Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14416/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 October 2018	**On 8 November 2018**

Before

UPPER TRIBUNAL JUDGE BLUM
UPPER TRIBUNAL JUDGE RIMINGTON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD KAMRUL ISLAM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms A Christie, Counsel, instructed by Hubers Law

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (SSHD) against the decision of Judge of the First-tier Tribunal Thorne (the judge), promulgated on 7 February 2018, allowing the appeal of Mr Islam (hereafter claimant) against the SSHD's decision, dated 31 October 2017, refusing his human rights claim.

Background

2. The claimant is a national of Bangladesh, born in November 1991. He entered the UK as a Tier 4 (General) Student on 18 January 2010. He made further applications for leave to remain in the same capacity on 31 October 2011 and 28 August 2013. Both these applications were granted. In each application he relied on an English language TOEIC certificate obtained from Educational Testing Service (ETS), having claimed to have undertaken a speaking test at Elizabeth College on 18 October 2011.

3. On 20 February 2015 the claimant married his British citizen partner, Nadira Alam Nadi (the partner). On 22 May 2015, the day before his leave expired, the claimant applied for further leave to remain based on his family/private life. Although the Reasons for Refusal Letter refers to the claimant as only being given an out-of-country right of appeal, Mr Tufan, representing the SSHD at the 'error of law' hearing, confirmed that the claimant did in fact have an in-country appeal. The appeal was dismissed. The claimant then made the human rights claim that is the subject of these proceedings. In his decision dated 31 October 2017 the respondent was not satisfied that the claimant met the Suitability requirements of Appendix FM of the immigration rules. The respondent explained that ETS undertook a check of the English language speaking test taken by the claimant on 18 October 2011 and that the test result was cancelled. On the basis of the information provided to him the SSHD was satisfied that the certificate was fraudulently obtained, and that the claimant used deception in his applications dated 31 October 2011 and 28 August 2013. The SSHD was not therefore satisfied that the claimant's presence was conducive to the public good and his application was refused under S-LTR.1.6 of Appendix FM.

4. It is pertinent to note that the SSHD accepted that the claimant met the Eligibility requirements of Section E-LTRP of Appendix FM, and specifically stated that the requirements of paragraph R-LTRP.1.1.(c)(ii) were met. No issue was therefore taken with the Relationship requirements, the Immigration Status requirements, the Financial requirements, or the English language requirements. This reflected the content of the covering letter accompanying the human rights claim, which referred to various documents accompanying the application in respect of Appendix FM-SE and the English language requirements. There was no suggestion in the parties' submissions that the claimant had ever remained in the UK without lawful leave, either pursuant to leave granted by the SSHD, or pursuant to section 3C of the Immigration Act 1971. This was a point accepted by Mr Tufan.

5. The SSHD went on to consider whether the requirements of EX.1 of Appendix FM were met, but he was not satisfied there were any 'insurmountable obstacles' preventing the couple continuing their relationship in Bangladesh. nor was the SSHD satisfied there were any exceptional circumstances sufficient to warrant a grant of leave to remain outsider the immigration rules on human rights grounds.

The First-tier Tribunal decision

6. The SSHD was not represented by a Presenting Officer at the First-tier Tribunal hearing. The SSHD only provided a Supplementary Bundle of documents on the day of the hearing, and then only to the Tribunal. The Supplementary Bundle contained, *inter alia*, generic statements from Peter Millington and Rebecca Collings, an expert report from Professor French, a 3-page copy of a criminal investigation entitled 'Project Façade' relating to Elizabeth College, and, crucially, the ETS results relating to the claimant's English-speaking test, marked as '**questionable**.'

7. Having set out the documents before him, including the 'questionable' test result, and having properly identified the correct standard and burden of proof (noting, with reference to **SM and Qadir v SSHD (ETS – Evidence – Burden of Proof)** [2016] UKUT 229, that the SSHD had to discharge the initial evidential burden, that the evidential burden then 'shifted' to the claimant to offer a plausible innocent explanation, and, if discharged, that the SSHD had to then meet the legal burden of establishing dishonesty on the balance of probabilities), the judge summarised the evidence given by the claimant and his wife at the hearing. This evidence included details of the claimant's attendance at the test centre, the amount he paid to undertake the test, his previous study of the English language and his preparations for the ETS test, and, while confirming that the voice on the recording provided to him was not his own, a denial that he used a proxy tester.

8. Under the heading 'Findings', the judge set out paragraph 30 of **Secretary of State for the Home Department v Shehzad & Anor** [2016] EWCA Civ 615 in which the Court of Appeal observed that, in circumstances where the generic ETS evidence was not accompanied by evidence showing that the individual under consideration's test was categorised as "invalid", the Secretary of State would face difficulties in respect of the evidential burden at the initial stage. At [51] the judge followed the analysis in **Shehzad**, noting again that the ETS test results were 'questionable' and not invalid. The judge then considered further observations from the Court of Appeal decision in **Ahsan** [2017] EWCA Civ 2009, relating to challenges to the SSHD's approach in ETS cases, and took into account a joint expert report prepared for the case of MM & MA v SSHD (IA/39899/2014), which was reported as **MA v SSHD (ETS -TOEIC testing)** [2016] UKUT 450 (IAC) and conjoined for hearing with two other cases (**R (on the application of Mohibullah) v Secretary of State for the Home Department (TOEIC – ETS – judicial review principles)** [2016] UKUT 00561 (IAC), and **R (on the application of Saha and Another) v Secretary of State for the Home Department (Secretary of State's duty of candour)** [2017] UKUT 00017(IAC)). The joint expert report noted that remote access software was sometimes used in test centers to alter results without the test taker knowing, that there was a delay in uploading the data and audio files which allowed for fraudulent replacement, and that there was no meta data linking test takers to audio files. In light of this evidence, the judge concluded that the SSHD failed to discharge the evidential burden of showing a prima facie case of fraud. In reaching this conclusion the judge relied on the 'questionable' test

result as opposed to an 'invalid' result, the observations in **Shehzad**, the dicta in **Ahsan**, the joint expert report, and the absence of meta date linking the voice recording to the claimant.

9. The judge nevertheless considered, in the alternative, that even if the initial evidential burden has been discharged, the claimant provided an innocent explanation and that he was the innocent victim of fraud. At [57] and [58] the judge holistically considered the findings of the joint expert report, the claimant's high proficiency in English, his studies of English in Bangladesh and his preparations before taking the ETS test, the evidence from the claimant's wife (a native English speaker), whom the judge found to be honest and reliable, and the claimant's evidence concerning the circumstances of the test and the amount he paid for it.

10. The judge proceeded to determine the human rights claim in light of his factual findings. The judge went through the **Razgar** [2004] UKHL 27 questions, finding that Art 8 was engaged in respect of the applicant's relationship with his partner, that there was an interference of sufficient severity to trigger the operation of Art 8, and that the respondent's decision was both lawful and in pursuit of a legitimate aim. In assessing proportionality, the judge identified the public interest factors set out in s.117B of the Nationality, Immigration and Asylum Act 2002, and noted that the claimant met all the requirements of the immigration rules necessary for a grant of leave to remain under Appendix FM. The judge considered this a weighty factor when determining the issue of proportionality and concluded, having regard to the public interest factors and his own findings, that the refusal of the human rights claim was disproportionate. The appeal was allowed.

The grounds of appeal, the grant of permission and the 'error of law' hearing

11. The Grounds of Appeal contend that the judge erred in finding that the claimant's test results were 'questionable' when they were "… *in fact invalid*." The grounds rely on the supposed 'invalidity' of the claimant's ETS test results to support the SSHD's contention that the judge failed to properly assess the burden of proof in accordance with **SM and Qadir** and the conclusions of the Court of Appeal in **Shehzad**.

12. The Grounds additionally criticise the judge for failing to consider whether there may be other reasons why, if the claimant could speak English to the required level, he would nevertheless cause or permit a proxy tester to take an ETS test on his behalf, citing the decision in **MA**.

13. The grounds finally contend that the judge failed to identify sufficiently compelling circumstances to justify allowing the appeal on Art 8 grounds. The proportionality assessment was coloured by the judge's error in respect of his findings on the use of deception. There were said to be no reasons given as to why the family life could not continue in Bangladesh, and there was nothing

preventing the claimant from making an entry clearance application from Bangladesh.

14. Permission was refused by the First-tier Tribunal, but granted after a renewal directly to the Upper Tribunal. Although the claimant's name and appeal number appear at the top of the decision granting permission, the claimant is later referred to as 'AG', and reference is made to "*evidence from Brac Bank*". There was no evidence from "*Brac Bank*". It is unclear why this appears in the grant of permission.

15. At the outset of the 'error of law' hearing Mr Tufan accepted that the ETS SELT SOURCE DATA document relating to the claimant was marked as 'questionable'. He was unable to explain why the grounds asserted to the contrary. He nevertheless submitted that the fact that the ETS tests results were not 'invalid' did not exclude the possibility that the claimant knowingly used a proxy tester, and that the judge should have considered other reasons why a competent English speaker may still wish to use a proxy tester. Mr Tufan confirmed that no issue had been raised by the SSHD in respect of the claimant's compliance with all the Eligibility requirements under Appendix FM, including that related to the financial and immigration status requirements.

16. We indicated that we did not need to hear from Ms Christie and that we were minded to dismiss the SSHD's appeal, but that we would reserve our decision. We heard submissions from both representatives in respect of an application by the claimant for a costs order against the SSHD and reserved our decision on this application.

Discussion

17. We are at a loss to understand how the author of the Grounds of Appeal could assert that the judge inaccurately categorised the claimant's ETS test as 'questionable' rather than 'invalid'. The ETS test result is incontrovertibly clear. There is no basis whatsoever for asserting that the claimant's English language test was found to be 'invalid.' This factual inaccuracy fundamentally undermines the principle criticism levelled by the SSHD against the First-tier Tribunal judge. The judge was fully entitled to rely on the distinction between a 'questionable' and an 'invalid' test result, considered in light of the observations of the Court in **Shehzad**, in concluding that the SSHD had not discharged the initial evidential burden. In so doing the judge additionally took into account the findings of the joint expert's report detailed in **MA (ETS – TOEIC testing)** [2016] UKUT 450 (IAC). We can discern no legal error in the judge's reasoning from [49] to [56]. The judge properly directed himself in respect of the correct legal test and applied that test to the evidence before him.

18. Having found that the judge was entitled to conclude that the initial evidential burden had not been discharged, we do not need to consider his alternative finding that the claimant offered a plausible explanation and that he took the test himself. We are nevertheless satisfied that the judge did give adequate reasons for

finding that the claimant provided a plausible innocent explanation. The SSHD's complaint centres on the weight attached by the judge to the applicant's proficiency in English and the failure to give adequate reasons "… *for holding that a person who clearly speaks English would therefore have no reason to secure a test certificate by deception*."

19. The SSHD relies on an extract from **MA**. At [57] the Tribunal stated,

> Second, 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 <u>other</u> explanations for deceitful conduct in this sphere. We are not required to make the further finding of <u>why</u> 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.

20. This extract must be considered in its proper context. The Tribunal had already concluded that the Appellant had engaged in deception. The Tribunal found there were "*significant gaps*" and "*notable discrepancies*" in the Appellant's evidence, and that his account was "*vague and hesitant*". **MA** is not authority for the proposition that a judge, having found that an Appellant was, at all material times, sufficiently proficient in English, is then obliged to speculate as to why that person may nevertheless have had a reason to use a proxy test-taker. In any event, at [57] and [58] the judge identified several reasons in support of his conclusion that a plausible innocent explanation had been provided, in addition to the applicant's proficiency in English. This included the findings of the joint expert report in **MA** highlighting concerns with the accuracy of the ETS test-checking process, the judge's acceptance of the claimant's evidence regarding his preparation for the ETS test, his account of the fees he paid for the test, and the corroborative evidence of his partner, whom the judge found "*honest and reliable*." The judge approached the claimant's explanation on a holistic basis and gave cogent and legally sustainable reasons for his conclusion.

21. We finally consider the SSHD's challenge to the judge's Art 8 assessment. We agree with the claimant's rule 24 response that the SSHD's complaint is hopeless. Having found that the allegation of fraud had not been made out, and that the claimant had not infringed the Suitability requirements, and there being no dispute that the claimant met all the other requirements of the immigration rules for leave to remain as a spouse, the judge was unarguably correct in concluding that the proportionality assessment fell in the claimant's favour. If any support is necessary for this conclusion, we rely on **TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department** [2018] EWCA Civ 1109, at [34]. The Court of Appeal held, in the context of applications for leave to remain by persons already in the UK, that, where a person satisfies the immigration rules, whether or

not by reference to an Art 8 informed requirement, this will be positively determinative of that person's Art 8 appeal, provided their case engages Art 8(1), for the very reason that it would be disproportionate for that person to be removed.

Notice of Decision

the First-tier Tribunal's decision did not involve the making of an error on a point of law.

The SSHD's appeal is dismissed.

30 October 2018

Signed Date

Upper Tribunal Judge Blum

DECSION ON APPLICATION FOR A COSTS/EXPENSES ORDER UNDER RULE 10(3)(d)

1. In his rule 24 Response, and at the 'error of law' hearing on 12 October 2018, the claimant made an application for an award of costs under rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008 against the SSHD.

2. The claimant contends that the SSHD acted unreasonably in challenging the First-tier Tribunal's decision on the basis that the Tribunal misinterpreted the ETS look-up tool result as being 'questionable' rather than 'invalid'. The claimant contends, *inter alia*, that it would have been clear to any reasonably competent civil servant that the ETS test result was 'questionable' and not 'invalid', and that it was not until the morning of the 'error of law' hearing that the SSHD's representative accepted that the appeal proceeded on the wrong premise. The claimant further submits that the duty of candour required the SSHD to bring to the Upper Tribunal's attention the inaccurate references in the grant of permission to matters unrelated to the appeal (such as the reference to 'Brac Bank'), and that, despite being aware of extensive expert evidence about the limited nature of the SSHD's evidence and his inability to link English language tests to individuals, the SSHD failed to disclose this evidence in the claimant's case.

3. Mr Tufan did not request an adjournment to enable him to deal with the costs application and did not request any more time to respond to the application for wasted costs. He submitted that the claimant knew what the case against him was, and that a 'questionable' result did not mean that the claimant would inevitably have succeeded in his appeal.

4. In assessing whether the SSHD acted unreasonably in challenging the First-tier Tribunal decision in the proceedings in the Upper Tribunal we have considered the decisions of **Ridehalgh v Horsefield** [1994] Ch 205, **Cancino (costs – First-tier Tribunal – new powers)** [2015] UKFTT 00059 (IAC), and **Thapa & Ors (costs: general principles; s 9 review)** [2018] UKUT 00054 (IAC). We have additionally had regard to the Presidential Guidance Note No 2 of 2018 on wasted costs and unreasonable costs. we note that the basic test is whether there is a reasonable explanation for the conduct under scrutiny.

5. We further note that the award of costs is always discretionary, even in cases where the qualifying conditions are satisfied, that orders for costs will be very much the exception rather than the rule and will be reserved to the clearest cases, and that any application for wasted costs will be governed in the main by the principles of fairness, expedition and proportionality.

6. Our reasons for granting the application are as follows. The conduct that is under consideration is the respondent's application for permission to appeal, and his pursuit of the appeal to the Upper Tribunal hearing, on the basis that the First-tier Tribunal judge arguably erred in law in finding that the SSHD had not discharged the initial evidential burden in an ETS case. The first and principle ground was

entirely premised on the First-tier Tribunal's alleged misinterpretation of the ETS evidence. The ground contends that the judge erred in finding ETS's assessment to be 'questionable' when it was in fact 'invalid'. We are satisfied beyond doubt that the ETS assessment concluded that the applicant's test result was 'questionable' and not 'invalid'. A very specific factual assertion was made in the grounds that was wholly inconsistent with the actual documentation that we consider must have been before the author of the grounds when they were settled. It is almost inconceivable that grounds asserting a factual mistake by a judge could have been settled without consideration of the ETS test Result at Annex A of the supplementary bundle of documents. We do not consider that a hypothetical reasonably competent civil servant would could have settled and relied on a principle ground of appeal that contains a fundamental and obvious factual error. Mr Tufan was unable to offer any reasonable explanation for this fundamental misapprehension of the evidence.

7. The remaining grounds only came into play if there was an arguable error in respect of the judge's assessment as to whether the SSHD discharged the initial evidential burden. For the reasons given by the judge, and in light of his accurate assertion that the ETS test result was not 'invalid', his conclusion was unassailable in the context of the principle challenge mounted in the grounds.

8. The SSHD's inaccurate and, we find, unreasonable conduct in respect of the ETS test result directly caused the claimant to incur the costs of having to pay counsel to draft issue a detailed rule 24 notice and to appear at the 'error of law' heating. We find there is a direct causal link between the unreasonable conduct and the costs incurred.

DECISION

9. The application for an unreasonable costs order is duly granted.

10. We do not consider it appropriate to award the claimant the legal fees for the adjournment request (£300), or counsel's costs for drafting the adjournment request (£900). The adjournment request was not granted and was without merit given the ability of alternative counsel to represent the claimant. We do however consider it appropriate to summarily award the claimant the costs of preparing the appeal hearing and counsel's fees for preparing the appeal hearing, including the drafting of the detailed rule 24 response (amounting to £2,250). The SSHD will pay the claimant's wasted costs in the sum of £2,250.

30 October 2018

Signed Date

Upper Tribunal Judge Blum