



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/34056/2015**

Appeal Numbers:

IA/34058/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 4 September 2017**

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

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**NIDA SHAHID
MUHAMMAD SHAHID RASHID
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondents: Mr S Akhtar, instructed by S Z Solicitors

DECISION AND REASONS

1. The first respondent ("the claimant") is a citizen of Pakistan born on 16 September 1983. The second respondent is her husband and dependent.
2. The claimant entered the UK as a Tier 4 (General) Student on 23 June 2011 with leave until 30 August 2012.

3. On 30 August 2012 she applied for leave to remain as a Tier 1 (Entrepreneur) Migrant. In support of her application, the claimant submitted, inter alia, a certificate of completion of the test for English for international communication ("TOEIC"). The TOEIC certificate was provided by an entity called Education Testing Service ("ETS"), which conducted the test.
4. The Secretary of State rejected the claimant's application for leave to remain on the basis that there was significant evidence that her TOEIC certificate was fraudulently obtained by the use of a proxy test taker and consequently ETS had declared the test she had taken to be "invalid".
5. The claimant maintained that she had taken the test herself and appealed to the First-tier Tribunal where her appeal was heard by Judge Buckwell. In a decision promulgated on 9 January 2017 the judge allowed the appeal.
6. Before Judge Buckwell, in order to establish that the claimant had acted fraudulently through the use of a proxy test taker, the Secretary of State relied upon evidence that has been used in numerous similar cases where it has been alleged that a test conducted by ETS was invalid because a proxy test taker was used ("the generic evidence"). The generic evidence included statements of Mr Millington and Ms Collings (both civil servants) concerning the processes by which fraudulent conduct has been detected at ETS test centres and a report from Professor French on the methodology used by ETS to detect fraudulent activity. In addition, the Secretary of State submitted a print out from a spreadsheet (known as the "look up tool") showing that the claimant's test had been categorised by ETS as invalid.
7. Judge Buckwell found (at paragraph 28) that:

"Whilst data has been provided with respect to the particular test taken by the [claimant] or in her name there is no specific statement which in my view relates in sufficient detail to the serious allegations made by the [Secretary of State] against the [claimant]. I find the generic evidence to be insufficient to discharge the [Secretary of State]'s burden."
8. The Secretary of State appealed the decision of Judge Buckwell. The grounds of appeal argue that the judge failed to adopt the correct approach in respect of the burden of proof by finding that the evidence of the Secretary of State was insufficient to discharge her initial burden thereby shifting the evidential burden onto the claimant to show an innocent explanation.
9. Before me, Mr Tufan observed that the approach to the burden of proof in cases where the Secretary of State alleges a proxy test taker was used is well established, as set out in SM & Qadir [2016] EWCA Civ 1167. He argued that the judge erred because that approach was not followed.
10. Mr Akhtar argued that because the Secretary of State's evidence did not deal specifically with the claimant it was deficient. He also maintained that

the Secretary of State's representative failed to cross examine the claimant at the First-tier Tribunal hearing and if she objected to the claimant's evidence she should have done so.

Error of Law

11. The burden and standard of proof, where it is alleged that an ETS test is invalid, was discussed in SM and Qadir v SSHD (ETS-Evidence-Burden of Proof) [2016] UKUT 00229), and is as follows:
12. The legal burden of proving that the test taker used deception lies on the Secretary of State albeit that there is a three stage process.
 - a) Firstly, the Secretary of State must adduce sufficient evidence to raise the issue of fraud.
 - b) Secondly, the test taker then has a burden of raising an innocent explanation which satisfies the minimum level of plausibility.
 - c) Thirdly, if that burden is discharged, the Secretary of State must establish on a balance of probabilities that this innocent explanation is to be rejected.
13. There is one civil standard of proof (which is the standard to be applied). The seriousness of the consequences does not require a different standard of proof but flexibility in its application will involve consideration of the strength and quality of the evidence. The more serious the consequence, the stronger must be the evidence adduced for the necessary standard to be reached.
14. In SSHD v Shehzad [2016] EWCA Civ 615 the Court of Appeal concluded that the "generic evidence" (comprising in that case of the same statements of Ms Collings and Mr Millington submitted in this appeal) together with the evidence that the test of individual in question has been assessed as "invalid", was sufficient for the Secretary of State to meet the initial evidential burden (the first of the three stages) thereby shifting the evidential burden onto the test taker to raise an innocent explanation (the second of the three stages). At paragraph 26 the Court of Appeal in Shehzad concluded that "the in limine rejection of the Secretary of State's evidence as even sufficient to shift the evidential burden was an error of law".
15. In this case, the Secretary of State submitted the statements of Ms Collings and Mr Millington (the generic evidence evaluated in Shehzad) along with evidence showing the claimant's test had been assessed by ETS as invalid. In addition, the Secretary of State submitted a report by Professor French dated 20 April 2016, giving opinion evidence on ETS's methodology for detecting fraud.

16. Professor French's expertise was not questioned before the First-tier Tribunal and it is noted that the High Court in Gaogalalwe [2017] EWHC 1709 (Admin), considering the same report, described Professor French as a "singularly well qualified expert". Professor French's conclusion was that ETS's error rate in identifying fraud was very low.
17. Having regard to Shehzad, as well as subsequent cases such as Gaogalalwe, it is clear that the evidence submitted in this appeal by the Secretary of State was sufficient to meet the initial evidential burden, thereby shifting the burden to the claimant to raise an innocent explanation.
18. In finding that the Secretary of State had not satisfied the initial evidential burden the First-tier Tribunal has made a material error of law.

Remade Decision

19. After delivering my decision to set aside the decision of the First-tier Tribunal I invited Mr Akhtar to present the claimant's case for the remaking of the decision. Noting the brevity of the claimant's witness statement and that it did not cover material that might be expected where a party is seeking to establish an innocent explanation, I invited Mr Akhtar to pose questions to her in order to elicit information that may raise an innocent explanation. He declined to do so, and proposed that Mr Tufan should cross examine the claimant.
20. Mr Tufan asked the claimant a range of questions about when and where the test was taken. The claimant gave short answers that identified the name of the test centre and when the test was taken, without giving any elaboration or wider explanation. She explicitly denied that she cheated and stated that because of her English language ability at the time the test was taken it was easy for her to take the test. Other than the assertion that she spoke good English at the time of the test, she did not put forward any other explanation, despite being encouraged (and given every opportunity) to do so by Mr Tufan.
21. I posed a few questions to the claimant including how she paid for the test (to which she responded that she paid in cash) and how she travelled to the test centre (to which she said that her husband drove her).
22. I asked Mr Akhtar, again, if he wished to ask the claimant any questions. He declined to do so.
23. Mr Akhtar handed me a document on headed note paper from "Stratford College of Management" dated 15 May 2012. The document states that the claimant has completed a NQF level 7 Post Graduate Diploma in Business Administration where her attendance was satisfactory. The document does not state if the course was passed, or what grade was obtained. It merely states that course was completed and attendance was satisfactory. Although the document states the course has been completed it also gives a

completion date of 23 August 2012, which is over three months after the date of the letter.

24. Mr Akhtar submitted that the claimant is an innocent victim and the evidence shows she took the test herself.
25. Mr Tufan submitted that the only innocent explanation the claimant has put forward is that she currently speaks good English (which is not disputed), and that at the time of the test she spoke sufficiently good English to not need to engage a proxy test taker. He argued, firstly, that the case law makes clear that ability in English is not an answer to the accusation of fraud given there could be a range of other reasons to cheat on the test. Secondly, he argued that the evidence before me did not in any event establish that in 2012 the claimant's English was strong enough to easily have passed the test. The only evidence was the document from Stratford College of Management which told us nothing about the claimant's English ability in 2012.
26. For the reasons explained in the error of law decision above, the Secretary of State, through the evidence of Mr Millington, Ms Collings and Professor French taken together with the categorisation of the claimant's test as "invalid", has satisfied the initial evidential burden, thereby shifting the evidential burden onto the claimant.
27. The claimant maintains that she satisfies the evidential burden of showing a plausible innocent explanation because at the time she took the test she was taking a management course in the UK and received a diploma from the college confirming she completed the course and her attendance was satisfactory. She also relies on the fact that she currently speaks English at a good level.
28. The claimant's current level of English is irrelevant. Approximately five years have elapsed since the test in question was taken, during which time the claimant has been living in the UK. It is not possible to infer anything about the claimant's ability in English in 2012 from her ability in 2017.
29. The document from Stratford College of Management is weak evidence to support the contention that the claimant did not use fraud to obtain her test. Despite being encouraged to do so by Mr Tufan (and Mr Akhtar being given every opportunity to pose questions to her) the claimant did not give any detail or elaboration about the course she took, the level of English it required of her, how well she did in it, or any other information that would indicate the level of English the course required in order for her to complete it.
30. Nor did the claimant, either in her written statement or orally before me, give an account that would point to there being an innocent explanation. She did not, for example, elaborate on the factors noted at paragraph 69 of SM and Qadir, such as what she had to gain from being dishonest, what she

had to lose, her character, the cultural environment in which she operated, and whether her academic scores make it illogical or unnecessary to cheat.

31. Although the evidential burden on the claimant to establish an innocent explanation is low – she need only show the minimal level of plausibility – I am not satisfied that she has met the burden, as the claimant’s innocent explanation amounts to no more than an assertion that because of her present ability in English (five years after the test) and that she undertook and completed a management course in 2012 she had no motive to cheat.
32. If I am wrong, and the evidential burden to show an innocent explanation has been met, I find in the alternative that Secretary of State has discharged the legal burden. Balancing the evidence of the Secretary of State (including in particular the expert report of Professor French which was not challenged before me) which points to a conclusion that the claimant’s test was taken by a proxy test taker, against the weak evidence of the claimant to show she did not need to cheat, I am satisfied that the Secretary of State has discharged the legal burden of proof.

Decision

33. The decision of the First-tier Tribunal contains a material error of law and is set aside.
34. I remake the decision by dismissing the appeals of the First and Second Respondents against the decision of the Secretary of State dated 2 November 2015.

Signed



Deputy Upper Tribunal Judge Sheridan Dated: 17 September 2017

