



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA003962016

THE IMMIGRATION ACTS

**Heard at Manchester
on 3rd August 2017**

**Decision and
Promulgated
on 7th August 2017**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

**MR. ZAHEER KHALID
(no anonymity direction made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr Brown of Counsel, instructed by Equity Law Chambers
(Oldham)
For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The respondent appeals against a determination by First-tier Tribunal Judge Ransley promulgated on 7 November 2016. For convenience, I will continue to refer to the parties as they were in the First-tier Tribunal.
2. The appellant is a national of Pakistan who applied for leave to remain on the basis of his family life with his wife, a British national, and their child born in October 2014.
3. His application was refused on suitability grounds. He had submitted an English-language test certificate in a Tier 4 student application dated 28 March 2013. The test was taken on 24 April 2012 at the Synergy Test

Centre, London. The test certificate was subsequently withdrawn by ETS on discovering widespread fraud at the test centre.

4. The appellant and his wife attended a marriage interview on 11 February 2015. On 26 October 2015 he attended a further interview to assess his credibility. The respondent concluded he had obtained his certificate by deception. This was on the premise the appellant arranged to have someone else take the test in his place and such conduct was relevant to the suitability grounds.

The First tier Tribunal

5. Both parties were represented at the hearing. The judge stated that it was for the respondent to establish on the balance of probabilities that the English language test certificate had been obtained by fraud. The presenting officer had relied on Annex E of the respondent's bundle. This is a document stating that the appellant's certificate was questionable. The judge accepted the point made by the appellant's representative that the certificate had not been classified as invalid. The generic statements normally contained in such cases had not relied upon by the respondent.
6. The presenting officer relied upon the content of the two interviews referred to. The appellant's representative said that the refusal letter did not make it clear what issues were taken about the interview. The judge accepted this submission.
7. The appellant gave details about sitting the test, stating he had travelled from Oldham to London to do so. The judge also noted that the appellant was able to give his evidence in English.
8. There was no issue at hearing in relation to why the appellant travelled from Oldham to London to take the test at the centre which subsequently was found to have been the site of widespread abuse.
9. The judge concluded by finding that the respondent has failed to discharge the burden of proof to substantiate the allegation of deception. Consequently, this being the only issue, the appeal was allowed.

The Upper Tribunal

10. Permission was granted on the basis that it was arguable that the judge failed to carry out a proper assessment of suitability issues in line with the guidance in SM and Qadir (ETS - evidence - burden of proof) [2016] UKUT 229.
11. At hearing I was referred to the two interviews of the appellant contained in the bundle. It was accepted that no specific parts of the interview were highlighted as showing a lack of ability in English. It was pointed out that the English language certificate was classified as questionable rather than invalid.

Consideration

12. In SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC) the Upper Tribunal referred to the evidential burden upon the respondent to support the allegation made and the need to satisfy the legal burden. There is reference in the decision to switching burdens of proof. A large number of decisions had been taken following the outcry over the college and generic statements have been used to explain the voice recognition technology. Subsequently expert evidence was heard about flaws in the technology.
13. In the present appeal the judge was not faced with having to assess the generic evidence typical in such cases. The evidence from the respondent in support of the assertion of impersonation was different from that used in the earlier cases. It included the typical printout, only in this case the test result was questionable rather than invalid. The cited cases indicate that a questionable outcome is more to do with the testing centre's reputation. The other evidence related to the marriage and subsequent interview. However, the refusal letter did not make clear which aspects of the interview provided evidence of a lack of ability in English on the part of the appellant. The marriage interview simply records as a footnote that the appellant had basic English language skills but was evasive about where he did the test. The other interview simply records at the end that he was able to answer the questions in basic English.
14. The judge's conclusion at paragraph 22 was that the respondent had failed to discharge the burden of proof. In this scenario I find no material error of law in the judge's approach given the evidence or perhaps more accurately the lack of evidence specific to the appellant. The judge also had the benefit of hearing the appellant give evidence. The complications of switching burdens did not arise because the evidence to support the respondent's claim was so limited. In conclusion therefore the decision allowing the appeal shall stand.

Decision.

No material error of law has been demonstrated by the respondent in the decision of Judge of the First-tier Ransely. Consequently, that decision allowing the appellant's appeal under the immigration rules shall stand.

3rd August 2017

Deputy Upper Tribunal Judge Farrelly