



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA 26520 2015

THE IMMIGRATION ACTS

Heard at TAYLOR HOUSE
On 24th April 2017

Decision & Reasons Promulgated
On 4th May 2017

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL
Ms. GA BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR AZIZUR RAHMAN

Claimant

No anonymity order made

Representation:

For the Appellant: Mr E. Tufan (Home Office Presenting Officer)
For the Respondent: Mr M. Hasan (Lincoln's Chambers solicitors)

DECISION AND REASONS

1. The appellant in these proceedings is the Secretary of State. I shall refer to the parties as "the Secretary of State" and "the Claimant." This matter comes before me

for consideration as to whether or not there is a material error of law in a decision and reasons of the First-tier Tribunal (Judge Harrington) (“FTT”) promulgated on 8th July 2016, in which she allowed the appeal under the Immigration Rules with reference to paragraph 322 (2) and paragraph 245ZX Appendix A and C.

Background

2. The claimant is a citizen of Bangladesh whose date of birth is 23.8.1989. He entered the UK with valid leave as a student in 2009 and thereafter made two further successful applications. On 3rd August 2014 the Claimant applied for leave to remain as a tier 4 student. The Secretary of State refused the application on 14.7.2015 on the grounds that paragraph 322(2) of the Immigration Rules applied, in that false documents were produced and relied on in a previous application. The Claimant was awarded 30 points under Appendix A and 10 points under Appendix C.

3. The Secretary of State refused the application on the grounds that the Claimant had used a test taken by a proxy tester and that he had completed his application form dishonestly. The Secretary of State relied on generic evidence of Collings, Millington, Singh and Professor French, together with the ETS test analysis and relevant schedule/entry in respect of the Claimant. The Claimant relied on evidence including his BA degree, further test score report and email communications as between himself and the ELTS dated 24th March 2015 and 4th June 2015.

FTT decision and reasons

4. In its decision the FTT made reference to the relevant burden and standard of proof at [11 -14]. The FTT considered the evidence which included the oral evidence of the Claimant at the hearing [28]. The Secretary of State’s representative submitted that the burden and standard of proof was as expressed in **SM & Qadir v SSHD (ETS-Evidence - burden of proof) [2106] UKUT 00229(IAC)** [29]. There was an evidential burden on the Secretary of State to show dishonesty and thereafter if the Claimant raised an innocent explanation the legal burden reverted to the Secretary of State. The FTT decision recorded that the Claimant submitted that the burden was “beyond reasonable doubt “[30].

5. The FTT found at [45] that certain matters suggested that the Claimant’s test was unlikely to be fraudulently obtained. It further found that his degree was taught in English and awarded in 2014, it found limitations in the evidence of Singh that on the same day (13th December 2011) as the Claimant’s test was taken, 32% of the tests were questionable and 68% of the tests were invalid. The FTT found that the Claimant took and passed a further test on 15th June 2013 which showed progression. The Claimant lived in the UK since 2009 and studied in English, and his evidence about attendance at the test centre was unchallenged. The FTT considered the assertion that the test was invalid with reference to a computer spread sheet [46]. The FTT found evidence to the contrary in the letter from ETS dated 4th June which

stated “because the validity of your test results could not be authenticated, those scores from the test taken on ... have been cancelled.” The FTT preferred the direct evidence from ETS which specifically related to the Claimant and found it to be more reliable evidence to show that the test was “questionable” rather than “invalid” [50]. It was on that basis that the FTT concluded that the case had not been proved on the balance of probabilities [52]. The FTT reasoned that the ETS letter dated 4th June was more consistent with the test being questionable, there were difficulties in the generic evidence as to the process that meant that a false positive test could not be discounted as “inherently implausible” and the evidence of the Claimant’s past immigration, account of the test itself and academic history suggested that it was “unlikely” to be a fraudulent test. The FTT found that the Claimant was a truthful witness in that he had made a mistake in completing his application form [54] and that the Secretary of State failed to show that he deliberately made an dishonest statement in his application form.

Grounds for application for permission

6. In lengthy grounds the Secretary of State contended that the FTT erred by failing to apply the correct burden and standard of proof in **SM & Qadir**, and that it failed to properly consider the evidence of Professor French that rendered the conclusions made by Dr Harrison unsustainable (paragraphs 1-23).

7. In the second ground it was contended that the FTT made a material misdirection in law by failing to consider the evidence as a whole including the two statements and the spreadsheet which identified that the test was invalid because it had been taken by a proxy tester. The FTT incorrectly and speculatively attributed to the letter from the ELTS an explanation that the test was cancelled rather than found to be invalid.

Permission to appeal

8. Permission was granted on renewal by DUTJ Davey in terms that the grounds at paragraphs 3-27 raised an arguable error in law in the FTT’s understanding and reasoning upon the ELTS evidence and the ETS letter of 4th June 2015.

9. I observed that in dealing with the application for permission the FTT decision was headed as a refusal, when it is clear from the wording at paragraph 3 that UTJ Deans granted permission on the grounds that it was clear that the Judge made errors in concluding that the Secretary of State had not discharged the legal burden of proving dishonesty. UTJ Deans found no arguable error in the findings made as to the report of Professor French.

10. At the hearing before me I drew attention to the mistake in the grant of permission by UTJ Deans. I proposed to deal with the matters raised in ground 2

only. I found no arguable errors in the FTT's consideration of the evidence of professor French.

Submissions

11. Mr Tufan relied on **MA (ETS -TOEIC testing) [2016] UKUT 450 (IAC)** at (50-51) where the Upper Tribunal (UT) concluded that the evidence of the spreadsheet was reliable as to the invalidity of the test assessment. The UT found no relevance in the letter from ETS as to the first phase of the tests.

12. Mr Hasan argued that the FTT applied the correct burden and standard of proof following **SM & Qadir** at (57). The three cases cited all referred to the evidential burden on the Secretary of State as having been discharged on the evidence. Mr Hasan argued that the FTT had accepted that the Claimant provided an innocent explanation by relying on his evidence that he was awarded a degree and that he had no reason to use deception in the test. The Secretary of State failed thereafter to discharge the legal burden by not responding to the letter dated 4th June from ETS. Mr Hasan argued that in any event the test certificate could not be relied on as it stated in the bottom right hand corner that after two years it was invalid. He argued that there was no audio recording produced in this case.

13. Mr Tufan responded that the ETS letter was non committal and that it was the spread sheet that was determinative of the validity of the tests. The case of **Shezad & another [2016] EWCA Civ 615** considered the ETS position. The evidence as to the Claimant's degree was not reliable as the degree was awarded some 3 years after the date of the tests and not reflective of the Claimant's proficiency in English at the date the test was taken in 2011.

14. At the end of the hearing I reserved my decision which I now give with my reasons.

Discussion and decision

15. I find that there were material errors in law by the FTT in that it is not clear that the FTT was applying the shifting burdens of proof to the appropriate standard following the guidance in **SM & Qadir** and more recently in **MA (ETS-TOEIC testing) Nigeria [2016] UKUT 450 (IAC)** and **Shezad** (para 3). There was no reference made in the FTT decision to any evidential or legal burden or to the issue of any innocent explanation raised by the Claimant. The FTT purported to apply one standard of proof, namely the balance of probabilities to the evidence and yet also referred to "inherent implausibility" which is suggestive of a different standard. I am satisfied that the FTT's reliance on the ETS letter as evidence of the test being in the "questionable" category is misconceived and there is no evidence to show that there was any irregularity in the procedure. The generic evidence together with the spread sheet source data and test centre look up tool are sufficient to discharge the

evidential burden on the Secretary of State and I conclude that the FTT erred in finding otherwise. Accordingly I set aside the decision made by the FTT.

Remaking the decision

16. I proceed to re make the decision having regard to the evidence that was before the FTT and the submissions made to me by the representatives. I am satisfied that the evidence relied on by the Secretary of State was sufficient to discharge the evidential burden to show that the Claimant's test was taken by a proxy taker. I find that the evidence of the "invalid " tests is reliable as it includes the generic witness statements, the test results for 2011 test, the project façade enquiry re Elizabeth College at the material time, and the spread sheet and reference to the look up tool to the Claimant. In considering if there is any innocent explanation put forward by the Claimant, I place little weight on the fact of his obtaining a degree in 2014 as this is not reflective of his proficiency in English at the date of the tests in 2011. As stated above the letter dated 4th June from ETS cannot be read to mean that the test results were questionable and to do so amounts to speculation and misinterpretation, and in any event the letter makes clear reference in general terms to the presence of a proxy test taker in the second paragraph. The Secretary of State relied on the evidence that the test was not taken by the Claimant. There was no evidence produced of any audio recording, but that has little bearing on the evidence relied on. I reject Mr Hasan's submission that the test certificate itself was not capable of being validated.

17. I find no evidence of innocent explanation of any element of the *prima face* case of deception established against him put forward by the Claimant. There was no proper consideration by the FTT as to why the Claimant would engage in TOIEC fraud even if he was proficient in English (MA paragraph 57) and the Claimant has put forward none that can be relied on. It follows therefore that there can be no further transfer of proof to the Secretary of State. I have also considered the evidence of the scores from the test taken in 2011 and from the further test taken in June 2013 and found inconsistencies. In 2011 the score achieved for speaking was level 6 and for writing level 7, whereas in 2013 the score is level 6.5 for speaking and level 5.5 for writing. I find significant discrepancies as between the scores for writing such that there is a marked decrease in standard from level 7 to level 5.5, and in speaking there is a slight improvement of 0.5. I find that this evidence together with all the evidence in the round causes me to conclude that the Claimant did use a proxy test taker in 2011.

18. There is a material error of law in the decision and reasons which is set aside. I remake the decision by substituting a decision to dismiss the appeal as the general ground for refusal under paragraph 322 has been met.

19. The Secretary of State's appeal is allowed and the Claimant's appeal is dismissed under the Immigration Rules.

Signed

Date 3.5.2017

GA Black
Deputy Judge of the Upper Tribunal

NO ANONYMITY ORDER

NO ORDER FOR FEE AWARD AS THE APPEAL IS DISMISSED.

Signed

Date 3.5.2017

GA Black
Deputy Judge of the Upper Tribunal