



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/31364/2015

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 6 July 2017**

**Decision &  
Promulgated**

**On 17 July 2017**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**UMID RUZIEV  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation

For the Appellant: Mr T. Wilding, Home Office Presenting Officer

For the Respondent: Mr A. Chohan, instructed by Fadiga & Co Solicitors

**DECISION AND REASONS**

1. The respondent (hereinafter “the claimant”) is a citizen of Uzbekistan born on 28 December 1979 who has resided in the UK since 26 June 2004 on a student visa. On 1 July 2014, after ten years of continuous residence, he applied for indefinite leave to remain in the UK under Paragraph 276B of the Immigration Rules. On 8 September 2015 his application was refused

by the appellant (hereinafter “the Secretary of State”) on the basis that he had obtained a Test of English for International Communication (“TOEIC”) from Educational Testing Services (“ETS”) fraudulently by use of a proxy test taker. The claimant appealed to the First-tier Tribunal where his appeal was heard by Judge Shepherd. In a decision promulgated on 21 November 2016, the judge allowed the appeal. The Secretary of State is now appealing against that decision.

2. Judge Shepherd gave two alternative reasons for finding for the claimant.
3. Firstly, he found that the Secretary of State had failed to discharge the initial evidential burden of establishing a prima facie case against the claimant. The judge contrasted the Secretary of State’s refusal letter, which stated that the date of the fraudulently taken test was 23 November 2012, with the evidence adduced by the Secretary of State to show the claimant engaged in deception, which referred to a test taken on 20 November 2012. At paragraph 74 the judge stated:

*On this point alone I conclude that, there being such a confusion as to the dates for which the test results were found to be invalid or questionable, that the [Secretary of State’s] evidence is such as to fall far below the evidential threshold required.*

4. Secondly, and in the alternative, the judge found that the Secretary of State was unable to discharge the legal burden of showing that, on the balance of probabilities, the claimant engaged in the alleged deception. The judge reached this conclusion after considering the claimant’s English language ability, educational history, and his response to questions posed to him in cross examination. The judge found, at paragraph 81, that it was more likely than not that the claimant “would have had no discernible reason for wishing to obtain and use a fraudulent certificate.”
5. The grounds of appeal make two arguments. The first argument is that the evidence correctly records when the claimant took the test and it is unclear why the judge found there to be a discrepancy. The second argument is that the judge relied on the claimant’s English language ability without recognising that a person might use a proxy test taker even though they speak English at the required level. It is argued that the judge erred by failing to give adequate reasons for holding that a person who clearly speaks English would therefore have no reason to secure a test certificate by deception.
6. Before me, Mr Wilding argued that the evidence unambiguously shows that the disputed test was taken on 20 November 2012 and therefore there was no reason for the judge to find there to be confusion about the date of the test. He argued that this error undermined not only the judge’s conclusion about the initial evidential burden not being met but also the judge’s evaluation of whether the legal burden of showing fraud was established, as the judge’s starting point in this assessment was that the Secretary of State had not managed to demonstrate even a prima facie

case. Referring to MA (ETS - TOEIC testing) [2016] UKUT 450(IAC), he also submitted that the judge failed to consider that a person who speaks English could still use a proxy test taker.

7. Mr Chohan argued that it was the Secretary of State's case, both at the hearing and in the refusal letter, that the disputed test was taken on 23 November 2012 and not 20 November 2012. As this was inconsistent with the documentary evidence, the judge was entitled to find that there was confusion as to the date and that this undermined the Secretary of State's case. He also argued that the judge, having correctly directed himself as to the factors relevant to evaluating if the claimant had used deception, carried out that assessment adequately.

### Consideration

8. In the Secretary of State's refusal letter dated 8 September 2015 it is alleged that verification software deployed by ETS detected that a proxy test taker took a speaking test instead of the claimant on 23 November 2012. At the First-tier Tribunal hearing, the Secretary of State's representative maintained that the claimant used a proxy test taker on an ETS speaking test taken on 23 November 2012. The claimant also identified 23 November 2012 as the date of the test.
9. However, although the parties appear to have been in agreement before the First-tier Tribunal that the relevant test was taken on 23 November 2012, this is not what the documentary evidence in fact shows. In the Secretary of State's bundle before the First-tier Tribunal, at page C2, is a photocopy of a document headed "Speaking and Writing tests Official Score Report". This document contains the claimant's photograph along with his name and date of birth. In the section for test date the date given is 20 November 2012. The Secretary of State adduced a Statement from a civil servant named Hilary Rackstraw. Appended to this Statement at Annex A is a document headed "ETS SELT Source Data" which shows the claimant's test was categorised as invalid. The test date on this document is 20 November 2012.
10. It is apparent that the Secretary of State made a mistake in the refusal letter by recording the test date as 23 November 2012 and that this mistake was not corrected at the First tier Tribunal hearing. However, regardless of what was stated in the refusal letter, the evidence unambiguously shows that the date of the claimant's speaking test was 20 November 2012, not 23 November 2012 (which was the date of his listening and reading test). The Secretary of State's letter is not evidence and the fact that it gives a different date than that shown by the evidence does not indicate there is confusion in the evidence as to the correct date. It merely shows that the Secretary of State mis-stated the date.
11. I am satisfied that it was an error of law for the judge to find that the initial evidential burden was not met because of "confusion" about the date of

the test when the evidence before her clearly and unambiguously showed that the date of the claimant's speaking test was 20 November 2012. However, for the reasons set out below, this error was not material.

12. After finding that the initial evidential burden was not met, the judge proceeded to consider the case in the alternative and address the question of whether, if the initial evidential burden had been met, it was more likely than not that the claimant had engaged in deception.
13. There are a range of factors relevant to such an assessment, as set out in paragraph 69 of SM and Qadir (ETS-Evidence-Burden of proof) [2016] UKUT 00229. They include: what a person had to gain from being dishonest, what he had to lose, what is known about his character, the cultural environment in which he operated, how he performed under cross examination, whether his English appears commensurate with the TOEIC scores, and whether his academic scores make it illogical or unnecessary to cheat.
14. In my view, it is clear from paragraphs 78-81 of the decision that the judge has considered a range of factors relevant to whether deception was used before reaching the conclusion that on the balance of probabilities it was not. In paragraphs 78 and 79 there is consideration of the claimant's academic history, English language ability, and how he responded to questions posed in cross examination (as well as from the judge herself). The judge also raised the issue, at paragraph 80, of why someone in the claimant's position would use deception, noting that this was not put to the claimant or explored in evidence at all by the Secretary of State. At paragraph 81 the judge concluded that it was more likely than not that the claimant "would have had no discernible reason for wishing to obtain and use a fraudulent certificate."
15. The grounds argue that the judge erred by failing to give adequate reasons for holding that a person who clearly speaks English would as a consequence have no reason to secure a test certificate by deception. This ground mischaracterises the decision. It is clear from paragraph 80 that the judge was alive to the possibility that someone who speaks good English may nonetheless cheat in a spoken English language test but that the issue was not explored or developed by the Secretary of State. If the claimant's claim that he would not have reason to use fraud was not challenged or explored by the Secretary of State (in cross examination or otherwise) there can be no error of law in the judge accepting the claimant's claim. The burden of proof to show deception lay with the Secretary of State and, based on the evidence before her, the judge was entitled to find, for the reasons she gave, that it had not been discharged.
16. In conclusion: although the judge erred by finding the initial evidential burden was not met this error was not material as there was no discernible error of law in the judge's consideration of the appeal in the alternative

where her starting point was that the initial evidential burden had been met.

Decision

17.The appeal is dismissed.

18.The judge has not made a material error of law and the decision of the First-tier Tribunal stands.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 14 July 2017

