



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/32235/2015  
IA/32237/2015

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 11 July 2017**

**Decision &  
Promulgated  
On 18 July 2017**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHAERF**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**FERDAUSHI ASMA ZULFIQAR  
MD. OMAR KHAYYAM  
(ANONYMITY DIRECTION NOT MADE)**

Respondents

**Representation:**

For the Appellant: Mr P Armstrong of the Specialist Appeals Team  
For the Respondents: Mr S Karim of Counsel by Direct Access

**DECISION AND REASONS**

**The Respondents**

1. The Respondents are wife born on 12 January 1979 and husband born on 28 February 1982. They are both citizens of Bangladesh. On 24

September 2014 the wife applied for further leave to remain as a Tier 4 (General) Student Migrant and the husband as her dependant.

### **The Secretary of State's Decision**

2. On 17 September 2015 the Secretary of State (SSHD) refused the wife's application under paragraph 322(2) of the Immigration Rules on the ground that the wife had submitted in connection with an earlier application of 12 August 2013 a TOEIC certificate from Educational Testing Service (ETS) which had been fraudulently obtained by the use of a proxy test taker. Consequently, the application also fell to be refused under paragraph 245ZX(a) of the Rules and the husband was refused in line.

### **Proceedings in the First-tier Tribunal**

3. On 30 September 2015 each of the husband and the wife lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended. The grounds are lengthy but in essence assert the wife had taken the TOEIC test in person and had not used a proxy test taker.
4. By a decision promulgated on 29 November 2016 Judge of the First-tier Tribunal Maciel allowed the appeals of the wife and the husband. She found the wife to be a credible witness and that she had taken the TOEIC test herself and not used a proxy test taker.
5. The SSHD sought permission to appeal on the grounds that the SSHD had produced sufficient generic and specific evidence to discharge the burden of proof and the Judge had erred in finding the SSHD had failed to fulfil the evidential burden and failed to raise a prima facie case that the wife employed deceit in her application. The grounds argue the Judge erred in her consideration of the evidence to support the allegation that the wife had used deception and that in reaching the finding that the wife had not used deception, had failed to take into account that there may be other reasons why a person who is able to speak English to the requisite level would nevertheless cause or permit a proxy test taker to undertake the test on their behalf or otherwise cheat.
6. On 31 May 2017 Judge of the First-tier Tribunal Parkes granted the SSHD permission to appeal all grounds.

### **The Hearing in the Upper Tribunal**

7. Both the wife and the husband attended although they took no part in the hearing other than for the wife to confirm their current address.

### **Submissions for the SSHD**

8. Mr Armstrong acknowledged that the Court of Appeal had subsequent to the Judge's decision handed down judgment in *Majumder and Qadir v*

*SSHD [2016] EWCA Civ.1167* on appeal from the decision of the Upper Tribunal in *SM and Qadir v SSHD (ETS - evidence - burden of proof) [2016] UKUT 00229 (IAC)*. He referred me to the head note of the Upper Tribunal decision much of which remains relevant and had not been overturned by the Court of Appeal which states -

- (1) The SSHD's generic evidence, combined with her evidence particular to these two Appellants, sufficed to discharge the evidential burden of proving that their TOEIC certificates had been procured by dishonesty.
  - (2) However, given the multiple frailties from which this generic evidence was considered to suffer and, in the light of the evidence adduced by the Appellants, the SSHD failed to discharge the legal burden of proving dishonesty on their part.
9. He relied in particular on paragraph (i) of the head note and referred me to paragraph 17 of the Judge's decision in which she stated that the SSHD had failed to fulfil the evidential burden. He then referred me to paragraph 68 of the decision in *SM and Qadir* in which the Upper Tribunal were satisfied the SSHD had discharged the evidential burden and the SSHD could rely on the generic evidence and the other evidence before the Upper Tribunal in that case to discharge the evidential burden of proof.
10. Mr Armstrong then referred me to the judgment in *SSHD v Shehzad and Chowdhury [2016] EWCA Civ.615* and in particular paragraph 26 in which the Court of Appeal found that even if the SSHD's evidence in that case which comprised the generic evidence and the "ETS Look-up Tool document", being the same evidence as submitted by the SSHD to support the allegation of deception in this appeal, were rejected then it still was incumbent on the applicant to provide a plausible explanation to rebut any suggestion that deception had been used.
11. He submitted that the Judge had erred in relying on the wife's facility in English at the date of the hearing on 14 November 2016 to justify her finding she had been capable of and had taken the TOEIC test on 27 June 2012. Further, he referred to paragraph 57 of the decision in *MA (ETS - TOEIC testing) [2016] UKUT 00450 (IAC)* which provided the basis for one of the grounds for appeal namely that:-
- In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustibly, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. ...
12. The Judge's findings at paragraph 17 of her decision had failed adequately to take into account the Upper Tribunal decisions in *SM and Qadir* and *MA* and the Court of Appeal judgment in *Shehzad*. These three cases all acknowledged that in ETS cases the generic evidence submitted

provided by the SSHD met the evidential burden of proof. There was a material error of law in the Judge's decision and it should be set aside.

### **Submissions for the Wife and Husband**

13. Mr Karim submitted that the SSHD had not shown that the Judge's decision contained a material error of law. There may have been errors of law but none of them were material. The Upper Tribunal in *MA* had found the question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact sensitive. At paragraph 11 of her decision the Judge stated that the SSHD had conceded the evidence submitted by the SSHD to show deception was limited because ETS was not willing to disclose any more information. At paragraph 15 she had cited and quoted at some length from the determination in *Shen (paper appeals: proving dishonesty) [2014] UKUT 236 (IAC)*. The Upper Tribunal had identified the "boomerang effect". First, sufficient evidence to raise an issue of deception must be produced by the SSHD. Then it is for the applicant to provide an innocent explanation described as "an account which satisfies the minimal level of plausibility". If the applicant does this then the burden shifts back to the SSHD to establish on the balance of probabilities that the innocent explanation should be rejected.
14. At paragraph 17 the Judge had found that the SSHD had "failed to fulfil the evidential burden". At paragraph 18 she had distinguished this case from other ETS cases by noting that there was no explanation how the ETS Look-up Tool data were obtained, abstracted and what the data really meant. There were simply copies of the certificate, of what purported to be the "ETS SELT Source Data", a document headed "ETS Invalid Test Analysis" which merely gave details and assertions about mis-match scores in data held on "CAS/CID" and an extract headed MIDA Matched Data.
15. Crucially, the Respondent had not challenged the Judge's findings at paragraph 19 of her decision that she had found the wife's evidence credible and that she did in fact take the TOEIC tests herself. It was clear the Judge had based her conclusions on the evidence set out at paragraphs 5-8 of her decision. The wife had been subject to cross-examination at the hearing before the Judge and further, the Judge had said in her decision not to make a fee award that no fee award was appropriate because the wife's credibility had been called into question by the SSHD and she had been able to establish it only after cross-examination.
16. Mr Karim further submitted that the SSHD had failed to follow the practice at paragraph 32 of the judgment in *Majumder and Qadir* to which she had herself referred and which covered cases like the wife's, namely:-

.... The third category also consists of appeals by the SSHD, where the appeal is against the decision in which it was held that the generic evidence had not discharged the initial evidential burden and was thus erroneous in that respect, but that other evidence meant that the Secretary of State would not have been able to discharge the legal burden. (Counsel for the SSHD) indicated that in this class of case, also without giving an undertaking in respect of any particular case, the SSHD was mindful to concede and to abandon the appeal.

17. Even if the SSHD had discharged the evidential burden of proof it had not been shown there was any material error of law made by the Judge in the light of her finding that the wife was a credible witness and had given a plausible explanation.

### **Response for the SSHD**

18. Mr Armstrong referred to the “boomerang” approach to the burden of proof. The Appellant had failed to provide an adequate explanation. There was no corroborative evidence relating to her attendance at the test centre and no evidence that she had challenged the decision of ETS to consider her test results invalid. There had been ample time between the SSHD’s decision to refuse further leave in September 2015 and the hearing in November 2016 for the wife to have gathered evidence to support her explanation.
19. The SSHD should not be criticised for relying on the limited evidence which ETS was prepared to provide, namely the ETS Look-up Tool. The wife’s test had been invalidated and her explanation had been invalidated because of suspected fraud. Her explanation was insufficient and the Judge’s decision should be set aside.

### **Findings and Consideration**

20. The Judge’s concise treatment of the evidential burden at paragraph 17 of her decision may not have fully taken into account the “boomerang” approach which she had set out in full at paragraph 15. But if there is an error of law here, it is not material when set against a finding that the wife’s evidence about attending the test centre and taking the TOEIC test in person was credible.
21. Even so, on the basis of the head note of the Upper Tribunal’s decision in *SM and Qadir*, even if the Judge’s findings that the SSHD had failed to discharge the evidential burden of proof is incorrect. She gave sustainable reasons for finding the wife’s account and explanation in response to be credible and so to have discharged the burden of proof on the wife and to shift the burden back to the SSHD. The SSHD has not challenged the Judge’s treatment of the third part of the process where the burden of proof returns to the SSHD to establish on the balance of probabilities that the wife’s innocent explanation should be rejected.

Indeed, the Judge's sustainable reasoning for finding the wife credible is sufficient to settle that.

22. Consequently, I find that there is no material error of law in the decision of the First-tier Tribunal Judge and her decision shall stand.

**Anonymity**

23. There was no request for an anonymity order and I see no reason to make one.

**NOTICE OF DECISION**

**The First-tier Tribunal decision did not contain a material error of law and shall stand. The consequence is:-**

**The appeals of the wife and her dependent husband are allowed.**

**No anonymity direction is made.**

Signed/Official Crest

Date 17. vii. 2017

Designated Judge Shaerf  
A Deputy Judge of the Upper Tribunal