



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

Appeal Number: IA/31206/2015

THE IMMIGRATION ACTS

Heard at Field House

On 7 December 2017

**Decision & Reasons
Promulgated
On 18 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MEAH MD OMAR FARUQ
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr D Mills, a Senior Home Office Presenting Officer
For the Respondent: Mr M Aslam of Counsel

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal. I shall refer to the Secretary of State as such throughout and to Mr Faruq as the claimant to avoid confusion.

2. The claimant is a citizen of Bangladesh born on 27 January 1985. He came to the United Kingdom on 9 February 2009 with leave as a student valid until 1 April 2012. He subsequently applied for an extension of leave in 2012 which was granted to 11 April 2014. On 24 January 2014 he applied for further Tier 4 Student leave. The Secretary of State refused his application on the basis that the results of the English language test that he had undertaken on 21 February 2012 had been obtained fraudulently.

The appeal to the First-tier Tribunal

3. The claimant appealed against the Secretary of State's decision to the First-tier Tribunal. In a decision promulgated on 14 March 2017 First-tier Tribunal Judge M R Oliver allowed the claimant's appeal. The First-tier Tribunal found that the claimant did not employ fraud.
4. The Secretary of State applied for permission to appeal against the First-tier Tribunal's decision and on 20 September 2017 First-tier Tribunal Judge Doyle granted permission to appeal.

The hearing before the Upper Tribunal

5. The grounds of appeal are that the judge failed to give adequate reasoning as to how the claimant had addressed the respondent's allegation of fraud with a plausible, innocent explanation. It is asserted that the judge relied on the claimant's English language ability. As such the Tribunal was satisfied that it was entitled to take this into account in determining whether the claimant had met the evidential burden in this case. The judge placed weight on the fact that the claimant was able to recall details of the examination process, however, this does not mean that the claimant personally took the test. Reference is made to the BBC Panorama programme which showed students standing next to terminals while proxy test takers took the test for them. The judge does not refer to having seen this evidence which was provided on DVD to every hearing centre and therefore the judge may not be aware of the methods used which would not preclude the candidates from having travelled to the test centre and having knowledge of the procedures and content of the test itself even though they had not taken it personally.
6. It is asserted that the First-tier Tribunal has materially erred by failing to give adequate reasons for holding that a person who speaks English would have no reason to secure a test certificate by deception. Reliance is placed on the case of **MA (ETS - TOEIC testing) [2016] UKUT 00450 ('MA')**, in particular paragraph 57. The fact that a person can speak English and has passed various tests in English does not determine the issue. As found in **MA** there may be many reasons why persons proficient in English may engage in TOEIC fraud including lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. The evidential burden fell upon the claimant to offer an innocent explanation which he has failed to do.

7. In oral submissions Mr Mills submitted that the judge allowed the appeal purely on the basis that the claimant could speak English and had passed several tests and exams in English. He referred to paragraph 5 of the decision where the judge specifically states that the law is settled. However, it is clear that the Secretary of State since the case was set out i.e. **SM and Qadir v SSHD (ETS - Evidence - ETS - Burden of Proof) [2016] UKUT 229, SSHD v Shahzad Chaudhury [2016] EWCA Civ 615, MA (ETS TOEIC testing) [2016] UKUT 450** and **MA** has now developed further evidence in support of its position. He submitted that the judge's reasoning was entirely based on the fact that the claimant spoke English fluently and does not take into account the powerful evidence of the Secretary of State regarding the invalid tests and the use of a proxy. No account has been taken of paragraph 57 of **MA** where the court set out that even though an claimant speaks English there may be evidence that he did not take the test and that he might have cheated even though he is able to speak English.
8. Mr Aslam submitted that the judge has correctly set out the steps that need to be taken in paragraph 5 of the decision and correctly says that the Secretary of State has discharged the evidential burden and that it is for the claimant to give an innocent explanation. The judge does demonstrate that he looked at and considered the innocent explanation. At paragraph 2 the judge refers to the claimant's witness statement and records why he took the TOEIC test. At paragraph 3 the judge records the evidence of the IELTS test and why he no longer retains that test. He described the evidence of the claimant regarding attendance at the centre. In paragraph 7 of the decision he submitted that the first sentence is referring to the innocent explanation set out by the judge at paragraphs 2 and 3. The second sentence of that paragraph repeats the evidence set out in paragraph 3 regarding the IELTS certificate. He submitted these were positive findings and that the judge clearly accepted his explanation that he had taken the test. The judge took into account was the fact that he took the test in 2014 and that this was not disputed. The judge clearly had no difficulty in understanding the claimant during the hearing. On the basis of the four parts of the innocent explanation the claimant had satisfied the legal burden. The Secretary of State's assertion that the sole basis that the appeal was allowed was that the claimant can speak English is incorrect. The judge took into account the claimant's witness statement where he set out in detail why he took the test at this centre and how much he paid etc. The reference to the BBC Panorama programme is not relevant as that only goes to the evidential burden and the judge found that the Secretary of State had satisfied the evidential burden.
9. In reply Mr Mills submitted that nothing else was taken into account other than the ability to speak English in paragraph 7.

Discussion

10. The judge in this case correctly set out at paragraph 5 that the Secretary of State must satisfy an evidential burden showing sufficient evidence of a reasonable suspicion of deception and then it is for the claimant to satisfy the legal burden of showing that deception was not used. The judge found that the Secretary of State had satisfied the evidential burden by submitting the finding that his test results from 21 February 2012 had been found to be invalid using the methodology outlined in the various witness statements submitted by the respondent. The judge correctly identified the relevant question which is - has the claimant satisfied the judge that he genuinely took the test himself rather than using a proxy taker?
11. The judge did set out at paragraphs 2 and 3 the evidence of the claimant including his description of the day of the examination but no analysis of that evidence or specific findings are made. At no point does the judge make a finding on the essential issue that he had set out which is whether the claimant genuinely took the test himself rather than using a proxy taker. The findings that the judge made are set out in one paragraph - 7:

“7. Apart from this allegation against him, the appellant’s immigration and education history has been wholly meritorious and successful. The appellant’s representative overstepped his role by asserting that the British High Commission in Bangladesh supplied the only IELTS testing, an assertion which I nevertheless find to be plausible. No suggestion has been made that the creditable 5.5 score he achieved on that occasion before coming in 2009 was not a genuine reflection of his English speaking abilities at that early stage. In the United Kingdom he has taken a number of courses, all taught in English, and has passed them all. His exposure to fluent English and his likely consequent improvement in English has been demonstrated by the subsequent IELTS test he took in 2014. The results for his questionable test are in line with his demonstrated abilities. I had no difficulty understanding the appellant and he was able to respond promptly to all the questions he was asked during the hearing. He cannot have felt that he had any need to use fraud to obtain the certificate. I find that he did not employ fraud.”

12. The judge has not addressed the issues set out in **MA** and has not considered that despite the proficiency in English a person may nevertheless may engage in TOEIC fraud. As set out in **MA** there may be many reasons, despite English proficiency, why a person might engage in TOEIC fraud:

(57) Second, we acknowledge the suggestion that the Appellant had no reason to engage in the deception which we have found proven. However, this has not deflected us in 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, inexhaustively, 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 for deceitful conduct in this sphere. We are not required to

make the further finding of why the Appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter.

13. The judge has not undertaken an analysis of the appellant's evidence against the background of the information provided by the Secretary of State including the evidence of the BBC Panorama programme. The judge appears to have relied solely on the fact that because the claimant was proficient in the English language and had passed an IELTS test that the claimant could have no reason to use fraud to obtain the certificate. The judge has failed to consider that there may be reasons, despite proficiency in English, to use a proxy.
14. The decision of the First-tier Tribunal contained a material error of law such that it should be set aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA').
15. I considered whether or not I could re-make the decision myself. I considered the Practice Statement concerning transfer of proceedings. I am satisfied that the nature and extent of judicial fact finding that is necessary in order for the decision in the appeal to be re-made is such, having regard to the overriding objective, that it is appropriate to remit the matter to the First-tier Tribunal.
16. I remit the case to the First-tier Tribunal for the case to be heard at the First-tier Tribunal at Taylor House before any judge other than Judge M R Oliver pursuant to section 12(2)(b) and 12(3)(a) of the TCEA. A new hearing will be fixed at the next available date.
17. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Notice of Decision

The appeal of the Secretary of State is allowed. The case is remitted to the First-tier Tribunal for a de-novo hearing before any judge other than Judge M R Oliver.

Signed P M Ramshaw

Date 16/1/18

Deputy Upper Tribunal Judge Ramshaw