Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31241/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 July 2017	**On 13 September 2017**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR NOOR ZADA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr S Khan, Counsel, instructed by Nasim & Co Solicitors

DECISION AND REASONS

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Devittie in a case that was heard on 4 October 2016. It resulted in the promulgation of his determination on 8 November 2016. The appeal was the appeal of Zada Noor, IA/31241/2015.

2. I shall refer to Mr Noor as the appellant as he was before the First-tier Tribunal. He is a national of Pakistan and was born on 24 March 1978. He is now 39 years old. He arrived in the United Kingdom in February 2006, that is now some eleven years ago (It was ten years at the date of hearing.) He had had leave to remain as a student until 31 May 2007 and subsequently received further extensions as a student ending on 23 July 2014. During his student years I assume that the medium of tuition was English. The relevant decision was made by the Secretary of State on 9 September 2015. It was made at a time when the appellant had been in the United Kingdom for 9 ½ years.

3. The decision was made on the basis of the ETS certificate and the appellant had been found to have used a proxy test taker by the Secretary of State on the basis of what we all now refer to as the generic evidence. The generic evidence was the same as that provided in a number of other cases but augmented by additional material to which I shall subsequently return.

4. In his witness statement the appellant had stated that he had been in a relationship with a British citizen since July 2010, that is now for some seven years and that he had never used deception in the test that he took on 17 July 2012. When that test was taken in 2012 he had been in the United Kingdom for some six years and during that time he had been studying.

5. The appellant gave evidence. He accepted that he had undertaken three English language tests the first two of which he had failed and that the third test was arranged by an agent and he attended classes with an agent to prepare him for those tests. His partner accompanied him to the test. He described how he was given a computer to use on arrival and he was able to describe the major content of the questions that were asked. He also gave evidence to the effect that he had passed a 'Life in the United Kingdom' test and that he and his partner, who was a British citizen, used, and only used, English as the method by which they communicated and that they had been in a relationship since 2010.

6. The position by the time the case was promulgated on 8 November 2016 had been substantially settled by the decision of the Court of Appeal in *Qadir v Secretary of State for the Home Department* [2016] EWCA Civ 1167. That had been an appeal against the decision of the Tribunal which we now know to be *SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof)* [2016] UKUT 229 (IAC). The decision of the Court of Appeal in *Qadir* effectively settled the position. It was the judgment of Beatson LJ that provided the reasoned decision. The appeal was brought by the Secretary of State against the determination of the Upper Tribunal in *SM and Qadir*. That itself was a decision of the President of the IAC and of Deputy Upper Tribunal Judge Saini.

7. The challenges advanced by the Secretary of State in the appeal to the Court of Appeal were numerous but the great majority related to the evidence supplied by the Secretary of State to prove that the English language qualifications recorded in the TOEIC certificates had been obtained by deception and fraud in the use of proxy test takers. The Secretary of State had relied on the same evidence as was submitted in this case and that was the evidence of Ms Collings and Mr Millington.

8. That evidence had also been considered by the Court of Appeal in the case of *Secretary of State for the Home Department v Shehzad and Chowdhury* [2016] EWCA Civ 615. That case determined that the generic evidence relied upon by the Secretary of State was sufficient to discharge the initial evidential burden of proof placed upon the Secretary of State of proving deception in an ETS appeal.

9. The Court of Appeal then went on to deal with whether there was a legal burden that had to be discharged. The Upper Tribunal in *Qadir*'s case determined in favour of the two appellants before the Court of Appeal. Those were Mr Majumder and Mr Qadir. It found, albeit by a small margin - a 'narrow margin', as it described it - that the initial evidential burden had been discharged in favour of the Secretary of State that deception had been used. However, it then went on to consider whether the evidential burden placed upon the appellant of raising an innocent explanation had been discharged.

10. The Upper Tribunal considered both the evidence of the appellants themselves and the expert evidence of Dr Harrison. They provided explanations that the Tribunal found were both plausible and truthful and in paragraph 19 of the decision of the Court of Appeal the Court records the findings made by the Upper Tribunal that there was no suggestion that the claimant's evidence was false or that they had falsified or forged any documents submitted in support of their claim. In particular, Mr Majumder had given oral evidence in English at the First-tier Tribunal and the opportunity of assessing his demeanour and the oral evidence that he had provided was afforded to the Tribunal. There was no evidence of invention, exaggeration or evasiveness and that he consistently presented himself as a witness of truth.

11. It was therefore said in Mr Majumder's case that he had discharged that evidential burden such that the Secretary of State failed to discharge the ultimate legal burden that remained upon her, the Secretary of State's shoulders. Very much the same thing occurred in Mr Qadir's case. His evidence had been accepted and the conclusion made in each of the cases was that the evidential burden which had initially been established by the evidence produced by the Secretary of State did not result in the legal

burden being eventually disposed of in favour of a finding of deception. Consequently the Court of Appeal held that it was open to the Upper Tribunal to determine that the Secretary of State had failed to make out her case on deception.

12. The situation in the current appeal has striking similarities in that the First-tier Tribunal Judge found that the appellant was a witness on whose evidence he could rely, that there was no suggestion that he was able to detect that his evidence was false or that any false documents had been used in support of the claim and he was not persuaded that there was evidence of invention, exaggeration or evasiveness. At least there are no such findings in any part of the determination. Instead the First-tier Tribunal Judge gave six separate reasons in paragraph 14 why he did not take the view that the appellant's evidence was defective in some way. In paragraph 15 he reached his conclusions as to whether there had been provided an innocent explanation.

13. In the course of the hearing before me this morning it became apparent that the Secretary of State's challenge was that these reasons had not properly been articulated and that they were unlawful in the sense that there was no basis upon which the judge was entitled to treat his explanation as a credible, innocent explanation.

14. In paragraph 14(i) the judge records that the appellant had been questioned closely in cross-examination on the contents of the test, the type of questions asked, the venue and the location. Whilst he does not say exactly what the answers were, he concluded that there was nothing in the answers that had been provided to suggest that those answers were untrue. He was guided by the respondent, who did not in his submissions on behalf of the Secretary of State appear to suggest that any of those answers were untruthful. The judge himself looked at the demeanour of the witness and was satisfied that his evidence in response to questions put to him was '*generally satisfactory*'.

15. Insofar as the appellant had sought to provide an explanation, he had provided an explanation and there was no material that the First-tier Tribunal Judge was able to detect that suggested that material was wrong. That finding of course has to be weighed against the generic evidence and it was that essential balancing of the material that the judge was obliged to undertake.

16. He also took into account that the appellant had displayed an impressive degree of fluency. We know that this should not be taken as being evidence that the test was necessarily taken by the person, in this case the appellant, who said he took the test. There may be a number of reasons why

somebody would wish to employ a proxy test taker. Some of those reasons might be that it was simply more convenient and was likely to be a guarantee of success.

17. The judge also took into account that he was not qualified to make any assessment of his proficiency in English and that there had been a considerable period of time between the time the test was taken in 2012 and the hearing of the appeal in October 2016 during which period the appellant was likely to have bettered his English language skills.

18. He also took into account, and this is noted in subparagraph (iii) of paragraph 14, the appellant's evidence, supported by the partner herself, that she was a British citizen, born in the United Kingdom and was only able to speak English and that their communications had at all times been only in the English language. He was also minded to take into account, as he was entitled to, the evidence that she gave in support of her partner's claim insofar as it was developed in the course of their relationship since 2010.

19. The judge also took into account that the appellant had taken two tests which he had failed in the past. This point is possibly better developed in paragraph 15 where there was a balance that was struck by the judge as to the weight that should be attached to this factor. He accepted in paragraph 15 that the fact that the appellant had taken two previous attempts to pass the English language test and had failed provided him with a very good motive for him to practise deception but he also took into account the appellant's claim that had he been minded to cheat he could have done so before he failed on the first two occasions. It was obvious therefore that it was a factor that he was taking into account but realised was equivocal.

20. The other matters that he took into account which are set out in subparagraphs (iv), (v) and (vi) may not be as significant. He had attempted to contact the college where the test was taken but he found out that that college had been closed. The judge also took into account that he had been studying since his arrival in 2006 until 2014 and that there was no adverse immigration history which might found the basis of an adverse credibility finding.

21. So, balancing all of those factors into consideration, he concluded in paragraph 15 that the evidence supported the probabilities that the appellant had been able to raise the level of his proficiency in the English language and that he was living and speaking with a British-born partner and that resulted in paragraph 16 in the judge's ultimate conclusion that the respondent had failed to discharge the burden of establishing that this appellant practised deception. That, in my judgment, was in conformity

with the approach that was adopted by the Tribunal in the case of *SM and Qadir* and by the Court of Appeal in the case of *Qadir v Secretary of State*. It is true that the decision of *Qadir* in the Court of Appeal decided on 25 October 2016 was not taken into account by the judge but then the hearing took place on 4 October 2016. It was therefore a case that actually pre-dated the decision of the Court of Appeal.

22. The Secretary of State makes two significant points in relation to the handling of this claim. First of all, she relies upon the decision of *MA (ETS - TOEIC testing) Nigeria* [2016] UKUT 450. That case was decided on 14 September 2016 and was not mentioned by the First-tier Tribunal Judge. Presumably neither party raised issues in relation to it. That decision took into account some more evidence that had been provided recently and the crucial point, I think, to make in relation to the account is the balance that was struck between the evidential burden which the Secretary of State had discharged and the evidence that was provided by the claimant as to his language skills.

23. There were provided in the course of the decision a catalogue of discrete findings in relation to the appellant's evidence. There were gaps in the evidence. He failed to provide even the most basic description of his journey to the relevant college. He sought to distance himself from contemporaneous records apparently relating to taking a test at Queensway College. He failed to provide any photograph of the first of the two TOEIC certificates. There were self-evident gaps and discrepancies which the appellant gave to the border force at Heathrow Airport. It was accepted by the Tribunal that the appellant probably found himself in a stressful situation when questioned by the border force but it noted that he was given every incentive and opportunity to provide a candid and full explanation in respect of the two TOEIC certificates, which he failed to do.

24. The conclusion of the Tribunal's consideration of the appellant's evidence was that, whilst there was cogent evidence in the appeal in relation to the Secretary of State's claim, this was to be compared with the poor evidence of the appellant himself. It was therefore a conclusion that the Tribunal properly made that the evidential burden had been satisfied at the initial stage by the Secretary of State. The appellant had failed to discharge the evidential burden of providing an innocent explanation with the effect that the Secretary of State also discharged the legal burden. It was a fact-finding and fact-sensitive decision that was made.

25. I am also referred to a decision in the Administrative Court. That of course is not a decision made as a result of any fact-finding. Inevitably it was a decision where there has been no oral evidence. This was a decision of Garnham J in the Administrative Court in the case of *R on the application of*

Veronica Gaogalalwe [2017] EWHC 1709. In that case the evidence that was submitted included the evidence of Professor French. It was considered by the High Court Judge. In the course of the assessment it was concluded that there was strengthening evidence in relation to the weight that could be attached to the ETS trained listeners to help reduce the number of false positives and Professor French had concluded that these were very substantially less than 1% after the process by trained listeners had been applied.

26. The evidence, however, on the part of the claimant in the case was quite obviously very weak indeed. Her case, as recorded by Garnham J, was that she had no reason to use a fraudulent test provider. That was, apparently, almost the sum total of her evidence. Accordingly, once again, on the basis of the weight that could be attached to her evidence, even taken at its highest, as it would have been in a judicial review hearing, it simply fell well short of discharging the evidential burden that the Secretary of State had set up in the generic evidence.

27. None of these cases, in my judgment, alter the weight that the judge was entitled to attach to the evidence of the appellant.

28. Whilst the evidence of Professor French was before the judge, it is difficult to know what to make of this in terms of how a judicial fact-finder is to assess the evidence of an appellant who provides evidence. Clearly matters have progressed but it nevertheless remains the case that there is a decision that has to be made by the judicial decision-maker as to whether the explanation provided by the appellant was an innocent one. This inevitably means that the judge has to form a view as to the overall credibility of the appellant on the evidence that was provided.

29. In these circumstances I am satisfied that the judge was entitled to rely upon his findings that were made in paragraphs 14 and 15. They are not tainted by his failure to refer to any other or subsequent case-law or, indeed, the evidence of Professor French, which is of course directed towards the probabilities of there being false positives in the assessment by ETS. There can still apparently be false positives and it was for the judge to determine whether the explanation provided by the appellant was sufficient to prevent the Secretary of State establishing that she had established the legal burden. Consequently I do not consider there was an error of law in the judge's determination.

DECISION

1. The appeal of the Secretary of State against the decision of the First-tier Tribunal Judge is dismissed.

2. The determination of the First-tier Tribunal Judge shall stand.
3. No anonymity direction is made.

Date: 4 August 2017

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL