



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/34454/2015

THE IMMIGRATION ACTS

Heard at Field House
On 18th September 2017

Decision & Reasons Promulgated
On 20th September 2017

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

And

Appellant

YASIR JIBRAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P. Singh, Senior Presenting Officer

For the Respondent: Mr P. Richardson, Counsel instructed by Pioneer Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission, against the decision of the First-tier Tribunal (Judge Herbert OBE) who, in a determination promulgated on the 31st January 2017 allowed his appeal against the decision of the Respondent to refuse to vary leave to remain and to make a decision to remove the Appellant.

2. Whilst the Secretary of State is the Appellant, for the sake of convenience I intend to refer to the parties as they were before the First-tier Tribunal.
3. No anonymity direction was made by the First Tier-Tribunal and no application has been made on behalf of the Appellant or any grounds put forward to support such an application.

The background:

4. The Appellant, a citizen of Pakistan, entered the United Kingdom in or about February 2006 on a student visa valid until the 31st December 2006.
5. His leave to remain as a Tier 4 student was extended on the 17th January 2007 and again on the 5th March 2008 until 31st October 2011.
6. On the 18th September 2013 he submitted an application for leave to remain as a Tier 4 student which was refused on the 9th November 2013. He lodged an appeal against that decision which was allowed by the FTT on the 7th April 2014.
7. Whilst the decision was awaiting implementation the respondent refused the application on the 20th November 2015.
8. The Respondent refused the application under paragraphs 322(1A) and paragraph 245ZX(a) of the Immigration Rules on the basis that the Appellant had, in an earlier application for leave to remain as a student on the 31st October 2011, 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 declared "invalid". As a false document had been submitted, the respondent refused the application under Paragraph 322(1A) and that the Appellant had used deception.
9. It was also refused under paragraph 245ZX (a) because the Appellant did not have a valid CAS. The decision letter stated that the Tier 4 sponsor register was checked on the 20th November 2015 but Northam College was not listed on that date. Therefore he did not meet the requirements to be awarded 30 points. As he failed to provide a valid CAS the respondent was unable to assess the amount of funds.
10. Therefore the respondent refused the application for leave to remain as a Tier 4 (General) Student Migrant under Paragraph 245ZX9a) and (c) with reference to paragraph 116(e) of Appendix A, paragraph 245ZX(d) and paragraph 322(1A).
11. The Appellant appealed that decision on the 26th November 2015.

The hearing before the First-tier Tribunal:

12. On the 9th January 2017 his appeal was heard by the First-tier Tribunal (Judge Herbert OBE). In a determination promulgated on the 31st January 2017 the judge allowed his appeal.

13. In the determination he set out the respondent's case at paragraphs 2 - 11 and the Appellant's case at paragraphs 13 - 21. When recording the Appellant's case, at paragraph 14, he made reference to the Appellant's previous studies both in Pakistan and in the United Kingdom. He recorded that his studies in Pakistan were in English and he undertook an English language course in St Paul's College of higher education in the first six months and had successfully completed his BTEC level VII and an extended diploma in strategic management and leadership.
14. At paragraphs 15 - 18 the judge recorded his evidence concerning the test and the circumstances of the test. He recorded that the Appellant maintained that he did take the ETS language test and had passed the required scores in listening and reading. He however failed his speaking and writing test and was required to reset that in January 2012. He maintained that he was a genuine student who had successfully completed all of his previous studies (paragraph 16). At paragraphs 17 - 18, the judge recorded his oral evidence that a friend of his based in Nottingham had dropped him off outside the test centre. He had to verify his photographic ID upon attendance and undertook the testing and in the booth where there was a computer-based test. He said he was required to listen to a video story he was asked questions about it. He said he did not take much notice about the location of the centre that he was concentrating on the drive down in practising the test.
15. At paragraphs 19 - 20, the judge made reference to the educational certificates that the Appellant had provided relating to his educational achievements in the United Kingdom.
16. As to his competence in English, the judge recorded at paragraph 21 "the Appellant spoke clearly in English with only very minor grammatical mistakes that appear to have full command of the English language and said that his English was actually better in 2011 when he took the test because he was in full-time education."
17. The judge's findings of fact are set out at paragraph 22 - 33.
18. At paragraphs 22- 29 the judge set out the submissions of the respondent and the evidence provided by the Secretary of State and made reference to the "generic respondent's bundle". That bundle included the report of Project Façade, a criminal enquiry into the abuse of the TOEIC at Elizabeth College in London dated 15th of May 2015, a statement from Ms Shah dated fifth of January 2017 (which explains circumstances in which the test scores were held to be invalid) the individual test score said to be invalid recorded as in the Appellant's name, test date 14th of December 2011 with a record number which appeared on the test results for Elizabeth College. He also made reference to the witness statements from Peter Millington and Rebecca Collings. The judge set out the respondent's submission that the generic evidence was of sufficient evidential quality to discharge the burden of proof and that this was accepted by the Appellant's representative (see paragraphs 24 to 25). At paragraph 28 he recorded the submission that the evidence in the current Appellant's appeal was closer to that considered in SM and Qadir and not

the more specific evidence in MA where the Appellant's credibility was significantly questioned and undermined.

19. Thus the judge found at paragraph 29 that the generic documentary evidence put forward by the respondent "just overcomes the basic evidential test of shifting the burden of proof to the Appellant to satisfy me on the balance of probabilities that the test was validly undertaken by him in person."

20. The judge made the following findings of fact at paragraphs 30 – 33:

"30. I have considered the generic evidence of the respondent and given that there are significant gaps in the respondent's case, namely there is nobody present from the Queen Elizabeth College to authenticate the fact that the Appellant did not turn up in person that there is no pro forma matrix of the test undertaken by this Appellant to question his subjective recollection about the test itself nor is there any individual to verify that the Appellant himself failed to appear on the dating question or had a first-hand knowledge of the recording of the Appellant's voice or how many other individuals that had imitated students that day or any other day.

31. In summary on balance of probabilities I found the Appellant to be a credible witness. Firstly he had a history of studying in English which clearly demonstrated as he did before me that he was a fluent English speaker I could understand and speak clearly. He also had a history of having undertaken significant studies both in Pakistan and in the United Kingdom successfully in English. He had also been unsuccessful in part of the examination he had taken in December 2011 had been obliged to retake it in January 2012.

32. That failure strongly suggests that there was not a third party who impersonated the Appellant but he did so himself and turned up on the subsequent day as there was no evidence to suggest that his subsequent test scores in January 2012 were anything other than genuine. The logic is that if one is going to undertake some fraud one would do so with a tester who was going to pass the whole test and not fail a significant part of it otherwise it would defeat the object.

33. I am satisfied therefore given the primary evidence before me that it is more likely than not that this Appellant was the person who took the test and therefore did obtain a successful score as he claims."

21. The judge therefore allowed the appeal to the limited extent whereby the appeal was remitted to the Secretary of State to issue a 60 day notice letter whereby the Appellant could locate another college of study that would satisfy the immigration rules and enable them to make fresh in time application based upon his subsequent qualifications in the usual way. There is no appeal against that disposal.

The appeal:

22. The Secretary of State sought permission to appeal that decision. The grounds stated as follows:

1. In reaching the material finding, the judge relied on the Appellant's English ability [31-33].
 2. Plainly there may be reasons why a person who is able to speak English to the required level would nonetheless cause or permit a proxy candidate to undertake an ETS test on their behalf, or otherwise to cheat.
 3. The FTT has materially erred by failing to give adequate reasons for holding that a person who clearly speaks English with therefore have no reason to secure a test certificate by deception.
 4. The judgement of MA Nigeria [2016] UKUT 450 records at [57], "second, we acknowledge the suggestion that the Appellant had no reason to engage in deception which we have found proven. However this has not deflected any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, in exhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations the deceitful conduct in the sphere. We are not required to make a further finding of why the Appellant engaged in deception and do this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter."
 5. In reaching the material finding the FTT relied on the Appellant's evidence and proficiency in English and allowed the appeal.
 6. The FTT has materially erred in failing to provide adequate reasoning as to why they prefer the evidence of the Appellant over the issues raised by the respondent.
23. On the 12th July 2017 First-tier Tribunal Judge Page granted permission for the following reasons:

"The respondent's grounds of appeal are arguable, saying that the judge has failed to give adequate reasons for his decision and failed to provide adequate reasoning as to why the judge preferred the evidence of the Appellant to the evidence adduced by the respondent. The respondents grounds are arguable because at paragraph 29 the judge found that the respondent's evidence "just overcomes the basic evidential test of shifting the burden of proof to the Appellant" and then went on in paragraph 31, 32 and 33 to say little more than the Appellant was found to be credible and that it was more likely than not that the Appellant to the test himself. It is arguable that the judges failed to give adequate reasoning to explain how the respondent's evidence was rebutted by the Appellant."

24. The Appellant responded to the grounds of appeal under rule 24. That document opposed the appeal observing the judge directed himself appropriately.
25. The document referred to the grant of permission by Judge Page who suggested that it was arguable that Judge Herbert had erred in law at [29] where he stated: "the respondent's evidence just overcomes the basic evidential test of shifting the burden of proof to the Appellant". However it was submitted that that was not an error of law but entirely consistent with the jurisprudence on ETS cases. Those cases are set out at paragraph 8 and make reference to the gaps and weaknesses in the respondent's evidence which was agreed by two experts.
26. Paragraph 9, the response cites the head note in SM and Qadir, which made reference to the Secretary of State's generic evidence, combined with the evidence particular to these two Appellant's was sufficient to discharge the evidential burden of proving that their TOEIC certificates have been procured by dishonesty but in the light of the multiple frailties from which this generic evidence was considered to suffer and, in the light of the evidence adduced by the Appellants, the Secretary of State failed to discharge the legal burden of proving dishonesty on their part.
27. The response then makes reference to the Upper Tribunal discussing those frailties at paragraph 62 and 66 of his decision and were reiterated by the Court of Appeal [16]. It is therefore submitted that where there was a wealth of critical judicial comment about the strength of the respondent's evidence, it was not an error of the Judge Herbert to describe it as only just discharging the evidential burden.
28. It was further submitted that his assessment of the Appellant's credibility was satisfactory and consistent with the case law (see paragraph 87 of SM and Qadir): "87. The key question to be addressed is whether, taking into account the shortcomings and frailties listed above, and bearing in mind the burden of proof and standard of proof to be met, this Appellant's evidence on the core issue of whether he was guilty of deceit in procuring his TOEIC certificate is believable."
29. It is submitted that in assessing the Appellant's account, and finally to be credible, the judge adhered to the guidance in the authorities. Judge Herbert was entitled to believe the Appellant and gave sound reasons for doing so in paragraphs 22 - 33 of the determination.

The hearing:

30. At the hearing, Mr Singh relied upon the grounds as recorded above. He submitted that there was inadequate reasoning given by the judge. He referred the Tribunal to a decision of the High Court in R (on the application of Veronica Gaogalalwe) [2017] EWHC 1709 and that the Appellant on that appeal was in the same position as the Appellant in the current appeal (see paragraphs 40-45). Thus he submitted that the explanation given by the Appellant and thus the judge was insufficient to discharge the burden of proof.

31. He further submitted that as paragraph 4 of the grounds set out, the judge made reference to the Appellant's ability to speak English but did not consider why he would have cheated (see MA at paragraph 57 as cited in the grounds).
32. Mr Richardson Counsel for the Appellant relied upon the Rule 24 response summarised above.
33. In answer to the oral submissions made by Mr Singh, he distinguished the case of Gaogalalwe from the present appeal. That case was a public law case and not a precedent fact case and the issue was whether the decision of the Secretary of State was reasonably open to her make on the material. At paragraph 42 the judge made reference to the Appellant's claim relating to her educational achievements in English and that she would have no motive or reason to cheat. However, he stated "critically I have no witness statement confirming it was she who took the test or providing any details about the circumstances in which the tests was taken. In my judgment, such a statement, supported by a statement of truth signed by the claimant, is necessary to make good a rebuttal of an allegation of cheating on facts such as these." He contrasted that position with that of the Appellant who had given a detailed account in a witness statement and given oral evidence which the judge had taken into account and analysed (paragraphs 26-27). Thus he submitted the judge had considered the assessment of credibility as the case law had set out (see paragraph 13 of the grounds and citation of SM and Qadir at [87]).
34. I asked Mr Richardson to deal with the submission made by Mr Singh concerning paragraph 57 (as set out above). He stated that whilst there may be reasons for why some would use dishonest means, it is a long way from saying that a finding of someone's fluency is not relevant as it makes it less likely that an Appellant has cheated in an exam if a reason he would not is eradicated. In any event, he submitted that it was not put to the Appellant in cross examination. In fact he stated there had been very little challenge to the Appellant's evidence. The judge believed the Appellant and gave reasons for reaching that view. In essence, he submitted, the grounds were a disagreement with the outcome and did not demonstrate an error law.
35. At the conclusion of the hearing I reserved my decision which I now give.

Discussion:

36. There is no dispute between the parties of the correct approach that should be taken in cases involving the issue of deception. The key decisions relevant to determining whether the Appellant has used deception in this context are SM & Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 and Sharif Ahmed Majumder and Ihsan Qadir v Secretary of State for the Home Department [2016] EWCA Civ 1167. The respondent's evidence in SM and Qadir was found by the Upper Tribunal to suffice to meet, albeit by a narrow margin, the initial evidential burden of showing deception. The burden then shifted to the Appellants to raise an innocent explanation. In the cases of Mr Majumder and Mr Qadir, in the context of the

explanations and evidence given by them, the respondent could not satisfy the legal burden to show that their TOEIC certificates were procured by dishonesty and so their appeals were allowed by the Upper Tribunal. The respondent initially appealed to the Court of Appeal but then settled those appeals by consent.

37. The question for me to consider is whether the judge gave adequate reasons for reaching his overall conclusions which is the mainstay of the submissions advanced in the written grounds and relied upon by Mr Singh.
38. Having considered the determination and there being no submissions made on behalf of the SSHD to the contrary, I am satisfied that the judge approached the matter in the manner directed by the Court of Appeal in SM and Qadir [2016] EWCA Civ 1167. That involves considering, first, whether the Secretary of State has met the burden on her of identifying evidence that the TOEIC certificate was obtained by deception; second whether the claimant satisfies the evidential burden on him of raising an innocent explanation for the suggested deception; and third, if so, whether the Secretary of State can meet the legal burden of showing, on the balance of probabilities, that deception in fact took place.
39. There can be no dispute on the evidence before the judge that that the generic evidence taken together with the ETS spreadsheet providing specific details relating to the Appellant is sufficient to allow the Secretary State to discharge the evidential burden of the use of deception in the taking of an English language test. (see Shezhad and Chowdhury [2016] EWCA Civ 615 at [26],28] [43] and SM and Qadir [2016] EWCA Civ 1167 at [4]). The judge reached that conclusion at paragraph 29 of the determination having considered the particular evidence and its frailties in accordance with the case law (see paragraphs 22-28).
40. The next stage is where there is a burden, again an evidential one on the Appellant of raising an innocent explanation. This required the minimum level of plausibility. Thereafter the judge was required to consider whether the respondent discharged the legal burden of proof in relation to dishonesty which remains with the Secretary of State.
41. The judge had the opportunity to hear the oral evidence of the Appellant and for that to be the subject of cross examination before him. Mr Richardson, who appeared before the First-tier Tribunal, observed that there had been very little challenge to his evidence. Having heard that evidence he considered it in the light of the evidence as a whole. He identified at [30] a number of difficulties he found in the respondent's evidence; that there were significant gaps in the respondent's case- that there was nobody present from the college to authenticate the fact that the Appellant did not turn up in person and that there had been no "proforma matrix of the test undertaken by the Appellant to question his subjective recollection about the test" nor was there any individual to verify that the Appellant failed to appear.
42. He weighed up the evidence of the Appellant and found him to be a credible witness. He accepted his evidence as to his history of studying English, both in

Pakistan and in the UK, which he found was consistent with the documentation he had provided and referred to at [18]-[19]. He took into account that the Appellant had been unsuccessful in part of the examination he had taken in December 2011 and had been obliged to retake it in January 2012 (see paragraph 32). He found that the failure strongly suggested that there was no third party who impersonated the Appellant but did turn up himself on the subsequent day as there was no evidence to suggest that his subsequent score in January 2012 was anything other than genuine. He concluded that "the logic is that if one is going to undertake some fraud one would do so with a tester who was going to pass the whole test and not fail a significant part of it otherwise it would defeat the object of it."

43. The judge returned to the respondent's evidence at [33] but reached the conclusion that on the balance of probabilities it was more likely that not that the Appellant did take the test and thus the respondent had not discharged the overall burden.
44. In reaching the conclusion the judge had taken into account his English language proficiency before the Tribunal itself. This is expressly challenged in the grounds by failing to take account of paragraph 57 of MA (Nigeria) (as set out earlier). However that paragraph has to be read in the light of the evidence in that case and as Mr Richardson submitted, the Appellant had not been cross examined nor had it been explored in evidence as to why he would have a motive to engage in deception.
45. In reaching a decision on this issue and addressing the legal burden, the factors that the Upper Tribunal noted at paragraph 69 of their decision in SM and Qadir as being relevant to considering an allegation of dishonesty in this context: "include (in exhaustively, we would add) what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated. Mr Dunlop also highlighted the importance of three further considerations, namely how the Appellants performed under cross examination, whether the Tribunal's assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic achievements are such that it was unnecessary or illogical for them to have cheated."
46. The Court of Appeal in SM and Qadir [2016] EWCA Civ 1167 endorsed that approach. These were the matters taken into account by the judge.
47. At paragraph 89 the Upper Tribunal in SM and Qadir stated as follows

"The final question is whether the Secretary of State is discharge the legal burden of establishing on the balance of probabilities that this Appellant procured his TOEIC certificate by deceit. The answer to this question requires a balancing of all of the findings and the evaluative assessments rehearsed above."
48. In this context findings of fact were necessary on the evidence given by the Appellant to demonstrate that he had not engaged in deception but had sat the test. The Appellant had given a detailed account as to how he had sat the examination as recorded in the oral evidence set out at paragraphs 15-18. In the case of SM and

Qadir, one of the Appellants had given details of how he sat the test (see paragraph 45) although I accept in impressive detail. Therefore the judge was required to consider that aspect of his account along with the other factors set out in paragraph 69 relevant to the issue of dishonesty; in this case what was known about the Appellant's character, what he would have to lose by using deception along with his level of English (which the judge did consider) and any other relevant factors.

49. Therefore contrary to the grounds, it was open to the judge to make reference to the English-language certificates, and his educational background and his English language ability and the evidence as to the circumstances in which he sat the test.
50. I do not consider that the High Court decision cited by Mr Singh assists his case. The judge did not hear any oral evidence (as it was not a precedent fact case but a public law challenge) and thus was not required to consider whether he was a credible or believable witness. Furthermore, as paragraph 42 makes plain, whilst the Appellant relied upon her qualifications, there was no witness statement setting out any details about the circumstances in which the test was taken, which differed significantly from the present Appellant who did give such an account which was believed by the judge.
51. As the case law identifies, each case is fact sensitive and requires an evaluative assessment to be made and this is to be determined on all the evidence adduced by the parties (see SM and Qadir at paragraph 102). The Secretary of State in the grounds does not identify any evidence from the respondent that the judge had failed to take into account but advances the challenge solely on the basis that the judge failed to give adequate reasons.
52. Consequently I am not satisfied that the grounds advanced by the respondent are made out.

Decision:

The decision of the First-tier Tribunal did not involve the making of an error on a point of law; the appeal by the Secretary of State is dismissed.

Signed

Date: 19/9/2017

Upper Tribunal Judge Reeds