Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27183/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th March 2017 & 2nd May 2017	**On 4th May 2017**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

MR AMIR HUSSAIN
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Bellara, Counsel, instructed by JJ Law Chambers
For the Respondent: Mr K Norton, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Pakistan born on 9th December 1989. He arrived in the UK on 13th August 2010 with leave to enter as a Tier 4 student migrant. He had leave in this capacity until 13th September

2014. On 12th September 2014 he made a further application to remain as a Tier 4 student migrant. This was refused in a decision dated 16th July 2015. His appeal against this decision was dismissed by First-tier Tribunal Judge I Malcolm in a determination promulgated on the 8th July 2016.

2. Permission to appeal was granted by Upper Tribunal Judge Deans sitting as a Judge of the First-tier Tribunal on 30th January 2017 on the basis that it was arguable that the First-tier judge had erred in law in failing to properly determine the issue of whether the appellant had used deception by failing to refer to SM & Qadir (ETS – Evidence-Burden of Proof) [2016] UKUT 00229 and by failing to give adequate reasoning.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law on 14th March 2017 and was adjourned for the appellant to amend his grounds of appeal by 21st March 2017 to include reasoning as to why an error of law was material if there was no possibility of the appellant winning the appeal. No amended grounds of appeal were received until the day of the next hearing on 2nd May 2017: at the hearing Mr Bellara presented amended grounds and a witness statement he understood had been served by his instructing solicitors on the Tribunal and Home Office in March 2017. Mr Norton was happy to deal with the amended grounds and accept the witness statement despite their late arrival, and in this context I made the decision to admit them.

Submissions – Error of Law

4. The amended grounds of appeal accept that the appellant could not succeed in his appeal because he had no CAS. It is argued however that the error with respect to the finding on deception is a material matter because the appellant would like, in the future, to return to the UK as a student with entry clearance, as set out in his witness statement, and believes that he will not be granted entry clearance as a Tier 4 student migrant under the points based system if he is found to have used deception in the past.

5. With respect to the finding of the First-tier Tribunal it is argued that the appellant was entitled to a fair and lawful determination of the issue of whether he used deception under paragraph 322(2) of the Immigration Rules. There is no reference to SM & Qadir in the decision or to the threshold to be met by the respondent in showing deception. The generic evidence before the First-tier Tribunal for the respondent was only the statements of Mr Millington and Ms Collins which were found to be severely lacking in SM & Qadir. The defects in this evidence were not considered by the First-tier Tribunal. Further the reasoning at paragraphs 49 to 52 of the decision regarding deception is very poor, and no adequate reasons are given as why the appellant was not found to be a credible witness given his consistent testimony at paragraphs 23 to 26 of the decision on his taking of the tests.

6. In a Rule 24 notice the respondent argues that SM & Qadir found that the generic evidence of the respondent was sufficient to meet the evidential burden. The Judge of the First-tier Tribunal makes findings that were open to him on the issue of deception and the appeal is in any case immaterial given that the appellant cannot succeed as he had no CAS. However, Mr Norton accepted in oral submissions that the errors the appellant had put forward were capable of being material given the appellant's proposed plan to apply for entry clearance in the future.

7. At the end of the hearing on error of law on 2nd May 2017 I informed the parties that I was satisfied that there was a material error of law in the decision of the First-tier Tribunal dismissing the appeal under the Immigration Rules for the reasons set out below, and that I would therefore remake the decision.

Conclusions – Error of Law

8. I accept that a finding of use of deception is a material matter for this appellant given his desire to return to the UK to study to complete his ACCA in this country due to his belief that an ACCA qualification from a British college will be more likely to enable him to access employment in Pakistan. As set out in the refusal letter of the respondent, due to a finding of deception any future student application will be refused for a period of between one and ten years under paragraph 320(7B) of the Immigration Rules. In these circumstances I find that the argued for errors are material despite the fact that the outcome of the appeal will inevitably be for it to be dismissed again due to the lack of a current CAS.

9. Following SM & Qadir the First-tier Tribunal could have found without any further reasoning that the appellant had been correctly refused for deception if the appellant had made no submissions on the issue. The spreadsheet evidence from ETS stating the appellant's 2011 TOEIC test was invalid combined with the statements of Mr Millington and Ms Collins satisfies the evidential burden and thus suffices to fulfil the burden of proof on the respondent to show deception absent any other evidence on this issue from the appellant.

10. In this appeal, however, there was evidence from the appellant that he had attended the test, which included a description of that attendance with some details, and evidence that he had obtained an IELTS certificate in July 2014. I find that the First-tier Tribunal erred in law in failing to give reasons why the appellant's evidence was not credible or why that evidence did not outweigh that of the respondent at paragraphs 47, 50 and 52 of the decision.

11. I also find that the First-tier Tribunal ignored material documentary evidence before it that the University of Reading and the University of the West of Scotland were not prepared to admit students with a ETS/

TOEIC English language test "history" when at paragraph 53 it concluded that the appellant's history that he had been refused by other educational institutions for this reason was not credible.

Evidence and Submissions - Remaking

12. The appellant attended the Upper Tribunal and gave evidence in English without an interpreter. He was able to communicate and answer questions in English in a reasonable fashion before the Upper Tribunal.

13. In his written statement and oral evidence in summary he says as follows. He is a citizen of Pakistan who came to the UK in August 2010 with entry clearance as a Tier 4 student migrant. He applied to extend his leave in September 2014 and was refused on 16th July 2015 in the decision under challenge for reasons which he finds unfair and unreasonable. He has obtained a business management diploma since coming to the UK and 3 components of the ACCA. He wishes to finish his ACCA in the UK as he believes it will have more weight when he seeks work in Pakistan than the same qualification obtained in Pakistan.

14. He maintains that he attended Elizabeth and Westlink Colleges in 2011 to take his TOEIC tests in person. He arranged to attend these tests at the same time through an agent and registered online, paying a fee and booking the test. He relied upon the TOEIC test from these colleges as they had spaces to take the tests more quickly than the ESOL and IELTS alternatives. He had no associations with these colleges where he took the tests other than to go there to take these tests. He did not take the test with anyone he knew, and went to the test alone. He took the tests over two days in east London: on the first day he did reading and writing and on the second day writing and speaking. He got his certificate one or two weeks after taking the test. He did try to contact the agent who arranged the tests after the allegations of deception arose but the agent did not answer his calls. He had no contact to pursue with the actual colleges where he took the tests. He confirmed that his name and date of birth and passport number are correctly recorded on the extract from the ETS spreadsheet that shows his tests as invalid.

15. In 2014 he took the equivalent IELTS English test and passed it, and provided the certificate to show he got this qualification to the respondent. He had also taken the Pearson test. He has tried to get a CAS to attend another college but cannot get one. He has asked about 8 to 10 colleges but none are prepared to offer him a place as his leave to remain has been curtailed on the basis he had obtained his TOEIC ETS English certificate by deception. He has letters from the University

of Reading dated 20th August 2014 and University of West Scotland dated 2nd September 2014 which confirm this.

16. Mr Norton relied upon the respondent's refusal letter dated 16th July 2015. The application is refused due to the lack of a CAS (which meant that the appellant was not awarded the relevant points under Appendix A and Appendix C of the Immigration Rules), and thus fell to be refused under paragraph 245ZX of the Immigration Rules. However, in addition the appellant fell to be refused under paragraph 322(2) of the Immigration Rules as he had used deception in a previous application, namely by submitting a false TOEIC English language certificate issued by ETS which had been obtained by the use of a proxy test taker. ETS had confirmed to the respondent that the appellant's tests were invalid on this basis.

17. Mr Norton submitted that the respondent had not made an error in relying upon the ETS spreadsheet with this appellant as his details were correctly listed on the entry which showed his tests were invalid. The evidence of the Secretary of State, which was therefore specific to this appellant and generic, was therefore sufficient to say that the legal burden was met notwithstanding the evidence of the appellant.

18. Mr Bellara submitted that the respondent had not discharged the legal burden. He accepted that the spreadsheet evidence and the generic evidence met the evidential burden which meant that the appellant had to answer the respondent's allegation. But the description of taking the test, the IELTS results which the appellant in 2014 and his ability to give evidence in English before the First-tier and Upper Tribunals answered this allegation, and given the quality of the respondent's evidence (which was poor as was highlighted in SM & Qadir) she could not show that the legal burden was met. In all the circumstances the appellant should not be found to have used deception in the decision of the Upper Tribunal.

Conclusions - Remaking

19. The key decisions relevant to determining whether the appellant has used deception in this context are SM & Qadir (ETS -Evidence – Burden of Proof) [2016 UKUT 229 and Sharif Ahmed Majumder and Ihsan Qadir v Secretary of State for the Home Department [2016] EWCA Civ 1167. The respondent's evidence in the case of SM & Qadir was the same as before me: the spreadsheet evidence that the appellant's tests had been deemed invalid by ETS, a look-up tool (in this case for Elizabeth College), and the witness statements of Ms Collings and Mr Millington, two civil servants. I note this as in some cases subsequent to SM & Qadir further evidence has been adduced by the respondent. The respondent's evidence in SM & Qadir was found by the Upper Tribunal to suffice to meet, albeit by a narrow margin, the initial evidential burden of showing deception. The burden then shifted to the appellants to raise an innocent explanation. In the cases of Mr Majumder and Mr

Qadir, in the context of the explanations and evidence given by them, the respondent could not satisfy the legal burden to show that their TOEIC certificates were procured by dishonesty and so their appeals were allowed by the Upper Tribunal. The respondent initially appealed to the Court of Appeal but then settled those appeals by consent.

20. The factors that the Upper Tribunal noted at paragraph 69 of their decision in SM & Qadir as being relevant to considering an allegation of dishonesty in this context: "include (inexhaustively, we would add) what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated. Mr Dunlop also highlighted the importance of three further considerations, namely how the Appellants performed under cross examination, whether the Tribunal's assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic achievements are such that it was unnecessary or illogical for them to have cheated."

21. I find, on the balance of probabilities, that this appellant did not need to cheat on the basis of his English language ability as before me and as reflected in the IELTS test he took in September 2014. I am satisfied that he was able to speak and understand English in a way not inconsistent with having taken his TOEIC test personally. I appreciate that I am not a language expert, and that these assessments are considerably after the point in time when he said to have cheated in his TOEIC ETS test: the IELTS test was almost three years later and the appearance before me five and and a half years later. I note as relevant in reaching this conclusion, that he has also managed to obtain a diploma in business management in the UK and the first three elements of an ACCA qualification before his studies were halted due to problems with his English language certificate in 2014.

22. I accept the appellant evidence that he has not been able to find a further college and CAS despite multiple applications trying to do this due to his leave having been refused in the concept of his TOEIC ETS test having been found to be invalid and deemed to have been obtained by deception is credible. The letters from University of Reading refusing his application to do an MBA at Henley Business School and from University of West Scotland both explicitly rely upon this matter to refuse his application, and support his evidence in this respect.

23. I accept that the applicant has given a credible if basic description of how he took the test; that he has no history of abusing immigration control or other deceptive behaviour; and has demonstrated some commitment to studying in the UK through obtaining his diploma and trying to find another college.

24. The decision is finely balanced, but ultimately when all of the evidence before me is considered I conclude that the respondent has not shown

on the balance of probabilities with sufficiently robust evidence that the legal burden on her that the appellant used deception to obtain his ETS TEOIC certificate. I therefore find that the appellant was not lawfully refused under paragraph 322(2) of the Immigration Rules. I therefore dismiss the student appeal on the sole basis that the appellant cannot meet the requirements of paragraph 245ZX of the Immigration Rules.

25. There was no attempt before me to argue that the appeal should be remade and allowed on Article 8 ECHR grounds although this was an original ground of appeal. I deal with this matter therefore in the briefest terms. I find that the appellant has no family life connection with the UK. He has not shown he can satisfy the private life Immigration Rules at paragraph 276ADE(1)(vi) as there is no evidence that he would have very significant obstacles to integration on return to his country of nationality, Pakistan. When looked at outside of those Rules I accept that the appellant has private life ties with the UK having lived in this country for almost seven years and that to remove him from the UK would interfere with those private life ties. However that interference would be entirely proportionate as I can give little weight to his private life ties to the UK as these have all been formed whilst he has been precariously present in the UK, s.117B(5) of the Nationality, Immigration and Asylum Act 2002, and he has given no reasons why he could not re-establish his private life in Pakistan. His ability to speak English, his good character and his ability to support himself financially can only be neutral factors. As he cannot meet the requirements of the Immigration Rules I must give weight to his inability to comply with immigration control and thus the public interest in his removal. When all factors are considered the removal of the appellant is therefore a proportionate interference with his private life ties in the UK.

Decision:

1. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

2. I set aside the decision

3. I re-make the decision in the appeal by dismissing it under the Immigration Rules and on human rights grounds.

Signed: Fiona Lindsley Date: 3rd May 2017
Upper Tribunal Judge Lindsley