



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

Appeal Number: IA/32124/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 19th January 2018**

**Decision & Reasons
Promulgated
On 13th February 2018**

Before

Upper Tribunal Judge Chalkley

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MISS PURVIBEN NAVNITBHAI PATEL
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S Kotas, a Senior Home Office Presenting Officer

For the Respondent: Ms S Iqbal, Counsel instructed by AY & J

REASONS FOR FINDING AN ERROR OF LAW

1. In this appeal the Secretary of State for the Home Department is the appellant and to avoid confusion I shall refer to her as being, "the claimant".
2. The respondent is a citizen of India, born on 2nd May 1985, who first entered the United Kingdom on 15th February 2009, with entry clearance conferring leave to enter until 31st March 2011, as a student. On 23rd June

2012, the respondent made a combined application for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the points-based system and for a biometric residence test.

3. With her application she submitted a TOEIC certificate from Educational Testing Service to the Home Office and her sponsor, in order for them to provide her with a Confirmation of Acceptance for Studies. However, according to information provided to the Home Office by ETS, the respondent obtained her TOEIC certificate number 0044201649015141, as a result of a test she took at Premier Language Training Centre on 27th June 2012. Evidence was provided to the Secretary of State confirming that the certificate was fraudulently obtained by the use of a proxy test taker and ETS have declared the test invalid as a result of a proxy tester who took the test in the respondent's place, and the scores have been cancelled by ETS. The claimant refused the respondent's application and refused the application under paragraph 322(1A) of the Immigration Rules.
4. The respondent appealed the claimant's decision and her appeal was heard by First-tier Tribunal Judge L K Gibbs sitting at Hatton Cross on 7th February 2017.
5. It is clear from the determination that the judge heard oral evidence from the respondent. However, the judge failed to set out a record of it, or at the very least, a summary of it, in the determination. Instead, she referred to the oral evidence being contained in the Record of Proceedings. That it very unhelpful. A determination is meant to be a **comprehensive** document explaining to the parties why they have been successful or unsuccessful in the appeal. It is intended to be a complete document and it should not be necessary for the parties to have to refer to other documents. In any event, the other parties are not entitled to a copy of the judge's Record of Proceedings unless they appeal.
6. In this determination the judge simply made findings and conclusions. She found the respondent to be a credible witness, who gave a detailed and consistent account regarding the TOEIC test that she took on 27th June 2012. She provided detailed evidence of where she took the test, why she chose the test centre, how she travelled there and what happened when she was there. However, the judge then went on to say that she found the [respondent]:

"... was able to speak fluent English. Further I place weight on the fact that she had previously been studying an ACCA course as evidence of her ability to speak English to a good standard, which I find is evidence that she did not need to treat at her test."
7. That was in paragraph 9 of the determination to which I shall refer again in a moment. The judge went on to refer to *SM and Qadir v Secretary of State for the Home Department (ETS - evidence - burden of proof)* [2016] UKUT 229 (IAC) and was aware that the Upper Tribunal had found the

generic evidence provided by the claimant sufficient to discharge the evidential burden that fell upon her in raising the allegation of dishonesty. The judge went on to find that she was satisfied that the respondent had raised an innocent explanation. She found that the respondent had provided, "a cogent and detailed explanation regarding the test" and that she had also credibly explained why she would have no need to cheat at the test (because her standard of English is sufficient).

8. The judge then went on to criticise an ETS SELT source data provided at Appendix D of the claimant's bundle. The judge believed that there were errors in this document such as affected the reliability of the whole document. The respondent's nationality was incorrectly recorded as being 'Malaysian'. The Presenting Officer had submitted that this was a simple clerical error which did not affect the reliability of the document. The judge found that the error caused her to have concerns with regard to the care with which the document was produced and it affected the weight that she felt she could attach to it. She was not satisfied that the respondent had used deception as alleged and not satisfied that the application should have been refused under paragraph 322(1A) of the Immigration Rules.
9. The respondent challenged the determination. The respondent's challenge was on the basis that the judge had failed to give any, or adequate reasons for holding that a person who clearly speaks English would have no reason to secure a test certificate by deception. There may be reasons why a person who is able to speak English to the required level would, nonetheless cause or permit a proxy candidate to undertake an ETS on their behalf, or otherwise cheat. The judge appears not to have considered that possibility.
10. The judge, at paragraph 9 of the determination, was clearly influenced by the fact that the respondent was able to speak fluent English and had been previously studying an ACCA course, but that was no basis for the judge to find that the respondent did not need to cheat at her test. In both *SM and Qadir* and in *MA (ETS - TOEIC testing)* [2016] 450 (IAC) the Tribunal cautioned against placing weight on an appellant's ability to speak English. The judge ignored the fact that the test was undertaken in 2012, some five years before the judge heard oral evidence from the respondent.
11. The ETS SELT source data did contain an error, which was an error as to the respondent's nationality but, when assessing the document in the round, the judge failed to have regard to the fact that she only needed to be satisfied on a balance of probability. All the other information was correct and the Presenting Officer addressing her was correct to suggest that there had been a simple clerical error which did not affect the reliability of the document.

12. I reject the submissions made to me by Ms Iqbal. I accept that at paragraph 10 the judge was correct to find that the evidence provided by the respondent was sufficient to discharge the evidential burden falling on her in relation to the allegation of dishonesty, but the judge was entirely wrong to use her own assessment of the respondent's use of English and the fact that she had previously been studying in English, as evidence that she did not need to cheat at the test. The mere fact that a respondent may well have been in a position to pass the test does not mean that they did not cheat and use a proxy and, as the Presenting Officer pointed out, the respondent's test had been undertaken in June 2012, and the hearing before the judge was in February 2017.
13. I have concluded that the determination cannot stand. I believe that clear findings are necessary. I am aware that were I to adjourn this appeal and hear it in the Upper Tribunal myself there would be inevitable lengthy delays in listing. This is a matter that needs to be decided without undue delay, because of course it will have been causing the respondent a great deal of uncertainty and concern. In the interests of justice, therefore, I remit this appeal to be heard by a Judge of the First-tier Tribunal other than Judge L Gibbs. One hour and a half should be allowed for the hearing of the appeal.

Richard Chalkley

Upper Tribunal Judge Chalkley

dated 12 February 2018