



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/07876/2015

THE IMMIGRATION ACTS

Heard at Field House
On 26 July 2017

Decision & Reasons Promulgated
On 18 August 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

NAZMUL AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr. S. Karim, Counsel instructed by Apex Law Associates
For the Respondent: Mr S. Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. This appeal arises from the decision of the respondent on 10 February 2015 to refuse the appellant's application for further leave to remain as a Tier 4 (General) Student. The appellant appealed to the First-tier Tribunal where his appeal was heard by Judge Parker. By a decision promulgated on 21 April 2016, Judge Parker dismissed the appeal. The appellant is now appealing against that decision.

Background

2. The appellant is a citizen of Bangladesh born on 15 February 1989 who entered the UK on 18 September 2012 on a Tier 4 (General) Student visa.
3. On 22 August 2013 the appellant submitted an application for further leave to remain as a Tier 4 (General) Student. He included with the application two Test of English for Internal Communication (TOEIC) certificates issued by Educational Testing Service (ETS) in respect of tests taken on 28 June 2013.
4. On 20 September 2013 an email was sent from a Home Office email address, by a person identified as "Catherine T HST11- Temporary Migration Team" to the following email address: contactuk@etsglobal.org. The email stated:

"To whom it may concern

Please can you verify the details of a TOEIC test submitted as part of a leave to remain application. The relevant details are:

Name: Nazmul Ahmed

DOB 15 February 1989

Registration number 0044203041001078

ID Number: 2559210

Test date (both certs) 28 June 2013

Scores: Listening 440, reading 395, speaking 190, writing 180

Test location: ETS Global, 707 High Road, London N12 0BT

5. On the same day, a response was received from a person named Michael Kossow, whose title on the email is TOIEC Administrator, ETS Global UK and ES Africa. His email stated:

"Please can you send me a scanned copy of this candidate's score reports to help me verify them accurately"

6. On 23 September 2013 he was emailed the scanned copies.
7. On that day (23 September 2013) Mr Kossow replied, stating as follows:

"Thank you for the scans

We confirm that after checking our databases ETS Global B.V. has NO RECORD of Nazmul Ahmed having undertaken English tests with TOEIC/ETS in the UK."

8. Following this correspondence, the respondent rejected the appellant's application on the basis that the TOEIC certificates were not genuine.
9. In the Secretary of State's letter dated 10 February 2015 it is stated:

"I am satisfied that the documents were false because we have 3rd party confirmation from ETS Global UK who are the issuing authority that, after searching their databases, they have no record of you undertaking these tests with them in the United Kingdom. This was after they had

receive scanned copies of the two TOEIC certificates you submitted with your Tier 4 (General) application."

Decision of the First-tier Tribunal

10. The judge directed himself that as deception was being alleged, the burden of proof fell on the respondent.
11. The judge stated that he was satisfied that the email exchange between the respondent and ETS (which I have set out above in paragraphs 4-9) was "sufficiently cogent evidence" that the appellant did not sit tests with ETS.
12. The judge noted that the details in the respondent's email of 20 September 2013 were consistent with the information provided by the appellant. However, he noted that the address provided in the email of 20 September (ETS Global, 707 High Road, London N12 0BT), whilst consistent with the certificate submitted by the appellant, does not match where the appellant claims to have sat the test, which is Colwell College in Whitechapel. The judge did not attach significance to this difference as ETS stated that there was no record of the appellant taking a test at *any* location in the UK. The judge's conclusion, at paragraph 23, was that "the respondent was entitled to seek verification of the appellant's test results and, having done so, was entitled to rely upon the unequivocal response of the testing body".
13. At paragraph 24 the judge stated that it was open to the appellant to rebut the claim he had never sat a test with ETS, but had failed to do so. The judge described the appellant's rebuttal as "vague, evasive and lacking in credibility."
14. The judge drew an adverse inference from the absence of evidence of the appellant taking steps to contact ETS to try and resolve the issue, which the judge considered the appellant would have done if this had been a misunderstanding or mistake by ETS. The appellant claimed to have sent a letter to Colwell College (where he claimed to have sat the test) but there was no copy of the letter or evidence to support this. He claimed to have emailed ETS in 2014 but there was no evidence of an email being sent. The appellant claimed that the account from which he sent the email has been closed due to him forgetting the password but the judge did not find this credible. The judge noted that the only other attempt by the appellant to contact ETS was an email sent shortly before the hearing but that this was not sent to the email address with which the Home Office had corresponded despite this being available to the appellant for almost a year but instead to an address he found on the internet.
15. The judge noted at paragraph 28 that the appellant relied on a booking letter sent by Colwell College a week before the claimed test and a further letter advising of his results. The judge stated "I have had regard to these but no attempt has been made to put them to ETS for comment".

16. At paragraph 28 the judge also commented on the extent to which the appellant had improved between a test taken in 2012 and the 2013 test. The judge stated that the overall improvement from 5.0 to 6.5 was significant but he placed no weight on this in finding deception as such improvement is possible.
17. The judge noted the failure on the part of the appellant's representatives to submit evidence to rebut the respondent's evidence. He observed no steps had been taken by them to obtain such evidence.
18. An issue raised by the appellant was the respondent's failure to provide originals of the certificates whose genuineness was in dispute. The judge addressed this at paragraph 30 where he stated:

"The appellant's representative has referred to the respondent's failure to provide originals of the certificates but I am not satisfied that this is necessary in light of the evidence from ETS that the appellant did not sit tests with them and is not, therefore, entitled to any certificate. I am not satisfied that the production of the original certificates would add or detract from that evidence."

19. In paragraph 30, the judge concluded that the certificates were false as:

"The issuing body unequivocally stated that the appellant has never taken any test with them...The appellant has failed to provide evidence, or credible evidence of an attempt to obtain evidence, to counter ETS' statement."

Grounds of Appeal and Submissions

20. The grounds argue that there was not sufficient evidence to support a finding that the TOEIC certificates supplied by the appellant were forged or counterfeit.
21. They also contend that the appellant was treated unfairly as the original test certificates, which had been submitted by the appellant to the respondent when he made his application, were not produced by the respondent so that they could be verified. It is alleged that this amounted to procedural unfairness. It is also submitted that as the respondent's case was that the certificates were forgeries, an adverse inference should have been drawn against the respondent for failing to provide originals to the appellant and Tribunal.
22. The grounds also argue that the email from ETS did not state that the appellant did not sit a test with them but only that "ETS Global BV" had "no record" of the appellant undertaking the test. The grounds observe that there was no verification of the email by a witness statement or statement of truth. They also note the absence of a document verification report or witness statement explaining the analysis of the appellant's certificate.
23. It is also argued that there was no evidence explaining the relationship between ETS and the entity referred to in the email "ETS Global BV" and it is therefore not clear why

ETS Global BV would have records of the appellant's TOEIC test. It is also contended that given the unreliability of ETS in the UK, as highlighted in Upper Tribunal case law, information provided by ETS should be treated with a degree of circumspection.

24. A further argument in the grounds is that the judge erred by giving no weight to the appellant's score attained in a 2012 test, when this should have weighed in the appellant's favour by showing he did not need to use fraud.
25. It is also maintained that the judge erred in failing to give weight to the booking forms from Colwell College which provided additional documentary support for the appellant's case.
26. Finally, the grounds contend that undue weight was placed on the appellant failing to provide evidence from the centre where the test was taken.
27. Permission to appeal was refused by both the First Tier and Upper Tribunal. Following judicial review, permission was granted. Permission was granted on the basis that the judge arguably "went wrong" in applying the burden and standard of proof by not engaging in the three step exercise enunciated in SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC).
28. Mr Karim submitted that the judge failed to apply the three stage burden of proof test delineated in Qadir. His argument was that the appellant discharged the evidential burden of showing an innocent explanation in accordance with Qadir and the judge erred by failing to appreciate this. He maintained that the judge had effectively reversed the burden of proof by drawing an adverse inference from the appellant failing to take proactive steps, when the burden should have been on the respondent.
29. Mr Karim questioned what basis there was for finding a nexus between ETS itself and the entity that responded to the respondent's email and submitted that the judge had failed to address this.
30. Mr Kotas argued that this case has nothing to do with Qadir, which was about widespread use of proxy test takers. This is a case about a person who never took the test and used fraudulent certificates. The judge correctly identified that the legal burden fell on the respondent and for clear reasons found the burden was discharged. The appellant's attempts to explain himself were feeble and it was clear why the judge found against him. Mr Kotas rejected the suggestion that the person responding to the Home Office was not the appropriate person as it was clear from the email correspondence that he was.

Consideration

31. As is well known, there have been a large number of cases arising from allegations of ETS/TOEIC certificates being obtained fraudulently through the use of proxy test

takers. The Upper Tribunal in Qadir described there as being a “*relatively substantial cohort of so-called "ETS/TOEIC" cases*”.

32. This appeal concerns an entirely different allegation: that the appellant used counterfeit TOEIC certificates to deceive the respondent into accepting that he took a test with ETS when no such test was ever taken.
33. The focus of Mr Karim’s submissions was the contention that the burden of proof had been applied incorrectly. Accordingly, I address this point first.
34. In Qadir the Upper Tribunal considered the burden and standard of proof where it is alleged that an applicant for leave to remain has used deception and made clear that the party alleging deception bears the *legal* burden of proof. As stated in Shen (paper appeals: proving dishonesty) [2014] UKUT 00236 (IAC):

“At the end of the day the SSHD bears the burden of proof. This is a proposition which is uncontroversial and has been confirmed on many occasions.”

35. However, although the legal burden of proving that the appellant used deception lies on the respondent, there is a three stage process.
 - a) Firstly, the respondent must adduce sufficient evidence to raise the issue of fraud/deception.
 - b) Secondly, the appellant then has a burden of raising an innocent explanation which satisfies the minimum level of plausibility.
 - c) Thirdly, if that burden is discharged, the Secretary of State must establish on a balance of probabilities that this innocent explanation is to be rejected.
36. In terms of the standard of proof, there is one civil standard of proof (which is the standard to be applied). The seriousness of the consequences does not require a different standard of proof but flexibility in its application will involve consideration of the strength and quality of the evidence. The more serious the consequence, the stronger must be the evidence adduced for the necessary standard to be reached.
37. I do not agree that the judge has misapplied the standard or burden of proof. At paragraph 22 he explicitly stated that the burden is on the respondent to establish that the deception occurred and that the standard of proof was “balance of probabilities.” These are the correct legal tests. Although there is a shifting evidential burden, the fundamental point is that where, as in this case, the respondent is alleging deception it is for the respondent to prove her case. It is clear from the decision that the judge appreciated this.

38. I accept that the judge did not explicitly set out the three stage process. However, it is apparent from reading the decision as a whole that this is the approach that has been taken.
39. The first of the three stages is whether the respondent adduced sufficient evidence to raise the issue of fraud. The judge dealt with this at paragraph 23, where he stated that the email exchange between the respondent and ETS (as set out above in paragraphs 4 -9) was “sufficiently cogent evidence that the appellant has not sat tests with ETS”.
40. The second stage is whether the appellant has raised an innocent explanation that satisfies the minimum level of plausibility. Although it is clear from the decision that the judge did not find the appellant credible and did not accept his explanation, there is not an explicit finding as to whether the appellant’s explanation was so lacking in credibility that it failed to meet the low threshold of a minimum level of plausibility. However, I do not consider this to be a material error as it is apparent that the judge proceeded in any event to the third stage, where he considered the innocent explanation along with the other evidence before concluding that the respondent had established that on the balance of probabilities the innocent explanation should be rejected.
41. Accordingly, I am satisfied that the judge has properly applied the burden and standard of proof and that this appeal is unable to succeed on that basis.
42. I am also satisfied that the judge did not make an error of law by failing to find procedural unfairness because the respondent failed to produce the original test certificates. The judge was alive to the fact that the original certificates were not produced. However, he found that their production would not have made a material difference in light of the other evidence before him. In essence, the judge’s position was that even if the ETS certificates looked (or indeed were evaluated as most likely being) entirely genuine, that would be insufficient to overcome the other evidence before him which indicated the test was never taken.
43. The judge had before him email correspondence between a “Catherine T HST11-Temporary Migration Team” in the Home Office and a “Michael Kossow TOIEC Administrator, ETS Global UK and ES Africa” using the email address contactuk@etsglobal.org that he considered to be strong evidence the appellant did not take an ETS test. There are, as pointed out in the grounds of appeal, deficiencies in this evidence. It is no more than a print out of an email chain. It is not in the form of a witness statement. There is no explanation of the corporate structure in ETS to explain the connection between “ETS Global BV” and other parts of ETS. However, despite these shortcomings the email correspondence strongly indicates a test was not taken by the appellant. There is nothing about the email from Michael Kossow which suggests it is other than genuine and written after a proper search was carried out. It is notable that Mr Kossow asked to see the test scores before stating that there was no record of the appellant.

44. It was for the judge to weigh the evidence before him. After considering the email correspondence between the Home Office and ETS alongside the judge's findings about the appellant's credibility, I am satisfied that it was open to the judge to conclude that, even without the original certificates being disclosed (or subject to a verification analysis), the strength and quality of evidence indicating that deception took place was sufficient for the respondent to discharge the burden of proof.

Decision

A. The appeal is dismissed.

B. The judge has not made a material error of law and the decision of the First-tier Tribunal stands.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 17 August 2017