



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/31459/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 4 August 2017

Promulgated

On 29 August 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHIPON MIAH

(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P. Singh, Home Office Presenting Officer

For the Respondent: Mr A. Rahman

DECISION AND REASONS

1. The respondent (hereinafter “the claimant”) is a citizen of Bangladesh born on 1 January 1992 who entered the UK in April 2010 as a Tier 4 (General) Student.
2. On 9 January 2014 he applied for further leave as a Tier 4 (General) Student. On 9 September 2015 the application was refused on the basis that he had submitted, with a previous application to the Home Office in October 2011, a TOEIC certificate from Educational Testing Service (ETS) that was fraudulently obtained by use of a proxy test taker.

3. The claimant appealed to the First-tier Tribunal. In a decision promulgated on 18 November 2016 Judge Kaler allowed the appeal. The Secretary of State is now appealing against this decision.

Decision of the First-tier Tribunal

4. The judge, at paragraph 5, summarised the evidence upon which the Secretary of State was relying to demonstrate that the claimant used a proxy test taker. He noted that this included witness statements from Peter Millington, Rebecca Collings and Professor French which set out the procedures followed to establish whether a test taker used a proxy. The judge also mentioned two documents which identified the claimant as having not taken the test. The judge referred to these documents by their position in the Secretary of State's bundle. The two documents are the "ETS Invalid Test Analysis" and the "ETS SELT Source Data". The latter describes the tests taken by the claimant as "invalid"

5. At paragraph 6 the judge summarised the claimant's case, stating:

"He has submitted a detailed witness statement setting out why he chose to attend this particular college to sit his test, what occurred when he took the test, and why he had to repeat the test. He stated in oral evidence how long it took him to get to the test centre."

6. At paragraph 12 the judge stated that he took into account the evidence of the Secretary of State (which he described as pointing to the test having been taken by a third party) as well as the claimant's "detailed evidence as to the taking of the test in question."
7. At paragraph 13 the judge stated that in reaching his conclusion he took into account the claimant's study and immigration history, as well as his spoken English.

Grounds of appeal and submissions

8. The grounds of appeal contend that the judge failed to provide adequate reasons for finding the Secretary of State did not discharge the legal burden of proof. The grounds state that in light of the evidence submitted by the Secretary of State it is clear that the Secretary of State reasonably concluded that the claimant had used deception in his application. It is also alleged that the judge provided inadequate reasons for finding the claimant credible.
9. Before me, Mr Singh argued that the judge had failed to appreciate that the evidence before him included a "look up tool" print out which specifically linked the fraud to the claimant, and that the Secretary of State was not relying on "generic" evidence. He also argued that the judge had not tested or adequately considered the claimant's innocent explanation. He commented that the claimant's statement could easily have been constructed based on publically available information.

10. Mr Rahman's response was that during the First-tier Tribunal hearing both the Secretary of State's representative and the judge posed questions to the claimant and the judge was able to form a view on the claimant's credibility based on the oral evidence. He added that the claimant's English ability was demonstrated at the hearing.
11. Mr Singh noted that the First-tier Tribunal hearing was four years after the test and therefore the claimant's English ability at it was of no relevance, given the time that had elapsed. He noted also that even if someone is competent in English it does not mean they would have no reason to cheat on a test.

Consideration

12. The burden and standard of proof, where it is alleged that an ETS test is invalid, was discussed in SM and Qadir v SSHD (ETS-Evidence-Burden of Proof) [2016] UKUT 00229), and is as follows:
13. The legal burden of proving that the test taker used deception lies on the Secretary of State albeit that there is a three stage process.
 - a) Firstly, the Secretary of State must adduce sufficient evidence to raise the issue of fraud.
 - b) Secondly, the test taker then has a burden of raising an innocent explanation which satisfies the minimum level of plausibility.
 - c) Thirdly, if that burden is discharged, the Secretary of State must establish on a balance of probabilities that this innocent explanation is to be rejected.
14. There is one civil standard of proof (which is the standard to be applied). The seriousness of the consequences does not require a different standard of proof but flexibility in its application will involve consideration of the strength and quality of the evidence. The more serious the consequence, the stronger must be the evidence adduced for the necessary standard to be reached.
15. The judge accepted that the Secretary of State produced evidence indicating a proxy test taker was used and that this was sufficient to satisfy the first evidential burden. Mr Singh maintained that the judge failed to recognise that the Secretary of State's evidence was not merely generic evidence. I do not agree. The judge made clear at paragraph 5 that documents specific to the claimant were produced. At paragraph 12 he stated that the Secretary of State's evidence "points to the test having been taken by a third party".
16. Having found the initial burden was met, the judge proceeded to consider the claimant's "innocent explanation", which is the second of the three stages. The claimant, both in writing (by way of a detailed witness statement) and orally (giving evidence at the hearing and

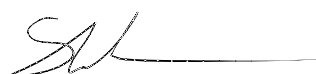
responding to questions from the judge as well as from the Secretary of State's representative) addressed issues such as why he chose a particular college and test, what occurred when he took the test, and why he had to repeat it. Evaluating this oral and written evidence, and forming a view on the claimant's truthfulness, was a matter for the judge and the judge was entitled to find the claimant credible and accept his "innocent explanation".

17. As explained in Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge. In this appeal, although the reasoning as to why the innocent explanation was accepted was brief, I am satisfied that it is sufficient. Having accepted, and found credible, the claimant's explanation of taking the test, and having considered his educational and immigration background, the judge was entitled to find that the claimant had met the evidential burden of showing an innocent explanation.
18. In paragraph 13 the judge commented on the claimant's current grasp of English and that he thought it sufficient to achieve the score he achieved in his test. In my view, taking into account the claimant's current English ability was an error of law. The gap in time between the test and hearing was 4 years. It would be surprising if the claimant's English level had not improved substantially during that time. His English ability in 2016 (at the hearing) can tell us very little, if anything, about his English four years earlier, when the test was taken. However, although taking this factor into account was an error, it was not material. It is clear from the decision that the judge has accepted the claimant's innocent explanation for a range of reasons that do not depend on his command of English at the hearing.
19. Accordingly, I am satisfied that the judge has reached a decision that was open to him on the evidence and that the grounds of appeal do not establish that a material error of law was made.

Decision

- A. The appeal is dismissed.
- B. 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: 25 August 2017