



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/13373/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 4 July 2018

Decision & Reasons Promulgated  
On 17 July 2018

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUHAMMAD SHABBIR  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant/Secretary of State for the Home Department: Ms Z Ahmad, Home Office Presenting Officer

For the Respondent: Mr Z Raza, Marks & Marks Solicitors

**DECISION AND REASONS**

1. I shall refer to the Respondent as the Appellant as he was before the First-tier Tribunal.

2. The Appellant is a citizen of Pakistan. His date of birth is 29 November 1983. He made an application for leave to remain on human rights grounds which was refused by the Secretary of State on 16 May 2016. The Appellant appealed against this decision. His appeal was allowed by First-tier Tribunal Judge Maciel in a decision promulgated on 13 October 2017, following a hearing at Taylor House on 12 October 2017. At the hearing both parties were represented. Permission was granted to the Secretary of State by Upper Tribunal Judge Rimington on 10 April 2018. The matter came before me on 4 July 2018 to determine whether the First-tier Tribunal erred in law.

#### *The Decision of the First-tier Tribunal*

3. The First-tier Tribunal set out the Appellant's immigration history which can be summarised. He entered the UK as a student on 10 September 2005. He was granted periods of leave until 13 January 2016. The Respondent decided that the Appellant submitted a fraudulent TOEIC certificate from Educational Testing Service (ETS) with an application that he made on 15 March 2013. The Respondent decided that it had been obtained using a proxy test taker. As a result, the listening and speaking tests that the Appellant had taken on 31 October 2012 at Queensway College were cancelled resulting in the curtailment of the Appellant's leave on 21 October 2014.
4. The Appellant made an application for permission to seek judicial review in respect of the decision to curtail his leave but this was unsuccessful. He made an application for leave which gave rise to the decision on 16 May 2016. The Secretary of State refused the application under paragraph 322(5) of the Immigration Rules in respect of the TOEIC certificate that he had submitted with a previous application. The Secretary of State considered the Appellant's claim under Appendix FM acknowledging that he was in a relationship with his spouse Sarah Shabbir and that they have a child here in the UK. The application was considered under paragraph 276ADE and outside of the Immigration Rules.
5. The judge considered the appeal under the Immigration Rules focusing only on paragraph 322(5) of the Immigration Rule and the allegation relating to the TOEIC certificate. He heard evidence from the Appellant and he made findings that can be found at paragraphs 19 to 31 of the decision. He concluded that the Appellant did not submit a fraudulent TOIEC certificate and that he satisfied the suitability requirements of the Rules. He allowed the appeal.

#### *The Grounds of Appeal*

6. The first ground is that the judge failed to give adequate reasons for his findings on a material matter. He did not give adequate reasons to explain why he accepted the Appellant's explanation in respect of the TOIEC certificate. 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 a test on his behalf.

7. The second ground is that the Appellant's right of appeal was restricted to human rights only. The judge failed to consider Article 8 and make a proportionality assessment outside of the Rules.
8. I heard submissions by both parties.

### *Conclusions*

10. There is no force in ground 1. The judge's findings in respect of paragraph 322(5) of the Immigration Rules are lawful and sustainable. The judge properly applied the standard and burden of proof in accordance with the judgment in *SM and Qadir v Secretary of State for the Home Department (ETS – evidence – burden of proof)* [2016] UKUT 229. The judge properly directed himself (see [19] and [20]). He properly directed himself that the Secretary of State had the evidential burden of proving that the TOEIC certificate had been procured by dishonesty. He then went on to consider whether the Secretary of State had discharged the legal burden (see [30]). I remind myself what the Upper Tribunal stated in relation to this aspect of the assessment of the evidence at [69] of *SM and Qadir*: -

“We turn thus to address the legal burden. We accept Mr Dunlop's submission that in considering an allegation of dishonesty in this context the relevant factors to be weighed include (inexhaustively, we would add) what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated. Mr Dunlop also highlighted the importance of three further considerations, namely how the Appellants performed under cross-examination, whether the Tribunal's assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic achievements are such that it was unnecessary or illogical for them to have cheated”.

11. The judge undoubtedly made a thorough evaluative assessment of the evidence and was entitled to conclude that the Appellant had raised an innocent explanation (see [23] – [29] of the decision. The grounds rely on *MA (ETS – TOEIC testing)* [2016] UKUT 450 with reference to what the Tribunal stated at paragraph 57: -

“Second, we acknowledge the suggestion that the Appellant had no reason to engage in the deception which we have found proven. However, this has not deflected us in any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere. We are not required to make the further finding of why the Appellant engaged in deception

and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter”.

12. What the Tribunal said at [57] in *MA* does not undermine what was said at [69] in *SM and Qadir*. I consider the headnote in *MA*, reflected in the main body of the decision, namely, that the question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact-sensitive. In this case the judge conducted a fact-sensitive assessment and considered all material matters. He reached a conclusion that was open to him on the evidence. His findings are grounded in the evidence and adequately reasoned.

### *The Error of Law*

13. There is substance in ground 2. The Appellant’s position is that the Secretary of State made a concession. I was referred to [15] of the decision where the judge recorded the submissions made by the representative for the Secretary of State. It reads “Ms McKenzie confirmed that the only issue before me was whether the test had been sat by a proxy test taker.” In submissions before me Mr Raza stated that this was a concession that the decision was not proportionate in the absence of deception. In support he referred me to the application made by the Appellant and the policy guidance. Ms Ahmad stated that the notes from the hearing do not accord with the judge’s decision and she did not accept that there had been a concession.
14. The Secretary of State’s grounds do not engage with [15] of the decision. There has been no disclosure of the advocates notes. There has been no request for disclosure of the ROP by either party. I located the ROP which accords with what the judge stated at [15]. I read this to the parties at the hearing. The problem with the Appellant’s position is that if what was recorded by the judge was a “concession” by the Secretary of State it is a concession in law made on an erroneous basis. It cannot stand. It cannot have been intended by the Secretary of State’s representative that it was not necessary to engage in a fact-finding exercise in respect of paras 276B, 276ADE or Appendix FM and not necessary to consider Article 8 outside of the Rules because it was accepted that absent deception the decision was not proportionate. This would not accord with the position of the Secretary of State in the decision letter; notwithstanding, the application made by the Appellant.
15. Following the lawful and sustainable findings of the judge that the Appellant meets the suitability requirements of the rules, it was necessary for the judge to consider Article 8 under the Rules and outside of the Rules. From the evidence it appears that the Appellant’s wife is not a British citizen and she is not settled here. They have children who were born here. It is difficult to see how the Appellant could succeed under Appendix FM. It is equally difficult to see how he could succeed under para 276B because his leave was curtailed within the 10- year period; although there is a possibility that the guidance may assist him. In the absence of deception, the Appellant’s Article 8 case is strengthened. However, I do not accept that if the judge

accurately recorded what was said by the Presenting Officer this would amount to a concession that the Appellant's meets the requirements of the Rules/ that the decision is not proportionate; rather it is a misstatement of the law which regrettably misled the judge who went on to allow the appeal on an erroneous basis. The judge did not intend to allow the appeal on Article 8 grounds. As a matter of fact he had no jurisdiction to allow the appeal under the Immigration Rules.

16. The application by the Secretary of State is very much out of time. It was received on 8 March 2018. The notice was sent to the appellant on 18 January 2018. Time expired on 1 February 2018. The application was 35 days out of time. The delay is significant. There was no application by the Secretary of State to extend time made. In any event, time was extended by the UTJ granting permission on 10 April 2018. Mr Reza queried the terms of the grant which refers to a decision having been certified. However, this is not an issue for me. Permission was granted. The issue for me is whether the judge materially erred. It is clear from the decision that he did.

*Remittal to the FtT*

17. I have considered paragraph 7 of the Practice Statement of 25 September 2012 relating to the disposal of appeals in the Upper Tribunal. I am satisfied that the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal. There has been no determination of the appeal under Article 8. In these circumstances it is appropriate to remit the appeal to a newly constituted First-tier Tribunal for a fresh hearing in respect of the Appellant's appeal under Article 8. The judge's findings in respect of the TOIEC certificate are lawful and sustainable.

No anonymity direction is made.

Signed *Joanna McWilliam*

Date 10 July 2018

Upper Tribunal Judge McWilliam