



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

Appeal Number: HU/05165/2017

**THE IMMIGRATION ACTS**

**Heard at: Field House**

**Decision and  
Promulgated**

**Reasons**

**On: 24 January 2019**

**On: 04 February 2019**

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**BHASSANT BOODHOO  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer

For the Respondent: Mr R Deepchand, of Lambeth Solicitors

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Boodhoo's human rights appeal against the respondent's decision to revoke his indefinite leave to remain in the UK.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Boodhoo as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Mauritius born on 1 August 1978. He entered the United Kingdom on 13 March 2003 with leave to enter as a visitor and was subsequently granted various periods of further leave to remain as a student until 30 April 2014. On 1 May 2013 he applied for indefinite leave to remain on 10 years long residence grounds and was granted indefinite leave on 15 September 2013. On 3 August 2016 the appellant applied for naturalisation as a British citizen and, as a result, enquiries were made by the respondent into his immigration history. The respondent concluded from the enquiries made that the appellant had obtained his leave by deception.

4. In a decision of 11 January 2017 the respondent made a decision to revoke the appellant's indefinite leave to remain. The respondent considered that the appellant had submitted a fraudulently obtained TOEIC English language test certificate in his application for further leave made on 28 December 2012. According to the Educational Testing Service, "ETS", there was significant evidence to conclude that the appellant's certificate was fraudulently obtained by the use of a proxy test taker. ETS cancelled the appellant's test scores from a test taken at South Quay College on 22 August 2012. The respondent considered that the appellant had accrued his leave to remain unlawfully and would not have been granted indefinite leave to remain had his deception been known at the time.

5. The appellant submitted a Statement of Additional Grounds following the respondent's decision, raising Article 8 issues on the basis of his family and private life. In a letter of 27 February 2017 the respondent considered the appellant's representations but maintained the decision of 11 January 2017.

6. The appellant appealed against the decision. His appeal was heard by First-tier Tribunal Judge Graves on 25 April 2018 and 15 May 2018. The appeal was adjourned part-heard in order for arrangements to be made for the audio clips of the English language test, disclosed by the respondent, and produced to the judge by the appellant's representative, to be heard by the Tribunal. The appellant gave oral evidence before the judge at the first hearing. At the resumed hearing he played the twelve separate audio files on his laptop, denying that any of the different voices was his, and asserting that the recordings were too short to be from his test.

7. The judge accepted that the evidence from the respondent was sufficient to discharge the initial, evidential, burden of proof, although by only a narrow margin given the deficiencies in the evidence. She did not accept that the respondent had discharged the full legal and factual burden of proof to establish deception and considered that the appellant met the requirements of paragraph 276B of the immigration rules. She found that the respondent's decision constituted a disproportionate interference with the appellant's Article 8 human rights and she allowed the appeal.

8. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had failed properly to address the question of

whether the appellant had provided an innocent explanation, that the judge had wrongly relied upon the appellant's English language ability rather than whether he employed deception and that there was a failure to give adequate reasons.

9. Permission to appeal was initially refused by Designated First-tier Tribunal Judge McCarthy but was subsequently granted by the Upper Tribunal on 5 December 2018.

## **Appeal Hearing**

10. Mr Tarlow, in his submissions, relied upon the grounds of appeal and submitted that the respondent's evidence was enough to show that the appellant had employed deception and that the judge had misdirected herself by relying on the appellant's ability in English.

11. Mr Deepchand submitted that the judge's decision was an exceptional one which could not be faulted and that there had been a meticulous consideration of the evidence. The judge had the benefit of the audio tapes which contained various voices and which therefore suggested that a proxy test taker had not been used. The judge also noted the length of the tapes was inconsistent with the length of the test the appellant had taken, supporting the appellant's position that none related to his test. The judge followed the correct burden of proof and was entitled to conclude as she did.

12. Mr Tarlow did not have any response and I indicated to the parties that in my view the judge had made no errors of law in her decision. My reasons for so concluding are as follows.

## **Consideration and Findings**

13. I am entirely in agreement with Mr Deepchand that the judge's decision was a particularly detailed and comprehensive one, including a meticulous consideration of the evidence and clear and cogent reasons for the conclusions reached. The judge's approach to the burden and standard of proof was entirely consistent with that advocated in SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 229.

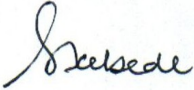
14. The respondent's grounds challenge the decision on the basis that the judge erred by giving too much weight to the appellant's English language ability instead of focussing on the question of whether he had employed deception. However that is plainly not the case. This was not a matter, consistent with [57] of MA (ETS - TOEIC testing) Nigeria [2016] UKUT 450, of the judge focussing on the appellant's ability in English without considering the range of reasons why persons proficient in English may engage in TOEIC fraud. The judge was not precluded from considering the appellant's proficiency in English at the relevant time in any event, and gave careful consideration to the matter at [37]. However she also gave very detailed reasons, aside from the appellant's proficiency in English, for accepting his assertion that the audio

tapes relied upon by ETS were not from his test and that he had not used a proxy test-taker. The judge expressed valid concerns about the deficiencies in the respondent's evidence, which she detailed at [32] to [35] and [43] to [44]. At [40] to [42] the judge assessed the appellant's own evidence, having had the benefit of hearing from him at length, on two occasions, and made positive findings about his immigration history, his character, his description of the test and his educational background. There were detailed and cogent reasons given by the judge for finding the appellant to be an honest and credible witness, for accepting his innocent explanation in response to the respondent's allegation and for concluding that the respondent had failed to meet the legal burden of proving deception. The respondent's grounds are essentially little more than a disagreement with the judge's decision and go nowhere near demonstrating that her findings and conclusions were unsustainable.

15. For all of these reasons I find no errors of law in the judge's approach to the evidence or in her reasoning. Her findings and conclusions were entirely open to her on the evidence before her.

### **DECISION**

16. The Secretary of State's appeal is accordingly dismissed. The making of the decision of the First-tier Tribunal did not involve an error on a point of law, such that the decision has to be set aside. I do not set aside the decision. The decision to allow Mr Boodhoo's appeal therefore stands.

Signed:   
Upper Tribunal Judge Kebede  
2019

Dated: 24 January