Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/22024/2016
IA/00551/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 February 2018	**On 1 March 2018**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MOHAMMAD HOSSAIN
MRS NASRIM SULTANA
(NO ANONYMITY DIRECTION MADE)
Respondents

Representation:
For the Appellant/Secretary of State: Mr E Tufan, Home Office Presenting Officer
For the Respondents: Mr S Hydel, Reza solicitors

DECISION AND REASONS

1. I shall refer in this decision to the Respondents as the Appellants as they were before the First-tier Tribunal. They are citizens of Bangladesh and married to each other. Mr Hossain's date of birth is 31 December 1977. Mrs Sultana's date of birth is 2 June 1985.

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2. They made what appears to be a joint application for leave to remain which was refused on 4 December 2015. My understanding is that they both appealed against this decision. Mr Hossain made a further application on 20 August 2016 for leave to remain, relying on the long residence rules. He withdrew his appeal against the decision of 4 December 2015. Mr Hossain's later application was refused by the Secretary of State on 10 September 2016. He appealed against the later decision. From the paperwork before me, it seems to be the case that Mrs Sultana did not withdraw her appeal against the decision of 4 December 2015. Therefore they both had pending appeals and the matters were linked. They were heard on 10 May 2017 by First-tier Tribunal Judge Telford who purported to allow Mr Hossain's appeal under the Rules and he dismissed Mrs Sultana's appeal on human rights grounds. Though not raised in the grounds, Mr Tufan argued that there was no appeal before the FtT in respect of Mrs Sultana because her application was dependent on her husband's and therefore her appeal had been withdrawn when his was. From the paperwork before me, there was a separate decision of the Secretary of State relating to an individual called Farida Yasmin. I suspect that this is an error because the body of the decision appears to relate to Mrs Sultana. In the absence of an application and notice of withdrawal as regards her appeal before the FtT, she had an extant appeal.

3. Permission was granted to the Secretary of State by First-tier Tribunal Judge Robertson on 11 December 2017.

The Grounds of Appeal

4. The grounds of appeal argue that the judge made a material misdirection in respect of the burden and standard of proof. He did not properly apply *SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof)* [2016] UKUT 00229 and *Shehzad & Anor* [2016] EWCA Civ 615. He failed to give adequate reasons. The judge failed to determine Mr Hossain's appeal on human rights grounds.

The Decision of the First-tier Tribunal

5. The judge at [6] cited the material cases of *SM and Qadir* and *Shehzad & Anor*. He found as follows:

> "8. … This claim was made out on the available evidence for the husband. He does qualify to remain under the Rules. The respondent failed to establish that he was not the person who had taken the English language test. His dependent wife therefore qualifies under his permission to remain. I do not go on to consider Human Rights for him.
>
> 9. I do not find her case made out separately under human rights because despite having a series of serious ailments, she has been able to survive well enough whilst in her home country and has failed to

show that she cannot access the same amount of care as she had before she came to the UK.

6. The reasons for the decision are set out at [10] to [13] and are as follows;

> "10. There was a claim that this appellant was a person whose voice had been individually identified and "matched" by voice recognition software. That came down to the print out at F10 in the respondent's bundle coupled with the witness statements showing that the Synergy College was in the habit of producing or allowing false certificates to be issued and false in the sense that the person's voice on the language test was shown by computer generated software to be not that of the person whose name had been given. The French statement did not take the matter any further because although it reduced the chance of a software mismatch, it only did so when there was individual checking. Here that was not the case.
>
> 11. In fact, the case was here that a person with the name Mohammed Hossain- (Not an uncommon name or surname to be fair) had on 13 December 2011 taken a test which was shown by software to be invalid. Unfortunately for the respondent, the figures for the scores claimed differ between that which was on the print out of 190 and that which was on the email from the respondent when the scores were checked at 160. This called for some explanation. I gave time for this to be forthcoming from the responded. There was time given for a CD of the voice of the person taking the test but none was forthcoming.
>
> 12. I find the appellant husband entirely credible. The respondent has failed to establish their case. I applied the principle of SM. The appellant comes within those provisions. Proper process required disclosure of the CD of his voice. It did not happen. The discrepancy in number of score cannot be ignored. The chances of it not being him are irrelevant in the light of this.
>
> 13. His case is properly made out on the Rules and I do not go onto consider article 8."

Submissions

7. Mr Tufan relied on the grounds. He raised at the hearing before me a jurisdiction issue relating to Mrs Sultana (discussed above). Mr Hydel made submissions effectively re-arguing the Appellant's (Mr Hossain's case) as it was advanced before the FtT relating to the deception issue.

The Law

8. It is necessary to set out the following paragraphs of *SM and Qadir:*

> 67. We begin by asking ourselves whether the Secretary of State has discharged the <u>evidential</u> burden of proving that the Appellants were, or either of them was, guilty of dishonesty in the respects alleged. Bearing in mind that, as noted above, all of the Secretary of State's evidence was adduced first, reflecting the burden of proof, it is appropriate to record that at the stage when the

Secretary of State's case closed there was no submission on behalf of either Appellant that the aforementioned evidential burden had not been discharged. We draw attention, *en passant*, to a procedural issue which may be worthy of fuller consideration in an appropriate future appeal, namely the question of whether in a case where the Secretary of State bears the evidential burden of establishing sufficient evidence of deception and, at the hearing, goes first in the order of batting, the Tribunal should invite submissions from the parties' representatives at the stage when the Secretary of State's evidence is completed.

68. As our analysis and conclusions in the immediately preceding section make clear, we have substantial reservations about the strength and quality of the Secretary of State's evidence. Its shortcomings are manifest. On the other hand, while bearing in mind that the context is one of alleged deception, we must be mindful of the comparatively modest threshold which an evidential burden entails. The calls for an evaluative assessment on the part of the tribunal. By an admittedly narrow margin we are satisfied that the Secretary of State has discharged this burden. The effect of this is that there is a burden, again an evidential one, on the Appellants of raising an innocent explanation.

69. 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 (in exhaustively, 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".

9. The Court of Appeal in *Shehzad and Anor* stated as follows:

"21. For present purposes, it is significant that in Qadir the tribunal stated (at [67] – [68]) that the evidence of Mr Millington and Ms Collings sufficed to shift the evidential burden onto the person whose leave had been curtailed. In that case, there was no submission that their evidence did not discharge the evidential burden lying on the Secretary of State at the initial stage. The tribunal described the threshold which an evidential burden entails as a "comparatively modest threshold" and stated that "by an admittedly narrow margin, we are satisfied that the Secretary of State has discharged this burden" and that the effect "is that there is a burden, again an evidential one, on the appellants of raising an innocent explanation". The tribunal then considered the evidence before it and reached the conclusion that the Secretary of State had not discharged the legal burden of proof that lay on her.

22. 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.

23. At the hearing, Ms Giovennetti informed the court that the other cases pending in the tribunal or in this court involve a range of different evidence adduced by the individual. These included an independent comparison of that person's voice with the voice tested by ETS, evidence of attainment in English language, for example by educational qualifications in English (some in this country), and evidence of spoken English ability. I do not address the question of what evidence will be sufficient to enable a tribunal to conclude that there has been no deception. That is likely to be an intensely fact-specific matter. These appeals and my judgment are only concerned with the initial stage and the evidential burden at that stage.

24. (ii) Mr Chowdhury's case: It appears that the FtT's decision rests solely on its refusal to accept that the Millington/Collings evidence, together with identification of the individual as a person whose test has been "invalidated", suffices to shift the evidential burden. Although Mr Chowdhury had submitted a witness statement together with educational qualifications taught in English, both in this country and in Bangladesh (see FtT determination at [24]) , these are referred to only in the most general terms. The decision rests on the approach of the tribunal to the Secretary of State's evidence and it is clear that the FtT judge misunderstood that evidence.

25. The FtT judge stated that there was no evidence identifying Mr Chowdhury as a person whose test was "invalid". In fact, the evidence included a screenshot of the results which stated this was the position. The evidence also included the "ETS Lookup Tool" which showed the tests that were "invalid". The determination also shows other mistakes and misunderstandings of the process undertaken by ETS and explained in Mr Millington and Ms Collings's statements. In particular, the FtT judge's conclusion (see [7] above) that "there could be multiple reasons for invalidation, some of which may not involve fraud or deception", failed to appreciate the distinction in the evidence between cases categorised as "questionable" and those categorised as "invalid". In "questionable" cases it was accepted that there may not have been deception. In "invalid" cases, this was not accepted. That was because the voice on the audio recording of the test under consideration (e.g. Mr Chowdhury or Mr Shehzad's test) matched the voice of someone who had taken another test using a different name.

26. With regard to the decision of the Upper Tribunal, I accept Ms Giovennetti's submission that it is not possible to derive from the FtT's determination that, as the Deputy Upper Tribunal judge found, the FtT judge was "well aware of the straightforward ETS Lookup Tool document" that she stated showed Mr Chowdhury's

> test to be invalidated. This statement also shows that the Deputy Upper Tribunal judge misunderstood the nature of the evidence. Had she understood it properly, she would have had to deal with the failure of the FtT judge to treat the "ETS Lookup Tool" as evidence that Mr Chowdhury's test had been invalidated. The reason for the misunderstandings by the tribunals may be that the language used by Mr Millington and Ms Collings in their statements to explain a technical process is not altogether clear. But, whatever the reason, in these circumstances, in my judgment the in limine rejection of the Secretary of State's evidence as even sufficient to shift the evidential burden was an error of law."

Conclusions

10. The judge erred in his application of the standard and burden of proof. It is not clear that he applied an evidential burden. He made no reference to it. If he did, it was not properly applied considering the low threshold and the evidence (spread sheet and witness statements) before him. The conclusion of the judge that "the claim was made out on the available evidence" and the "respondent failed to establish their case," makes no reference the low threshold of the evidential burden and is inadequately reasoned. Although material case law was cited, it was not applied to the evidence in this case. There was clear evidence that that the English Language test had been invalidated (see F10 and F12 in the Secretary of State's bundle). The judge attached weight to an email produced by the Secretary of State which records one of the scores as 180 which is inconsistent with other sources. However, the other scores recorded in the email are consistent with those recorded elsewhere. Mr Tufan submitted that the explanation relied on at the hearing was that this was a typographical error. This does not appear to have been considered by the judge. Furthermore, the judge concluded that Mr Hossain was entirely credible without giving a single reason for having reached this conclusion. Whilst I note what is said by the Appellant in his witness statement at [16] – [18], the decision is inadequately reasoned. It appears from the last sentence at [12] that because there was a failure by the Secretary of State to provide a copy of the CD and there was an inconsistent score recorded in the email, according to the judge whether the Appellant was telling the truth was not material. Maybe what the judge meant is that the Secretary of State failed to discharge the evidential burden and therefore it was not necessary for the Appellant to raise an innocent explanation, but this is not properly expressed. In any event, for the reasons stated the judge did not properly apply the evidential burden. Mr Hydel informed me that the Appellant asked for the audio recording once only in an email dated 13 December 2016 and there was no response other than an acknowledgement of the same date. The Appellant had not chased the matter up (the hearing was on 8 May 2017).

11. The appeal was allowed under "the Rules." Mr Hossain made the application for leave on 20 August 2016 under the long residence rules. The judge did not have jurisdiction to allow the appeal under the rules,

taking into account the date of the application and amendments made by the Immigration Act 2014 to Part 5 of the Nationality, Immigration and Asylum Act 2002. The judge should have determined the appeal under Article 8. The judge dismissed the appeal of Mrs Sultana on human rights grounds; however, he gave inadequate reasons for doing so. (The application was made on 30 March 2015; however the decision on human rights grounds post-dates the amendments and the transitional provisional do not apply in these circumstances). There was no lawful basis to conclude that “she qualifies under [Mr Hossain’s] permission to remain” (see [8].)

The Decision

12. The decision of the judge to allow the appeal is set aside.

13. The matter is remitted to the First –tier Tribunal for a re-hearing.

14. Mr Hossain has an appeal on human rights grounds under the current statutory regime. As part of that assessment whether he meets the long residence rules will need to be determined. The Secretary of State’s position is that he has used deception and he falls for refusal under para 322 (2) of the rules, with reference to the English Language certificate. On the papers before me, it appears that Mrs Sultana did not withdraw her appeal in respect of the earlier decision. The FtT should check that this is the case and if so her appeal should be determined on human rights grounds.

Signed *Joanna McWilliam* Date 21 February 2018

Upper Tribunal Judge McWilliam