



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/31709/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 25th May 2017

**Decision & Reasons
Promulgated
On 31st May 2017**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ADNAN YOUNAS
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr P Armstrong, Home Office Presenting Officer
For the Respondent: Mr R Sharma of Counsel

DECISION AND REASONS

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Lingam promulgated on 26 October 2016, in which Mr Younas' appeal against the decision to refuse his application for indefinite leave to remain on the basis of long residence dated 10 September 2015, was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mr Younas as the Appellant and the Secretary of State as the Respondent.
2. The Appellant is a national of Pakistan, born on 26 June 1984, who first entered the United Kingdom in 2004 with leave to enter and remain as a

student. The Appellant's leave to remain as such was extended for further periods up to 30 October 2014, albeit his leave to remain was curtailed to end on 28 July 2014. On 8 August 2014, the Appellant made a further application for leave to remain as a Tier 4 student, which was varied on 9 September 2014 to be an application for indefinite leave to remain on the basis of 10 years' lawful residence in the United Kingdom.

3. The Respondent refused the application on 10 September 2015 under paragraphs 276B(ii) and 322(2) of the Immigration Rules on the basis that the Appellant had, in an earlier application for leave to remain as a student, submitted an English language test certificate from ETS which was false. The Respondent referred to the Appellant's test scores having been cancelled by ETS and in reliance on generic witness evidence about such fraudulent tests and was satisfied that the Appellant's certificate was fraudulently obtained and that he had used deception in his application. The Appellant's presence in the United Kingdom was not therefore considered conducive to the public good and it was undesirable to allow him to remain in the United Kingdom. It was however accepted that for the purposes of paragraph 276B(i) of the Immigration Rules, that the Appellant had resided continuously lawfully in the United Kingdom since 29 August 2004.
4. Separately, the Respondent considered the Appellant's circumstances on the basis of his private and family life established in United Kingdom. There was no suggestion that the Appellant had any family life in the United Kingdom and leave to remain on the basis of private life was refused under paragraph 276ADE on the basis that the Appellant would not face any very significant obstacles to his reintegration on return to Pakistan. There were no exceptional circumstances found to warrant a grant of leave to remain outside of the Immigration Rules.
5. Judge Lingam allowed the appeal on 26 October 2016 under the Immigration Rules finding that the Respondent had not discharged the legal burden of proof falling on her that the Appellant had used deception in the previous application. As such, the refusal was not sustainable under paragraph 322(2) or paragraph 267B(ii) of the Immigration Rules. Having regard to the public interest there were no reasons adverse to the Appellant who had had lawful presence since 2004, had been following legitimate activity in the United Kingdom, had developed strong connections in the United Kingdom from his long residence, was integrated in society, financially self-sufficient and had no law record or adverse history with the authorities.

The appeal

6. The Appellant appeals on a single ground of appeal that the First-tier Tribunal failed to give adequate reasons for the findings made, which were broken down into four specific complaints. First, no sufficient reasons were given as to why the Appellant's evidence amounted to a plausible innocent explanation in relation to his English language test. Secondly, there was an over reliance on the Appellant's English language ability

contrary to the Upper Tribunal's findings in **MA (ETS - TOEIC testing) [2016] UKUT 00450 (IAC)** and a failure to consider that there were many reasons why a person may use a proxy test taker. Thirdly, that the First-tier Tribunal had failed to engage with the expert report of Prof French submitted by the Respondent, which should have been given greater weight than that of the evidence of Dr Harrison because it was more up-to-date, included additional technical information not available for the previous report and because Prof French was more senior. Finally, the First-tier Tribunal relied upon an unreported determination of the Upper Tribunal, contrary to paragraph 11 of the Practice Directions.

7. Permission to appeal was granted by Judge Parks on 21 April 2017 on all grounds, with an extension of time also been granted for the late application for permission to appeal.
8. At the hearing, the Home Office Presenting Officer relied on the written grounds of appeal with an emphasis on the failure to give reasons, particularly on the issue of whether the Respondent had satisfied the burden of proof. It had been specifically held in the cases of **SM & Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC)**, **Shehzad v Secretary of State for the Home Department [2016] EWCA Civ 615** and **MA** that the generic evidence relied upon by the Respondent about invalidity of ETS tests was sufficient to discharge the initial evidential burden on the Respondent in cases such as the present one. The burden of proof is then on the Appellant to provide an innocent explanation which meets the minimum level of plausibility and only if that is done does the burden revert back to the Respondent for her to establish, on the balance of probabilities, that the Appellant's prima facie innocent explanation is to be rejected.
9. It was submitted in the present case that the Appellant had failed to give such an innocent explanation and that judge Lingam had placed too much weight on the Appellant's English language ability at the hearing before her without consideration of any of the other reasons why a proxy test taker may be used. It was notable in this case that there was no evidence supporting the Appellant's explanation, for example, nothing from ETS or from the college where the test was said to have been taken.
10. Separately, it was an error of law for Judge Lingam not to engage with the report of Prof French, dismissing it on the basis that he had not attended as a witness to give live evidence, in circumstances where it was impractical for him to be expected to do so in every First-tier Tribunal appeal. There were in any event other reasons why that report should have been given more weight.
11. In response, Counsel for the Appellant submitted that Judge Lingam properly applied the process set out in **Shen (Paper Appeals: Proving Dishonesty) [2014] UKUT 236 (IAC)**, firstly by considering whether the Respondent had met the initial evidential burden, secondly by considering whether the Appellant had given an innocent explanation with the

minimum level of plausibility and finally considering whether the Respondent had discharged legal burden of proof to establish deception in this case. Findings were made in paragraph 29 onwards of the decision as to the Appellant's educational background, his interviews in English in connection with immigration matters in the past and, qualifications obtained in the English language which consistently showed his ability (even though some post-dated the test which had been validated in this case). It was clear that Judge Lingam did not rely solely on the Appellant's English language ability at the appeal hearing but found for a number of reasons that he had no reason to use a proxy test taker or cheat in this case. The Appellant's detailed evidence of taking his test and collecting the results was set out and accepted, which was an innocent explanation and a sufficient one for the burden of proof to revert back to the Respondent.

12. With regard to the report of Prof French, that was provided to the Appellant only shortly before the First-tier Tribunal hearing with little opportunity given for the Appellant to consider it. The Respondent was not represented at that hearing and there were no submissions from her about the weight to be attached to the report, nor whether it provided a sufficient basis to depart from the findings in the reported decision of **SM & Qadir**. In any event, in paragraph 26 of the decision, reasons were given as to why Prof French's report was not given significant weight, which included that not all of the questions and responses which are relevant to the report had been made available which meant that it lacked context and the report itself showed that there was still a false positive rate in cases, albeit a smaller percentage than thought by Dr Harrison previously. Whether or not it would be impracticable for the Respondent to make Prof French available in every appeal tribunal hearing in which his report was relied upon, that was a matter of choice for the Respondent. If an expert provides evidence that is to be assessed in court, that witness should be made available for cross-examination and in the absence of that process it is difficult for greater weight to be attached to the evidence.
13. Finally, in relation to the unreported decision, contrary to the grounds of appeal that the First-tier Tribunal had relied upon it, it is clear from the decision that it was not treated as binding and that in any event Judge Lingam had come to the same conclusions independently of it.

Findings and reasons

14. I do not find any material error of law in the First-tier Tribunal's decision in this appeal for the reasons set out below. Although the three stages for the burden of proof set out in **Shen** were not expressly set out Judge Lingam, it is clear from the structure of her determination that that process was followed. In paragraphs 20 to 25 and 28 of the decision, Judge Lingam deals with the Respondent's generic evidence and that specific to the Appellant in which his test scores were invalidated, making reference to the findings in **SM & Qadir**. Although it is not expressly found that the Respondent had met the initial evidential burden with this evidence, it is clear that that was accepted by reference to the case law

relied upon and because the decision went on to consider the explanation given by the Appellant.

15. The Appellant's explanation and findings that it was a plausible innocent one, are set out in paragraphs 29 to 31. The reasons include his educational background, consistent English language ability and qualifications as well as his evidence as to taking the test itself and collecting the results. The Appellant's evidence in that regard was unchallenged by the Respondent, who was not represented at the hearing before the First-tier Tribunal. Contrary to the Respondent's submissions, it is clear from the range of reasons given that there was not sole reliance on the Appellant's English language ability at the hearing but that his consistent ability was demonstrated through interviews and qualifications before as well as after the 2012 test. These were just one part of the consideration as to whether an innocent explanation had been given. There is nothing contrary and the findings by Judge Lingam to those in **MA** that there are a range of reasons why an individual may use a proxy test taker.
16. On any legitimate view, the explanation given by this Appellant in the context of his background was an innocent explanation meeting the minimum level of plausibility such that the burden of proof reverted to the Respondent. This is dealt with in paragraph 32 to 35 of the decision with an express finding that the legal burden of proof falling on the Respondent has not been discharged for the same reasons set out by the Upper Tribunal in **SM & Qadir**.
17. Judge Lingam set out her findings on the report of Prof French in paragraph 26 and 27 of the decision, noting that it remained accepted by Prof French that there were false positives in the assessment of the ETS tests but at a lower rate than previously thought. The evidence had not been tested in court and there were no submissions as to why the report should be given greater weight than the findings in Dr Harrison's report which had been tested before the Upper Tribunal. These are sustainable, lawful reasons for finding that the report of Prof French did not affect the conclusions reached by the Upper Tribunal in **SM & Qadir** which were relied upon in the present appeal. Given the acceptance by Prof French of false positives, it is difficult to see how ultimately his evidence could have done so even if given greater weight, as it is clear that there will be cases where an individual's test results have been invalidated wrongly.
18. The final burden of proof on the Respondent is to establish on the balance of probabilities that an appellant's prima facie innocent explanation is to be rejected. It is clear that Prof French's report was not specific to this Appellant and could give no rational basis on which an innocent explanation could be rejected. There was no further evidence from the Respondent specific to this Appellant to discharge the burden of proof in this case and there is no error of law in relying on the findings in **SM & Qadir** to the effect that the generic evidence was not sufficient for that purpose either. For these reasons, there were no material errors of law in the First-tier Tribunal's decision in finding that the Appellant had

given an innocent explanation and the Respondent had not discharged the legal burden of proving deception in this case.

19. Finally, there is nothing in the point about reliance on an unreported determination in the final ground of appeal. It is clear on the face of the decision that Judge Lingam did not consider it binding nor rely on it, but instead expressly stated that she independently arrived at the same view. Not only is the ground not made out on the face of the decision itself, in light of the above it could not have been a material error of law in any event.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such is not necessary to set aside the decision.

The decision to allow the appeal is therefore confirmed.

No anonymity direction is made.

Signed
2017



Date 26th May

Upper Tribunal Judge Jackson