Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00001/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th October 2018	**On 9th November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS SOBIA MALIK
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr A Chohan, Counsel instructed by S.Z. Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of Judge Lucas who allowed the appeal of Sobia Malik against refusal of her application for leave to remain in the United Kingdom as a Tier 1 Migrant.

2. For the sake of clarity, I shall hereafter refer to the parties in accordance with their status before the First-tier Tribunal; that is to say, I shall refer to Sobia Malik as the Appellant and the Secretary of State as the Respondent.

3. Before turning to the reasons that the judge gave for allowing the appeal and the Secretary of State's criticism of those reasons, it is first necessary to set out the background to these proceedings.

4. The application was made as long ago as 2013, and so the appeal rights remained those that were available to Appellants prior to their amendment by the Immigration Act 2014.

5. The initial refusal of her application was on the basis that the Appellant did not attract the requisite number of points because she had failed to submit all the documents that were required to gain those points. She appealed that decision and, in a decision promulgated on 22nd November 2013, Judge White held that the Secretary of State had failed to apply her own evidential flexibility policy by giving the Appellant an opportunity to provide the missing documents. He therefore allowed the appeal on the ground that refusal of the application had not been in accordance with the law. That decision was made in the expectation that the Respondent would thereafter make a fresh decision taking account of the documents that had now been supplied.

6. It appears not to be in dispute that when the Appellant's application was originally refused in 2013, the Secretary of State had been unaware of evidence that the Appellant may have employed deception in her application by submitting an English language proficiency test certificate which had been obtained by use of a proxy. However, that evidence had come to light by the time the Secretary of State reviewed the decision in 2016. She therefore refused it on this occasion upon the alternative ground that deception had been used in connection with the application.

7. Thus it was that the Appellant appealed once again. On this occasion, the matter came before Judge Lucas. He allowed the appeal on two grounds, which I treat as being in the alternative. Firstly, he concluded that the Secretary of State had not discharged the burden of proving that the Appellant had used deception. Secondly, even if she had used deception, he concluded that it was unfair for the Secretary of State now to raise the matter having previously refused the application on a ground that was held to be unlawful.

8. The kernel of the judge's findings is to be found within paragraphs 14 to 19 of his decision -

> 14. The Tribunal has read and considered the decision in **Nawaz** and **Uddin/Begum** which have been submitted by Ms Lambert on behalf of the Respondent. These establish and underline the principle that this Tribunal is not able to determine deception, or lack of it, in ETS cases as a question of precedent fact. Reliance is therefore placed upon the generic bundle provided by the Respondent with regard to the issue of IELTS.
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> 15. The Tribunal therefore sees no reason to go behind the conclusion with regard to ETS generally with regards to the issues of deception.

16. However that is not the end of the matter and the Tribunal must consider all of the evidence presented by this Appellant.

17. It has to be noted the Appellant has denied the use of deception and given her academic background, that is not perhaps a surprise. She is educated to a high standard and most notably, holds a masters degree in English literature. She also successfully passed IETLS in 2011 prior to her entry into the UK (with an overall score of 6.0) in 2013. Why, the Tribunal asks rhetorically, would she wish to employ deception with regard to TES in the exam said to have been taken on 28th November 2012. The answer seems to be that it is unlikely applying the civil standard of proof.

18. In any event, it is of note that the Appellant proceed to make a Tier 1 claim to remain in the UK which was refused on 17th May 2013. However the decision was deemed to have been unlawful by the Tribunal on 14th October 2013 and her claim was sent back to the Respondent for reconsideration. It was then in December 2016 – some three years after her arrival in the UK in 2013 – that the Appellant's claim was then refused on an entirely different basis to the refusal of May 2013. The Tribunal can quite see how the issue of unfairness to the Appellant may arise in such circumstances. However, no part of that conclusion is critical of the Respondent for generally as opposed to specifically reviewing the grounds upon which the Appellant was granted leave to remain in the UK.

19. In all the circumstances of this case the Tribunal is not satisfied – on balance – that the Appellant would have or did use deception with regard to TES in 2011. Further, it regards it as unfair to her that having successfully appealed against the previous refusal in 2013 she is now placed in this invidious position. It is of note that she has been awarded full points in every other category of the requirements of her current status, apart from that of English language. She has now set up a business in the UK and is, no doubt, contributing her time and resources to life here".

9. I take the two Grounds of Appeal in turn.

10. The first ground is that the judge was wrong to consider the likelihood of someone with the Appellant's educational background finding it necessary to cheat in her English language test. This ground relies upon the observations of this Tribunal in the case of **MA (Nigeria) [2016] UKUT 450** at paragraph 57 -

> Second we acknowledge the suggestion that the Appellant had no reason to engage in deception which we have found proven. However this has not deflected us in any way from reaching our main finding and conclusion. 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.

11. The first ground is expressed in the following way at paragraph 4: "The FtT has materially erred by failing to give adequate reasons for holding that a person who may speak English would have no reason to secure a test certificate by deception". However, and with all due respect, that is not what the judge found. What the judge in fact found was that, given the particular educational background of this Appellant and the fact that she had passed an IETLS in 2012, it was unlikely to be the case that she had cheated in her test. The judge thus reached a conclusion that was reasonably open to him by applying the correct burden and standard of proof to established facts. This is not at all the same thing as making a finding that the Appellant had "no reason" to secure a test certificate by deception.

12. It is moreover clear from the wording of the passage I have cited from paragraph 57 of **MA** (above) that it does not purport to set out any statement of general legal principle. On the contrary, the only such principle is that which appears in the headnote to the report: "The question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact sensitive" [my emphasis]. Paragraph 57 of **MA** is thus nothing more or less than the Tribunal's analysis of the evidence in that particular case, and accordingly does not have the force of law. I also note, in passing, that the Tribunal appears to have adopted the somewhat surprising approach of finding the case of the Secretary of State proved prior to considering the Appellant's explanation for why it should not do so (see the first sentence of the passage quoted at paragraph 10, above). Moreover, if paragraph 57 were to be taken as a statement of general legal principle, it could potentially lead to bizarre results. Suppose, for example, that a person had won the Nobel Prize for literature in respect of a novel that had been written in the English language. Could it seriously be suggested in such circumstances that the Tribunal was unable to take this into account in deciding whether it had been proved that the person had later cheated in a rudimentary English language proficiency test? Such a suggestion would be an affront to common sense. What the judge did, therefore, was to take what was in my view the entirely appropriate course of looking at matters in the round and thereafter applying the correct legal burden and standard of proof to the Appellant's particular and individual circumstances. The first ground is not therefore made out.

13. So far as the second ground is concerned, I accept that the judge was wrong to hold that it was unfair for the Respondent to question the validity of the English language proficiency test certificate for the first time upon a review of the original decision, given that (a) the evidence of possible fraud only came to light after the Appellant had succeeded in her first appeal, and (b) she was in any event given reasonable notice of the allegation prior to the hearing of her second appeal. This error was not however material to the outcome of the appeal given that I have upheld the Tribunal's finding that the Respondent had failed to discharge the allegation of fraud that formed the sole basis of the Respondent's second decision to refuse the application.

Notice of Decision

14. The appeal is dismissed.

No anonymity direction is made.

Signed Date: 30th October 2018

Deputy Upper Tribunal Judge Kelly