



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

Appeal Number: HU/11795/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 2<sup>nd</sup> May 2019**

**Decision & Reasons  
Promulgated  
On 16<sup>th</sup> May 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

**MR HASSAN ALI MOHAMMED  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr K Jegede, Ashton Ross Law, Solicitors  
For the Respondent: Ms S Jones, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant, a national of India, appealed to the First-tier Tribunal against the decision of the Secretary of State dated 16<sup>th</sup> May 2018 refusing his application for leave to remain in the UK outside the Immigration Rules. The application was considered on the basis of his private life in

the UK under Article 8. First-tier Tribunal Judge Randall dismissed the appeal in a decision promulgated on 21<sup>st</sup> January 2019. The Appellant now appeals to this Tribunal with permission granted by Judge P J M Hollingworth on 13<sup>th</sup> March 2019.

2. The background is that the Appellant entered the UK on 18<sup>th</sup> October 2009 with entry clearance as a Tier 4 (General) Student. His application for further leave to remain on that basis was granted until February 2015. His subsequent application for leave to remain to find a new educational Sponsor was refused and, following judicial reviews, that decision was maintained in March 2016 and February 2018. However, the reconsidered application of 20<sup>th</sup> February 2015 was refused on the basis that the Appellant had used deception in the application on 20<sup>th</sup> April 2011 by submission of a TOEIC certificate from the Educational Testing Service in relation to which there was significant evidence that it had been obtained fraudulently by use of a proxy test taker.
3. The First-tier Tribunal Judge dismissed the appeal.

#### The grounds of appeal

4. On behalf of the appellant three grounds of appeal are put forward. The first ground is that the judge applied the wrong standard of proof to the issue of the allegation of fraud in relation to the ETS TOEIC certificate. It is contended in the second ground that the judge put forward no reasons for finding that the Secretary of State had discharged the legal burden of proof. It is contended in the third ground that a proper assessment of the Respondent's evidence was not sufficient to discharge the burden of proof.
5. In the grounds and at the hearing before me it was contended that the judge applied the wrong standard of proof to the assessment of the Appellant's evidence. It is accepted in the Grounds of Appeal that the judge identified the "evidential pendulum" at paragraphs 13 to 14 of the decision where he set out the requirement on the Secretary of State to discharge the evidential burden, then looked to whether the Appellant had provided an innocent explanation and then considered the legal burden having shifted back to the Respondent. It is accepted that the judge noted properly at paragraph 15 that, after the Appellant's explanation of innocence, which reaches the level of minimum plausibility, the legal burden shifts back to the Respondent.
6. However, it is contended that the judge erred in then applying the standard of the balance of probabilities at paragraphs 15 and 16 to the assessment of the Appellant's evidence. It is contended that the judge scrutinised the Appellant's evidence in detail criticising the Appellant for not requesting ETS for a recording of his interview, looking at his English language results from India and failing to have regard to the detailed explanation given by the Appellant as to where, how, why and when he sat his English language test. Mr Jegede put forward some examples of the judge's application of too high a standard of proof, for example at

paragraph 12 where the judge noted that the Appellant's account was vague but failed to give evidence or illustrations as to how he reached that conclusion. Mr Jegede pointed to the documents within the Appellant's bundle which showed the Appellant's competence in the English language. Mr Jegede submitted that the judge had failed to consider that, because of the passage of time since the test was undertaken, the Appellant's account could have been vague. In response Ms Jones contended that the judge made no error in relation to the test, he considered all of the evidence.

### Error of law

7. In **SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 00229** the Tribunal set out the correct approach to assessing the evidence in cases involving an allegation of fraud in terms of the ETS TOEIC test.
8. The judge in this case set out the appropriate approach as paragraph 10 in a citation from **Abbas [2017] EWHC 78 (Admin)**. There it is stated that the Secretary of State must first adduce sufficient evidence to raise the issue of fraud, the Appellant then has a burden of raising an innocent explanation which satisfies the minimum level of plausibility and if that burden is discharged the Secretary of State must establish on a balance of probabilities that this innocent explanation is to be rejected.
9. I accept that at paragraph 11 the judge talked about the standard of proof being the balance of probabilities. However, it is clear from the citation above that he was there referring to the balance of probabilities in terms of the standard of proof for the Secretary of State's case. The judge set out the three steps at paragraphs 13, 14 and 15. At paragraph 13, which has not been challenged, the judge accepted that the Respondent had provided prime facie evidence of deception by providing the generic evidence and the look up tool which was sufficient to discharge the initial evidential burden.
10. The judge considered the Appellant's innocent explanation at paragraph 14 with reference to paragraph 12. At paragraph 12 the judge found that the Appellant was not a credible witness about the test. The judge found that the Appellant was able to provide only a few details about the test, about the bus journey and the length of time it took him and this was evidence which the judge considered the Appellant could have put forward. The judge found that the Appellant's account of the actual test was very vague as was his account as to why he decided to use ETS in the first place. At paragraph 14 the judge considered the Appellant's explanation as to why his name was linked to the reports. At paragraph 15 the judge proceeded on the basis that this amounted to an explanation of innocence which reached the minimum level of plausibility and that the legal burden shifted back to the Respondent. In these circumstances the Appellant has not made out the first ground because the judge proceeded on the basis that the minimum level of plausibility had been made out and

that the legal burden shifted back to the Respondent. In these circumstances the judge was looking at the case on the balance of probabilities as to whether the Respondent had established his case on the balance of probabilities.

11. In this context the judge looked at all of the evidence in the round at paragraphs 15 and 16. At paragraph 15 the judge took into account the fact that the Appellant had not provided a satisfactory alternative explanation as to how his test came to be identified as valid and that the Respondent's methodology as to how the appellant cheated was sufficiently robust. The judge took into account that the Appellant had not complained to ETS and had not taken the opportunity to listen to the audio recording. The judge took into account the Appellant's assertion that his English was sufficiently good to ensure that he did not need to cheat on a test but considered that this would not have been a sufficient reason.
12. It is clear reading particularly the beginning of paragraph 15 the judge did not apply too high a standard of proof to the Appellant's innocent explanation. Accordingly Ground 1 has not been made out.
13. In Ground 2 it is contended that the judge failed to give adequate reasons for finding that the legal burden on the Secretary of State had been discharged. At the hearing Mr Jegede submitted that the judge applied the wrong standard of proof here. Ms Jones submitted that the complaint in relation to Ground 2 had not been particularised. She referred to paragraph 101 of **SM and Qadir**. She submitted that at paragraph 12 the judge set out why he rejected the evidence of the Appellant. In her submission the judge gave proper reasons for finding that the evidential burden had been discharged, why the innocent explanation had been addressed and the evidential burden had been discharged. In her submission, unless the errors could be particularised, no error had been established. In her submission the judge had given adequate reasons in accordance with **MK (duty to give reasons) Pakistan [2013] UKUT 00641**. In my view the judge dealt with all of the reasons at paragraphs 15 and 16 and gave adequate reasons for finding that the legal burden had been discharged.
14. It is contended in the third ground that a proper analysis of the Respondent's evidence was not enough to discharge the burden of proof. It is contended that the evidence submitted in this case was largely of a generic nature and that the ETS look-up tool was the Respondent's own evidence rather than being evidence directly from ETS itself. At the hearing Mr Jegede accepted that a look-up tool had been produced in this case, but submitted that this had been provided by the Respondent and not by ETS. Ms Jones submitted that the look-up tool had been correctly assessed against the Appellant's case. In her submission Mr Jegede had put forward nothing in particular to suggest that the look-up tool should not be accepted. In her submission the grounds amount to a disagreement with the judge's findings.

15. In my view it is clear from paragraphs 9 to 17 that the judge considered all of the evidence in accordance with the guidance in **SM and Qadir** and reached a decision that the Respondent had discharged the legal burden upon him having considered all of the evidence. In my view the grounds have not been made out and amount to a disagreement with the judge's findings.

**Notice of Decision**

16. The Grounds of Appeal have not been established. The decision of the First-tier Tribunal does not contain a material error of law. The decision of the First-tier Tribunal will stand.

No anonymity direction is made.

Signed

Date: 14 May 2019

**A Grimes**

Deputy Upper Tribunal Judge Grimes

**TO THE RESPONDENT**  
**FEE AWARD**

The appeal has been dismissed therefore there can be no fee award.

Signed

Date: 14 May 2019

**A Grimes**

Deputy Upper Tribunal Judge Grimes