



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/31291/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 4th May 2017

Promulgated

On 16th May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MUHAMMAD IJAZ SALEEM
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr P Armstrong, Senior Home Office Presenting Officer
For the Respondent: Mr R de Mello of Counsel instructed by IJ Law Chambers

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a decision of Judge Bowler of the First-tier Tribunal (the FtT) promulgated on 24th June 2016.
2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to him as the Claimant.
3. The Claimant is a male citizen of Pakistan born 10th November 1975. On 3rd February 2015 he applied for indefinite leave to remain as the partner of a person present and settled in the United Kingdom. On 12th June 2012

the Claimant had applied for entry clearance from Pakistan, and this application was granted from 28th November 2012 until 28th November 2015.

4. The application was refused on 28th August 2015 with reference to paragraph 322(1A) of the Immigration Rules on the basis that the Claimant had used deception in his application for entry clearance.
5. It was contended that he had submitted with his entry clearance application a TOEIC certificate issued by Educational Testing Service (ETS). It was believed that the Claimant had not undertaken the English language test, but another person had taken the test and passed it on his behalf. It was therefore contended that the Claimant had submitted a false English language certificate, and obtained entry clearance by deception.
6. The Claimant appealed to the FtT and the appeal was heard on 6th June 2016. The FtT heard evidence from the Claimant. The FtT noted the evidence submitted on behalf of the Secretary of State, that being witness statements from Rebecca Collings and Peter Millington, and an ETS spreadsheet showing that the tests taken by the Claimant on 24th April 2012 had been declared invalid by ETS.
7. The FtT did not find that this evidence was sufficient to discharge the evidential burden which was on the Secretary of State. However, the FtT nevertheless went on to the next stage, and considered whether the Secretary of State had discharged the legal burden of proof and proved dishonesty.
8. The FtT found that the legal burden of proof had not been discharged and therefore allowed the appeal.
9. The Secretary of State applied for permission to appeal to the Upper Tribunal. In summary it was contended that the FtT had provided inadequate reasons for its conclusions. The FtT had erred in law by failing to have proper regard to the Claimant's poor level of English at the hearing. It was contended that the FtT had misapplied the guidance in SM and Qadir [2016] UKUT 00229 (IAC). The Claimant had given an account of what occurred at the test centre when he took the test, but this was entirely uncorroborated.
10. The Secretary of State contended that the level of English demonstrated at the hearing was in direct contrast to the high score in the ETS test taken in 2012.
11. It was contended that the evidence submitted by the Secretary of State was sufficient to discharge the evidential burden of proof, which meant that there was then a burden on the Claimant to provide an innocent explanation.
12. Permission to appeal was initially refused by Judge of the First-tier Tribunal Robertson, who found the FtT decision generous, but concluded that

adequate reasons had been provided, and no arguable material error of law established.

13. A renewed application for permission to appeal was granted by Deputy Upper Tribunal Judge Davey who found the grounds arguable.
14. Following the grant of permission the Claimant did not lodge a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Directions were issued making provision for there to be a hearing before the Upper Tribunal to decide whether the FtT decision contained an error of law such that it should be set aside.

Submissions

15. Mr Armstrong relied upon the grounds and the grant of permission. Reliance was placed upon SM and Qadir which indicates that the generic evidence provided by the Secretary of State in cases such as this sufficed to discharge the evidential burden and the FtT had erred in law in finding to the contrary. It was not clear why the FtT found the evidential burden not to have been discharged, and inadequate reasons were given for concluding that the Claimant had given an innocent explanation, and therefore the legal burden of proof was not discharged.
16. Mr de Mello submitted that the decision disclosed no material error of law. The FtT was entitled to find that the evidential burden of proof had not been discharged, and if the evidential burden was not discharged there was no obligation on the Claimant to provide an innocent explanation.
17. In any event, the FtT had been entitled to find that the legal burden of proof had not been discharged by the Secretary of State. The FtT was entitled to place little weight upon the Claimant's English ability displayed at the hearing, and reference was made to paragraph 80 of SM and Qadir in support of that submission. Mr de Mello submitted that there could be no challenge in law to the conclusion reached by the FtT that the explanation offered by the Claimant was accepted.
18. In response Mr Armstrong pointed out that the ETS spreadsheet confirmed that the tests taken by the Claimant were invalid. The FtT had found that the English spoken by the Claimant at the hearing was unintelligible and an interpreter was needed. Therefore the FtT had given inadequate reasons for concluding that the initial evidential burden had not been discharged by the Secretary of State, and for concluding that the legal burden of proof had not been discharged.
19. At the conclusion of submissions I reserved my decision.

My Conclusions and Reasons

20. The FtT did not have the benefit of the guidance given by the Court of Appeal in Shehzad and Chowdhury [2016] EWCA Civ 615, which was published after the FtT decision was promulgated. That decision endorsed what had been found by the Upper Tribunal in SM and Qadir regarding the

burden of proof. The position is that there is an initial evidential burden upon the Secretary of State. If that is discharged, there is a burden upon the Claimant to provide an innocent explanation. The legal burden of proof in relation to dishonesty remains with the Secretary of State.

21. I find the FtT erred in law at paragraph 25 in finding that the evidential burden had not been discharged by the Secretary of State. The error is in not providing adequate reasons for that conclusion.
22. The evidence before the FtT comprised the generic witness statements of Rebecca Collins and Peter Millington, and an ETS spreadsheet which showed that the two tests taken by the Claimant on 24th April 2012 were invalid. That was very much the same evidence as had been considered in SM and Qadir and the Upper Tribunal found at paragraph 68 that this evidence, although it was described as having shortcomings, discharged “the comparatively modest threshold which an evidential burden entails”. As explained in SM and Qadir, the effect of this is that there is a burden, again an evidential one, on an Appellant of raising an innocent explanation.
23. The reason given by the FtT for concluding that the evidential burden was not discharged was the absence of the application form submitted by the Claimant when he made his entry clearance application. I do not find that a satisfactory explanation was given by the FtT as to why that was relevant, and why the absence of that document meant that the evidential burden had not been discharged.
24. The conclusion by the Upper Tribunal in SM and Qadir was endorsed by the Court of Appeal in Shehzad and Chowdhury.
25. Having found that the FtT had erred in law, I must then consider whether the error is material. I find that it is not for the following reasons.
26. The FtT, having found that the evidential burden on the Secretary of State was not discharged, could have ended the decision there. However the FtT went on to consider whether the Secretary of State had in any event discharged the legal burden of proof in relation to dishonesty.
27. The FtT noted the apparent inability of the Claimant to speak fluent English at the hearing, and considered this at paragraph 27. Reliance was placed upon the guidance in SM and Qadir, to the effect that judges should be cautious in evaluating the level of English shown at a hearing.
28. The FtT noted at paragraph 28 the detailed description that the Claimant gave of how he sat the test in 2012. At paragraph 29 the FtT noted the Claimant’s consistent explanation as to how he arranged the test. At paragraph 30 the FtT considered the point raised by the Secretary of State, that the ETS certificate had been collected by the Claimant’s friend rather than the Claimant. The FtT found that there was no evidence as to whether identification was required to obtain the certificate.

29. At paragraph 32 the FtT notes that the Claimant's friend was not called to give evidence but concludes that given the Claimant's general consistency about the circumstances of his English test, and the level of detail provided, the FtT was satisfied that the Claimant had sat the ETS tests in 2012 and had not used a proxy.
30. Therefore the FtT concluded that the Claimant had satisfied the evidential burden of providing an innocent explanation, and that the generic evidence together with the ETS spreadsheet did not discharge the legal burden of proof.
31. I conclude that those findings were open to the FtT on the evidence. When permission to appeal was initially refused, the FtT decision was described as generous. I would observe that many judges would not reach the same conclusion as the judge in this case, but that is not the test to be considered. I find that the FtT has given sustainable reasons for the conclusions reached in relation to the legal burden of proof, and that the challenge made by the Secretary of State demonstrates a very strong disagreement with the FtT decision, but does not disclose a material error of law in relation to the legal burden of proof. Therefore although the FtT erred in finding that the initial evidential burden on the Secretary of State was not discharged, that error was not material, because the FtT gave adequate reasons for finding that the legal burden of proof was not discharged.

Notice of Decision

The making of the decision of the FtT did not involve the making of a material error of law such that the decision must be set aside. I do not set aside the decision. The appeal of the Secretary of State is dismissed.

Anonymity

No anonymity direction was made by the FtT. There has been no request for anonymity made to the Upper Tribunal and no anonymity order is made.

Signed

Date 10th May 2017

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

Because the decision of the FtT stands so does the decision not to make a fee award.

Signed

Date 10th May 2017

Deputy Upper Tribunal Judge M A Hall