Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12149/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 July 2018	**On 1 August 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

AJIT LAL DAS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Malik, of Counsel instructed by AWS Solicitors
For the Respondent: Miss A Everett, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant appeals, with permission against a decision of Judge of the First-tier Tribunal Beg, who in a decision promulgated on 5 October 2017 dismissed the appellant's appeal against a decision to refuse him indefinite leave to remain.

2. The appellant is a citizen of Bangladesh, born on 22 October 1979. He entered Britain as a student on 1 April 2006 and thereafter received further extensions of stay until 11 May 2016. On that basis he applied for leave to remain on ten year long residency grounds.

3. His application was refused under the provisions of paragraph 322(2), it being asserted that he had made false representations or failed to disclose material facts for the purpose of obtaining variation of leave. In the letter of refusal it was stated that:-

> "In your application dated 20 January 2011, you submitted a Master of Arts Degree in Marketing Management from Middlesex University London awarded to you on 10 August 2010.
>
> I have contacted Middlesex University London and they have verified that the above degree which you submitted as part of your application on 20 January 2011 is not a genuine certificate.
>
> In your application dated 11 January 2013, you submitted a TOEIC certificate from Educational Testing Service ('ETS').
>
> ETS has a record of your speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS, has via the use of computerised voice recognition software and a further human review by anti-fraud staff (each of whom has determined that a proxy was used), undertaken a check of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker. Your scores from the test taken on 18 September 2012 at Bfluent School of English have now been cancelled by ETS. On the basis of the information provided to her by ETS, the SSHD is satisfied that your certificate was fraudulently obtained and that you used deception in your application of 11 January 2013.
>
> At the time you took your test, as you will have been aware, ETS was an approved provider of Secure English Language Tests (SELT) for UK immigration purposes. Its role as a SELT provider was to help ensure that those who seek to enter or remain in the United Kingdom are able to speak English. As recognised in para 117B(2) of the Nationality, Immigration and Asylum Act 2002, those who can speak English are less of a burden on taxpayers and are better able to integrate into society. Although you did not rely on your TOEIC certificate for the purposes of your current application for leave to remain, 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".

4. At the hearing of the appeal the First-tier Judge noted the terms of the refusal. She noted that the appellant, although present, did not give evidence and that Mr Malik who also represented the appellant at that hearing stated that the respondent had made an allegation that there was a fraudulent degree certificate and fraudulent TOEIC certificate, but that she had not provided evidence in support. He had relied on the case of **SM and Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC)** where the Tribunal had held that where there was an allegation of dishonesty made by the respondent the burden of proof was on her to show that dishonesty. Mr Malik had submitted that the Secretary of State had not produced anything to discharge the evidential burden. The judge noted that it was submitted

that no evidence from ETS had been provided and that the appellant relied on his degree certificate.

5. The judge noted that the appropriate standard of proof was a civil standard of proof and said she had taken into account all documents in the file. She referred to the determination **SM and Qadir** and to the decision in **Shehzad & Anor [2016] EWCA Civ 615**. She noted, moreover, that the burden lay on the respondent to produce evidence that the documents on which the appellant relied were fraudulently obtained. She found, in paragraph 12, that the initial evidential burden on the Secretary of State was very narrowly discharged. She noted that while it was common ground that the test which was taken on 18 September 2012 was taken at Bfluent School of English, no explanation was provided for the fact that in the interview (question 8) the appellant had said believed that he had taken the test at the Bow Business Centre and then, in his witness statement dated 21 September 2017 at paragraph 21, he had confirmed that the test was taken at the Bfluent School of English. She said there was no innocent explanation before her. She therefore found the TOEIC certificate had been obtained fraudulently.

6. However, the judge did accept that the Secretary of State had not produced evidence that the Master of Arts degree certificate from Middlesex University was a forgery. She stated that she found that a mere assertion was not enough.

7. The judge went on to take into account the fact that she had found that the appellant had obtained the TOEIC certificate fraudulently when she considered the rights of the appellant under Article 8 of the ECHR. She took into account the position of the appellant's children who were born on 23 October 2010 and 7 September 2017 and set out in detail the terms of Section 117B. She found that the family could return as a family unit to Bangladesh and that the decision to refuse leave to remain was not disproportionate because of the deception that had been used.

8. The grounds of appeal asserted that no evidence whatsoever had been produced to show that the TOEIC certificate was fraudulently obtained. The judge was not entitled, it was asserted, to rely on a bare assertion that that was the case. It was asserted that the judge had erred in her application of the determination in **SM and Qadir** and the judgment of the Court of Appeal in **Shehzad**. It was also asserted, moreover, that the judge had erred in considering the questions regarding where the appellant had taken the TOEIC tests and had failed to make findings in accordance with the guidance given in **SM and Qadir**. There was nothing, it was argued, to show that the appellant's test had been characterised as invalid.

9. Permission, having been granted by Upper Tribunal Judge Freeman, who referred to the judgment of the Court of Appeal in **Shehzad**, the Principal Resident Judge set out, as is invariably the case, directions that there should be a presumption that where a decision is set aside for error of law, the remaking of a decision would take place at the same hearing and that the Tribunal was empowered to permit new or further evidence to be admitted, but that that evidence should comply with Rule 15(2A) of the Procedure Rules – that is that a note should be sent to the Upper

Tribunal and any other party indicating the nature of the evidence and explaining why it was not submitted to the First-tier Tribunal. The directions added that failure to comply with those directions could result in fresh or further evidence not being considered by the Tribunal.

10. Those directions also directed that, at the latest five working days prior to the scheduled hearing of the appeal, the parties should contact the Tribunal for the purpose of confirming that all bundles and all other materials considered by the First-tier Tribunal and/or directed by them would be available for distribution to the judge and taking any other judge.

11. The Secretary of State served a Rule 24 response to the Tribunal on 16 July 2016. It stated that:-

> "The Respondent does not oppose the Appellant's application for permission to appeal and invites the Upper Tribunal to remit the appeal to the First-tier Tribunal for a *de novo* hearing, without the need for a hearing before the Upper Tribunal, in order to save costs for all parties to the appeal."

On 18 July 2018 the Rule 24 response was sent to the appellant's solicitors by e-mail. On 20 July 2018 a file note indicated that:-

> "Despite an urgent email and three telephone calls to the representatives, requesting a response by no later than today, no response has been forthcoming. Thus the appeal will remain in the list for Monday ...".

12. At the hearing of the appeal before me Mr Malik indicated that he did not accept that the appeal should be remitted as requested in the Rule 24 statement. He asked rather that the judgment of the First-tier Judge be set aside and the appeal be allowed. He referred to the directions to which I have referred above and stated that the Secretary of State had failed to comply with those directions. The reality was that the Secretary of State had not met the evidential burden before her – that evidential burden being clear from the judgment of the Court of Appeal in **Shehzad** and the determination of the Tribunal in **SM and Qadir**. Miss Everett merely asked that the appeal be remitted saying that an error was conceded. The Secretary of State, she accepted, should have produced evidence. She appeared to accept that the judge had accepted that the appellant's degree certificate was genuine.

13. Mr Malik stated that he was not arguing that the appellant had not had a fair hearing but rather that the Secretary of State had failed to discharge the burden upon her and that therefore the appellant had not been required to give evidence to explain the discrepancies at interview. The appellant had no case to answer.

14. I consider there is some weight in the reasoning of the judge regarding the TOEIC certificate being obtained fraudulently. However, I accept that it has been conceded by the Secretary of State that there has been an error of law and therefore I set aside the decision of the First-tier judge.

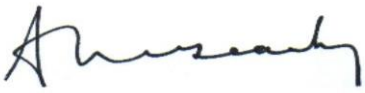
15. I do not, however consider that it is appropriate for me, having set aside the decision of the First-tier Judge, to remake the decision myself on the basis that the Secretary of State has not produced the relevant evidence to discharge the burden of proof upon her. I have discretion to direct how and when the further hearing should take place and I reach my decision because I consider that the appellant's representatives should have responded to the Rule 24 notice and the request that the appeal be remitted to the First-tier Tribunal promptly rather than taking no action at all, and further I consider that in the interests of fairness it is appropriate that both parties be able to give evidence so that the issue can be properly decided. The Secretary of State clearly has, or may well have, relevant evidence which should be put forward and I consider that it is appropriate that he should be given the opportunity to do so. The overriding objective in this case is that there is an outcome which is fair to both parties in this appeal and consider that that is only met by the appeal being remitted to the First-tier for hearing afresh on all issues.

Notice of Decision

The decision of the First-tier Judge is set aside.

The appeal will proceed to a further hearing in the First-tier Tribunal before a judge other than Judge of the First-tier Tribunal Beg on all issues

No anonymity direction is made.

Signed  Date:25 July 2018

Deputy Upper Tribunal Judge McGeachy