



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/30028/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 28 June 2018

Decision & Reasons Promulgated  
On 05 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MRS BHAVNA LUCHMUN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Hussain, Counsel instructed by Wisestep  
For the Respondent: Mr C Avery, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Mauritius born on 11 November 1977. She arrived in the United Kingdom on 6 September 2003 with six months' valid leave to enter as a visitor and then made subsequent applications to remain. Most recently, on 7 January 2015, she applied for leave to remain as a partner having met her husband in 2005 and married on 26 October 2011. This application was refused in a decision dated 21 August 2015 on a number of bases, in particular that the Appellant could not meet the suitability requirements in light of the fact that she had undertaken a TOEIC certificate from the ETS on 13 December 2011 at Elizabeth College and there was evidence to conclude that this had been fraudulently obtained by the use of a proxy to take the test. Thus the application was refused on the basis that the

Appellant's presence in the country was not conducive to the public good: S-LTR1.6 of Appendix FM. It was accepted that the Appellant had a genuine and subsisting relationship with her partner but that there were no insurmountable obstacles to family life continuing in Mauritius, nor very significant obstacles to her integration.

2. The appeal against this decision came before Judge of the First-tier Tribunal Broe for hearing on 27 November 2017. In a decision and reasons promulgated on 13 December 2017 the appeal was dismissed. The judge directed himself in respect of the "ETS jurisprudence" vis Shehzad [2016] EWCA Civ 165; MA (ETS - TOEIC testing) [2016] UKUT 00450 (IAC); SM & Qadir (ETS - evidence - burden of proof) [2016] UKUT 00229 (IAC). He concluded at [20] and [21] that on the basis of the evidence the Respondent had discharged the initial burden of furnishing proof of deception and noting that the record showed the test taken in the Appellant's name was invalid. At [22] the judge held as follows:

*"The burden therefore shifts to the Appellant to provide a plausible innocent explanation. I note that she made no reference to the issue in her grounds of appeal, statement or evidence-in-chief. The matter came up in cross-examination when she was asked about what efforts she had made to contact ETS. I found her answers to be vague and unhelpful. She failed to provide any documentary evidence of any contact with ETS or the college where the test took place. She gave no evidence of taking the test or of any dealings with the college. I find that she has not offered a plausible innocent explanation for the finding that her test was invalid. The burden does not therefore shift back to the Respondent. I therefore conclude that the Respondent was right to refuse the application for the reasons given."*

3. The judge then went on to find that given that the Appellant could not satisfy the eligibility requirements of the Rules and with regard to the judgment in Agyarko [2017] UKSC 11 and the test set out in Razgar [2004] UKHL 27 that although family life had been established, removal of the Appellant would not be disproportionate.
4. Permission to appeal was sought to the Upper Tribunal essentially on two grounds. Firstly, that the judge's assessment of proportionality was flawed, incorrect in law, unfair and unreasonable in light of the judgment in Chikwamba and, secondly, that the judge applied the wrong test regarding the assertion that the applicant use false information or documents as asserted by the Home Office and ETS. It was submitted that the evidence provided by the Appellant, in particular NVQ diplomas and a further English language test and the fact the Appellant spoke English proficiently at the hearing, discharged the burden.
5. Permission to appeal was granted by First-tier Tribunal Judge Nightingale in a decision dated 1 May 2018 in the following terms:

*"Little turns upon the grounds at paragraphs 1 to 5 and the Judge gave adequate reasons for finding that the interference with family life would be proportionate to the lawful aim pursued. However, that proportionality balancing exercise was based on the finding that the Appellant had employed deception in her use of an ETS test certificate. It is argued that the Judge erred in failing to take the approach in Qadir. The Judge made no mention of the Appellant's NVQ diplomas, passed in the United Kingdom*

*around the same time as the ETS test, or her English language test certificate or her English language skills in evidence at the hearing. This ground is arguable."*

6. The Respondent submitted a Rule 24 response dated 21 June 2018 opposing the appeal.

*Hearing*

7. On behalf of the Appellant, Mr Hussain submitted that key evidence had been put forward that had not been considered by the First-tier Tribunal Judge. Although these were not contained in the Appellant's bundles the originals were handed up on the day. These comprise the following documents:

- (i) A pre-NVQ in care dated 16 April 2004.
- (ii) A level 2 NVQ in Health and Social Care dated 21 December 2006.
- (iii) A level 3 NVQ in Health and Social Care dated 4 February 2008.
- (iv) A level 2 Food Safety certificate dated 4 April 2008.
- (v) An NCFE certificate in the safe handling of medicines dated 16 September 2008.
- (vi) An Equality, Diversity & Inclusion Test Certificate dated 9 January 2012.
- (vii) Evidence of the payment of fees in respect of the ESOL level 1 Life in the UK Test dated 22 December 2004.
- (viii) A copy of an ESOL English language test dated 9 January 2015.

8. He submitted in addition that the Appellant spoke fluent English at her appeal and in light of this evidence the judge should have considered she had discharged the evidential burden of proof in light of the test set out at [30] of Qadir. Mr Hussain explained the reason the Appellant had taken the ESOL test on 9 January 2015 was because at that stage she had been advised to make an entry clearance application and would therefore require the certificate as evidence in that application.

9. In his submissions Mr Avery submitted that this was a somewhat odd case in that it was clear that no explanation had been put forward by the Appellant. The judge at [11] noted the Appellant's oral evidence and her two statements and expressly stated, "*there was no mention in either statement of the ETS test*". At [12] the judge records the cross-examination of the Appellant where she stated as follows:

*"In cross-examination she said that after reading that the certificate had been found to be fraudulently obtained she tried to contact the school but it was closed. She said she could not remember if she tried to contact ETS. She then said she did contact them but did not get through. She could not remember when this was. She tried to contact them by email and letter but had no response. When asked how she paid for the test she said she paid her solicitors and they did everything. It was a firm in Camden Town but she could not remember the name. The solicitor organised the college. His name was Mr*

*Frank. She did not have anything from the college but her other solicitors had an email."*

10. Mr Avery's submission was that, in light of the absence of anything other than this, the judge was entitled to conclude the Appellant had not discharged the evidential burden of proof.
11. In respect of the Appellant's English language ability Mr Avery submitted that there was a significant lapse in time between the Appellant taking the ETS test which was in December 2011 and the ESOL test in January 2015 and that judges are warned against taking into account proficiency in English, particularly when there has been a lapse in time and he referred to the judgment of the Tribunal in MA [2016] UKUT 00450 (IAC) where specific note is made about the use of a proxy and the reasons that individuals might choose not to take a test themselves.
12. In his reply, Mr Hussain submitted that in order to gain qualifications in health and social care the Appellant needed to have a good grasp of English and that these qualifications had been taken up to 2008 which was well before the TOEIC exam. He submitted that obtaining a level 3 NVQ in Health and Social Care is a much more significant task than undertaking the TOEIC test and predates it. He conceded however that no innocent explanation had been put forward in the Appellant's statements and that her explanation was recorded by the judge at [12] of the decision and reasons.

### *My Findings*

13. I find no material error of law in the decision of First-tier Tribunal Judge Broe. It is regrettably the case that the issue of the ETS test was simply not addressed in either of the Appellant's two witness statements before the First-tier Tribunal. Whilst the Appellant was cross-examined, she was not asked specifically about the circumstances under which the test was taken, but simply about what she did after reading that the certificate had been found to be fraudulently obtained. In those circumstances there is no error on the part of the judge for finding that the burden had not been discharged by the Appellant. His findings at [22] were open to him on the basis of an absence of any material evidence on this point before him. Given that permission to appeal was granted only in respect of the specific issue of the judge's interpretation of the relevant jurisprudence the judge's decision is upheld.
14. In relation to the evidence relied on as to the Appellant's ability in English I noted that the Appellant was able to speak and understand English at the hearing before me. However, that was not the key issue before the judge, which was of course whether she could provide an innocent explanation in face of the assertion by the Respondent that she utilised a proxy test-taker at her TOEIC examination on 13 December 2011 at Elizabeth College and no innocent explanation was put forward before the First-tier Tribunal Judge.

### *Notice of Decision*

15. I find no material error of law in the decision of First-tier Tribunal Judge Broe which is upheld.

*Anonymity*

16. No anonymity direction is made.

Signed *Rebecca Chapman*

Date 4 July 2018

Deputy Upper Tribunal Judge Chapman