



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/01630/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 20 August 2018

Decision & Reasons Promulgated  
On 10 October 2018

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MS SASANTHI UDARA JAYASEKARA  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Kannangara, counsel

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Faulkes-Jones who, in a decision promulgated on 7 February 2017, allowed the appellant's appeal against a decision of the Secretary of State to refuse her application for indefinite leave to remain in the United Kingdom.
2. The appellant is a citizen of Sri Lanka who arrived in the United Kingdom on 29 February 2004 with entry clearance as a student. She was granted further leave to enter in that capacity until 28 February 2005 and remained in the United Kingdom as

a student, her leave being extended on various periods, her most recent application being an application for leave to remain as a Tier 4 Student granted until 29 December 2014.

3. On 2 December the appellant made a human rights application for indefinite leave to remain in the United Kingdom based on long residence and she was interviewed in connection with that application on 5 October 2015, the respondent being concerned that the appellant may have obtained a TOEIC certificate from ETS by deception.
4. The respondent refused the application on general grounds, pursuant to paragraph 322(2) of the Immigration Rules on the basis that in her current application, at Section D11, she had said she had not used deception when seeking leave to remain, the respondent concluding that this statement was false because she had in an application made on 20 September 2012 submitted a TOEIC certificate from ETS which related to a test taken on 21 June 2012 at London College of Media and Technology which had been cancelled by ETS, the respondent being satisfied from the information provided by ETS that the certificate had been fraudulently obtained; and, that she had therefore used deception in her application made relying on that on 20 September 2012. For these reasons the Secretary of State refused the application pursuant to paragraph 322(1A) and pursuant to paragraph 276B on the basis that although she had resided in the United Kingdom continuously and lawfully during the period from her arrival after 29 February 2004 she had used deception in an attempt to obtain leave in the United Kingdom and thus the application fell to be dismissed pursuant to paragraph 276B(ii).
5. The respondent also refused the application on family life grounds under the Appendix FM parent rules.
6. When the matter came before the First-tier Tribunal on 12 January 2018 the appellant gave evidence. It was accepted between the parties that there was no available copy of the interview record of 5 October 2015, an interview in which the appellant was asked about her attendance at the ETS testing centre. It was also accepted the only issues were Rules 322(1A), 322(2) and 276B(ii) and (iii).
7. It was recorded that the appellant had said that she had not used a proxy test taker and taken the test herself, providing two IELTS test certificates dated 31 March 2011 and 13 October 2014.
8. The judge directed herself [5.3] to [5.5] in respect of SM and Qadir v SSHD (ETS – evidence – burden of proof) [2016] UKUT 229 noting [5.6] the evidence of Professor French that errors may have occurred and concluding that the respondent had not passed the first evidential burden in that he had not produced sufficient evidence to raise an issue as to the existence of fraud. She therefore allowed the appeal.
9. The respondent appealed on the grounds that the judge had erred in reversing the burden of proof, failing to follow the guidance given in SSHD v Shehzad and Another [2016] EWCA Civ 615 and SM and Qadir. The headnote of the latter provides:

(i) *The Secretary of State'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.*

(ii) *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 Secretary of State failed to discharge the legal burden of proving dishonesty on their part.*

10. After hearing submissions from the parties I concluded that the judge had failed properly to direct herself in light of SM and Qadir and Shehzad and Others in failing to note the guidance that the material provided showed that the Secretary of State had satisfied the evidential burden.
11. I heard evidence from the appellant who said that she had taken the test in East London at the London Media and Technology College. She said that the test was taken in two parts over two days. She said that she recalled going to the college by train, the college had not been that far from Bow and they had checked her passport and the details on arrival. She said the test was computer-based and she could recall reading out passages describing what was in photographs, she had done this herself. She said it took one to one and a half weeks to get the result and that TOEIC tests were quicker than others which is why she had chosen them and they are approved by the Home Office. She said she was not sure when she realised there was a problem and that she had done this to be on the safe side in case the certificate had run out. She had not heard anything until she got the Home Office refusal and that she was surprised by this. She said she could not do anything when she found out about it other than appeal and that she had emailed ETS to get details about what happened but not received a response. She said a lot of people were in the same position. Copies of emails were produced. She denied having used a proxy test taker and she was confident she would have passed. Asked if she could explain the result she said that she did not have a clue.
12. The appellant confirmed that her son is still living in the United Kingdom and has now acquired British citizenship. She said that she now lived with her partner who is a British citizen.
13. Mr Tarlow submitted, relying on the refusal letter, that the respondent had met the evidential threshold and it was therefore for the appellant now to provide an innocent explanation which she had not done. On that basis the appeal should be dismissed.
14. Mr Kannangara submitted that the appellant had given a truthful and honest account and that she had no need to obtain a false test given her earlier good IELTS test result. She had done this only to obtain a sense of security. He submitted that it was telling that there was no interview record provided and the appellant had done all she could to try to find out what happened with her test result.
15. There is no challenge directly to the appellant's credibility, despite extensive cross-examination. I am satisfied following SM and Qadir that the Secretary of State has

satisfied the evidential burden. It is therefore for the appellant to provide an innocent explanation as to why her result has been invalidated, not least in the light of the evidence of Professor French.

16. It is worrying that the record of the appellant's interview which was nearer in time to the alleged use of a proxy test-taker, have been lost and accordingly, the result of that interview cannot be relied upon by the Secretary of State. There are inherent difficulties in the appellant having to recall some six years after the event the taking of an English language test but it has not been suggested that her account of what happened during the test which was detailed as to how it was conducted or how she travelled there are in any way inconsistent with what is known. It was not suggested that she could have learned this information, nor that she had taken several ETS tests and so the knowledge was not related to the one test she took. Viewing all the evidence as a whole, and in the round, I am satisfied that she has given an accurate account of what occurred but that is not in and of itself an indication that she did not cheat by using a proxy test taker.
17. It is of note in this case that the appellant had obtained IELTS tests before and after the ETS test. Her explanation, which was not challenged by Mr Tarlow, was that she had obtained the TOEIC test results as she was concerned that a test certificate, and they are time limited, might run out before she needed to renew it and to prevent there being difficulties in renewing a visa, due to the time lag between taking the test and obtaining the certificate, she had obtained a TOEIC certificate as this was the quickest to obtain. I am satisfied again, that this is a plausible response and explains why she took the test at the time.
18. I note also in this case that the appellant did seek to obtain from ETS details as to why her result had been invalidated, and that there has been no response. I bear in mind that the chance of error is low, as indicated in the evidence of Professor French, but that does not eliminate it. Equally, the error rate is an average, and I must view the evidence in the round as a whole.
19. I found the appellant to be a candid and truthful witness. I accept that she simply does not know how she could have got an invalid test result and it is difficult to see what other steps she could have taken, nor were any put to her. I accept that in her evidence before me she spoke in clear, confident and fluent English but equally she lives with a native English speaker and has done for many years and I attach little weight to her current fluency in English. I do, however, consider that it is noteworthy that her English test results both before and after the impugned test results were such that there appears to be no need for her to have taken the test result other than to secure her position.
20. Taking all of the evidence as a whole and bearing in mind that the appellant faces a difficult burden to provide an innocent explanation, having heard her give evidence and be subject to cross-examination, I am satisfied that she has told me the truth and am satisfied that this is one of the few occasions in which it has been shown that there had in fact been no dishonesty, albeit that this is a finely balanced case.

21. I am satisfied that the appellant has, contrary to the respondent's submissions, provided an innocent explanation and has therefore shifted the evidential burden imposed on her, and shown that there was no deception. Accordingly, the Secretary of State cannot properly rely on paragraph 322(2) or 322(1A) of the Immigration Rules. Similarly, it is not suggested that the appellant does not meet the requirements of paragraph 276B(ii) on any other basis and I allow the appeal under the Immigration Rules for these reasons,

**Notice of Decision**

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remake the decision by allowing the appeal under the Immigration Rules on a different factual basis

Signed

Date 1 October 2018

A handwritten signature in black ink, appearing to read 'Jonathan Rintoul', written in a cursive style.

Upper Tribunal Judge Rintoul