



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11492/2016

THE IMMIGRATION ACTS

Heard at Field House
On 15 June 2018

Decision & Reasons Promulgated
On 27 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD RUHUL AMIN
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent/
Claimant: Mr Zane Malik, Counsel, instructed by AWS Solicitors

DECISION AND REASONS

1. The Secretary of State appeals from the decision of the First-tier Tribunal (Judge Hembrough sitting at Hatton Cross on 26 September 2017) allowing on human rights grounds the claimant's appeal against the decision made on 22 April 2016 to refuse to grant him ILR on the grounds of long residence. The Secretary of State's reason for refusing the application was that she was satisfied that the claimant's presence in the UK was not conducive to the public good because of his past misconduct. The alleged misconduct was fraudulently obtaining an English Language certificate from ETS on two occasions by the use of a proxy test-taker.

The Reasons for Granting Permission to Appeal

2. On 25 April 2018 Judge Juliet Grant-Hutchison granted permission to appeal for the following reasons: *“It is arguable that the Judge has misdirected himself by (a) failing to make a clear finding as to whether it was accepted that the respondent had met the initial burden of proof; (b) by failing to give adequate reasons for accepting the appellant’s innocent explanation; (c) although the ETS certificates were not relied upon in the appellant’s applications, by failing to consider that there was no requirement in paragraph 322 of the Immigration Rules ... for the documents to have been used in this way; and (d) by failing to identify compelling circumstances such as to justify consideration of whether there would be a breach of Article 8. It is arguable that the Judge’s proportionality assessment has been coloured by his error in respect of his findings on the appellant’s use of deception. There was nothing to prevent the appellant returning to Bangladesh in order to apply for the correct entry clearance.”*

The Hearing in the Upper Tribunal

3. At the hearing before me to determine whether an error of law was made out, Ms Isherwood developed the arguments advanced in the grounds of appeal. In reply, Mr Malik adhered to the Rule 24 response opposing the appeal which had been settled by his instructing solicitors.

Discussion

4. The case law of **SM & Qadir (ETS - evidence - burden of proof) UTIAC 21 April 2016, Shehzad & Another [2016] EWCA Civ 615 and R (On the application of Nawaz) -v- SSHD (ETS: review standard/evidential basis) [2017] UKUT 00288 (IAC)** establishes that the standard generic evidence relied on by the Secretary of State in ETS cases is sufficient to raise a prima facie case such that the evidential burden shifts to the claimant to provide an innocent explanation.
5. The Judge received oral evidence from the claimant, who adopted as his evidence in chief a witness statement in which he gave a detailed account of taking an ETS test at Synergy Business College in the autumn of 2011, and of taking a further ETS test on 27 November 2013 at South Quay College.
6. The Judge had the benefit of the claimant’s evidence being tested by way of cross-examination. The claimant’s evidence was that he did not use a proxy test-taker in connection with either test. The Judge found at paragraph [16] that the claimant had given a reasonable account of how he came to take the test at the two colleges, and why. In short, both colleges were close to where he was living, and he was looking for work, and he wished to be able submit evidence of his competence in English.
7. The burden of proof rested with the Secretary of State to prove that the claimant had obtained his English Language certificates by deception: that is, by not genuinely sitting for the speaking test, but by sanctioning someone else to take the speaking tests on his behalf.
8. While it was open to the Judge to find the claimant credible, he still had to give adequate reasons as to why the Secretary of State had not proved her case. His decision fails to discharge a vital function, which is to explain adequately to the losing party

why they have lost. In addition, some of the Judge's reasoning is clearly flawed; and there is also an egregious failure by the Judge to engage with the expert report of Professor Peter French dated 20 April 2016, or with a witness statement dated 15 May 2017 from Detective Inspector Andrew Carter on the topic of Project Façade and the high level of abuse uncovered at the two colleges, all of which material was relied upon by the Secretary of State as augmenting what the Judge characterised as the "*now familiar generic evidence in ETS/TOEIC cases, namely the statements of Rebecca Collings and Peter Millington.*"

9. At paragraph [19] of his decision, Judge Hembrough said as follows: "*It is not in my view necessary to make any finding as to whether the appellant did in fact cheat. There is no evidence that use of the ETS certificates, whether obtained by fraud or otherwise, was contemplated for immigration purposes or for any other illegal purpose.*" This is a clear misdirection. The correct position is precisely the opposite. It was incumbent on the Judge to make a finding as to whether the claimant had cheated in either one or both ETS tests. The Judge appears to have considered that it was unnecessary to do so because he was under the misapprehension that cheating in the ETS tests would only have been material if the claimant's purpose in obtaining false ETS certificates was to support an application for leave to remain. But under the Rule cited in the refusal decision, Rule 322(5), the purpose for which the cheating had been undertaken was irrelevant. The Secretary of State acknowledged that the claimant had not relied on his ETS language certificates for the purposes of an application for leave to remain. She relied instead on the following proposition: "*your complicity in the fraud nonetheless contributed to an extremely serious attack on the maintenance of effective immigration controls and the public interest more generally.*"
10. Although Ms Mindelsohn of the Home Office mistakenly claimed in her witness statement that the claimant had used the ETS certificates in support of a previous application, the position taken in the refusal decision was that he had not done so, but that his complicity in the fraud nonetheless contributed to an extremely serious attack on the maintenance of effective immigration controls and the public interest more generally.
11. At paragraph [18], the Judge held that there was no reason for the claimant to cheat, as the Immigration Rules did not require him to submit evidence of his competence in the English language in connection with the Tier 1 dependant applications which he had made in 2011 and 2013. While this was true, at this stage of his reasoning the Judge appears to have forgotten that the claimant had a separate reason to cheat, which was that he was looking for work and he wished to submit evidence of his competence in English to potential employers.
12. At paragraph [20], the Judge held that there was no evidence that the claimant had ever used deception in connection with the application for leave to enter or remain in the UK. While this was true, it was not the point in issue. The point in issue was simply whether the claimant had used deception to obtain the ETS certificates.
13. Although the Judge listed in paragraph [13] the documentary evidence emanating from the Secretary of State which he said he had considered, and although he included in this list the expert report of Professor Peter French and also the Project Façade

evidence in relation to both Synergy Business College and South Quay College, he did not engage with this evidence for the purposes of evaluating the strength of the Secretary of State's case on deception.

14. In broad terms, the weaker the Secretary of State's *prima facie* case of deception, the weaker the innocent explanation needs to be in order to rebut successfully the Secretary of State's case. Conversely, the stronger the Secretary of State's case on deception, the more cogent the innocent explanation needs to be.
15. As I explored with Mr Malik in oral argument, the significance of Professor French's expert evidence is that it was commissioned by the Home Office to counter the expert evidence of Dr Harrison which was adduced in the case of **SM & Qadir**, and which was the foundation for the Tribunal's finding at paragraph [68] as follows: "*As our analysis and conclusions in the immediately preceding section made clear, we have substantial reservations about the strength and quality of the Secretary of State's evidence. Its shortcomings are manifest. On the other hand, while bearing in mind that the context is one of alleged deception, we must be mindful of the comparatively modest threshold which an evidential burden entails. This calls for an evaluative assessment on the part of the Tribunal. By an admittedly narrow margin, we are satisfied that the Secretary of State has discharged this burden.*"
16. In reaching the conclusion that the standard generic evidence only discharged the evidential burden by a narrow margin, the Tribunal attached great weight to the expert evidence of Dr Harrison, who was of the opinion that ETS' method of analysing the TOEIC test data was deeply flawed and was capable of generating a very high number of false positives. Professor French's report is a direct riposte to the expert evidence of Dr Harrison. The lawyers for the Secretary of State made a late application for Professor French's report to be admitted into evidence at the hearing of the **SM & Qadir**, but the application was refused on the grounds of lateness.
17. In his report, Professor French was asked to give his opinion of whether, on the balance of probabilities, ETS's methodology was likely to result in any false positives (i.e. speaking comparison test results wrongly indicating that different speakers were the same person). If he considered false positives were likely, he was asked to estimate how many.
18. His conclusion at Section 3.2 is that the ASR used by ETS is extremely likely to produce some false positives among the 58,464 matches identified by the software in respect of TOEIC test recordings. This is despite the threshold for producing matches having been set conservatively. The number of false positives produced by the ASR cannot however be estimated with any great degree of precision.
19. The error rate of 2% quoted for the pilot test was not broken down into false positives versus false negatives. But even if one assumes the worst case scenario, that all the errors were false positives, the safety net system of having trained listeners assess all the matches shown up by the ASR would, in his opinion, have made a very large reduction to the overall number of false positives.

20. At paragraph 3.3.7, Professor French refers to the fact that of the 58,464 matches produced by the ASR, only 33,735 were confirmed by the listener pairs. In other words, only 57.7% of matches were accepted.
21. Professor French opines that the very high rejection rate of 42.3% is in part attributable to the stringent conditions laid down for match confirmation i.e. for acceptance of a match both listeners working independently had to confirm it, and the test for individual acceptance was that, "*any doubt about the validity of the match will result in it being rejected*", citing the witness statement of Peter Millington at paragraph 45.
22. His conclusions at paragraph 4 are that the conditions used for trained listener pair confirmation, in conjunction with the conservative threshold set for ASR match identification, would, in his view, have resulted in substantially more false rejections than false positives.
23. Even though there is material missing from the body of information called for by Dr Harrison, he is not convinced that the provision of such information could be used to establish a closely specified percentage of false positives.
24. If the 2% error rate established for the pilot recordings were to apply to the TOEIC recordings, he estimates that the number of false positives is likely to be substantially less than 1% after the process of assessment by trained listeners has been applied.
25. In short, whereas Dr Harrison is of the view that the shortcomings in the process used by ETS to identify proxy test-takers is so great that the rate of false positives might be as high as 30% or 40%, in Professor French's view the number of false positives is likely to be of a much lower order of magnitude.
26. Accordingly, absent an expert report from Dr Harrison or another expert in rebuttal, a much stronger prima facie case of deception was raised against this claimant than was raised against the claimants in **SM & Qadir**, and the evidential burden on this claimant to produce an innocent explanation for his invalidated test results was correspondingly more onerous, at least in theory.
27. For the above reason, the Judge was wrong to approach the issue of cheating on the basis that it did not really matter what evidence was deployed by the Secretary of State; and that the only thing that mattered was whether he believed that the claimant was credible in his denial of cheating. It was incumbent on the Judge to evaluate the additional evidence relied upon by the Secretary of State, and to make findings as to whether and to what extent it bolstered the case on deception, before addressing the question whether the claimant had, *in the particular circumstances of his case (including the additional evidence deployed against him by the Secretary of State)*, provided an innocent explanation.
28. Accordingly, the decision of the First-tier Tribunal was vitiated by a material error of law, such that the decision must be set aside and remade. As the Secretary of State has been deprived of a fair hearing in the First-tier Tribunal, the appeal must be remitted

to the First-tier Tribunal for a fresh hearing, with none of the findings of fact made by the previous Tribunal being preserved.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, such that the decision must be set aside in its entirety and remade.

Directions

This appeal is remitted to the First-tier Tribunal at Hatton Cross for a fresh hearing (Judge Hembrough not compatible), with none of the findings of fact made by the previous Tribunal being preserved.

My time estimate for the hearing is 2 hours.

I make no anonymity direction.

Signed

Date 26 June 2018

Judge Monson

Deputy Upper Tribunal Judge