



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

Appeal Number: IA/31358/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 18 May 2018**

**Decision & Reasons Promulgated
On 25 May 2018**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

Md MUFAZZAL HUSEN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. G. O’Ceallaigh, of counsel, instructed by Solicitors

For the Respondent: Mr. L. Tarlow, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant, who was born on 12 August 1983, is a national of Bangladesh.

2. The Appellant applied for leave to remain as a Tier 4 (General) Student on 17 December 2012. His application was refused on 3 July 2012 and again on 19 June 2013. This decision was withdrawn before the First-tier Tribunal in Newport on 13 November 2013. The Respondent made a further decision to refuse the Appellant's application on 4 September 2015. The Appellant appealed and his appeal was heard by First-tier Tribunal Judge Russell, who allowed his appeal in a decision, promulgated on 27 September 2016.
3. The Respondent appealed against this decision and First-tier Tribunal Judge Shimmin granted her permission to appeal on 17 January 2017. The appeal came before Upper Tribunal Judge McWilliam and she allowed the Respondent's appeal and remitted it to the First-tier Tribunal. First-tier Tribunal Judge Thorne refused the Appellant's appeal in a decision promulgated on 19 September 2017.
3. The Appellant appealed against this decision and First-tier Tribunal Judge McCarthy granted him permission to appeal on 13 March 2018.

ERROR OF LAW HEARING

4. Both counsel for the Appellant and the Home Office Presenting Officer made oral submissions and I have referred to the content of these submissions, where relevant, in my decision below. In particular, the Home Office Presenting Officer submitted that, although the First-tier Tribunal Judge's findings were short, he had applied the law correctly.

ERROR OF LAW DECISION

5. At a previous hearing before First-tier Tribunal Judge Russell on 8 September 2016, the Respondent said that he no longer relied on the ground of refusal which related to a bank statement and letter from the NCC Bank. Therefore, the issue before First-tier Tribunal Judge Thorne was whether the Appellant had relied on TOEIC tests issued by ETS test which had been taken by proxy.
6. In paragraph 48 of his decision, First-tier Tribunal Judge Thorne correctly stated that he had to apply the approach set out in *Shehzad and Another v Secretary of State for the Home Department* [2016] EWCA Civ 615. He added that this meant that the Secretary of State bore

the initial evidential burden of establishing that the Appellant had used deception and that then the burden passed to the individual concerned to provide a plausible innocent explanation for the evidence which appeared to show that he had used deception.

7. The case law relied upon by the Appellant in ground one of his grounds of appeal does not undermine reliance on *Shehzad and Others* as in paragraph three of that judgement Lord Justice Beatson noted that:

“It is common ground that for a decision to be made under paragraph 322(1A) there must be material justifying a conclusion that the individual under consideration has lied or submitted a false document. It is also common ground that the Secretary of State bears the initial burden of furnishing proof of deception, and that this burden is an "evidential burden". That means that, if the Secretary of State provides *prima facie* evidence of deception, the burden "shifts" onto the individual to provide a plausible innocent explanation, and that if the individual does so the burden "shifts back" to the Secretary of State: see *Shen (paper appeals: proving dishonesty)* [2014] UKUT 00236 (IAC) at [22] and [25] and *Muhandiramge (section S-LTR 1.7)* [\[2015\] UKUT 675](#) at [10]. As to the standard of proof, the civil standard of proof applies to this question. The approach in *Re B (Children)* [\[2008\] UKHL 35](#), [\[2009\] 1 AC 11](#) to the standard of proof required to establish that a child "is likely to suffer significant harm" under section 31(2) of the Children Act 1989 is of relevance in the present context. It was held in that case that the standard required is the balance of probabilities. Baroness Hale stated (at [70]) that "neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies."

8. First-tier Tribunal Judge Thorne did not accept that the Appellant had provided an innocent explanation for the evidence relied upon by the Respondent and, therefore, it was not necessary for him to move on to “the third stage” of any application of the burden of proof. It is also clear from this paragraph that no heightened civil standard of proof applies.

9. The Appellant took his TOEIC tests at New College of Finance and the Respondent relied on an ETS SELT Source Data excerpt which stated that he had been recorded as scoring 170 for his speaking test and 200 for his writing test but that these tests had been deemed by ETS to be invalid. The details given on this excerpt mirrored those on the Official Score Report relied upon by the Appellant.
10. The First-tier Tribunal Judge also relied on other objective evidence relating to the manner in which these tests were investigated. However, when doing so he purported to rely on a document, entitled *Project Façade*, which documented the widespread ETS fraud taking place at Colwell College. Clearly this was not the college at which the Appellant took his tests. The index of the Home Office's Supplementary Bundle does refer to a report on New College of Finance but the item is not numbered or included.
11. The fact that the First-tier Tribunal Judge appeared to have relied on the fact that there was an individual report into deception at a college raises the clear possibility that this resulted in him placing some or significant weight on such a report and that, if there was no such report, deprived the Appellant of the opportunity to rebut the contents of any such report. This was an error of law.
12. In paragraph 45 of his decision, the First-tier Tribunal Judge also relied on the case of *R (on the application of Nawaz) v Secretary of State for the Home Department (ETS review standard/evidential basis)* [2017] UKUT 00288 (IAC) and the fact that in that case the Upper Tribunal found that "evidence obtained by use of the Look-up Tool and subject to the human verification procedure is an adequate basis for the Secretary of State's deception findings in these cases". However, in a judicial review hearing, the test was whether the decision by the Respondent to rely on such evidence was irrational or unlawful. The test to be applied in a statutory appeal was the more complex one adopted in *Shehzad and Another*.
13. Furthermore, in his findings at paragraph 50 of his decision the First-tier Tribunal Judge asserted that the Appellant had failed to discharge the burden of providing a plausible innocent explanation for the evidence relied upon by the Respondent. As submitted by counsel for the Applicant, this places an impossible burden on the Appellant in relation to details to which he has no access. All that the Appellant had to do was to submit sufficient

evidence to show that there may be an innocent explanation and that his account of taking the tests was plausible. Then the burden shifted back to the Respondent.

14. As a consequence, I find that First-tier Tribunal Judge Thorne did err in law in his decision.

DECISION

- (1) The Appellant's appeal is allowed.
- (2) The appeal is remitted to a First-tier Tribunal Judge, other than First-tier Tribunal Judge Thorne or First-tier Tribunal Judge Russell, for a *de novo* hearing.

Nadine Finch

Signed

Date 18 May 2018

Upper Tribunal Judge Finch