Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02227/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 December 2017	**On 7 March 2018**
And 5 March 2018	

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MONJUR AHMED
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms A Fujiwala (Senior Home Office Presenting Officer) (2017)
Mr I Jarvis (Senior Home Office Presenting Officer) (2018)
For the Respondent: Mr Khan

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal, dated 16 March 2017, allowing the Respondent's appeal against the refusal of his application under Appendix FM as the partner of his wife, Athia Begum Chowdhury.

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2. The immigration history supplied by the Secretary of State was that the Respondent entered the United Kingdom as a student on 13 December 2009 and his leave was extended until 10 April 2015; he applied to switch status to that of a spouse, an application which was granted in August 2013 until 7 February 2016. The Respondent applied for leave to remain as a partner on 18 January 2016 and the application was refused on the same day; presumably this was a same-day application made in person.

3. The application was refused because a TOIEC English language qualification on which the Respondent had previously relied had now been questioned by the issuing body, ETS, on the basis that there was significant evidence to conclude that it had been fraudulently obtained, a proxy having been thought to have sat the test in the Respondent's stead. Accordingly the Secretary of State was satisfied that deception had been used in the course of the application. This justified refusal of the application as the Respondent was thought unsuitable for the grant of leave in the partner route; and there were no very significant obstacles to his integration in Bangladesh. There was no further consideration of the application in terms of the Respondent's family life.

4. The impugned test result was dated 27 October 2011. The Home Office conclusions were based on test results of 27 October 2011 taken at the Luton test centre, and on 15 November 2011 at Portsmouth International College, and on the same date at Charles Edward test centre.

5. The Respondent appealed, and the First-tier Tribunal gave its reasons for allowing the appeal. It noted that the Secretary of State could discharge the evidential burden on her via the generic evidence that she supplied regarding her treatment of cases where ETS cancelled test results, and that ultimately the legal burden of proof lay upon the Home Office too. The First-tier Tribunal was plainly not wholly satisfied with the oral evidence of the Respondent, noting that his evidence was at times "illogical"; nevertheless it accepted that given he was describing events that took place some six years ago, and in relation to requirements of the Rules that had changed over time, it was unsurprising that he might not recall the precise order of events.

6. However, the First-tier Tribunal was concerned as to the cogency of the case put by the Secretary of State. There was no logical explanation for the same person causing a proxy to sit English language tests on three separate occasions when the correct score was acquired on the first occasion, nor was it apparent why an individual would seek to have tests taken by two different proxies in two different parts of the country on the same day. Furthermore, one of the impugned test results had been on the basis that the results were "questionable" rather than invalid.

7. Accordingly, the First-tier Tribunal found that the Secretary of State had failed to discharge the burden of proof that lay upon her. It then stated that this left the original application outstanding before the original decision maker.

8. Judge Osborne granted permission to appeal on 27 September 2017 on the basis that findings should have been made on the private and family life dimension of the appeal. A close reading of Judge Osborne's decision indicates that permission to appeal was granted on this aspect of the case alone, as the grant appears to paraphrase the Secretary of State's challenge to the ETS limb of the judge's reasoning but to find the decision "careful and focussed" vis-á-vis that aspect of the case. Nevertheless, as this came to my attention only after the hearing, I have determined both aspects of the Secretary of State's challenge in line with my indication at the hearing itself.

Findings and reasons – Error of law hearing

9. The Upper Tribunal cites expert evidence deployed by a litigant seeking to cast doubt upon the validity testing process used by ETS in *Gazi* (IJR) [2015] UKUT 327 (IAC):

> "Dr Harrison also examines, with accompanying critique and commentary, the discrete issues of factors affecting performance; the typical performance of human verification; the definition of thresholds; the explicit acknowledgement of human errors; the lack of testing of the performance of analysts; the dubious touchstone of "confidence" (see Mr Millington's witness statement); the dearth of information about the actual analysis methodology; the lack of detail about the experience and knowledge of both the recruited analysts and their supervisors; the indication that any training of the newly recruited analysts was hurried; the shortcomings in Mr Millington's speech recognition averments; and the clear acknowledgement on the part of ETS that false identifications (viz false positive results) have occurred. One passage relating to the human verification process is especially noteworthy:
>
> > "… although the analysts only verified matches where they had no doubt about their validity – i.e. where they were certain about their judgments – this should not be taken as a reliable indicator of the accuracy of those judgments. This approach does not remove the risk of false positive results."
>
> Dr Harrison also highlights that both the automatic system and the human analysts are capable of false positive errors. The Secretary of State's evidence does not disclose either the percentage or the volume of such errors."

10. No findings were made on that evidence in *Gazi*. However in the subsequent appeal of *Qadir* [2016] UKUT 229 (IAC) the UT concluded that the Home Office evidence had significant shortcomings, in particular at [63], a lack of qualifications or expertise of the officials who visited ETS and produced witness statements based on their visit to ETS, during which ETS was the sole arbiter of the information disclosed and assertions made, undue Home Office dependency on the information from ETS when ETS had put forward no witness or indeed any other evidence whatsoever of their own, the lack of any expert evidence backing up the opinion of the staff who visited ETS, and the fact that voice recording files had never been put forward pertaining to the appellants themselves. Accordingly the Tribunal accepted that the methods used by ETS were not necessarily

guaranteed to avoid the occasional false positive whereby an innocent student is wrongly identified as having cheated in their test.

11. In *MA Nigeria* [2016] UKUT 450 (IAC) the Upper Tribunal stated that

> "... 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. The President explains in *Muhandiramge* [2015] UKUT 675 (IAC), that decisions in these cases involve a "moderately complex exercise" in which "the evidential pendulum swings three times and in three different directions". To quote further from that decision:

> "(a) First, where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue: for example, by producing the completed application which is prima facie deceitful in some material fashion.
>
> (b) The spotlight thereby switches to the applicant. If he discharges the burden - again, an evidential one - of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.
>
> (c) Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's prima facie innocent explanation is to be rejected.
>
> A veritable burden of proof boomerang!"

13. The First-tier Tribunal's decision is wholly consistent with the *Muhandiramge* approach; it clearly appreciated that both the initial evidential and the ultimate legal burden of proof was on the Secretary of State, and that cogent explanations from an appellant before it could rebut Home Office allegations of malpractice. The Tribunal below was clearly concerned about the Respondent's oral evidence, but ultimately found his account plausible: there was nothing perverse in an assessment of oral evidence that recognised that it may be difficult to recall events several years earlier. The acceptance of his evidence as credible necessarily implies that it then fell upon the Secretary of State to discharge the ultimate legal burden.

14. It is here that the Home Office case was found wanting. The First-tier Tribunal understandably considered it odd that a person sitting English language tests would have sought to procure three test results when their first result was adequate to demonstrate the requisite English language proficiency, and added that a "questionable" result was not the same as an "invalid" result. There was clearly something strange about the results that ETS sent to the Home Office: the Respondent could not reasonably have been thought to have been in two places at the same time, and any scheme that was predicated on having two proxies standing in for them on the same day would seem likely to bring just the kind of attention to the tests in question that any fraudster would try to avoid. So this was not a case where a single result was questioned and where the bare provision of the "look-up" tool results would be sufficient to require cogent evidence from the migrant in response; the very results upon which the Secretary of State's case was founded themselves called out for some further enquiry before being relied upon.

15. One might think that the First-tier Tribunal's reasoning somewhat generous. But the question for the Upper Tribunal is not to assess whether it would have come to the same conclusion itself, but to determine whether the approach below is within the range of reasonable responses to the material before the decision maker. Lord Sumption stated in *Hayes v Willoughby* [2013] UKSC 17 at [14]:

> "A test of rationality … applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."

16. It seemed to me that there was a clear logical connection between the evidence relied upon by the First-tier Tribunal and its reasons for its decision. I accordingly found that the Secretary of State's grounds of appeal were not made out on the English language issue: as noted above, it may well be that I was overly generous in assessing them at all.

17. The Secretary of State was on a firmer footing when it came to the question of the final disposition of the appeal. The appeal was brought on human rights grounds alone. The Secretary of State had refused the Respondent's appeal on human rights grounds. Accordingly it was necessary for the First-tier Tribunal to determine the private and family life interests involved in the appeal and whether any interference with them would be disproportionate. It wholly failed to do so. Whilst it is true that the Secretary of State had not made a decision on the Respondent's application under the five-year route to settlement under Appendix FM, that was because she had thought that step unnecessary.

18. The question for the First-tier Tribunal was whether or not the Secretary of State's decision was contrary to the Human Rights Convention. As the Respondent holds an immigration status that permits him to switch into the partner route, and the genuine and subsisting nature of his marriage has not been questioned, the only

remaining material questions were his English language proficiency and ability to meet the maintenance requirements, at the date of application, via the complex provisions of Appendix FM-SE. If those provisions were to be satisfied, it would be very difficult to imagine that the Respondent's removal could be proportionate to his private and family life: for the Immigration Rules set the measure for that question to be assessed.

19. As there was only limited fact-finding remaining to be done, it was appropriate for the Upper Tribunal to retain this matter for final resolution itself, rather than to remit it back to the First-tier Tribunal.

Continuation hearing

20. Further evidence was supplied for the continuation hearing before the Upper Tribunal. The parties agreed that it showed that, in the 12 months leading up to the application, the gross annual income earned was £21,084.80, via work for Sainsbury's and Gravesham Muslims Cultural and Educational Centre. A letter from Sainsbury's of December 2015 stated earnings of £7.36 hourly for 20 hours a week, since 22 April 2015; and a letter from the Muslims Centre confirmed employment on a full time permanent basis as an Islamic Teacher, working 117 hours monthly, earning £9.406.80.

21. Appendix FM–SE requires that the relevant sums are evidenced in a particular way: a person whose employment regime has altered in the last 6 months must show that a year's worth of matching payslips and bank statements, and an employer's letter confirming the nature and length of employment, and the precise remuneration.

22. Referring to the lawfulness of a limitation on the forms of evidence provided in support of a family life claim, in *MM (Lebanon)* [2017] UKSC 10 the Supreme Court ruled §99:

> "Operation of the same restrictive approach outside the rules is a different matter, and in our view is much more difficult to justify under the HRA. This is not because "less intrusive" methods might be devised, but because it is inconsistent with the character of evaluation which article 8 requires. As has been seen, avoiding a financial burden on the state can be relevant to the fair balance required by the article. But that judgment cannot properly be constrained by a rigid restriction in the rules. Certainly, nothing that is said in the instructions to case officers can prevent the tribunal on appeal from looking at the matter more broadly. These are not matters of policy on which special weight has to be accorded to the judgment of the Secretary of State. There is nothing to prevent the tribunal, in the context of the HRA appeal, from judging for itself the reliability of any alternative sources of finance in the light of the evidence before it."

23. Mr Jarvis pragmatically accepted that this material was very close to satisfying the strict financial requirements of Appendix FM–SE. He was reluctant to concede that the rather brief letters from employers necessarily satisfied every aspect of that Appendix or that the bank statements necessarily tallied with every pay slip.

However he acknowledged that, applying the approach enjoined by *MM (Lebanon)*, the core policy objective of ensuring that a reliable form of enduring income at a sufficient level to support the family unit was satisfied beyond reasonable doubt.

24. I consider that Mr Jarvis's realistic submission was fully justified. The Immigration Rules set the benchmark for when removal will be disproportionate to the public interest, and where the policy objectives they set out are plainly met by the evidence relied upon by an applicant, it will be difficult to conclude that a person's expulsion is proportionate. That is the case here. No challenge has been made to the genuineness of the relationship, English language proficiency is established by the test results put forward and accepted by the First-tier Tribunal as honestly obtained, and the financial requirements have been shown to be met, to all intents and purposes.

25. The financial requirements are met via reliable long-term employment earning more money than Parliament has identified as the relevant benchmark. Having regard to the factors identified in section 117B of the Nationality Immigration and Asylum Act 2002 that require specific attention on appeal, the Appellant has not been present in a manner that is precarious, having been lawfully present and then having applied to switch into spouse leave consistently with the scheme of the Rules. No considerations of finance or English language proficiency count against him.

26. I accordingly find the immigration decision was disproportionate to the public interest at which it aimed.

Decision:

The Secretary of State's appeal is dismissed. The appeal of Mr Ahmed stands allowed.

Signed: Date: 21 December 2017
5 March 2018

Deputy Upper Tribunal Judge Symes