Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31490/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 January 2018	**On 21 February 2018**

Before

UPPER TRIBUNAL JUDGE GILL
DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMAD AMINUL ISLAM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T. Wilding.
For the Respondent: Mr Z. Malik.

DECISION AND REASONS

1. The respondent (hereinafter "the claimant") is a citizen of Bangladesh born on 19 May 1979.

2. On 26 September 2014, having resided in the UK continuously for over ten years, the claimant applied for indefinite leave to remain under Paragraph 276B of the Immigration Rules. By a decision dated 7 March 2015, the application was refused by the Secretary of State on the basis that the claimant did not satisfy Paragraphs

276B(ii)(c) and 276B(iii) of the Immigration Rules. She also refused the application under paragraph 322(1A) of the Immigration Rules.

3. The claimant appealed to the First-tier tribunal where his appeal was heard by First-tier Tribunal Judge Scott-Baker. In a decision promulgated on 6 February 2017 the judge allowed the appeal under paragraph 322(1A) and then said: *"… it follows that the Secretary of State must consider the [claimant's] application for indefinite leave to remain under the Immigration Rules"*. In other words, she remitted the case to the Secretary of State for consideration of paragraph 276B.

4. The Secretary of State is now appealing against that decision.

Background

5. In order to support a previous application for leave to remain (as a student), made on 18 June 2012, the claimant submitted to the Secretary of State a Test of English for International Communication ("TOEIC") certificate from Educational Testing Service ("ETS"). This concerned English language tests taken on 21 February 2012 and 22 February 2012 at the Synergy Business College of London.

6. The reason given by the Secretary of State for rejecting the claimant's application made on 26 September 2014 for indefinite leave to remain was that ETS had undertaken a verification of the claimant's tests taken on 21 February 2012 and 22 February 2012 and decided that there was significant evidence to conclude that the certificate was fraudulently obtained by the use of a proxy test taker.

7. The application for indefinite leave to remain was consequently refused under Paragraph 276B(ii)(c) of the Immigration Rules because the Secretary of State considered that the claimant's presence in the UK was not conducive to the public good and under Paragraph 276B(iii) (with reference to Paragraph 322(1A) of the Rules) because she considered that he had used false representations when making the application on 18 June 2012. She said she was not prepared to exercise her discretion in his favour.

Decision of the First-tier Tribunal

8. The sole factual issue in contention before the First-tier Tribunal was whether the claimant had used deception through the use of a proxy test taker in respect of the tests taken at Synergy Business College of London in February 2012.

9. The evidence adduced by the Secretary of State to establish that there had been deception included:

    a) Witness statements from Home Office civil servants, Ms Collings and Mr Millington. These statements are not specific to the claimant's case and have

been relied on in multiple cases before the First-tier Tribunal. They explain the process by which ETS has identified where deception has been used.

b) An "ETS TOEIC Test Centre Look Up Tool" spreadsheet (Annex A) showing that all eight of the claimant's tests taken on 21 February 2012 and 22 February 2012 had been identified by ETS as "invalid". This spreadsheet identifies the claimant by name and lists all eight of the tests he took.

c) An "ETS TOEIC Test Centre Look Up Tool" spreadsheet (the first page of Annex B) showing that on 21 February 2012 125 tests were taken at Synergy Business College of London, of which 58% were found to be "invalid" and 42% were found to be "questionable".

d) An "ETS TOEIC Test Centre Look Up Tool" spreadsheet (the second page of Annex B) showing that on 22 February 2012 104 tests were taken at Synergy Business College of London, of which 68% were found to be "invalid" and 32% were found to be "questionable".

e) A report by Professor French commenting, inter alia, on the likelihood of false positives arising from the ETS methodology in identifying where a proxy test taker has been used.

f) A report titled "Project Facade- criminal enquiry into abuse of the TOEIC Synergy Business School" (hereinafter "the Project Facade Report"). The Project Facade Report summarised the outcome of a criminal investigation into Synergy Business School and concluded as follows:

> *"Between 24/11/2011 and 15/01/2013, Synergy Business College undertook 4894 TOEIC speaking & writing tests of which ETS identified the following:*
>
> | | |
> |---|---|
> | *Invalid* | *2410* |
> | *Questionable* | *2484* |
> | *Not withdrawn (no evidence of invalidity)* | *0* |
> | *Percentage invalid* | *49%"* |

10. The evidence of the claimant before the First-tier Tribunal, both in his written statement and given orally, was that he took the tests in February 2012 himself and because of his high level of English at that time (as evidenced by his educational attainment in the English language) he had no reason to use deception. The claimant claimed that when he took the test there were 14-15 other people in the room and he did not see anyone cheat.

11. It is relevant to quote the following extracts from the judge's decision:

> *"17. … Invalid was termed as those where evidence existed of proxy test taking and/or impersonation and questionable were when test takers should retest due to administrative irregularities. A report into Synergy Business College showed that between 24 November 2011 and 15 January 2013 4,894 TOEIC speaking and*

writing tests had been undertaken which showed that 49% were considered invalid.

19. *The Tribunal has considered these documents in the decision of SM and Qadir and it was accepted at head note 1 that this evidence combined with evidence particular to appellants [sic] sufficed to discharge the evidential burden of proving that the TOEIC certificates had been procured by dishonesty.*

20. *The evidence of Ms Collins [sic] and Mr Millington was considered in detail at paragraphs 14 to 26 of the judgment.*

21. *I was asked to note by Mr Gill that* ***the only evidence relied upon by the [Secretary of State] were the documents produced at the outset of the hearing****, there was no other evidence such as any voice recording or records. The general assertion was that because of the propensity of Synergy Business College results and that there had been a number of invalid decisions that an inference should be drawn that this decision [sic] was invalid but this was an inadequate assessment. He objected to the late production of the evidence and I was asked to note that the report by Professor Harrison had been dealt with in the decision of SM and Qadir but asked to note that before me there was not the same evidence as in SM and Qadir and in particular ETS had not produced any documents relating to the [claimant]. I was asked to note in particular that the [claimant] had produced a valid IELTS certificate from 2002 which had been accepted as genuine by the [Secretary of State]. He had also studied in English in the United Kingdom and he had produced those certificates. Those results had not been forged and he had been given leave to remain year by year.* ***Mr Gill submitted that the [claimant] had done more than enough to offer an innocent explanation*** *and the [Secretary of State] had failed to establish that his test result was invalid. The [claimant]'s ability in the English language was supported by his academic achievements. No test results have been submitted from ETS and if they had been submitted there could have been some cross-examination and insufficient evidence had been produced to show that the Section 322 refusal had been made out.*

22. *In SM and Qadir the Tribunal had considered the evidence from Ms Collins [sic] and Mr Millington. It was noted that neither witness had any qualifications or expertise vocational or otherwise in the scientific subject matter namely voice recognition, technology and techniques. The Home Office had been entirely dependent on the information provided by ETS. At that time it stated that the Home Office had no advice or input from suitable experts and there had been no evidence from any ETS witness.*

23. *I noted in particular from Mr Millington's evidence that to his knowledge the Home Office had not at any time requested ETS to provide the voice recordings in respect of any individual. Nor had the Home Office ever asked for the software used by ETS. The Tribunal noted that in the trial ETS had communicated its unwillingness to provide any of the voice recordings absent judicial compulsion to do so.*

24. *There was before us a report from Professor French which does not appear to have been before the Upper Tribunal in SM and Qadir. His report before me is dated 20 April 2016 which post-dated the case of SM. He was asked to comment on the likelihood of false positives having occurred and he confirmed for the reasons given that ETS was extremely unlikely to have produced some false positives and he concluded that the number of false positives emanating from the overall process followed by assessment of two trained listeners to be very small.*

> 25. *There was no specific evidence against the [claimant]. What is evident from the refusal letter is that ETS had undertaken a check of his test and confirmed to the SSHD that there was significant evidence to conclude the certificate was fraudulently obtained by the use of a proxy test taker but there is no actual evidence before me to support that assertion. All that is known about Synergy Business Centre is what is set out in the Project Facade report which stated that 49% of the results of that college were invalid. As it was pointed out at the hearing that meant that 51% of results were valid.*
>
> 26. *The [claimant] stated that he had completed an IELTS examination and a copy of the certificate from 2002 was before me. There was no allegation by the [Secretary of State] that this certificate was false. Further he had been in the United Kingdom since 2002 studying in English and he had satisfactorily completed a BBA in 2006 and been taught in English and he had then gone on to do other postgraduate qualifications. I also had the opportunity of receiving oral evidence from the [claimant] at the hearing and noted he was able to adequately express himself in the English language.*
>
> 27. *On the basis of this evidence I find that the [Secretary of State] has failed to establish that the [claimant] fraudulently obtained the TOEIC certificate. This evidence produced, looked at in the round, suggests that there is a possibility that the [claimant] fell within the 51% of students whose certificates had not been cancelled."*
>
> (our emphasis)

Grounds of Appeal and Grant of Permission to Appeal

12. The Secretary of State raised five grounds of appeal:

a) Ground 1 is that the judge failed to follow the correct approach to the burden of proof in line with *SM and Qadir (ETS-Evidence-Burden of Proof)* [2016] UKUT 229.

b) Ground 2 is that the judge misunderstood the Secretary of State's evidence. There were two specific points raised on the Secretary of State's behalf under ground 2, which we will refer to as ground 2(a) and ground 2(b) and which are as follows:

   i) Ground 2(a): That the judge misunderstood the Project Facade report: at paragraph 25 of the decision the judge stated that the report recorded that 51% of results were valid when in fact no tests were found to be valid.

   ii) (Ground 2(b)) The judge overlooked relevant evidence when she said, in the first sentence of paragraph 25, that "*there was no specific evidence against the [claimant]*".

c) Ground 3 is that the judge failed to recognise that a person who is proficient in the English language may nonetheless engage in fraud, as explained in *MA (ETS*

– *TOEIC testing)* [2016] UKUT 00450 at paragraph 57, where the Upper Tribunal said:

> *"… 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 <u>other</u> explanations for deceitful conduct in this sphere. We are not required to make the further finding of <u>why</u> 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."*

d) Ground 4 is that the judge failed to give adequate reasons why the Secretary of State's evidence was not sufficient to discharge the legal burden.

e) Ground 5 is that the judge failed to recognise that a consequence of the claimant's certificate being cancelled by ETS was that the basis of his leave was removed. The judge should have dismissed the appeal rather than remit the case for the Secretary of State to consider paragraph 276B.

13. In granting permission to appeal, Upper Tribunal Judge Kopieczek noted the discrepancy between the Project Facade report which concluded that 49% of results were invalid and 51% questionable and the judge's statement in paragraph 25 that "*51% of results were valid*" and in paragraph 27 that there is a possibility that the claimant "*fell within the 51% of students whose certificates had not been cancelled*". He described the judge's conclusion about the Project Facade report as factually incorrect and arguably significant.

14. At the hearing before us, Mr Wilding accepted that ground 5 was wrong. He agreed that the sole issue was whether the judge had materially erred in law in reaching her decision on paragraph 322(1A). The Secretary of State's position is that, if the judge did not materially erred in law in reaching her finding on the paragraph 322(1A) issue, she should have allowed the appeal outright under paragraph 276B of the Immigration Rules, instead of remitting that aspect of the case to the Secretary of State. He submitted that the Tribunal has no power to remit the case to the Secretary of State.

<u>Assessment</u>

15. In relation to ground 1, it was agreed before us that there was a three-step approach pursuant to the Upper Tribunal's decision in *SM and Qadir:* The first step was to decide whether the Secretary of State had discharged the initial evidential burden. If so, then the evidential burden shifted to the claimant to provide an innocent explanation. The third step is to consider whether the Secretary of State had discharged the overall legal burden to establish deception.

16. Mr Wilding submitted that paragraphs 19-22 of the judge's decision did not reflect her reasoning in any way but merely represented her summary of the submissions before

her. She therefore failed to consider whether the Secretary of State's evidence discharged the initial evidential burden. It is known, from *SM and Qadir*, that the evidence relied upon in that case discharged the initial evidential burden in that case. That evidence was similar to or the same as the generic evidence in the instant case.

17. Mr Malik submitted that the judge's assessment began at paragraph 19 where she mentioned *SM and Qadir*. In his submission, it followed that the judge had considered at paragraph 19 whether the Secretary of State's evidence discharged the initial evidential burden. He submitted that paragraph 21, from the sentence beginning "*Mr Gill submitted that the [claimant] had done more then enough to offer an innocent explanation …"* represented the judge's consideration of the second stage and that paragraphs 22-27 represented the judge's consideration of whether the claimant's innocent explanation should be rejected and whether the Secretary of State had discharged the overall legal burden of proof upon her.

18. We do not accept Mr Malik's submissions. We are satisfied that paragraph 19 of the judge's decision was not part of the judge's reasoning. It is clear from the contents of paragraphs 16-22 that she summarised the parties' respective submissions at paragraphs 16-22. We are satisfied that her assessment began at paragraph 23. There is nothing from paragraph 23 onwards that shows that the judge considered whether the Secretary of State's evidence discharged the initial evidential burden.

19. We are therefore satisfied that the judge failed to consider whether Secretary of State's evidence discharged the initial evidential burden.

20. On the basis of the decision in *SM and Qadir* and on any legitimate view, the Secretary of State's generic evidence in the instant case was sufficient to discharge the initial evidential burden. Thus, if the judge had considered this issue, she would have been bound to conclude in the Secretary of State's favour on this issue, on any legitimate view. She could not reasonably have concluded otherwise.

21. Ground 1 is therefore established.

22. We have to consider the consequence of ground 1 being established. As will be seen from our analysis and decision on ground 2, the judge misunderstood material evidence produced by the Secretary of State. We are satisfied that, as a result of her error in relation to ground 2 taken together with ground 1, she erred by placing no weight at all on the Secretary of State's evidence. Whilst it is always a matter for the first-instance judge to decide what weight to attach to particular evidence, the judge was not reasonably entitled to place no weight at all on the Secretary of State's evidence, on any legitimate view.

23. For these reasons, we are satisfied not only that ground 1 is established but also that ground 1 is material to the outcome.

24. We turn to ground 2 (a).

25. The Project Facade Report summarises the outcome of a Home Office investigation of Synergy Business College of London. The report states that between 24 November 2011 and 15 January 2013, 4894 TOEIC tests were taken at the Synergy Business School, of which 49% were found to be "*invalid*" and 51% were found to be "*questionable*". It follows that no tests were found to be valid. The report states that all of the tests taken during this period were withdrawn.

26. Although the Project Facade Report makes clear that no tests taken between 24 November 2011 and 15 January 2013 were found to be valid and that all tests were withdrawn, the judge stated that:

    a) "All that is known about Synergy Business Centre is what is set out in the Project Façade report which stated that 49% of the results of that college were invalid. As it was pointed out at the hearing **that meant that** 51% of results were valid" (our emphasis) (paragraph 25); and

    b) "… there is a possibility that the [claimant] fell within the 51% of students whose certificates had not been cancelled" (paragraph 27)

27. We agree with Mr Wilding that the judge misunderstood the report's conclusions – mistakenly inferring, from the fact that 49% of the results were invalid, that therefore 51% of results were found valid and not cancelled when in fact it is clear that 49% were invalid and 51% were questionable from which it follows that none of the tests were found to be valid. This led the judge to mistakenly infer, further, that 51% of certificates were not cancelled when in fact all test certificates were withdrawn, i.e. cancelled. Mr Wilding characterised this as a clear factual inaccuracy which undermined the judge's decision.

28. Mr Malik argued that paragraphs 25 and 27 of the decision need to read in context. He asked us to consider paragraphs 25 and 27 in the context of paragraph 17 of the judge's decision.

29. Paragraph 17 contains a summary of the Project Facade Report, where the judge stated that:

> *"… [ETS] used voice analysis software corroborated by two human assessors independent of each other to assess the scale of the abuse. They identified 33,725 test scores that were found to be invalid and 22,694 that were questionable. Invalid was termed as those where evidence existed of proxy test taking and/or impersonation and questionable were when test takers should retest due to administrative irregularities. A report into Synergy Business College showed that between 24 November 2011 and 15 January 2013 4,894 TOEIC speaking and writing tests had been undertaken which showed that 49% were considered invalid."*

30. Mr Malik submitted that paragraph 17 of the decision shows that the judge understood the distinction between "*invalid*" and "*questionable*" tests. He submitted that the phrase "*…that meant that 51% of results were valid*" in paragraph 25, when read in the context of paragraph 17, should properly be read as follows: "*…that meant that 51% of results were not invalid but questionable*".

31. We have no hesitation in rejecting Mr Mali's submission. Paragraph 17 of the decision sets out the judge's summary of the Project Facade Report. It does not contain any analysis of it. The extract we have quoted from paragraph 17 shows that the judge's attention was drawn to the meaning of the term "*invalid*" in the Project Facade report. However, that does not mean that the judge had that in mind when she assessed the evidence. The judge's analysis of the Project Facade report is contained in paragraphs 25 and 27. It is clear from those paragraphs that the judge understood the conclusion of the Project Facade Report to be that 51% of results were valid and not cancelled, which is plainly incorrect.

32. It is plain and beyond any doubt, in our judgement, that the judge drew the inference, from the fact that 49% of the results were invalid, that "***that meant that***" 51% were valid. This demonstrates that her thinking was that there were only two possible categories identified in the report: test results were either invalid or valid. It is clear from paragraphs 25 and 27, taken in context and having regard to the decision as a whole including paragraph 17, that the judge did not merely misstate the conclusions of the Project Facade Report but misunderstood them. Mr Malik's suggested interpretation of the relevant phrase in paragraph 25, whilst ingenuous, is an attempt not only to re-write the judge's words but also to re-write the judge's clearly expressed thought process. We have no hesitation in rejecting this submission.

33. We have therefore concluded that the judge did err in law by misapprehending the Project Façade report relied upon by the Secretary of State when she said that 51% of the test results were valid.

34. Ground 2(a) is therefore established.

35. Mr Malik submitted that any error in relation to ground 2(a) was not material for the following two reasons:

    (i) Firstly, he submitted that the error was not material because, at paragraph 27, the judge mentioned the fact "*there is a possibility that the [claimant] fell within the 51% whose certificates had not been cancelled*" after she had already found, at paragraph 27, that "*On the basis of this evidence I find that the [Secretary of State] has failed to establish that the [claimant] fraudulently obtained the TOEIC certificate*". He submitted that, given that the judge had already made her finding that the Secretary of State had failed to establish that the claimant fraudulently obtained the TOEIC certificate before she mentioned that the claimant fell within the 51% whose certificates had not been cancelled, her misapprehension of the evidence was not material to this finding.

    We drew Mr Malik's attention to the fact that the judge had also said, at paragraph 25, i.e. *before* her finding at paragraph 27, that the 51% of the test certificates were valid. Mr Malik did not wish to address us further, asking us to assess his submission.

    Mr Malik seeks to rely upon the *form* of the judge's language at paragraph 27. One should not focus on form over substance. In any event, even on the basis of

form, the fact is that the judge made a similar finding at the end of paragraph 25 which Mr Malik ignores.

In terms of substance, it is clear that the judge relied upon her view that 51% of the test results were valid in order to reach her conclusion, taking into account the claimant's oral evidence, that the Secretary of State had not discharged the burden of proof upon her. We have no hesitation in rejecting Mr Malik's submission on this issue.

(ii) Secondly, Mr Malik submitted that any errors in relation to ground 2(a) as well as ground 2(b) are not material for reasons which he relied upon to resist grounds 3 and 4.

36. We will therefore deal with whether ground 2(a) and (if established) ground 2(b) are material when we consider grounds 3 and 4.

37. Before dealing with grounds 3 and 4, it is necessary to consider ground 2(b), i.e. that the judge overlooked relevant evidence when she said, in the first sentence of paragraph 25, that "*there was no specific evidence against the [claimant]*".

38. Mr Wilding submitted that the fact that the judge considered that there was no specific evidence against the claimant shows that she overlooked the following evidence relied upon by the Secretary of State before her and which showed that the claimant's certificate had been deemed to be invalid and was therefore cancelled:

i) Annex A to the ETS Look Up Tool shows that all eight of the tests he took at the Synergy Business College were declared invalid, as opposed to questionable. Mr Wilding submitted that this was specific evidence against the claimant.

ii) Annex B was in two parts, the first relating to all the tests that took place at the Synergy Business College on 21 February 2012 and the second relating to all the tests that took place at the Synergy Business College on 22 February 2012. In relation to the tests that took place on 21 February 2012, 125 tests were taken, of which 42% were questionable and 58% invalid. In relation to the tests that took place on 22 February 2012, 104 tests were taken of which 32% were questionable and 68% were invalid. It follows that none of the tests that took place on 21 February 2012 and 22 February 2012, the dates upon which the claimant took his tests, were valid. Mr Wilding submitted that this was specific evidence against the claimant as it was capable of showing that the claimant did not take the tests that resulted in the award of his certificate, which the judge failed to consider.

39. Mr Malik did not dispute Mr Wilding's submission that i) and ii) above comprised specific evidence against the claimant. We are satisfied that i) and ii) above each comprised specific evidence against the claimant.

40. Mr Malik submitted that the judge had considered the specific evidence. He asked us to read the first and second sentences of paragraph 25 together. They read:

> *"There was no specific evidence against the [claimant]. What is evident from the refusal letter is that ETS had undertaken a check of his test and confirmed to the SSHD that there was significant evidence to conclude the certificate was fraudulently obtained by the use of a proxy test taker* ***but there is no actual evidence before me to support that assertion…."***
>
> (our emphasis)

41. Mr Malik submitted that these two sentences, when read together, show that the judge had taken into account the ETS Look Up Tool. However, one difficulty with this submission is that the ETS Look Up Tool was not produced with the refusal letter. It was not even referred to in the refusal letter. As we understand it, it was only produced at the outset of the hearing before the judge, as the first sentence of paragraph 21 of the judge's decision shows. If we are right, then judge could not have been referring to the evidence in the ETS Look Up Tool in the second sentence of paragraph 25 which refers to the refusal letter. However, even if we are wrong about this, the judge expressed the view that "*there is no actual evidence before me to support that assertion*", which plainly shows, in our judgement, that she was completely unaware that she did have specific evidence against the claimant before her.

42. Ground 2(b) is therefore established.

43. We turn to consider Mr Malik's submissions on grounds 3 and 4 given that he relied upon them in submitting that any errors in relation to grounds 2 (a) and (b) are not material.

44. In relation to ground 3, Mr Malik referred us to the judgment of the Court of Appeal in *SM and Qadir* [2016] EWCA Civ 1167 at paragraphs 13 and 18 where the Court of Appeal said:

> *"13. Another reason given in the determination is the recent case decided by the UT, Home Secretary v MA [2016] UT 00450, in which, in a decision promulgated on 16 September 2016, the UT observed that there was far more evidence, both general and specific, than there was in the cases before us. The Tribunal stated that there was clear evidence of TOEIC corruption at the test centres where MA claimed to have been examined, and outlined the nature of the new expert and individual evidence. The schedule, however, did not explain how the fact that, in cases that will come before the UT in future, there may be more evidence can affect the large number of applications and appeals that are pending in this court, many of which have been through the Tribunal. There is also no explanation as to why guidance by this court is no longer necessary for cases already decided in the UT, either before or after its determination in the cases of these respondents, on similar evidence to the evidence in their cases.*
>
> *18. I have stated that the UT decided that the Secretary of State had discharged the evidential burden that lay on the Secretary of State so there was a burden, again an evidential one, on Mr Majumder and Mr Qadir of raising an innocent explanation. The UT accepted (at [69]) the submission on behalf of the Secretary of State, that in considering an allegation of dishonesty the relevant factors included the following: what the person accused had to gain from being dishonest; what he had to lose; what is known about his character; the cultural environment in which he operated; how the individual accused of dishonesty performed under cross-examination, and*

> *whether the Tribunal's assessment of that person's English language proficiency is commensurate with his or her TOEIC scores; and whether his or her academic achievements are such that it was unnecessary or illogical for them to have cheated. There was no criticism in this court by Mr Kovats of that approach."*

45. Mr Malik submitted that the approach suggested by the Court of Appeal at paragraph 18 of *SM and Qadir* was exactly the approach that the judge followed, at paragraph 26 of her decision. She considered the fact that the claimant had passed an IELTS test in 2002. that he had completed a BBA in 2006, that he had studied and been taught in English and that he had then gone on to complete other postgraduate qualifications. She took into account his oral evidence and formed the view that he was able to adequately express himself in the English language. The claimant was cross-examined at the hearing. There were no inconsistencies in his evidence. Mr Malik submitted that, in view of the circumstances described by the judge at paragraph 26, one wonders why the claimant would cheat.

46. Mr Malik submitted that the judge did not say that she was allowing the appeal simply because he had been able to give evidence in English. The fact that he was able to do so was merely one of the factors in his favour.

47. In view of the judge's reasoning at paragraph 26, Mr Malik submitted that ground 3 was not established. He relied upon the same submissions in respect of grounds 4.

48. We accept that the judge followed the guidance in the Upper Tribunal's decision in *SM and Qadir* and the Court of Appeal's judgment in *SM and Qadir* at paragraph 26 when assessing whether the claimant had provided an innocent explanation. However, she failed to take into account the reasoning of the Upper Tribunal in *MA*, that there are a range of reasons why a person who is proficient in English may engage in TOEIC fraud when assessing his evidence.

49. In any event, the reality is that the errors she made and as we have explained in relation to grounds 1, 2(a) and 2(c) have the result that: (a) she placed no weight at all on the Secretary of State's generic evidence; (b) she misapprehended the Project Facade report; and (c) she overlooked entirely the specific evidence against the claimant. We are satisfied that, if she had not committed these errors, she may have reached a different decision on the question whether the claimant had fraudulently obtained his certificate. We are satisfied that each of these errors is material.

50. For the above reasons, we are also satisfied that ground 4 is also established. As a consequence of the errors we have explained in relation to grounds 1, 2(a), 2(b) and 3, the judge gave inadequate reasons for concluding that the Secretary of State had not discharged the legal burden of proof upon her to show that the claimant had fraudulently obtained his test certificate.

51. For all of these reasons, we set aside the decision of the judge in its entirety. None of her findings shall stand.

52. Both parties were of the view that if we found there to be an error of law the appeal should be remitted to the First-tier Tribunal for a fresh hearing. We agree. We note the extent of judicial fact finding which is likely to be necessary for the decision to be re-made. In our judgement, this case falls within paragraph 7.2(b) of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal. In addition, we take into account the fact that the claimant won his appeal before the First-tier Tribunal. We have had regard to the Court of Appeal's judgment in *JD (Congo) & Others* [2012] EWCA Civ 327. In all of the circumstances, we consider this an appeal which is appropriate to remit to the First-tier Tribunal.

53. The parties agreed before us that the sole factual issue at the next hearing is whether the claimant had fraudulently obtained the TOEIC certificate that he obtained from ETS and which he submitted in his application of 2012, following tests taken on 21 and 22 February 2012 at the Synergy Business College. If he did, then Mr Malik accepted that, although Article 8 was raised in the grounds of appeal and the claimant has submitted a witness statement in which he relied upon his right to his private life, his Article 8 claim cannot succeed if he had fraudulently obtained his TOEIC certificate. However, the judge will then need to consider whether to exercise the discretion in paragraph 276B in the claimant's favour. This is because there is no power to remit any case to the Secretary of State. If the claimant did not obtain his TOEIC certificate fraudulently, then Mr Wilding accepted that the claimant's appeal under paragraph 276B of the Immigration Rules should succeed, because the deception issue was the sole reason for refusing his application under paragraph 276B.

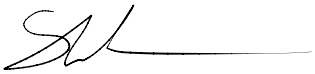
54. The evidence summarised by Judge Scott-Baker at paragraphs 14 and 15 of her decision, to the extent relevant to the paragraph 322(1A) issue, shall stand as the record of his evidence at the hearing before her and may be relied upon by either party at the next hearing.

Notice of Decision

55. The decision of the First-tier Tribunal involved the making of a material error of law and is set aside in its entirety.

56. The appeal is remitted to the First-tier Tribunal to be heard afresh by a judge other than First-tier Tribunal Judge Scott-Baker.

Signed



Deputy Upper Tribunal Judge Sheridan Dated: 28 January 2018