



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11589/2017

THE IMMIGRATION ACTS

Heard at Field House
On 17 December 2018

Decision & Reasons Promulgated
On 23 January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS SANAM PURJA ROKA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Miss K Pal, Home Office Presenting Officer
For the Respondent: Mr A Blake, Counsel instructed by AKL Solicitors

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of Nepal born on 11 December 1981. She appealed against the decision of the Respondent dated 19 September 2017 refusing further leave to remain in the UK on the basis of an assertion that the TOEIC English language test that she had undertaken on 17

September 2013 had been obtained by deception. The appellant appealed against that decision and her appeal came before Judge of the First-tier Tribunal Trevaskis for hearing on 21 June 2018. In a Decision and Reasons promulgated on 2 July 2018 he allowed the appeal. The Secretary of State sought permission to appeal to the Upper Tribunal against this decision.

2. The renewed grounds in support of the application for permission to appeal asserted: firstly, that the judge failed to assess correctly the burden of proof in line with the jurisprudence *cf. SM and Qadir v Secretary of State for the Home Department* (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC) and *Shehzad* [2016] EWCA Civ 615 heard by Lord Justice Beatson at [22]; secondly, that the judge had erroneously relied on the Claimant's English language ability and qualifications and had been far too generous in his assessment of that ability and that this was, in any event, contrary to the judgment of *MA* (Nigeria) [2016] UKUT 450 at [57] and the judge failed to give adequate reasons for finding that a person who speaks English would have no reason to secure a test certificate by deception; thirdly, in finding that the fact the Claimant was able to recall details of her journey to the test centre and the examination process does not mean that the appellant necessarily took the test in light of the BBC Panorama programme; fourthly, that the judge materially misdirected himself in applying an impermissibly high standard of proof in determining the deception issue at [57] in finding that the Secretary of State could obtain evidence in the form of video or audio. It was asserted that the evidential burden was met and thus it fell upon the Claimant to adopt an innocent explanation and the Judge failed to correctly apply these principles.
3. Permission to appeal was granted by Upper Tribunal Judge Hanson in a decision dated 8 November 2018, on the basis that there were arguable legal errors identified in the grounds of appeal, which amounted to more than a disagreement with the findings of the judge.

Hearing

4. Ms Pal submitted that the judge failed to adequately assess the evidence provided for the purposes of the appeal hearing. The judge had the witness statement of the two civil servants and the spreadsheet extract and also the relevant information from the look-up tool (see [56] and [57] of the decision) and this evidence had been considered by the Upper Tribunal and Court of Appeal to be sufficient (the Secretary of State's generic evidence). She submitted that this, combined with the evidence relevant to the Claimant, shows that the English language test certificate could be procured by dishonesty. She asserted that the findings at [57] were wholly inadequate and that the judge had failed to assess and correctly apply the burden of proof. At [59] the judge made his findings on the basis of an absence of any evidence from the Secretary of State, which was an erroneous application of the burden and standard of proof, in light of the fact that the judge had the look-up tool. However, she acknowledged that there were no test results in relation to the actual Universal Training Centres, but rather that, out of the results 47 are being treated as invalid and five as questionable out of 53 tests taken on the day and that there were a number of

Universal Training Centres, however the specific location at which the Claimant took her test have not been specified by the Secretary of State as part of the assertion of deception.

5. Ms Pal submitted that the Secretary of State argued that the judge had sufficient evidence to enable him to make a finding that the Secretary of State had discharged the evidential burden and ought then to have gone on to consider whether there was an innocent explanation.
6. In his submissions on behalf of the Claimant, Mr Blake submitted that the decision read in the round did not show an error of law. He submitted that this was not the first appeal, but rather there had been an appeal before Upper Tribunal Judges Trevaskis and Dawson in 2013 which had been allowed, and this was related to a previous English language test taken in Edexcel which the Claimant had undertaken in April 2012, but had been unsuccessful on the basis that Edexcel were not at that time on the list of approved test providers (F2 of the respondent's bundle at 2.) The ETS deception allegation arose after the appeal had been remitted back to the First-tier Tribunal.
7. In relation to the decision in Qadir, Mr Blake submitted even if the judge was wrong at [58] to find that the Secretary of State had not demonstrated sufficient evidence to justify a reasonable suspicion of fraud he, in any event, clearly went on at [59] to consider whether the Claimant had given an explanation and found that she did (at [59] and [60]), therefore the burden shifts back to the Secretary of State to demonstrate that the Claimant's explanation is not innocent. He submitted that when one looked at the decision as a whole, the judge was entitled to conclude that the Secretary of State had not discharged the burden. The judge had correctly identified and noted that the Secretary of State had produced evidence from a camera with an audio/video. This was not part of the Secretary of State's generic evidence because no centre had been identified in this particular case, but rather the Secretary of State had agreed that such evidence existed. Mr Blake submitted that given there was a criminal investigation, the Secretary of State was on notice that he could be expected to produce this evidence.
8. In relation to the assertion that the judge should have taken into account evidence, e.g. from the Panorama programme, this is not the case in that the alleged deception varied from centre to centre and the judge, in any event, directed himself in respect of the Project Façade investigation at [57] and was alive to the wider issues.
9. Mr Blake submitted that the judge directly referred himself to the relevant case law at [50] onwards, e.g. Gazi (ETS - judicial review) [2015] UKUT 00327, SM and Qadir [2016] UKUT 00229 (IAC) and Shezhad [2016] EWCA Civ 615. The judge had the benefit of the Claimant and witnesses giving evidence and accepted their evidence at [59] and see also [55]. In relation to the assertion that the judge relied on the Claimant's English language ability, this is not the case and there is no finding to that effect. He was entitled to take account of the fact that the Claimant had previously passed the Edexcel test, but at [55] he noted that whilst the Claimant understands

English, she had difficulty expressing herself in a tense situation such as the hearing, that she had a strong accent and he formed the impression she had difficulty understanding the Secretary of State's representative who had a pronounced Welsh accent, thus it was clear he did not rely on her English language ability in allowing the appeal.

10. In respect of the look-up tool, Mr Blake submitted that this only identified the centre as a Universal Training Centre. He submitted that many of the cases in the First-tier Tribunal turn upon a proper assessment being made, given the frailty of the evidence provided. It was necessary for a judge to make a rounded assessment correctly and the judge had done that, finding that at [60] in light of his conclusions that the Claimant's evidence had not been obtained by fraud, he was satisfied she had attended the test personally and had taken it without the use of a proxy. He submitted the findings of fact at [59] were important, particularly as no evidence had been produced by the Secretary of State as to the location of the test centre, and there was no police investigation into that specific test centre, unlike e.g. Project Façade. He submitted that this was good enough to discharge the burden on the Claimant to show an innocent explanation and the findings were open to the judge in all the circumstances and had not been challenged by the respondent in the application for permission to appeal.

Decision and Reasons

11. First-tier Tribunal Judge Trevaskis held as follows at [56] through to [60]:-

"56. With regard to the allegation of fraud, I begin by considering the evidence relied upon by the respondent. It is found in annex G of the respondent's bundle. The 'generic evidence' identifies Universal Training Centre as one of the test centres identified in the BBC investigation. The appellant undertook and passed the test provided by Edexcel in September 2012, having completed an approved program at Universal Training Centre; that test was rejected only because the provider was not on the respondent's list of approved providers. The tests under challenge in this appeal were those taken on 16 and 17 September 2013; those results were before the Upper Tribunal on 29 November 2013 when the appellant's appeal against the refusal of further leave was allowed; no issue was then raised regarding the impropriety of those tests; the respondent claims that suspicions began in May 2013 [G5 paragraph 14].

57. The only evidence which directly identifies and relates to the appellant is the 'look-up tool' E1 to 3 RB. It relates to tests undertaken on 17 September 2013 and only identifies the test centre as Universal Training Centre; no evidence has been provided by the respondent to identify the actual location of the tests; the documentation of that organisation indicates that it is based in Watford. The appellant has stated that the tests were recorded, by audio and/or video; the respondent has not sought to rebut that claim; since it is alleged that the appellant has used a proxy, it would be reasonable to assume that any investigation on behalf of the respondent would have involved examination of such evidence, or a statement that no such evidence exists.

The absence of such evidence from the respondent undermines the strength of her assertions of fraud by the appellant. Bearing in mind that the tests have previously been accepted by the respondent in the context of an Upper Tribunal hearing, I am surprised that, when asserting fraud, the respondent is unable to produce evidence as to the location of the allegedly fraudulent tests. In relation to other test centres, there has been concurrent police investigations, which have produced reports, for example Project Façade; no such evidence is relied upon in this case.

58. *Having regard to the above factors, I am not satisfied that the respondent has demonstrated sufficient evidence to justify a reasonable suspicion of fraud by this appellant.*
59. *Even if I am wrong about that, based on the evidence which I have received, and making the rounded assessment which I am required to make, I find that I am satisfied to the required standard on the evidence which has been presented by the appellant that her test scores were not obtained by means of fraud, or by the use of a proxy to take the tests on her behalf. In evaluating the evidence of the appellant and her witnesses, I have made appropriate allowance for their obvious nervousness and difficulty of comprehension, as well as the fact that they were being asked to recall events which took place almost five years ago. In the absence of any evidence from the respondent as to the location of the allegedly fraudulent tests, I am satisfied to the required standard that the appellant has shown that she attended the tests personally, and she undertook them without the involvement of a proxy. She has described in acceptable detail the procedures followed at the test centre, which have not been contradicted by the respondent.*
60. *I therefore conclude that the test certificates which she provided in support of her application for leave were not obtained fraudulently."*

12. I find the judge has given adequate reasons for finding that the Claimant did not utilise a proxy. Key to his findings in this respect is:-
 - (1) the fact that the Secretary of State accepted there was audio or video evidence of the Claimant or a proxy undertaking the test but failed to produce this evidence to prove his contention that the test was not undertaken by the Claimant;
 - (2) the fact that none of the generic evidence addressed the actual location of the test centre; and
 - (3) that no specific test results from that test centre were released or provided by the training centre.
13. The grounds of appeal contend that the judge failed to assess correctly the burden of proof in line with the jurisprudence, however, it is apparent from [50]-[52] that this is not the case as the Judge expressly directed himself in respect of the relevant jurisprudence. The grounds of appeal further assert that the judge had erroneously relied on the Claimant's English language ability and qualifications, however, I accept Mr Blake's submission that this assertion is not borne out by what the Judge actually found at [55]. In respect of the challenge to the Judge's finding that the

Claimant was able to recall details of her journey to the test centre and the examination process does not mean that she necessarily took the test in light of the BBC Panorama programme is nothing more than a disagreement with the Judge's finding of fact, which was open to him on the evidence.

14. In respect of the assertion that the judge materially misdirected himself in applying an impermissibly high standard of proof in determining the deception issue at [57] in his finding that the Secretary of State could have obtained evidence in the form of video or audio, which was apparently available but not produced I find this was a material consideration that the Judge was entitled to take into account. He gave clear reasons for his finding at [57] and I do not find that this amounted to the Judge imposing an "impermissibly high standard of proof" but that this was simply one of a number of factors that he considered in the round when determining the appeal.
15. Further, in light of the Judge's detailed reasons for finding that the Secretary of State's assertion that this particular Claimant had utilised a proxy or deception in order to obtain her English language test result had not been proved on the balance of probabilities, I find no error of law in his decision.

Notice of Decision

16. I find no material errors of law in the decision of First-tier Tribunal Judge Trevaskis. I uphold that decision with the effect that the appeal by the Secretary of State is dismissed.
17. No anonymity direction is made.

Signed *Rebecca Chapman*

Date 10 January 2019

Deputy Upper Tribunal Judge Chapman