary evidence of his direct and indirect contact (in the form Skype phone calls referred to in the CAFCAS report) with his British child as set out above. As [the claimant's] child is only 3 years old, and lives with her British mother in the United Kingdom there is no prospect of him being able to enjoy her relationship with his father in the same way if the [claimant] is forced to return to Bangladesh. The [claimant] wishes to remain in the United Kingdom, so he can maintain the visits to his son and that he is able to maintain the emotional and parental bond. In the circumstances, it is not reasonable to expect [the claimant's] child *[sic]* leave the United Kingdom. I find that given that the [Secretary of State] has not satisfied the the *[sic]* legal burden of proving the [claimant] having obtained his TOEIC results by deception, the [claimant] does meet the suitability requirements of the rules. I find that on the totality of the evidence before me, the [claimant] has met the requirements of Paragraph R-LTRP.2.4 (a)(i). In accordance with EX1.(a), the [claimant] does have a genuine and subsisting relationship with a qualifying child.

16. In considering [the claimant's] article 8 outside the rules, the interest of [the claimant's] child whom he has a father and child relationship with, and his ability to continue a positive and meaningful relationship with him are highly relevant factors that I attach considerable weight to. I have regard to E-A (Article 8 — best interests of child) Nigeria 120111 UKUT 00315 (IAC).

> "…"

17. At paragraph 29 of the judgment Lady Hale considers what might been encompassed in the 'best interests of the child':

> "…"

18. The existing guidance of the Upper Tribunal in LD (Article 8 - best interests of child) (Zimbabwe) [20101 UKUT 278 (IAC), and in particular to paragraph 3 of the guidance:

> "…"

19. I note that the [Secretary of State has not had any or any sufficient regard to S.55 of the Borders, Citizens and Immigration Act 2009. In the circumstances of this case, and given

[the claimant's] son's age, and his inability to independently visit his father in Bangladesh [sic] would be that his welfare would be adversely affected if the [claimant] is forced to return to Bangladesh. I have particular regard to the fact the [claimant] did live with his son for the first two years of his life, during which he was taking an active role in his care. [The claimant's] son is autistic and this renders [the claimant's] positive parental relationship with him all the more important. The issue of the consideration of the best interests of the children was considered in Zoumbas (Appellant) v SSHD (Respondent) 120131 UKSC 74 that provides as to the following:

"…"

20. The [claimant] is his son's biological father with whom he has developed a father and child relationship with since his birth. The CAFCAS report has recommended an increase in [the claimant's] current contact with his son. I find that the totality of the factors in [the claimant's] case does constitute compelling factors. I have regard to SS (Congo) [20151 EWCA Civ 387, which provides that there must be something 'compelling' about a claim for it to succeed on Article 8 grounds outside the Immigration Rules. As set out in Iftikhar Ahmed 120141 EWHC 300 (Admin), when considering paragraph 3.2.8 of the October 2013, exceptional circumstances have been considered:

"…"

21. In Forman (SS 117A Considerations) [20151 412 (IAC) it was held that:

"…

22. I have regard to Part 5A of the Nationality, Immigration and Asylum Act 2002, as implemented by S.19 of the Immigration Act 2014. S.117B provides:

"…"

23. In accordance with paragraph *[sic]* 117 B(6), the [claimant] has since his separation from his ex wife continued to have a genuine and subsisting relationship with his child.

24. I find that the public interest factors in this case do not justifying removal of the [claimant] as this would deprive him and his child of any prospect of developing a positive parental relationship with his minor British child. I find that [the claimant's] removal from the United Kingdom would cause a disproportionate interference with the prospect of the [claimant] and his children resuming and rebuilding a family relationship that they have previously enjoyed. In this regard I have regard to Razgar [20041 UKHL27 at paragraph 17 (1-5). At paragraph 17 of the decision of the House of Lords in the case of Razgar v SSHD [2004] UKHL 27 Lord Bingham formulated the questions, which have to be answered by an Immigration Judge in a case where removal is resisted in reliance on Article 8, as follows:

"…"

25. I find that these are reasons that do render the Respondent's decision a disproportionate interference with family life of the [claimant], and that of his child. I allow the Appeal under Article 8 of ECHR."

23. I have to say that ground 3, which challenges the judge's finding that the claimant has a genuine and subsisting parental relationship with his son, amounts to no more than a disagreement with her reasoning. There is no reason to think that she was not aware of the fact that the claimant had recently taken family court proceedings to obtain access. However, it is plain that she placed weight on the fact that the claimant had lived with his son for two years after the son was born and that during that time he took an active role in his son's care (para 19). It is plain that she was aware that the claimant had limited contact by way of supervised access and that it

was necessary for him to complete a course for parents of children with ASD before commencing unsupervised contact.

24. At the hearing, Ms Holmes submitted that the judge had failed to consider the fact that it was necessary for the claimant to undergoing such a course, implying that attendance on such a course would be unnecessary if the claimant had a genuine and subsisting parental relationship with his son. I do not see the connection. Given the nature of the condition of autism, it may well be that it is considered sensible for adults who may be spending time with autistic children to attend such courses before a family court permits unsupervised contact irrespective of the nature of their relationship with the children. In any event, there was no evidence before the judge that any parent with an autistic child may reasonably be expected to have the ability to spend unsupervised time with the child without needing to attend such a course.

25. Accordingly, in my judgement, the mere fact that the family court decided that it was necessary for the claimant to attend such a course before he could have unsupervised contact does not undermine the judge's finding that he has a genuine and subsisting parental relationship with his son.

26. The grounds contend that the claimant only sought to contact his son as a means of remaining in the United Kingdom. This simply amounts to a disagreement with the judge's view (para 12 of her decision) that the claimant had made repeated efforts to resume and extend the nature and duration of his contact with his son. It is plain that the judge considered the "*repeated efforts*" made by the claimant against the background, as she had found it, of the claimant having lived with his wife and son for two years after the son's birth and taking an "*an extremely active role in his son's care and upbringing*" during that time (para 11), whereas the grounds ignore that background.

27. Accordingly, I have concluded that ground 3 is not established. The judge did not materially err in law in reaching her finding that the claimant has a genuine and subsisting parental relationship with his son.

28. It follows that the judge was entitled to allow the appeal on human rights grounds by reference to s.117B(6) of the 2002 Act.

29. Although Ms Ferguson and Ms Holmes agreed that, in the event that I decided that the judge did not err in reaching her finding that the claimant has a genuine and subsisting parental relationship with his son, it would not be necessary for me to decide grounds 1 and 2, I will nevertheless decide grounds 1 and 2 for reasons which I will explain later (see para 45 below).

Grounds 1 and 2

30. The judge's consideration of the deception issue is set out at paras 8-10(a) of her decision, the relevant parts of which read as follows:

> "8. In cross-examination, the [claimant] confirmed that he had taken the TOEIC test at Duru House, in East Ham at 101 Commercial Road. The [claimant] explained that he had taken the Speaking and Writing test first and this had taken two and half-hours. He had paid £140 for the test in cash. The Reading test is said to have had four components, which included a listening component. The [claimant] has adamantly denied the [Secretary of State's] allegation of having

obtained [sic] TOEIC certificate by fraudulent means. In cross-examination, the [claimant] reiterated that he had taken the TOEIC test himself and has provided details of the various components of the test, and the location.

9. I have regard to the Tribunal's findings in SM & Qadir v SSHD (ETS — Evidence — Burden of Proof) 12016] UKUT (MC), at Paragraph 63. The Tribunal referred to the following shortcomings in the evidence relied upon by the [Secretary of State], as to the following;

(i) Neither witness has any qualifications or 'expertise, vocational or otherwise, in the scientific subject matter of these appeals, namely voice recognition technology and techniques.

(ii) In making its decisions in individual cases, the Home Office was entirely dependent on the information provided by ETS. At a later stage viz from around June 2014 this dependency extended to what was reported by its delegation, which went to the United States.

(iii) ETS was the sole arbiter of the information disclosed and assertions made to the delegation. For its part, the delegation — unsurprisingly, given its lack of expertise — and indeed, the entirety of the Secretary of State's officials and decision makers accepted uncritically everything reported by ETS.

(iv) The Home Office has at no time had advice or input from a suitable expert.

(v) There was no evidence from any ETS witness — this notwithstanding the elaborate critique of Dr Harrison compiled over one year ago.

(vi) The test results of the 33,000 suspect TOEIC scores, coupled with the information disclosed and assertions made to the Secretary of State's delegation during a one-day meeting, constitute the totality of the material provided by ETS.

(vii) Almost remarkably, ETS provided no evidence, directly or indirectly, to this Tribunal. Its refusal to provide the voice recordings of these two Appellants in particular is mildly astonishing.

(viii) While the judgment of this Tribunal in Gazi promulgated in May 2015, raised significant questions about the witness statements of Ms Collings and Mr Millington, these were not addressed, much less answered, in their evidence at the hearing. See in particular Gazi at [9]-[15] (reproduced in [19] above).

(ix) While certain documentary evidence, highlighted in [15] above, might have fortified the Secretary of State's case, none was produced.

(x) Similarly, although requested, Dr Harrison provided none of the voice recording files pertaining to the Appellants for analysis and consideration.

10. I do not find that there is before me any explanations or specific and cogent evidence relating to the [claimant's] TOEIC individual test results that would satisfy the burden of proof on balance of probabilities that the [claimant] had used a proxy in order to achieve the results set out in the test result that the [Secretary of State] has submitted. The documents submitted by the ETS do not provide evidence to show that [the claimant's] results were obtained through fraudulent participation and misrepresentation of the English Test certificate by the use of a proxy, which is said to have been made on [the claimant's] behalf. I have regard to the Court of Appeal Judgment, in Secretary of State for the Home Department v Shehzad & Anor [20161 EWCA Civ 615;

"30. It appears that no material was put in front of the tribunal to show that Mr Shezad's TOEIC speaking English Test had been adjudged to be 'invalid" as opposed to "questionable....But 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."
>
> 10(a). In the particular circumstances of [the claimant's] case, his solicitors have not made any endeavours to obtain the recording evidence relied upon by the [Secretary of State] to show that the [claimant] had allegedly used a proxy to undertake the TOEIC test. Nevertheless, I do not find that the [Secretary of State] has satisfied the burden of proof on balance of probabilities to show that his specific test results were obtained through deception in the manner that has been suggested by the [Secretary of State]. There is no voice recording evidence. The [Secretary of State] has also found that on the date of [the claimant's] test namely 14.12.2011 taken at Opal College, the majority of the tests results were found to be invalid. I do not find that this is sufficient to satisfy the legal burden to establish to the balance of probabilities that the [claimant] has used deception in relation to a previous application for leave to remain."

31. It was agreed at the hearing before me that, pursuant to the judgment in SM and Qadir, there was a three-step approach to be followed by a judge in deciding whether the Secretary of State has discharged the burden of proving, to the standard of the balance of probabilities, that an individual claimant had obtained a TOEIC certificate by deception. The first step is to decide whether the Secretary of State had discharged the initial evidential burden. If so, then the evidential burden shifted to the claimant to provide an innocent explanation, which is the second step. The third step is to consider whether the Secretary of State had discharged the overall legal burden to establish deception. It was also agreed before me that the Tribunal decided in SM and Qadir that the evidence relied upon by the Secretary of State in that case was sufficient to discharge the initial evidential burden (in the first step) of proving that the TOEIC certificates of the appellants in that case had been procured by dishonesty.

32. Ms Ferguson relied upon her "*Rule 24 response*" dated 7 October 2018 (hereafter the "Reply"). In the Reply, Ms Ferguson submitted that, although it is well-understood that the Secretary of State's generic and specific evidence is enough to discharge the initial evidential burden, the Secretary of State's generic and specific evidence was not conclusive, in that, it is always open (in her submission) to an applicant to offer an innocent explanation in his oral evidence before the Tribunal. Accordingly, Ms Ferguson submitted that, although the judge did not explicitly note the specific evidence provided in relation to the claimant that his test results were deemed invalid, she was nevertheless entitled to conclude on the evidence before her that the Secretary of State had not discharged the overall legal burden of proving deception.

33. It is clear from Ms Ferguson's submissions in her Reply and at the hearing that she accepted that the judge had failed to follow the three-step approach. In her submission, this was not material for the reasons she explained and which I have summarised.

34. Ms Holmes drew my attention to the Secretary of State's bundle. At Annex A1 was evidence that the claimant's test results had been cancelled by ETS as invalid. At Annex A2 was evidence which provided the breakdown of the results for the tests taken at Opal College on 14 December 2011. This stated that 21% of all the tests for that day were questionable and 79% were invalid.

35. At para 10(a) of her decision, the judge referred to the fact that the Secretary of State's evidence showed that the majority of the test results at Opal College were

found to be invalid. I accept that this shows that the judge took into account the evidence at Annex A2 of the Secretary of State's bundle.

36. However, I have no hesitation in concluding that the judge failed to take into account the Secretary of State's specific evidence, i.e. the evidence at Annex A1 of the Secretary of State's bundle. Not only did the judge make no reference, in terms, to this specific evidence, she said, in terms, in the first sentence of para 10 that she found that there were no *"explanations or specific and cogent evidence relating to [the claimant's] TOEIC individual test results …"* and then proceeded to quote para 30 of the judgment of the Court of Appeal in Shehzad to the effect that the Secretary of State faces a difficulty in respect of the evidential burden at the initial stage if *no* material is put forward to show that the TOEIC speaking English test for the claimant Shehzad in that case had been adjudged "*invalid*" as opposed to "*questionable*". In addition, it is to be noted that the judge did not (contrary to Ms Ferguson's submission) consider whether the claimant had provided an innocent explanation.

37. In these circumstances, the only reasonable inference that one can draw is that the judge simply overlooked the specific evidence at Annex A1. Ms Ferguson did not seek to suggest otherwise. To conclude otherwise would make no sense as it would then be impossible to understand why she said what she said in the first sentence of para 10 and why she quoted para 30 of Shehzad. It is *because* she had overlooked the specific evidence that she did not consider whether the claimant had provided an innocent explanation and therefore proceeded from the first step to the third step to conclude that the Secretary of State had not discharged the overall legal burden of proof on the balance of probabilities.

38. I am therefore satisfied that ground 1 is established. For the same reasons, given what the judge said in the first sentence of para 10 of her decision and the fact that she quoted from para 30 of Shehzad, I am also satisfied that, irrespective of ground 2, ground 1 is fatal to the judge's conclusion that the Secretary of State had not discharged the overall burden of proof to establish deception.

39. I turn to ground 2.

40. By failing to take into account the specific evidence at Annex A1, it is clear that the judge materially erred in law in her consideration of the first step. In addition, there is no consideration of the second step, i.e. whether the claimant had provided an innocent explanation, nor did the judge reach any finding as to whether he had given an innocent explanation. It is true that she summarised the claimant's evidence in cross-examination at para 8 of her decision but she does not assess the evidence and reaches no conclusion as to whether it amounts to an innocent explanation. She simply states, in effect, at paras 10 and 10(a) that, by reason of the fact that the Secretary of State had not provided any specific evidence in relation to the claimant, he had failed to discharge the burden of proof in establishing on the balance of probabilities that the claimant had used deception in his previous application for leave to remain.

41. I do not accept Ms Ferguson's submission that the judge's failure to follow the three-step approach explained in SM and Qadir is immaterial because she concluded that the Secretary of State had not discharged the overall burden of proof. It is misconceived and simply wrong. The failure to follow the three-step approach was

not merely a failure to follow a process. It resulted in material evidence being omitted entirely and set the judge on an incorrect path, omitting consideration of the second step and therefore leading her to equate the conclusion in the third step with the answer she had arrived at in relation to the first step.

42. It is therefore inevitable that the errors in failing to take into account the specific evidence at Annex A1 and failing to follow the first and second steps of the three-step approach mean that the judge's conclusion in the third step is also fatally flawed.

43. I am therefore satisfied that ground 2 is also established.

44. Accordingly, the judge erred in law in reaching her conclusion that the Secretary of State had not established that the claimant had used deception in his previous application for leave to remain and her finding that the claimant satisfied the suitability requirement. This is plainly material to her finding that the claimant satisfies the requirements of Appendix FM and EX.1(a).

Whether to set aside the judge's decision, in whole or in part

45. The question whether an individual has practised deception in a previous application for leave is a very important one. Although the errors of law made by the judge in deciding this issue do not affect the outcome of *this* appeal, this is not say that it will never be of relevance or importance. No one can say for certain what the future holds. It would be wrong for me to leave the judge's findings on the deception issue in place notwithstanding the errors of law she made simply because the errors of law do not affect the outcome of this appeal on this occasion.

46. I have therefore decided to set aside the judge's decision and to re-make the decision on the appeal against the Secretary of State's decision.

47. For the reasons given by the judge at paras 11-25 of her decision and my reasons in relation to ground 3, as set out at paras 22-29 above, I re-make the decision on the claimant's appeal by allowing his appeal against the Secretary of State's decision on human rights grounds (by reference to s.117B(6) of the 2002 Act).

48. There is no need to give the parties an opportunity to make submissions on the re-making because my ultimate decision, i.e. as stated in the preceding paragraph, is not materially different from my deciding to dismiss the Secretary of State's appeal on the basis of the parties' agreed position (as summarised at para 20 above) to the effect that, if ground 3 is not established, then the Secretary of State's appeal stands to be dismissed without it being necessary to consider grounds 1 and 2. It was therefore within the reasonable contemplation of the parties that the Secretary of State's appeal would be dismissed in such event without a lawful determination of the deception issue.

49. I record that there has been no lawful determination of the Secretary of State's allegation that the claimant had used a TOEIC certificate obtained by fraud in his application dated 4 December 2011 for leave to remain and that he does not meet the suitability requirement in Appendix FM.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision is set aside. The Upper Tribunal re-made the decision on the claimant's appeal by allowing the appeal against the Secretary of State's decision on human rights grounds (by reference to s.117B(6) of the Nationality, Immigration and Asylum Act 2002).

Signed Date: 1 November 2018
Upper Tribunal Judge Gill

ANNEX

"R-LTRPT.1.1. The requirements to be met for limited or indefinite leave to remain as a parent or partner are-
(a) the applicant and the child must be in the UK;
(b) the applicant must have made a valid application for limited or indefinite leave to remain as a parent or partner; and either
(c) (i) **the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and (ii) the applicant meets all of the requirements of Section ELTRPT: Eligibility for leave to remain as a parent, or**
(d) **(i) the applicant must not fall for refusal under S-LTR: Suitability leave to remain; and (ii) the applicant meets the requirements of paragraphs E-LTRPT.2.2-2.4. and E- LTRPT.3.1.; and (iii) paragraph EX.1. applies."**

"**Relationship requirements**
E-ECPT.2.1. The applicant must be aged 18 years or over.

E-ECPT.2.2. The child of the applicant must be-
(a) under the age of 18 years at the date of application;
(b) living in the UK; and
(c) a British Citizen or settled in the UK.

E-ECPT.2.3. Either -
(a) the applicant must have sole parental responsibility for the child; or
(b) the parent or carer with whom the child normally lives must be-
(i) a British Citizen in the UK or settled in the UK;
(ii) not the partner of the applicant; and
(iii) the applicant must not be eligible to apply for entry clearance as a partner under this Appendix.

E -ECPT.2.4. (a) The applicant must provide evidence that they have either-
(i) sole parental responsibility for the child, or that the child normally lives with them; or
(ii) access rights to the child; and
(b) The applicant must provide evidence that they are taking, and intend to continue to, take an active role in the child's upbringing."

Paragraph EX.1:
"This paragraph applies if
(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-
(aa) is under the age of 18 years;
(bb) is in the UK
(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application;
and
(ii) it would not be reasonable to expect the child to leave the UK…"

(emphasis supplied)