



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

Appeal Numbers: IA317962015  
IA317992015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 21<sup>st</sup> June 2017**

**Decision & Reasons  
Promulgated  
On 26<sup>th</sup> June 2017**

**Before**

**UPPER TRIBUNAL JUDGE MARTIN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR NILESHKUMAR GHANSHYAMBHAI KEVADIA  
MRS ANKITABEN NILESHKUMAR KEVADIYA  
(ANONYMITY DIRECTION NOT MADE)**

Respondents

**Representation:**

For the Appellant: Mr N Bramble, Home Office Presenting Officer  
For the Respondents: Mr S Muquit, Counsel, instructed by Farani Javid Taylor Solicitors

**DECISION AND REASONS**

1. This is an appeal to the Upper Tribunal by the Secretary of State in relation to a Decision and Reasons of the First-tier Tribunal, Judge McIntosh, promulgated on 25<sup>th</sup> April 2017 after a hearing at Taylor House. This is

one example of a great number of cases concerning the alleged fraud committed by student migrants in having proxies take the TOEIC test run by the ETS.

2. There has been much litigation and many cases about this and the main case in the Upper Tribunal was SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC). That then came before the Court of Appeal in Qadir v SSHD [2016] EWCA Civ 1167. The Court of Appeal gave only a short judgment because the matters were actually settled on 25<sup>th</sup> October 2016. I shall return to that in a moment.
3. The First-tier Judge heard evidence from the Appellant. There was also an appeal by his wife but she was his dependant and therefore her appeal was entirely dependent on the outcome of his. It was said by the Secretary of State that the Appellant had used fraud in taking the test on 20<sup>th</sup> March 2013 at the test centre at Cauldon College. The Secretary of State relied on the usual statements by Rebecca Collings and Mr Millington and also relied upon a witness statement from another civil servant, Mona Shah, another person without expertise in voice recognition, and also a report from Professor French.
4. The judge noted the Secretary of State's evidence and came to a conclusion at paragraph 30 that the Respondent had not discharged the burden of proof in establishing fraud by the Appellant. In that the judge has made an error of law because it is quite clear from the Court of Appeal's Decision and indeed from the Tribunal's Decision that there is a shift in burden in such cases. How it operates is set out at paragraph 18 of the Court of Appeal's Decision where it is said that the generic evidence produced by the Secretary of State was sufficient to discharge the evidential burden that lay on her which then shifted again an evidential burden onto the Appellants to raise an innocent explanation.
5. In deciding whether there should be an innocent explanation relevant factors included what the person accused 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 the individual accused of dishonesty performed under cross-examination and whether the Tribunal's assessment of that person's English language proficiency is commensurate with his or her TOEIC scores and whether his or her academic achievements are such that it was unnecessary or illogical for them to have cheated.
6. The judge did in this case look at the evidence provided both in oral evidence and documentary evidence by the Appellant and noted that the Appellant had undertaken a number of academic courses, prior to all this taking place, at a significantly high level and all of the course were studies in English. He also noted that there was a document from Cromwell College for IT and Management indicating the Appellant to be a diligent and well-motivated student. He had also taken other English tests which he had passed and he gave his evidence in English.

7. Therefore, whilst the judge did make an error in declaring where the burden of proof lay that error is not material because the outcome would have been the same had he not made that error. This is a case that is among those that falls into the category described at paragraph 32 of the Court of Appeal's Decision, namely one where the appeal by the Secretary of State is against a Decision in which it was held that the generic evidence had not discharged the initial burden and was thus erroneous in that respect but that other evidence meant that the Secretary of State would not have been able to discharge the legal burden.
8. Mr Bramble on behalf of the Secretary of State before me accepted that that was the situation in this case and did not pursue the application further. On that basis the Secretary of State's appeal to the Upper Tribunal is dismissed.

### **Notice of Decision**

The appeal is dismissed.

No anonymity direction is made.

Signed

Date 23rd June 2017

Upper Tribunal Judge Martin