



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

Appeal Numbers: IA/32271/2015
IA/32274/2015

THE IMMIGRATION ACTS

Heard at Field House

**On 16th November, 2017
Corrected, signed and sent
For Promulgation on 20th December, 2017**

**Decision & Reasons
Promulgated**

21st December 2017

Before

Upper Tribunal Judge Chalkley

Between

**MR MD ASHRAFUL ALAM (FIRST-NAMED APPELLANT)
MRS MST ISMOT ARA (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

*For the Appellants: Miss C Lichfield of Counsel instructed by J Stifford Law,
Solicitors*

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are nationals of Bangladesh. Mr Alam was born on 25th November 1980 and his wife on 7th October 1981. They appealed against the decision of the respondent, taken on 18th September 2015, refusing

each of them variation of leave to remain to the First-tier Tribunal and their appeal was heard by First-tier Tribunal Judge I A Lewis on 26th October, 2016.

2. The first-named appellant arrived in the United Kingdom in January 2010; he obtained successive grants of leave and was last granted leave to remain valid from 1st September 2012 to 24th August 2014. The second applicant arrived in the United Kingdom on 2nd October, 2013 with a visa conferring leave until 24th August 2014 (the second applicant has for immigration purposes been treated as the dependant of the first applicant and indeed her position in these linked appeals is contingent upon that of her husband).
3. Permission to appeal was granted by First-tier Tribunal Judge P J M Hollingworth. At the hearing before me today Counsel appeared on behalf of the appellants and Mr Walker, a Senior Home Office Presenting Officer appeared on behalf of the respondent. Miss Lichfield addressed me at some length and told me that the judge had made the following errors of law:-
 - (i) He failed to provide adequate reasons for rejecting the first named appellants' evidence and failed to explain why it did not amount to an innocent explanation.
 - (ii) The First-tier Tribunal Judge placed too high a burden on the first-named appellant as to whether he had an innocent explanation and failed to give any reasons at all why the first-named appellant should cheat in his examination. It was, she asserted incumbent on him to do so.
 - (iii) Lastly, there were no proper reasons given as to why the first-named appellant has not given an innocent explanation. The judge has simply failed to consider the first-named appellant's existing academic achievements, all taught in English, and make an analysis of them when finding that he did not have an innocent explanation.
4. Mr Walker pointed out that at paragraph 18 of the judge's decision he had recognised and acknowledged the force of submissions made on behalf of the appellants, and at paragraph 20 of the decision concluded, looking at all the evidence, that the first named appellant had failed to provide any adequate explanation or bases to reject the evidence relied on by the respondent.
5. I reserved my decision.
6. At paragraph 14 of the judge's decision he said "The real issue in this case is whether or not the Appellant obtained his ETS certificate through the use of a proxy sitter". At paragraph 17 of the decision the judge records a submission made on behalf of Counsel to the effect that the first-named appellant had provided the requisite innocent explanation (per *Shehzad* [2016] EWCA Civ

615 at paragraph 22 and also paragraph 23). In this context the judge highlighted the first-named appellant's academic achievements, both before and after the disputed test.

7. The first-named appellant had been awarded a Master in Business Administration in April 2012 (referred to at page 28 of the appellants' bundle), which, it was asserted by Counsel, suggested a good command of English; he scored well in the IELTS test in November 2007 (page 32 of the appellants' bundle), some three years prior to his arrival in the United Kingdom, and it was reasonable to assume that at the date of the disputed test, some two years after his arrival in the United Kingdom, during which time he had been studying, that his language would have improved significantly; in this latter regard it was to be noted that he had obtained a BTEC level 7 Diploma in July 2011 (pages 30 to 31). It was submitted that the first-named appellant did not present as a person who needed to cheat in an English examination and accordingly the evidence was indicative that he would not seek to fake a test.

8. The judge said at paragraphs 18, 19 and 20:-

"18. I recognise and acknowledge the force and logic of Mr Karim's submission. However, I am not satisfied on the particular facts here that what is essentially circumstantial evidence is sufficient in circumstances where the Respondent has discharged the evidential burden such that it shifts to the Appellant.

19. I do not consider the First-named appellant's ability to advance a narrative account of the date, times, venue, and format of the examinations to advance his case. These are essentially matters of record, and it is not suggested that the First-named appellant did not book examinations. Moreover his due attendance at the exams would not preclude the use of a proxy sitter. Nor do I consider the potential to be able to pass an examination without cheating to be an inevitable or even significant indicator of not cheating.

20. Looking at all of the evidence I find that the Respondent has discharged the evidential burden and that the Appellant has failed to provide any adequate explanation or basis to reject the evidence relied upon by the Respondent. In such circumstances I find the Respondent's decisions to be in accordance with the Immigration Rules in respect of both Appellants. "

9 Having carefully read the determination I have concluded that what the judge said at paragraphs 18, 19 and 20 was perfectly adequate. The respondent discharged the evidential burden and it was for the first-named appellant to provide an innocent explanation. I believe that looking at the evidence in the round the judge was entitled to find that the first-named appellant's ability to advance a narrative account of the date, times, venue and format of the examinations to advance his case. As the judge pointed out they were a matter of record, in any event, and there is

no suggestion that the first-named appellant did not actually book the examinations himself. Additionally, as the judge pointed out, the first-named appellant's attendance at the examination could not possibly preclude his use of a proxy sitter to take the examination for him. The judge considered the first-named appellant's potential to be able to pass examinations without cheating and was entitled to conclude that that was not a significant indicator of him not having cheated. The fact that the first-named appellant was awarded an MBA Degree in April 2012, passed the IELTS in November 2007 and was awarded a BTEC level 7 Diploma in July 2011, does not mean that he did not use a proxy sitter. The failure by the first-named appellant to provide an innocent explanation means that the respondent's decisions are in accordance with the Immigration Rules in respect of both appellants.

10. I conclude that there was no error of law in the decision of Immigration Judge I A Lewis and I uphold it. The appellants' appeals are dismissed.

Summary

The appellants' appeals are dismissed

No anonymity direction is made.

Richard Chalkley
Upper Tribunal Judge Chalkley

TO THE RESPONDENT **FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Richard Chalkley
Upper Tribunal Judge Chalkley