



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/32565/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 10 August 2017

Determination Promulgated  
On 16 August 2017

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

HASSAAN IQBAL MALIK  
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr M Rana, of Counsel, instructed by Stifford Legal Advice Centre

For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The respondent challenges the decision of First-tier Tribunal Judge A W Khan to allow the appeal of the appellant under the Immigration Rules by way of a determination promulgated on 15 December 2016. For convenience, I continue to refer to the parties as they were before the First-tier Tribunal.
2. The appellant is a Pakistani national born on 11 December 1983. He arrived here as a Tier 4 Migrant on 17 January 2011 and obtained further leave until 25

November 2015. On 12 March 2013, however, that leave was curtailed until 11 May 2013 as the sponsor's licence was revoked. On 10 May 2013, the appellant applied for further leave using the ETS TOEIC certificate as evidence that he could meet the language requirements and he was granted leave to remain until 19 December 2014. On 2 September 2014, he applied for leave to remain as the spouse of Sarah Smith. That application was refused on 24 September 2015 on the basis that the appellant did not meet the suitability requirements of the rules in that the ETS certificate he had previously relied on had been obtained fraudulently and that his test scores had been cancelled. The respondent considered that his presence was not conducive to the public good and further that he had not met the maintenance requirements.

3. The appeal came before Judge Khan at Harmondsworth on 16 November 2016. The judge found that the documentary evidence relied on by the respondent did not demonstrate whether a proxy had taken the test on the appellant's behalf and that it was unclear how she had concluded that the appellant had fraudulently obtained his certificate. He considered that the evidence was unclear and that the respondent had not shown that the appellant had used deception. He then considered the appellant's evidence as to the test taking. He found there were some problems with it but giving him the benefit of the doubt concluded that he had genuinely taken the test. He also found that the maintenance requirements had been met. Accordingly, the appeal was allowed.
4. The respondent sought and obtained permission to appeal on 21 June 2017 on the basis that the judge had arguably failed to apply SM and Qadir where the Tribunal had held that the generic evidence sufficiently discharged the respondent's evidential burden. In granting permission, Judge Ransley also noted that the judge had expressed doubts about the appellant's evidence; in the circumstances, it was arguable that he had erred in concluding that the appellant had taken the test himself.

### **The hearing**

5. At the hearing before me on 10 August 2017, Ms Willocks-Briscoe relied on the grounds for permission and submitted that the judge had failed to grasp the nature of the evidence. She accepted that the statements of Mr Millington and Ms Collings did not in themselves raise a prima facie case against the appellant, as the judge found at paragraph 21, but she argued that there had been additional evidence and the judge had not understood its significance. She maintained that whilst the judge had repeatedly observed that there was no evidence to show a proxy test taker had been involved, the evidence which also consisted on the look up tool, a report from Professor French, the statement of Leslie Singh and a specific report on the college where the test had been taken cumulatively demonstrated that the certificate had been fraudulently obtained. She argued that the court had held in SM and Qadir that the two generic statements, the look up tool and its accompanying statement sufficiently

discharged the burden of proof on the respondent. The judge therefore erred when he found that the evidence was inadequate to make out the allegation of fraud. She submitted that the judge's erroneous belief that it had not been shown whether a proxy had been used had infected the remainder of his findings. She submitted that the various statements adduced by the respondent clearly showed the process by which test results were deemed to be invalid and the scores were cancelled; the judge was wrong to find that this had not been explained and wrong to find there was no link between the evidence and the appellant. She submitted that in this case the judge had even more evidence than the court had seen in SM and Qadir. She submitted there had been no consideration of the French report of the college report and that the issue impacted upon the question of whether the appellant met the suitability requirements. The decision was unsustainable.

6. In response Mr Rana took me through the determination and submitted that the judge had set out all the evidence, was aware of the issues, summarised and analysed the evidence, applied the correct legal test and properly found that the appellant had provided an innocent explanation. He had considered the evidential and legal tests and had considered the evidence the appellant gave at the hearing. He submitted that whilst another judge may have reached a different conclusion, this judge's conclusions were not perverse. He was entitled to give the appellant the benefit of the doubt and to conclude that he had taken the test himself. He submitted that the respondent's grounds did not disclose any errors of law in the determination and the appeal should be dismissed.
7. Ms Willocks-Briscoe replied. She pointed to the judge's "assumption" at paragraph 28 and submitted that no finding had been made. The evidence had established a link to the appellant having used a proxy test taker and the judge should have started from that standpoint. If the correct approach had been taken, the outcome could have been materially different. She questioned whether the judge would have given the appellant the benefit of the doubt if he had properly understood the evidence.
8. At the conclusion of the hearing, I reserved my determination which I now give.
9. **Conclusions**
10. It is of concern that the judge repeatedly maintained throughout his findings that the respondent's evidence had failed to establish a link between the appellant and a proxy test taker. As such, I concur with Ms Willocks-Briscoe that his starting point for the assessment of whether there was an innocent explanation was flawed and that this infected the remaining conclusions.

11. The respondent relied on several items of evidence in support of her allegations; the statements of Peter Millington and Rebecca Collings, the Look Up Tool with the accompanying statement from Leslie Singh, the report from Professor French, a report on the substantial fraud perpetrated at Elizabeth College where the appellant had taken his test, the ETS SELT source date and the CID notes. I accept that the judge has set out this evidence in his determination but the difficulty is that he made no clear finding that the respondent's evidence was sufficient to discharge the burden on her and, indeed at paragraph 28, he appears to proceed on an assumption. He sets out the difficulties with the appellant's oral evidence as regards the test (at 8, 9, 28 and 29), observes that he has reservations about the evidence but then proceeds to give the appellant the benefit of the doubt because the respondent had failed to make out her case. Ms Willocks-Briscoe is right to argue that had the judge proceeded on the basis that the respondent's evidence *did* link the appellant to the invalid test and *did* show that a proxy had sat the test, the appellant's "innocent explanation" would have been evaluated in the proper context and the judge may not have so readily given the appellant the benefit of the doubt.
  
12. For these reasons, I set aside the decision of the First-tier Tribunal. As regards disposal, Ms Willocks-Briscoe suggested that the matter be retained by the Upper Tribunal in view of other findings that had been made but Mr Rana asked for the matter to be remitted back to the First-tier Tribunal for fresh credibility findings to be made. I, therefore, set aside the decision in its entirety and remit it to the First-tier Tribunal for a fresh hearing on all issues.
  
13. **Decision**
  
14. The First-tier Tribunal made errors of law such that the decision is set aside. It shall be re-heard afresh by a different judge of that Tribunal at a date to be arranged.
  
15. **Anonymity**
  
16. There has been no request for an anonymity order and I see no reason to make one.

Signed



Upper Tribunal Judge  
Date: 11 August 2017