Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26549/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 July 2017	**On 17 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HARMINDER SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr A Rehman of Mayfair, Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing an appeal by the applicant against the decision made on 8 July 2015 refusing him further leave to remain as a Tier 4 student. In this decision, I will refer

to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Secretary of State as the respondent.

Background

2. The appellant is a citizen of India, born on 12 December 1984. He arrived in the UK on 8 September 2006 with leave to remain as a student until 31 October 2009. On 21 April 2010 he was granted further leave to remain as a Tier 4 general student until 14 January 2011 and on 2 March 2011 he was again granted further leave to remain in the same capacity until 30 April 2014. On 10 August 2012 the respondent curtailed his leave until 9 October 2012. He was then granted leave until 3 February 2015 but his leave was curtailed on 18 June 2014 to expire on 22 August 2014, when he submitted a Tier 4 application for further leave to remain.

3. This application was refused firstly, on the basis that the appellant had submitted TOEIC certificates from Educational Testing Service ("ETS") which were fraudulently obtained by the use of a proxy test taker and secondly, because he did not have a valid CAS as the reference number indicated that it had been withdrawn by his sponsor and in consequence he could not meet the points requirements set out in Appendix A of the Rules.

The Hearing before the First-tier Tribunal

4. At the hearing before the First-tier Tribunal the appellant gave evidence that in order to seek entry clearance, he had sat an IELTS test in India and had scored in the 5.5 band. In May 2014 he had set the test again and had scored in the 6 band. He said that he had sat the ETS test twice, the first at Eden College and the second at South Quay college. When cross-examined, he denied that he had used a proxy to take the tests at these colleges.

5 The judge considered the issues arising from the allegation that the appellant had submitted a fraudulent ETS certificate in support of his application at [38] – [52] of his decision. He referred to the evidence submitted by the repondent including the witness statements from Rebecca Collins and Peter Millington, the ETS spreadsheet confirming that the appellant's TOEIC test was invalid, the report by Professor French, a statement from Sonya Poulter and the Home Office documentation containing extracts from the investigation "Project Façade" into Eden College and South Quay College.

6. The judge then referred to the guidance in the following authorities: SM and Qadir (ETS - Evidence-Burden of Proof) [2016] UKUT 229, Secretary of State v Shehzad and Chowdhury [2016] EWCA Civ 615 and MA (ETS – TOEIC) [2016] UKUT 450. He referred to the generic statements from Rebecca Collins and Peter Millington. He said that, having carefully perused the statement of Sonya Poulter, it also had a generic appearance to it. He noted the contents of the report from Professor French in which he concluded that the process adopted by ETS in discovering which individuals had not sat the test was stringent and would have resulted in a "false

positive" rate of less than 1%. The judge commented that this document again had a generic appearance and it did not expressly state that the appellant did not sit the test.

7. The judge referred to the articles from Project Façade showing that 77% of those who sat the test at Eden College during the material period and 67% who sat it at South Quay College had their results declared invalid but said that this was not specific evidence which showed that the appellant did not sit the test, let alone that he fell within the 77% and 67% figures. He referred to the spreadsheet attached to Sonya Poulter's statement stating that the test undertaken at Eden College was invalid but commented that it did not specifically make clear that the reason was because a proxy had taken the test on the appellant's behalf and the results of the test undertaken at South Quay College did not even go so far as to say that he results were invalid, simply that they were questionable.

8. The judge said that in the decision letter the respondent had asserted that ETS undertook a check of the appellant's test and confirmed that there was "significant evidence" to conclude that his certificate was obtained by the use of a proxy but he was not persuaded that the respondent had served any such "significant evidence". The judge then said at [52] that whilst he had taken into account all the additional evidence provided, in light of his above concerns, he was not persuaded that the respondent had discharged the evidential burden placed upon her.

9. So far as the ground relating to the CAS was concerned, the application was refused on the basis that the appellant's education provider had had its licence removed from the Sponsor Register. It was conceded by the respondent's representative at [54] that if the judge found in the appellant's favour, the respondent had erred by not granting him 60 days leave to find another college to study at in accordance with their policy and the appeal should be allowed on that basis. The judge agreed and said that as the respondent had refused to grant the appellant 60 days leave to find a new college, that amounted to an error of law and the appeal was allowed on that basis. The notice of decision records that the appeal was allowed under the Immigration Rules but the intention was clearly only to allow the appeal on the limited basis as conceded in accordance with the policy.

<u>The Grounds of Appeal and Submissions</u>

10. In the first ground it is argued that the judge erred in law by allowing the appeal because the respondent did not give the appellant 60 days to find a new sponsor when the withdrawal of the CAS was an issue for the sponsor not the respondent. The second ground argues that the judge erred in law by his "in limine rejection of the respondent's evidence as even sufficient to shift the evidential burden".

11. Mr Tufan adopted his grounds. He accepted that he may be in difficulties with the first ground in the light of the concession recorded at [54] of the decision but he argued that in the light of the terms of the policy the judge should not have

accepted that concession. On the second ground, he submitted that the judge had erred by finding that the respondent had failed to discharge the evidential burden on the basis that the evidence relied on was generic. The judge had failed to analyse the evidence properly or to grapple with the issues arising from the further evidence in Professor French's report or to consider the implications in the evidence in the spreadsheet setting out an invalid and questionable test result for the appellant.

12. Mr Rehman submitted that the judge was right to act on the concession made by the respondent and had been entitled to allow the appeal on the basis that it was not in accordance with the law. So far as whether the appellant had use a proxy test taker, the judge had considered all the evidence including the appellant's account of events. He had been entitled to take the view that the further evidence produced by the respondent did not advance her case. The judge had in reality, so he argued, followed the threefold approach of considering whether the respondent had discharged the evidential burden upon her, the appellant's explanation and then, whether the respondent had discharged the legal burden of proving that a fraudulent certificate had been produced.

Assessment of whether the First-tier Tribunal erred in law

13. I shall deal firstly with the issue of whether the judge erred in law by acting in accordance with the concession made by the presenting officer by allowing the appeal on the basis that the respondent should have granted the appellant 60 days leave to find a new sponsor. I am not satisfied that he did. If a policy is to be relied on, it should be proved and produced in evidence. It is not clear whether it was and it appears that there were no submissions about the terms of the policy, probably in the light of the concession. In any event, it was the respondent's policy and the judge was entitled to rely on the concession by the presenting officer on the terms and the consequences of the policy in the circumstances this appeal and he did not err in law by doing so.

14. I now turn to the second ground of the appeal. This raises the issue of whether the judge properly applied the approach to the evidence set out in SM and Qadir at [57]-[59] when assessing whether the appellant had submitted a fraudulent test certificate and, in particular, whether in his decision he was simply considering the first stage, whether the evidential burden had been discharged, or, as Mr Rehman argues, he adopted the threefold approach set out in that decision and found that the respondent had failed to discharge the burden of proof on a balance of probabilities.

15. The three-stage approach identified in SM and Qadir can briefly be summarised as firstly, whether the respondent could satisfy the evidential burden of showing that there was evidence to justify the assertion of fraud or dishonesty; secondly, whether the appellant was able to raise an innocent explanation and, if so, whether, thirdly,

the respondent could discharge the legal burden of showing on a balance of probabilities that the assertion of fraud or dishonesty was made out.

16. Mr Tufan argued that the judge had only considered the first stage, whether the respondent had satisfied the evidential burden, and that his finding that this burden had not been discharged was not properly open to him. Mr Rehman argued that when the decision was read as a whole, it was clear that the judge considered all aspects of the threefold approach.

17. I am not satisfied that it can be argued that in [38]-[52] the judge was considering and applying all three stages of the approach to the evidence. He focused solely on the initial issue of whether the evidential burden was discharged and explained why he found that not to be the case. He recorded the appellant's evidence and his explanation of events but he made no finding on it and there is nothing to indicate whether he accepted it or not. The fact that he did not make any such findings indicates to me that it was his view that it was not necessary for him to do so in the light of his explicit finding at [52] that the respondent had failed to discharge the evidential burden.

18. This leads to the issue of whether, as Mr Tufan argues, the judge reached a decision properly open to him on whether the evidential burden had been discharged or whether to use the words of Beatson LJ in [26] of Shehzad and Chowdhury his in limine rejection of the respondent's evidence even to shift the evidential burden was an error of law. On that issue, at (30) of the Court of Appeal's judgment, Beatson LJ said:

> "But, in circumstances where the generic evidence is not accompanied by evidence showing that the individual under consideration's test was categorised as "invalid", I consider that the Secretary of State faces a difficulty in respect of the evidence of the initial stage."

19. I am not satisfied that the respondent faced any such difficulty in the present case. There was evidence that the appellant's test taken at Eden College was identified as invalid. I am not satisfied that the failure to make it clear in the spreadsheet that the reason was because a proxy had taken the test undermines the fact that there was specific evidence relating to the appellant to support a contention that his result had been obtained by fraud: the generic evidence was sufficient to provide a adequate basis for an inference that it was invalid because it was taken by a proxy. Further, there was specific evidence relating to the test taken at South Quay College by the appellant which, even though assessed as questionable, was capable, even if only to a limited extent, of supporting a finding that his test at Eden College was taken by a proxy.

20. There was also evidence in the articles from Project Façade setting out the percentages of those taking the test at Eden College and South Quay College whose tests were declared invalid. Whilst these percentages do not in themselves indicate that the appellant did not sit the test, they form part of the background

against which his evidence of an innocent explanation can be assessed and the evidence is at least capable of providing support for the respondent's assertion that the tests taken by the appellant were by proxy.

21. Further, the judge's comment that the decision letter had asserted that ETS had confirmed that there was "significant evidence" to conclude that the certificate was obtained by use of a proxy but the respondent had failed to serve any such "significant evidence" does not take the matter any further. In order to discharge the evidential burden, the respondent did not necessarily have to produce significant evidence but sufficient evidence to discharge the evidential burden. I am satisfied that the respondent did so and that the judge reached a decision on this issue which was not properly open to him on the evidence and so erred in law. The evidence produced by the respondent was clearly sufficient to shift the evidential burden.

22. Mr Tufan submitted that in these circumstances the proper course would be for the appeal to be remitted to the First-tier Tribunal for rehearing by a different judge whereas Mr Rehman argued that the matter should be remitted to the same judge to complete his assessment of the evidence. However, I am satisfied that the proper course in the light of the judge's approach to the respondent's evidence is for the appeal to be remitted for a full rehearing by a different judge on the issue of whether the appellant submitted a test certificate obtained by fraud. The issue relating to the policy has been determined and is not to be reopened.

Decision

23. I am satisfied that the First-tier Tribunal erred in law such that the decision should be set aside. The appeal is remitted to the First-tier Tribunal for a full rehearing by a different judge on the issue of whether the appellant's ETS certificate was obtained by fraud.

Signed H J E Latter Date: 14 August 2017

Deputy Upper Tribunal Judge Latter