



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/26873/2015
IA/26875/2015

THE IMMIGRATION ACTS

Heard at Field House
On 30 August 2018

Decision & Reasons Promulgated
On 06 September 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SANA [F]
[A F] [a minor]
[NO ANONYMITY ORDER]

Respondents

Representation:

For the Appellant: Mr T Wilding, a Senior Home Office Presenting Officer

For the Respondents: Mr A Rehman of Counsel, instructed by Mayfair Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimants' appeal against his refusal to vary their leave to remain to enable them to remain in the United Kingdom pursuant to Appendix FM and

paragraphs 276ADE(1) of the Immigration Rules HC 395 (as amended) or outside the Rules on the basis of exceptional circumstances.

Background

2. The claimants are Pakistani citizens, a mother and her minor son, who are the spouse and child of the principal appellant's husband who is present and settled in the United Kingdom. Save where otherwise stated, references in this decision to the claimant are to the principal claimant.
3. The Secretary of State's refusal was based on deception by the principal claimant who relied on an ETS/TOEIC test taken at a Hounslow test centre (Eden College) on 18 September 2012. When interviewed some 33 months later by the Secretary of State, the principal claimant said she had only ever taken one English language test, which she thought was a TOEIC test, but she produced a City and Guilds English language certificate. The principal claimant used an interpreter at her interview, which the Secretary of State regarded as corroborative of his doubts about the TOEIC test.
4. The Secretary of State did not consider that, given the age of the children, that a grant of leave outside the Rules on section 55 grounds or for any other exceptional circumstances was appropriate. The claimants and the other child would be returned together to Pakistan as a family unit and had lived here only for 3 years at the date of decision.
5. The claimants appealed to the First-tier Tribunal.

First-tier Tribunal decision

6. The appeal has been heard twice in the First-tier Tribunal, the first decision being set aside and the appeal remitted to the First-tier Tribunal for a fresh decision. This appeal lies against that second decision, by First-tier Judge Wilson.
7. The Judge placed little weight on the principal claimant having used an interpreter in her Home Office interview. He noted that the interview record in 2015 had not been read back to the claimant or signed by her. He expressly excluded from consideration her use of an interpreter in 2015. The claimant gave evidence in English in 2018 before the First-tier Tribunal 'with perfect fluidity' and gave details of her husband's choice of the Eden College test centre and how they had driven there, also what happened on arrival. Both of them were clear that she had sat the test personally.
8. No copy of the ETS Look-up tool results were produced by the Secretary of State. There was no email or witness statement specific to this application. The claimant had not sought to verify the voice recording herself. There was secondary evidence of the outcome of consulting the ETS Lookup tool: immediately following the interview record in the First-tier Tribunal bundle was a computer record showing why the claimant had been invited for interview. That document shows that the Secretary of State had no TOEIC test certificate on file; that the ETS Lookup tool indicated that the test result was invalid; and that "Invalid TOEIC on look up tool cannot be matched to this or previous applications. [Claimant] to be invited for interview". The claimant was indeed invited

for interview and it was that interview that formed the basis of the Secretary of State's refusal to grant leave. That document is dated 26 May 2015 and signed by a caseworker, Janet Abdulla. The Judge treated that document as being sufficient to shift the burden to the claimant for an innocent explanation to be advanced.

9. The First-tier Judge considered that he had been given an innocent explanation and then considered the evidence of deception provided by the Secretary of State. At [14], he held that although the TOEIC test was by its very nature to be regarded as suspect, on the balance of probabilities, he was not satisfied that the Secretary of State had established that the appellant obtained her certificate fraudulently.
10. The First-tier Judge allowed the appeal.
11. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

12. The grounds of appeal assert that the evidence of deception was not properly considered; that the claimant's ability to speak English in 2018 was not determinative of her ability to do so in 2012, and that, applying *MA (ETS - TOEIC testing) Nigeria* [2016] UKUT 450 (IAC) at [57], there might be many reasons for choosing a proxy test-taker: lack of confidence, fear of failure, lack of time and commitment, contempt for the immigration system, and so on.
13. Permission to appeal was granted on the basis that the First-tier Judge had arguably misunderstood the test to be applied, that he had concentrated on matters outside the *SM and Qadir* test, and that his reasons for finding that the claimant had no reason to cheat were inadequate and/or susceptible to challenge.
14. The grounds also asserted that the Judge should have watched the *Panorama* documentary about the ETS/TOEIC fraud. Mr Wilding did not pursue that submission at the hearing.

Rule 24 Reply

15. There was no Rule 24 Reply on behalf of the claimants.
16. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

17. At the Upper Tribunal hearing, Mr Rehman relied on *MA (Nigeria)* at [11]-[15] and argued that the Judge had not erred in the 3-stage approach taken. The claimants had provided an innocent explanation and the Secretary of State had not discharged the evidential burden upon him. The minimum level of plausibility which *MA (Nigeria)* required had been reached.
18. Mr Rehman took me to the claimant's witness statement which said that her speaking and writing results were at 190 of a possible 200 points and her reading and listening

even higher, at 490 for reading and 495 for listening out of a possible 495 points. Those are indeed stellar marks.

19. For the Secretary of State, Mr Wilding argued that the evidential burden had been made; the Judge's reasons were inadequate and no innocent explanation had been provided.

Discussion

20. I begin by looking at *MA (Nigeria)* and the guidance there given. The Tribunal held that the question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact sensitive.
21. The three-stage shifting burden approach used by the First-tier Judge in this appeal derives from the judgment of the Court of Appeal in *Secretary of State for the Home Department v Shehzad & Anor* [2016] EWCA Civ 615 and has been methodically applied, in that the Judge found at [11] that the primary evidential burden of showing that the claimant had lied or produced a false document had been met, then that the claimant had presented an innocent explanation which satisfied him; and then at [14], that the Secretary of State's evidence of dishonesty was inadequate to support a finding that the principal claimant had, indeed, been dishonest.
22. The Judge has not given any weight to the claimant's failure to call for her voice recording and seek expert evidence as to whether the voice is hers.
23. On the other hand, apart from the Peter Millington generic witness statement, the Secretary of State's evidence lacks many of the elements which one would expect to see, in particular the ETS Look up test result and the statistical evidence regarding Eden College where the claimant took her test.
24. Therefore I conclude that the *R (Iran)* standard for interference with the First-tier Judge's finding of fact in this highly fact-sensitive appeal has not been met. The Judge's findings are neither incomprehensible nor contrary to the evidence. The assessment of the claimant's explanation is a generous one, and other Judges might have assessed it differently, but that is not sufficient to allow the Upper Tribunal to interfere, on the basis of the evidence before the First-tier Tribunal.

DECISION

25. For the foregoing reasons, my decision is as follows:
The making of the previous decision involved the making of no error on a point of law
I do not set aside the decision but order that it shall stand.

Date: 31 August 2018

Signed 
Upper Tribunal Judge Gleeson