



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

Appeal Number: IA/31613/2015
IA/31614/2015

THE IMMIGRATION ACTS

Heard at Field House

On 22 June 2017

**Decision &
Promulgated
On 3 July 2017**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

**SEEMA THAPA
MOHAN BAHADUR THAPA
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellants: Mr P. Richardson, Counsel instructed by Paul John & Co Solicitors

For the Respondent: Mr S. Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The first appellant (hereinafter “the appellant”) is a citizen of Nepal born on 13 July 1990 who has been in the UK as a Tier 4 (General) Student

Migrant since October 2009. The second appellant is her dependent partner.

2. On 23 September 2014 the appellant applied for further leave to remain in the UK as a Tier 4 (General) Student. On 8 September 2015 the application was refused under paragraph 322(2) of the Immigration Rules, which concerns the making of false representations in seeking a variation of leave. The appellant's ensuing appeal to the First-tier Tribunal was heard by Judge Rayner. In a decision promulgated on 7 November 2016 the judge dismissed the appeal. The appellant now appeals against that decision.
3. The reason given by the respondent for refusing the appellant's application under paragraph 322(2) was that the Home Office had been provided information by Educational Testing Service (ETS) which satisfied them that the appellant had, when making a previous application (on 4 April 2013), submitted a Test of English for International Communication (TOEIC) certificate that was fraudulently obtained by use of a proxy test taker and which therefore was invalid. The test in question was taken on 19 February 2013.
4. The evidence relied upon by the respondent to show the appellant's English language test taken on 19 February 2013 was invalid included, along with the generic evidence (notably witness statements of two civil servants Rebecca Collings and Peter Millington) that has been adduced in multiple case and which has been subject to considerable judicial comment (see SM and Qadir v SSHD (ETS-Evidence-Burden of Proof) [2016] UKUT 00229), a print out of a "look up tool" and of a document titled "ETS Invalid Test Analysis", both of which identified the appellant's test as invalid.
5. The print out from the "look up tool" appears to contain an error. It identifies the appellant by the correct name and date of birth, and gives the correct test date; but lists her nationality as Chinese (she is from Nepal). A further document identifying the appellant as having an invalid test relied upon by the respondent is a single sheet of paper titled the "ETS Invalid Test Analysis". This document gives the appellant's correct name, nationality, date of birth and passport number but lists the date of the test as 19 February 2012, rather than 19 February 2013.

Burden and standard of proof

6. The burden and standard of proof, where it is alleged that an appellant's ETS test is invalid, was discussed in SM and Qadir and is as follows:
7. The legal burden of proving that the appellant used deception lies on the respondent albeit that there is a three stage process.
 - a) Firstly, the respondent must adduce sufficient evidence to raise the issue of fraud.

- b) Secondly, the appellant 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.
8. 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.

Decision of the First-tier Tribunal

9. The judge found there to be no significant difference between the evidence provided in SM and Qadir and that before him and consequently that there was no reason to depart from the conclusion in SM and Qadir that the respondent's evidence was sufficient to satisfy the initial evidential burden thereby shifting the burden to the appellant to provide an innocent explanation for the alleged deceit. The judge noted that the look up tool listed the incorrect nationality for the appellant and the ETS Invalid Test Analysis gave the wrong date for the test. He stated that this demonstrated how errors may occur in transposing information from one source to another. However, he concluded that notwithstanding these errors the evidential burden shifted to the appellant to give an innocent explanation.
10. The judge then turned to consider the appellant's account and whether she gave a credible explanation. After a detailed analysis of her academic achievements, scores on English language tests and the importance to her of remaining in the UK, he made, inter alia, the following findings:
- a) Her academic achievements did "not compellingly suggest that she would be able to pass the English language test without difficulty".
 - b) Obtaining an extension to her visa was so important to her that she would be prepared to use a proxy if necessary, given her poor academic achievement.
 - c) It suggests something was amiss that she performed less well in an English language test taken a year after the disputed test, given that her language skills could be expected to have improved during that time. The judge rejected the argument that the later test was harder.

- d) There is nothing known of a negative nature in her character and she gave a credible account of the process of taking the test, which was detailed but not conclusive.
11. The judge concluded that overall he was satisfied that the respondent has demonstrated that the appellant provided a false test result with her 2013 application.
12. The judge briefly considered the appellant's claim that removing her and her partner would be contrary to Article 8 ECHR. He found that she could not meet the Immigration Rules and there were no compelling circumstances to suggest removal from the UK would be a disproportionate interference with her, or her partner's, family or private life.

Grounds of appeal and submissions

13. The grounds of appeal argue, firstly, that, in contrast to SM and Qadir, there was not, in this case, reliable evidence identifying the appellant's ETS TOEIC certificate as having been obtained fraudulently due to the errors in the look up tool and ETS Invalid Test Analysis. Accordingly, the judge erred by finding the respondent's evidence was sufficient to shift the burden.
14. Secondly, the grounds argue that the judge erred by failing to recognise that the appellant gave sufficient evidence to constitute an innocent explanation and that he effectively required her to disprove dishonesty rather than provide a plausible explanation.
15. Thirdly, the grounds maintain that the judge improperly assumed the role of assessing the appellant's level of English.
16. The fourth ground of appeal submits that the decision was "littered with errors" indicating a lack of care and attention.
17. Permission to appeal was granted by Judge Coker, who identified as an arguable error that the judge considered the mistakes in the look up tool as indicative of transcription errors without giving reasons for that finding and without factoring into his decision overall whether there was a possible error in the reliance by the respondent on documents that did not in fact apply to the appellant.
18. Before me, Mr Richardson focused on the two mistakes in the documentation. The mistakes are summarised above, at paragraph 5. He argued that these mistakes show that the process of transferring data from ETS to the Home Office has errors and they cast into doubt whether the documents can be relied upon in this case. He argued that in light of these mistakes, the respondent's evidence is less reliable: if an error can be made in one field, it could equally be made in another field - including

the field stating the test was invalid. Mr Richardson clarified that he was not arguing the respondent did not meet the initial evidential burden. Rather, his argument was that these errors need to be factored into the overall assessment of whether there was deception and the judge had plainly failed to do this.

19. Mr Richardson was also critical of the judge giving weight to the appellant's poor academic record. The appellant had been studying business, not English, and her lack of academic success could be unrelated to her ability in English. He was also critical of the judge's approach to comparing the appellant's score on the disputed 2013 test and her (poorer) score on the test taken a year later, arguing that the judge's finding that the tests were of equal difficulty level was not based on evidence.
20. Mr Kotas' response was that the judge was alive to the mistakes in the look up tool and ETS Invalid Test Analysis and it is clear he gave those mistakes consideration. He submitted that it is fanciful to contend the documents did not apply to the appellant. They had the correct name, college, date of birth and passport number.
21. Mr Kotas submitted that the judge had dealt properly – and thoroughly – with the evidence relevant to the appellant's innocent explanation and having accurately set out the law proceeded to apply it appropriately and in an even handed way.

Consideration

22. The Court of Appeal in Shehzad and Chowdrey [2016] EWCA Civ 615 has made clear that the 'generic evidence' of Mr Millington and Ms Collings about ETS's analysis of the spoken English component of the TOEIC test taken together with evidence that the test of the individual under consideration has been assessed as "invalid" suffices to satisfy the initial evidential burden on the respondent.
23. In this case, the only tenable argument that the initial evidential burden was not met is that the documentation purporting to show that the appellant's test was invalid did not in fact pertain to her.
24. There are clear errors in the documentation relied upon by the respondent to show the appellant was identified by ETS as having an invalid test. In the document headed "ETS Invalid Test Analysis" the wrong year is given for the test; and in the "look up tool" the appellant is incorrectly described as being Chinese.
25. However, the documents are otherwise accurate. The "look up tool" states the appellant's correct name, date of birth, test date, test centre and certificate number. The "ETS Invalid Test Analysis" states the appellant's correct certificate number, test centre, reference number, name and date

of birth. The error in the date of the test only relates to the year: it is stated as 19.02.2012 rather than 19.02.2013.

26. Given the number of accurate details about the appellant contained within these documents, I agree with Mr Kotas that it is fanciful to suggest they do not relate to her. Accordingly, the judge was entitled to find that the initial evidential burden was met. The appellant cannot therefore succeed under the first ground of appeal.
27. Nor can she succeed under the related argument that the judge erred by failing to take into account the errors in the look up tool and ETS Invalid Test Analysis when considering whether the respondent met the legal burden of proving deception. There is an overwhelmingly strong likelihood that, notwithstanding the errors, the look up tool and ETS Invalid Test Analysis relate to the appellant. Accordingly, the errors do not make a material difference to the question of whether, on the balance of probabilities, the appellant used deception.
28. There is no merit to the second ground of appeal, which challenge's the judge's approach to the appellant's "innocent explanation". The judge has directed himself correctly as to the law and has then proceeded to apply it. He has engaged with the appellant's arguments and evidence and having taken into account a number of factors reached a conclusion. This approach is entirely appropriate and there is no discernable error of law.
29. The third ground of appeal is equally without merit. There was no error of law in the judge considering the appellant's academic record in subjects other than English. As explained in SM and Qadir, a relevant factor in assessing if there has been deception is whether the appellant's academic achievements are such that it was unnecessary or illogical for them to have cheated.
30. I am also satisfied that the judge did not engage in an improper assessment of the appellant's English language ability. His core finding about her language pertained to her performing worse on a test taken a year after the disputed test. It is apparent that the judge considered the appellant's explanation for this before concluding that "an equally likely explanation for any deterioration in her language skills is that her results in the TOIC tests had been obtained fraudulently". There is no error in the approach taken by the judge to the evidence and his conclusion was open to him based on his evaluation of that evidence.
31. The fourth ground, which contends there was a lack of care and attention on the part of the judge, is entirely without merit. This is a well written and detailed decision where the judge has dealt thoroughly with the evidence.

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

A handwritten signature in black ink, appearing to be 'S. Sheridan', with a long horizontal line extending to the right.

Deputy Upper Tribunal Judge Sheridan

Dated: 30 June 2017