



**Upper Tribunal  
(Immigration and Asylum Chamber)  
IA/34862/2015**

**Appeal Numbers:**

**IA/34863/2015**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision and Reasons  
Promulgated**

**On 2 May 2018**

**On 11 May 2018**

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**LAILA AKTER LUBNA  
SOHEL RANA  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr I Khan, Counsel

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

**DECISION AND REASONS**

1. The appellants are citizens of Bangladesh, born on 25 March 1988 and 1 May 1987 respectively, and are wife and husband. They have been given permission to appeal against the decision of First-tier Tribunal Judge Davey dismissing their appeals against the respondent's decisions to refuse the first appellant's application for leave to remain as a Tier 1 (Entrepreneur) Migrant and the second appellant's application for leave to remain as her dependant.

2. The first appellant entered the United Kingdom on 13 October 2009 with leave to enter as a student until 31 October 2012 and the second appellant joined her in the UK on 15 April 2010 as her dependant. On 27 November 2012 the appellant applied for leave to remain as a Tier 1 (Entrepreneur) Migrant and the second appellant applied for leave to remain as her dependant. The applications were refused on 5 November 2015.

3. The first appellant's application was refused under paragraph 322(1A) of the immigration rules on the basis that she had submitted a TOEIC English language test certificate with her application which had been found to have been fraudulently obtained through the use of a proxy test taker. The second appellant's application was refused in line accordingly.

4. The appellants appealed against that decision. Their appeals were heard on 24 October 2017 by First-tier Tribunal Judge Davey, who found that the respondent had made out her case under paragraph 322(1A) and that the first appellant had failed successfully to challenge the assertion that she had used a proxy test-taker. He accordingly dismissed the appeals.

5. Permission to appeal to the Upper Tribunal was sought by the appellants on the grounds that the judge had failed to make adequate findings on the report of Professor Sommer which had been produced in support of the appeals and that the judge's decision as a whole failed to provide adequate reasons.

6. Permission was granted on 27 February 2018.

### **Appeal Hearing**

7. At the hearing both parties made submissions. Mr Khan relied upon the two grounds, submitting that the judge's decision contained no analysis of why Professor Sommer's report was inadequate and that the first appellant had provided sufficient evidence of when and how she had taken the test to discharge the burden upon her. The judge had wrongly referred to the need for a "reasonable explanation" rather than an "innocent explanation". Mr Wilding submitted that there was no error of law in the judge's decision.

8. I advised the parties that I did not consider the judge's decision to contain any errors of law. My reasons for so finding are as follows.

### **Consideration and findings**

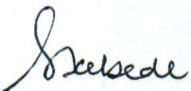
9. I am entirely in agreement with Mr Wilding that it is difficult to see how Professor Sommer's report assists the first appellant, given that it is written in general terms and is not specific to her and given that it confirms that fraudulent behaviour could and did happen, albeit identifying some flaws in the ETS's checking system. The fallibility of the process was, however, a matter considered by the Upper Tribunal in SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 229 and it was concluded that the generic evidence produced by the respondent was sufficient to discharge the evidential burden of proof.

10. It is clear that Judge Davey had regard to, and followed the approach in SM and Qadir. He identified the evidence produced by the respondent and the appellant at [8] to [11], which included the respondent's generic evidence together with the "ETS SELT Source data" at D1 of the respondent's bundle specifically referring to the appellant and properly concluded that that was sufficient to discharge the respondent's initial evidential burden of proof. He then went on to consider whether the evidence produced by the appellant was sufficient to rebut the respondent's evidence. In so doing he plainly had full regard to the evidence of Professor Sommer and took that evidence into account, at [11], [12] and [24]. He gave full and careful consideration to the appellant's evidence about her attendance at the test centre, her choice of test centre, the actions she took in response to the respondent's allegation and provided cogent reasons for concluding that that was not sufficient to challenge the respondent's assertions. I do not consider that anything material arises from the judge's reference at [24] to a "reasonable explanation" as opposed to an "innocent explanation". Clearly the judge was perfectly aware of what was required in SM and Qadir and, indeed, at [12] he properly referred to the need for the appellant to provide an "innocent explanation". The judge gave cogent reasons for concluding that no such explanation had been provided by the appellant and he was perfectly entitled to conclude that the appellant had failed to rebut the respondent's evidence and that the respondent had made out her case.

11. Accordingly the judge was entitled to dismiss the appeals on the basis that he did and provided full and proper reasons for so doing. I find no errors of law in his decision, which I uphold.

## **DECISION**

12. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeals stands.

Signed   
Upper Tribunal Judge Kebede  
2018

Dated: 3 May