Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31137/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 July 2017	**On 12 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALEEM MOHAMMED
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms J Isherwood (Senior Home Office Presenting Officer)
For the Respondent: Mr S Hyder (Simon Noble Solicitors)

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal of 13 January 2017 allowing the appeal of Aleem Mohammed (who is accordingly the Respondent to this appeal), a citizen of India born 15 December 1980, itself brought against the refusal of his application for leave to remain as a Tier 4 migrant of 7 September 2015.

2. The Respondent applied for leave as a Tier 4 migrant on 22 May 2014. His application had originally been refused on the basis that he had submitted a TOEIC certificate from ETS on 15 October 2012 as evidence of his English language proficiency which had now been identified by ETS as invalid. Accordingly his application was refused on the basis that the test result had been fraudulently obtained.

3. Grounds of appeal to the First-tier Tribunal argued that the Secretary of State had produced no documentary evidence regarding ETS's conclusion as to invalidity and the manner in which the Respondent was said to have been dishonest.

4. The First-tier Tribunal heard the Respondent's appeal. In his witness statement, the Respondent had stated that the allegations made against him were baseless. He had previously provided English language test results from City and Guilds of 4 October 2012 and Pearson English exam of 14 August 2014. He had contacted ETS in relation to his TOEIC test with ETS of December 2012, and was told that they could provide no information about a test taken more than two years earlier.

5. The First-tier Tribunal allowed the Respondent's appeal on the basis that he spoke good English and expressed himself adequately under cross examination, giving evidence that was generally satisfactory and coherent, and that his academic performance was consistent strong, and had not been criticised by the Home Office; he had passed all his examinations and successfully completed the City and Guilds and Pearson English tests, taken after the ETS test, demonstrating that he had always had the capacity to prove his proficiency in English under exam conditions, including at the date of the tests.

6. The Secretary of State appealed. Permission to appeal was granted on 23 May 2017 by the First-tier Tribunal on the basis that arguably inadequate reasons had been given for the decision.

7. Ms Isherwood for the Secretary of State submitted that the decision was inadequate, and that the witness statement had not given details of the Respondent's recollection of the testing process. The witness statement from Rebecca Collings included her statement that para 18 that Eden College was one of the test centres specifically the subject of the notorious BBC documentary that spawned the enquiry leading to ETS's review of many of the decisions.

8. Mr Hyder submitted that the decision of the First-tier Tribunal was a lawful and adequate response to the evidence before it. The witness statement combined with the oral evidence before the First-tier Tribunal was sufficient to provide a reasonably plausible response to the allegation of dishonesty; the generalised nature of the material the Home Office had put forward simply failed to do so.

Findings and reasons

9. The Upper Tribunal cites expert evidence deployed by a litigant seeking to cast doubt upon the validity testing process used by ETS in *Gazi* (IJR) [2015] UKUT 327 (IAC):

> "Dr Harrison also examines, with accompanying critique and commentary, the discrete issues of factors affecting performance; the typical performance of human verification; the definition of thresholds; the explicit acknowledgement of human errors; the lack of testing of the performance of analysts; the dubious touchstone of "confidence" (see Mr Millington's witness statement); the dearth of information about the actual analysis methodology; the lack of detail about the experience and knowledge of both the recruited analysts and their supervisors; the indication that any training of the newly recruited analysts was hurried; the shortcomings in Mr Millington's speech recognition averments; and the clear acknowledgement on the part of ETS that false identifications (viz false positive results) have occurred. One passage relating to the human verification process is especially noteworthy:
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> > "… although the analysts only verified matches where they had no doubt about their validity – ie where they were certain about their judgments – this should not be taken as a reliable indicator of the accuracy of those judgments. This approach does not remove the risk of false positive results."
>
> Dr Harrison also highlights that both the automatic system and the human analysts are capable of false positive errors. The Secretary of State's evidence does not disclose either the percentage or the volume of such errors."

10. No findings were made on that evidence in *Gazi*. However in the subsequent appeal of *Qadir* [2016] UKUT 229 (IAC) the UT concludes that the Home Office evidence had significant shortcomings, in particular at [63], a lack of qualifications or expertise of the officials who visited ETS and produced witness statements based on their visit to ETS, during which ETS was the sole arbiter of the information disclosed and assertions made, undue Home Office dependency on the information from ETS when ETS had put forward no witness or indeed any other evidence whatsoever of their own, the lack of any expert evidence backing up the opinion of the staff who visited ETS, and the fact that voice recording files had never been put forward pertaining to the appellants themselves. Accordingly the Tribunal accepted that the methods used by ETS were not necessarily guaranteed to avoid the occasional false positive whereby an innocent student is wrongly identified as having cheated in their test.

11. It would be perfectly open to the Secretary of State to put forward further evidence of the methods used by ETS in order to answer the critique of Dr

Harrison, for example if their software was identified or the expertise of the ETS analysts was set out in greater detail. If she does not do so she runs the risk that fact-finders will employ similar reasoning to that in *Qadir* (subsequently upheld as lawful by the Court of Appeal), ie that the direct evidence of genuineness put forward by the migrant accused of dishonesty outweighs the somewhat generalised material relied upon by the Home Office.

12. The President explains in *Muhandiramge* [2015] UKUT 675 (IAC), that decisions in these cases involve a "moderately complex exercise" in which "the evidential pendulum swings three times and in three different directions". To quote more of his evocative words directly:

> "(a) First, where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue: for example, by producing the completed application which is prima facie deceitful in some material fashion.
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> (b) The spotlight thereby switches to the applicant. If he discharges the burden - again, an evidential one - of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.
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> (c) Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's prima facie innocent explanation is to be rejected.
>
> A veritable burden of proof boomerang!"

13. There is nothing in the First-tier Tribunal's decision which is inconsistent with that approach; it clearly appreciated that the burden of proof was generally on the Secretary of State, and that cogent explanations from an appellant before it could rebut Home Office allegations of malpractice. The Tribunal below was plainly impressed by the Respondent's record of English language proficiency as shown by his present skill in the language when he gave evidence before it, and additionally by his historic qualifications. Ms Isherwood's response to these central aspects of the Tribunal's reasoning was to point me to the finding of the President in *MA Nigeria* [2016] UKUT 450 (IAC) §57:

> "In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere. We are not required to make the further finding of

> why the Appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter."

14. Additionally, of course, there is the observation in *Qadir* §80 that documentary evidence of English language proficiency from qualifications obtained over the period in which the Respondent's honesty is in question:

> "…is likely to be of substantially greater force and cogency than the tribunal's own assessment of an appellant's English language proficiency based on performance at the appeal hearing. This is especially pertinent in the present case, given that some three years have elapsed since this Appellant claims to have secured his TOEIC certificate. In some of the FtT decisions in this field one finds observations concerning the appellant's apparent fluency in, and command of, the English language. We consider that Judges should be cautious in adopting this approach for at least three reasons. The first is the passage of time. The second is that Judges are not language testing or linguistics experts. The third is that, to date, there has been no expert linguistic evidence in any of these cases."

15. There is certainly one potential error in the approach, in that the Respondent's present ability to speak English as assessed from his oral evidence was taken into account by the First-tier Tribunal. Given that this assessment took place in the context of reference to his earlier proficiency in the English language as attested to by test result certificates, a source of evidence expressly commended by the Upper Tribunal in *Qadir*, I do not consider that that is in itself a material error of law.

16. I was briefly concerned with the fact that the BBC's "Panorama" programme which contributed to the discovery of widespread TOIEC fraud had focused on two specific centres, one of which was indeed Eden International College, where the Applicant underwent his test, as was explained in the Rebecca Collings witness statement and as noted in *Gazi*. It seems to me that was a potentially material consideration. However, the only reference to Eden College in the case put forward by the Secretary of State in the Tribunal below was a brief mention in the statement by Rebecca Collings, and nothing is said there regarding the ultimate extent of fraud at Eden College. In these circumstances I do not consider that the Secretary of State had done enough to warrant this aspect of her case receiving express treatment by the First-tier Tribunal.

17. True it is that the First-tier Tribunal's reasons are concisely expressed. However, as stated by the President in *Shizad (sufficiency of reasons: set aside)* [2013] UKUT 85 (IAC) §10: "reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge". The reasoning of the Tribunal below is perfectly comprehensible: a combination of evidence, including the Appellant's general good character, and his past and present proficiency in English, all combined to impress the First-tier Tribunal to the extent it considered

him a credible witness such that the Secretary of State had not discharged the burden of proof upon her to establish that his test results were procured dishonestly.

Decision:

The decision of the First-tier Tribunal does not contain any material error of law and stands. The appeal is dismissed.

Signed: Date: 7 July 2017

Deputy Upper Tribunal Judge Symes