



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/38567/2014

THE IMMIGRATION ACTS

Heard at Field House
On 5 June 2018

Decision & Reasons Promulgated
On 14 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR TEJINDER PAL SINGH GILL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Ms R Bagral, Counsel instructed by Gills Immigration Law

DECISION AND REASONS

Background

1. The appellant in this case is the Secretary of State and the respondent is Mr Gill. However, for the purposes of the decision and reasons I refer to the parties as they were before the First-tier Tribunal where the appellant was Mr Gill.
2. Mr Gill is a national of India, born on 15 May 1986, who appealed to the First-tier Tribunal against the decision of the respondent dated 6 September 2014 to refuse the appellant further leave to remain in the UK on the basis of family and private life. The appeal was originally determined by the First-tier Tribunal in a decision promulgated on 28 June 2016, allowing the appellant's appeal. On 25 January 2017 Upper Tribunal Kebede set that decision aside and remitted the appeal to the First-

tier Tribunal with no findings preserved. In a decision promulgated on 22 February 2015, Judge of the First-tier Tribunal Nolan allowed the appellant's appeal.

3. The respondent appeals with permission on the grounds that the First-tier Tribunal failed to give adequate reasons in relation to the claim that the appellant had used a TOEIC certificate fraudulently obtained using a proxy test taker. It was argued that the judge failed to give adequate reasons for finding that the appellant had offered an innocent explanation, the respondent having discharged the initial burden of proof as set out in **Shehzad [2016] EWCA 615**. The Secretary of State noted that the Tribunal relied on the appellant's English language ability and other English qualifications but the Secretary of State submitted that the correct test was not whether the appellant speaks English but whether the appellant had employed deception and the Secretary of State relied on **MA (Nigeria) [2016] UKUT 450** including that the fact that there was no reason to engage in deception does not preclude a finding that such deception had taken place.

Discussions on Error of Law

4. Mr Bramble simply relied on the respondent's grounds, but with no great enthusiasm and specifically conceded that it was difficult to make any further arguments in support of the Secretary of State's position.
5. I agree with Ms Bagral that the Secretary of State's grounds disclose no more than a disagreement with the findings of the First-tier Tribunal, which properly address the shifting burden of proof and properly identify the innocent explanation.
6. The judge properly set out the evidence before her, including in relation to how and when the appellant took the test, which the judge records in some detail including at [12], [13], [14] and [15] of the decision and reasons. The judge at [34] recorded that the appellant had advanced an innocent explanation in response to the look up tool produced by the Secretary of State sufficient to discharge the initial burden. The judge took into account that the appellant had consistently maintained that he did take the test himself at a venue different from the one alleged by the respondent and that he had no reason to cheat, considering at the time in 2012 he had been living and studying in the UK since 2010 and had already gained English language qualifications both prior to arrival in the UK and afterwards and that he had studied through the English language medium.
7. The judge took into account that the respondent had not provided any additional evidence and that the actual audio files were not before the First-tier Tribunal. The judge found that it was a bold claim of the appellant to make that he did not take the test in the centre specified by the Secretary of State and it was open to the First-tier tribunal to find, as it did, that this claim was credible, including because it would not have been necessary or even desirable for the appellant to choose a test centre in Southampton, if indeed he were cheating, as so many London centres had also been found to be part of the TOEIC cheating scandal. The First-tier Tribunal found this to be significant as the appellant had been consistent that he was living in West London

at the time he was alleged to have taken the fraudulent test. However, he took the test in East London and not in Southampton as claimed by the respondent.

8. The First-tier Tribunal also took into consideration the appellant's recollections of taking the test, which the judge found to, in the main, detailed and comprehensive with no embroidering in relation to any gaps. Although the judge did take into account that the appellant's English was fluent and confident, the judge properly directed herself that this did not necessarily reflect his ability at the time of the test in 2012 and this was by no means the sum of the judge's conclusions in relation to the innocent explanation. It was open to the judge to take into account, as she did, that the respondent had failed to provide any further evidence and the judge was entitled to find that the appellant had already been living in the UK for two years at the time of the test in 2012 and that it was not credible that he would have put his future at risk over an English test which, considering all the factors, he should not have had "great difficulty" in passing. The judge took into consideration what was said in SM and Qadir at [77], which the judge found to be analogous to this appellant's circumstances, in relation to the level of proficiency at the time of the test and the lack of any reason to jeopardise both career and future by cheating. Although that must be balanced with what was said in MA (Nigeria), it is evident from the judge's findings that she had in mind the correct test and reached properly reasoned conclusions which were open to her on the facts.

Notice of Decision

9. The decision of the First-tier Tribunal does not contain an error of law and shall stand.

No anonymity direction was sought or is made.

Signed _____ Date _____

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

No fee award application was sought or is made.

Signed _____ Date _____

Deputy Upper Tribunal Judge Hutchinson