



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/31297/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 30<sup>th</sup> August 2017

Decision & Reasons Promulgated  
On 4<sup>th</sup> October 2017

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MD MAHMUDUL ISLAM  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: No attendance  
For the Respondent: Mr Bramble

DECISION AND REASONS

The Appellant

1. The application for permission to appeal was made by the Secretary of State. Nonetheless I have referred to the parties as they were described before the First-tier Tribunal.
2. At the hearing before me the appellant did not attend. A letter from SEB Solicitors dated 25<sup>th</sup> August 2017 informed the Tribunal that the appellant was “unable to afford the Counsel’s fee and also unable to attend personally because of his physical fitness”. There was no indication of any medical documentation and despite the absence of the appellant because the solicitors representing him indicated that the Tribunal should make the decision on the basis of the paper provided within the respondent’s bundle I proceeded with the hearing.

3. The appellant had made a combined application for leave to remain in the UK as a Tier 4 (General) Student. That application was refused under paragraph 322(2) of the Immigration Rules on the basis that a false document had been submitted in relation to the previous application namely a TOEIC certificate in support of an application made on 15<sup>th</sup> September 2012 for leave to remain as a Tier 4 (General) Student. The Secretary of State asserted that ETS had advised that a TOEIC test submitted by the applicant was “invalid” owing to the presence of a proxy tester who sat the test.

***Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused***

322(2) *the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave or in order to obtain documents from the Secretary of State or a third party required in support of the application for leave to enter or a previous variation of leave.*

4. First-tier Tribunal Judge McIntosh allowed the appellant’s appeal against the refusal on the basis that

*“I cannot however state that on the balance of probabilities that the respondent has discharged the burden upon her as there is no direct evidence from Mr Millington or Ms Collings relating to this specific case. Their evidence is largely hearsay and not verified by any witness that understood the test (paragraph 30).*

5. At paragraph 32 the judge stated

*“I have not been given the benefit of seeing any document that confirms the identity of the person that conducted the test relating to the appellant’s IELTS result. There is no documentary evidence that shows that the voice recognition test in relation to this appellant ever took place. The evidence is unspecific and general and therefore I have to conclude that it is inconclusive (paragraph 32).*

6. In the circumstances the judge found that the Secretary of State had not discharged the burden to show that the appellant had used deception to obtain “his IELTS”.
7. An application for permission to appeal was made on the grounds that (i) the judge made no reference to the evidence and (ii) had confused the evidence.
8. Ground (i) - the First-tier Tribunal Judge made no reference to the ETS spreadsheet extract which was evidenced at E1 and E2 of the respondent’s bundle and read together with the two statements and the spreadsheet containing the specific confirmation of the appellant’s identification provided both a clear explanation of the careful method used to detect fraud and documentary evidence that the appellant’s test results had been identified as invalid by use of this method.
9. This ground is quite clearly made out. The judge failed to apply the guidance of **SM Qadir** [2016] UKUT (229) IAC, a judgment which held that the Secretary of State had discharged the initial evidential burden of proof [67]-[68] and it was for an appellant to show credible evidence that they had passed the ETS test and that there was an

innocent explanation to counter the evidence. That decision is in effect confirmed by Shehzad [2016] EWCA Civ 615 at [21]. Further analysis is fact specific. The judge failed to address the documentary evidence which was clearly included in the respondent's bundle.

10. Ground (ii) – The Secretary of State advanced that it was not clear why the judge referred throughout the decision to an IELTS test [30, 32 and 33]. The certificate in question was a TOEIC one. The Tribunal appears simply to have made an assessment of whether the appellant genuinely took an IELTS test that there is as a result nothing to counter the allegation of deception in the TOEIC test and further the Tribunal failed to take into account the report of Professor French or the Operation Façade Report of results of all the tests taken at the Elizabeth College on the same day the appellant took his test. There was no analysis of those documents provided by the respondent.
11. It is quite clear that this ground is also made out. At paragraph 32 as set out above the judge refers to the fact that he had not seen any document that confirmed the identity of the person that conducted the test relating to the appellant's IELTS result. The document in question was not an IELTS test but a TOEIC test.
12. There is no indication that the judge made any reference to the documents in the respondent's bundle namely D1 and E1. E1 clearly confirms that the certificate is classified as invalid. The document D1 identified that the applicant "*used an invalid TOEIC certificate in previous Tier 4 applications. Invalid certificate used for speaking score. A copy of an invalid certificate in HO File*".
13. The judge is clearly confused in his application the law to the matter of deception in this case. As he allowed the matter on the basis of the Immigration Rules he failed to proceed to consider the matter in relation to Article 8, which I note, was also a ground of appeal.
14. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2) (a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made in relation to the evidence presented by the Secretary of State regarding deception and the further findings to be made in respect of Article 8 this matter is to be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.
15. I set aside the decision of Judge McIntosh and remit the matter to the First-tier Tribunal.

No anonymity direction is made.

Signed *Helen Rimmington*

Date 3<sup>rd</sup> October 2017

Upper Tribunal Judge Rimmington