



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/23081/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 26 June 2018

Decision & Reasons Promulgated  
On 24 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS SAOVANEE KULTHUM  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr C Avery, Senior Presenting Officer

For the Respondent: Ms L Appiah, counsel instructed by Vine Court Chambers

**DECISION AND REASONS**

1. In this decision the Appellant is referred to as the Secretary of State and the Respondent is referred to as the Claimant.
2. The Claimant a national of Thailand, date of birth 1 January 1982 appealed against the Secretary of State's decision dated 20 September 2016 to refuse the grant of further

leave to remain as the spouse of a settled person under the Immigration Rules. First-tier Tribunal Judge Flynn (the Judge) decided [D] to allow the appeal on human rights grounds on 2 March 2018. Permission to appeal was given on 6 April 2018 by First-tier Tribunal Judge Pickup.

3. The Secretary of State's grounds essentially argue that the Judge has incorrectly carried out the exercise by reference to the established case law. In examining whether or not the Claimant had used a proxy test taker as long ago as 2013 which test result was subsequently used for immigration application purposes. The refusal was therefore mounted by the Secretary of State in the original decision on the basis of use of deception. The Judge considered the matter and Mr Avery submitted that it was surprising, when the Judge having set out the relevant case law, that she concluded that the Secretary of State had not discharged the burden of proof to show that at least the evidence was sufficient to engage and support the assertion that a proxy test taker had been used. There was before the Judge a discrete bundle specifically addressing the evidence sometimes referred to as 'generic evidence' from the Secretary of State relying upon the ETS outcomes particularly the look up tool and the source data provided. In addition there was the evidence, which again the Judge referred to, to show that the Synergy Business College, at which the Claimant was said to have taken the test, had been the subject of Operation Façade and that a very significant number of its test results had been found to be questionable or invalid.
4. As is clear from the case law, which the Judge cited, particularly *SM and Qadir* [2016] UKUT 229, as further referred to by the Court of Appeal in *Majunder* [2016] EWCA Civ 1167 the 'generic evidence' was sufficient for the purposes of showing that there was the likelihood that a proxy test taker had been used. Although the Judge did not refer to it, as the Tribunal in *SM and Qadir* identified, once that first hurdle has been crossed by the Secretary of State it then fell upon the test taker to provide an innocent explanation of events so as to satisfy a Judge that on the balance of probabilities deception had not been used by with a proxy test taker.

5. The Judge made no reference to any evidential burden being upon the Claimant but rather and somewhat curiously [D59 and 60] concluded with reference to the evidence provided by the Respondent that there was nothing that related to the Claimant and more particularly that the Respondent had failed even to discharge a burden of showing the likelihood of proxy test taking having been used. Accordingly the Judge who had formed a favourable view of the Claimant's evidence plainly did not approach it in the correct way. Rather the Judge assumed that it was a requirement for the Secretary of State to prove on a balance of probabilities that a proxy test taker had been used whereas that is not as the case law makes plain the relevant approach.
6. In the circumstances it is unfortunate, when in many other respects a very thorough and careful decision was made, that this error of law should have crept into the Judge's decision: Perhaps, I suspect, because the Judge had formed a very favourable view of the Claimant's evidence and that of her witness. I find the Original Tribunal's decision on the use of the proxy test taker cannot stand.
7. The Judge further went on plainly affected by the fact it was an appeal constrained by human rights grounds. Having found that the Claimant did not use a proxy test taker the Judge concluded that there was nothing, although she did not express it correctly in the public interest, in maintaining the Respondent's decision and that the decision was therefore disproportionate. Those considerations are as the Judge expresses it so inextricably linked with the idea of insurmountable obstacles and how the judge has approached that: Although I would have to say it seemed to me somewhat incorrectly. Nevertheless, the Original Tribunal's decision on the human rights grounds cannot stand and will have to be remade. It is very unfortunate that this will have to be done.

## **DECISION**

8. The appeal is allowed to the extent that it is to be remade in the First-tier Tribunal.

**DIRECTIONS**

- (1) List for hearing not before FTTJJ Flynn or Pickup.
- (2) List Taylor House, two hours, two witnesses. The likelihood is that a further witness statement is required from the Appellant specifically addressing the 'innocent explanation' point.
- (3) Any additional statements to be served not less than ten working days before resumed hearing.
- (4) No anonymity direction is made.

Signed

Date 4 July 2018

Deputy Upper Tribunal Judge Davey