



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15731/2018

THE IMMIGRATION ACTS

Heard at Field House
On 23rd August 2019

Decision & Reasons Promulgated
On 25th September 2019

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

MR MD RABIUL ALAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Sharma, instructed by Chancery Solicitors

For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh born on 4 May 1984. He appeals against the decision of First-tier Tribunal Judge Widdup, promulgated on 15 March 2019, dismissing his appeal, against the decision of 19 July 2018 refusing of leave to remain, on human rights grounds.
2. The Appellant came to the UK as a student in November 2009 and subsequently was found by the Respondent to have submitted a fraudulent ETS certificate. His application for leave to remain on human rights grounds was refused on the grounds

that the Appellant did not satisfy the suitability requirements and that it was a proportionate response given his dishonesty. The Appellant's appeal was dismissed by First-tier Tribunal Judge Widdup on the ground that he was satisfied the Respondent had proved the Appellant's dishonesty and the public interest was not outweighed by the Appellant's private life in the UK.

3. Permission to appeal was sought on three grounds:
 - (i) There was insufficient evidence from the Respondent to show that there were reasonable grounds for suspicion of dishonesty and the Respondent had failed to discharge the evidential burden such that an innocent explanation was required;
 - (ii) The judge had applied the wrong test in assessing the Appellant's innocent explanation which only had to meet a basic level of plausibility
 - (iii) The judge failed to give any proper consideration to the legal burden which remained on the Respondent throughout.
4. Permission was granted by Upper Tribunal Judge Grubb on 16 July 2019 on the basis that grounds 1 and 3 were arguable. He stated:

"As the appellant's test result was only recorded as questionable rather than invalid, it is arguable that the evidence was not sufficient to discharge the evidential burden on the Respondent to establish a prima facie case of fraud (see SSHD v Shehzad and Chowdhury [2016] EWCA Civ 615 at [30]).

I see less merit in ground 2 but would not exclude its consideration. Permission is granted on all grounds."

The judge's findings

5. The judge made the following relevant findings:
 - "39. The Respondent's evidence includes a witness statement from Raana Afzal which states that the Appellant submitted a questionable TOEIC certificate in support of an application made by him on 22 June 2012. Reference was made to Annex A in that witness statement which contains the ETS Source data and shows that the Appellant took the test at Colwell College Test centre on 16 May 2012." ...
 - "40. I accept that the generic evidence provided by the Respondent provides reasonable grounds for suspicion of dishonesty by the Appellant. I reject the submission of Mr Aslam that the generic evidence in this case is flawed by the failure to consider Blue Moon. The information provided to the Respondent by ETS showed that the tests undertaken by the Appellant in 2012 were questionable (see Annex A). The Appellant accepts that Colwell College had some role in the process which he described as being the awarding body. It is unclear to me why Colwell College would be awarding a TOEIC certificate unless they had some association with Blue

Moon. In addition, I note it is the test results which are said to be questionable rather than the identity or location of the test centre.”

6. The judge then made findings of fact and concluded at [43]: “The fact that the Appellant’s credibility is damaged by these elements of his case does not mean that his case in relation to the ETS test is also lacking in credibility.” The judge then set out factors which supported the Appellant’s credibility and those which detracted from it before concluding that the Appellant’s evidence lacked general credibility and his evidence about the ETS tests lacked individual detail and were unsupported by other evidence [46]. The judge found that the Appellant had failed to provide an innocent explanation [48] and looking at all the evidence in the round the Respondent had discharged the burden of proving that the TOEIC was dishonestly procured.

Submissions

Ground 1

7. On behalf of the Appellant, Mr Sharma relied on the grounds and stated that the Appellant’s own evidence was insufficient to discharge the evidential burden of giving rise to a reasonable suspicion. The Respondent’s evidence was not that the Appellant’s English language test result was ‘invalid’ but that it was ‘questionable’. The Respondent’s evidence showed that a ‘questionable’ result was one in which there had been other irregularities at the test centre such that the Appellant’s results could not be relied upon.
8. Mr Sharma referred me to [28] and [29] of Rebecca Collings’ statement and [46] and [47] of Peter Millington’s statement and submitted that, when read together, in a ‘questionable’ test result there was no match with a proxy test taker, but the test had been taken at a centre where other tests had been invalidated. Therefore, the Appellant’s test was deemed ‘questionable’. He submitted that the Respondent had failed to show that a proxy test taker had been used. At best there were irregularities at the test centre which could include fraudulent tests for people other than the Appellant.
9. At its highest, the Respondent’s evidence was that there was something ‘dodgy’ about the college such that half the tests were invalidated. The findings in SM and Qadir [2016] UKUT 229 (IAC) did not apply in this case and there was no evidence before the Tribunal that the Appellant had cheated. The judge had erred in his approach because the Appellant did not have to provide an innocent explanation. ‘Questionable’ meant that there were irregularities at the test centre which could mean that others had used a proxy test taker. However, there was no evidence here that the Appellant was such a person.
10. Further, the Respondent relied on a test from a different college although it was accepted there was some link and the look-up tool referred to two tests, but the

Appellant stated he only took one. The judge had failed to take into account the nature of the evidence which failed to show that the Appellant had cheated.

11. On behalf of the Respondent, Ms Fijiwala submitted that it was apparent from the decision that the judge was aware the Appellant's test was not 'invalid' but 'questionable'. The judge relied on the Appellant's 'questionable' ETS test, the generic and specific evidence and the Appellant's interview. The judge was permitted to consider all these aspects in finding that there were reasonable grounds for suspicion. The judge's reasons given at [40] were sufficient.
12. Ms Fijiwala submitted the Respondent's evidence did not show a link to Blue Moon, but the Appellant had accepted that there was such a link, although it was the Appellant's case that he had not taken the test at Colwell College.

Ground 2

13. Mr Sharma submitted that the Appellant's explanation had to be capable of belief following Shen (Paper appeals; proving dishonesty) [2014] UKUT 236 (IAC). The judge found that the Appellant's evidence was unsatisfactory but that did not mean it was incapable of belief. At [45], the judge found that the Appellant's interview was not unclear but then speculated as to where the Appellant had obtained the information from. At [42], the judge made criticisms of the Appellant's evidence which was in general terms and his failure to corroborate his private life and studies was not necessarily evidence of cheating in an ETS test. The Appellant's asylum claim was not relevant to whether he had taken the ETS test. The judge had failed to apply the appropriate test to the Appellant's proffered innocent explanation.
14. Ms Fijiwala submitted that the Appellant had made no mention of the Blue Moon test centre in his witness statement and how he came to take the test there. The judge accepted that general negative credibility findings were not determinative of the ETS issue at [43] and he went on to consider whether the Appellant's explanation was capable of being credible at [44].

Ground 3

15. Mr Sharma submitted that the judge had failed to take into account the weakness of the Respondent's evidence and the inconsistencies therein. The fact that the Appellant had been deemed to have a 'questionable' test should not be taken against him. The appeal should be allowed such that the Respondent was required to put the Appellant into the position he would have been if the allegation had not been made following Ahsan v SSHD [2017] EWCA Civ 2009. The ETS allegation was material, even if the Appellant could not succeed under 276B. The Respondent had to provide the Appellant with a remedy.

16. Ms Fijiwala submitted the judge considered all relevant matters and was entitled to find that the Appellant had not provided an innocent explanation in his witness statement, oral evidence or in documentary form. Although the judge did not repeat all his findings in considering whether the Respondent has discharged the legal burden, it was clear he took all relevant matters into account in concluding at [49]:
- “Looking at the evidence in the round and having regard to the lack of an innocent explanation, I have come to the conclusion that the Respondent has discharged the burden of proving dishonesty and I find therefore that the TOEIC certificate was procured dishonestly.”
17. In relation to Article 8, Ms Fijiwala submitted the Appellant could not succeed even if it was found that he had not submitted a fraudulent English language test certificate. His private life was not disproportionately interfered with. Even if the ETS issue was taken out of the proportionality balance the refusal of leave to remain did not breach Article 8. This was a human rights appeal, the judge had considered it and it was not necessary for the Respondent to look at it again.
18. In response, Mr Sharma submitted that the judge had not referred to Ahsan which was the road map for providing a remedy in relation to ETS material. There were catastrophic consequences for the Appellant in concluding that he had been dishonest. If dishonesty was not made out, then the appeal should be reheard because the consequences for the Appellant were of such gravity that a rehearing was necessary. In this case there had been no proper assessment of dishonesty and the hearing should be remitted to the First-tier Tribunal for hearing de novo.
19. In summary, Mr Sharma submitted the judge did not accept that the Appellant’s evidence in interview was unclear and therefore the Respondent’s suspicion was on an erroneous factual basis. The Appellant had given information which was clear and, even if he could have obtained it from other sources, the fact that the Appellant’s account lacked individual detail and was unsupported was insufficient to show that it was incapable of belief. It was for the Respondent to prove that it was more likely than not that the Appellant had cheated. The Appellant was not required to rebut the suspicion with perfect evidence. At its highest, the material relied on by the Respondent did not show that the Appellant had cheated.

Conclusions and Reasons

Ground 1

20. The generic evidence relied on by the Respondent included the witness statement of Rebecca Collings in which she stated:

“29. ETS explained, at the time, that those categorised as questionable (as opposed to cancelled/invalid) were inconclusive in terms of being certain of impersonation/proxy test taking. Following further communication with ETS they confirmed the definition of questionable and this is set out

in Peter Millington’s witness statement; it is where an individual’s test result was still cancelled on the basis of test administration irregularity including the fact that that their test was taken at a UK testing centre where numerous others results have been invalidated on the basis of a ‘match’. ETS had analysed over 10,000 test scores at that point, of which the majority were cancelled as invalid, the remainder were cancelled as questionable.”

21. In SM and Qadir, Ms Collings, in oral evidence, identified a third category of test results in which the Respondent considered the results to be illegitimate (not invalid or questionable) because the students had taken their tests at a test centre where large numbers of invalid and questionable results had been diagnosed.
22. The Respondent submitted evidence specific to the Appellant over and above the generic evidence relied on in SM and Qadir. That evidence showed that the Appellant had submitted an English language test certificate from Colwell College in his application made on 22 June 2012 and Colwell College was part of a criminal inquiry into the abuse of TOEIC: Project Façade. The Appellant accepted that Colwell College was the awarding body and providers of his English language test.
23. The Appellant’s attempt to distance himself from Colwell College by claiming to have taken the test at the Blue Moon test centre was found to be lacking in credibility. This finding was open to the judge on the evidence before him. The Appellant referred to the Blue Moon test centre in his interview on 30 June 2017, but the judge found this account to be lacking in detail and unsupported by any other evidence. The Appellant made no reference to the Blue Moon test centre in his witness statement dated 14 February 2019. In oral evidence he confirmed that Colwell College was the provider of the test and the awarding body. The location of the test centre was irrelevant.
24. The report attached to Adam Sewell’s witness statement dated January 2017 stated:
 - “8. Analysis of listening and reading tests results at Colwell College shows several abnormal patterns that are not consistent with tests conducted under genuine test conditions. Some of these patterns are extreme and can only be attributed to the deliberate manipulation of test results.” ...
 - “9. These concerns were not limited to a small number of individual candidates but were widespread throughout the entire period that the Colwell College test centre was offering TOEIC tests.”
25. In Ahsan at [31], Underhill LJ referred to recent judicial review decisions including Habib v SSHD in which the impugned test was taken at a college that was under criminal investigation, Elizabeth College, and the Respondent relied on the Project Façade report and Mr Sewell’s report. Underhill LJ stated: “It is common ground that the evidence raised a case to answer and UTJ Gleeson found that the applicant’s oral evidence, which was riddled with implausibilities, was insufficient to shift the burden on him.”

26. Underhill LJ went onto agree with Ms Giovannetti's submission at [33] that: "The observations of the UT in *SM and Qadir* should not be regarded as the last word. Where the impugned test was taken at an established fraud factory such as Elizabeth College, and also where the voice file does not record the applicant's voice (or no attempts were made to obtain it), the case that he or she has cheated will be hard to resist." The Court accepted that was a reasonable summary of the effect of recent decisions, emphasising that, even in such strong cases, the issue of whether an applicant or appellant had cheated was fact specific.
27. The judge took into account the generic and specific evidence at [36] and acknowledged the fact specific nature of the appeal at [37]. He applied the correct burden and standard of proof, appreciating the evidential burden was initially on the Respondent. The judge was well aware that the Appellant's English language test certificate was 'questionable' not 'invalid'. He was entitled to take into account the Appellant's interview on 30 June 2017 and, whilst disagreeing with the Respondent's conclusion about that interview, he found that the Appellant's answers were lacking in individual detail such that the information provided was of insufficient weight to show that the Appellant took the test himself.
28. A 'questionable' test result obtained from a test centre where over 50% of the results were rendered invalid coupled with Mr Sewell's evidence and that in the Project Façade report were sufficient to enable the judge to conclude, as he did, that there was a reasonable suspicion that the Appellant had dishonestly submitted a fraudulent English language test certificate. I find that there was no error of law in the judge's finding that the Respondent had discharged the initial evidential burden and it was for the Appellant to provide an innocent explanation.

Ground 2

29. The judge assessed the Appellant's explanation and gave adequate reasons at [44] for why it was incapable of belief. That is separate to his general credibility findings which he makes at [42]. I am not persuaded that the judge applied the incorrect test to the proffered innocent explanation.

Ground 3

30. I am also satisfied that the judge properly considered the legal burden and appreciated it remained with the Respondent throughout. The judge looked at the totality of the evidence and was entitled to conclude, on the evidence before him, that the Appellant had submitted a fraudulent English language certificate.
31. It was accepted by Mr Sharma that the Appellant's Article 8 claim could not succeed if he did not establish that the Respondent had failed to show dishonesty. The weight

to be attached to the public interest was considerable in this case and the judge properly dismissed the appeal on Article 8 grounds.

32. I find there was no error of law in the decision promulgated on 15 March 2019 and I dismiss the Appellant's appeal.

Notice of decision

Appeal dismissed

No anonymity direction is made.

J Frances

Signed

Date: 23 September 2019

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed

Date: 23 September 2019

Upper Tribunal Judge Frances