Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00238/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 August 2019	**On 30 August 2019**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

ABDUL AWAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Gilbert, counsel instructed by Londonium Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Burnett, promulgated on 21 May 2019. Permission to appeal was granted by Upper Tribunal Judge Pitt on 16 July 2019.

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Anonymity

2. No direction has been made previously, and there is no reason for one now

Background

3. The appellant arrived in the United Kingdom on 25 October 2009 with leave to enter as a Tier 4 (General) migrant under the Points Based System, which was valid until 31 December 2011. On 31 December 2011, he made an invalid application for further leave to remain in the same capacity. That application was returned to him on 24 January 2012 because he had not completed mandatory sections of the application form. On 3 February 2012, the appellant resubmitted his application for further leave. He varied that application on 2 July 2013 because he had finished his previous course and wished to study a new course at Academy De London College. The appellant's application of 3 February 2012 was refused on 18 November 2013 because he submitted a false bank statement as evidence of his financial support. The respondent informed the appellant that he had no right of appeal because his leave expired on 31 December 2011 and he had no valid leave at the time the application was made.

4. The appellant nonetheless appealed the decision of 18 November 2013, claiming that his appeal be treated as valid, relying on *Basnet (validity of application – respondent)* [2012] UKUT 00113 (IAC). In a decision promulgated on 11 December 2014 (IA/50547/2013), a First-tier Tribunal Judge Drabu, allowed his appeal to the limited extent that the respondent consider new evidence provided by the appellant and make a fresh decision. There was no apparent consideration of the jurisdictional issue.

5. The respondent refused to favourably reconsider the appellant's application, according to the decision letter dated 19 February 2016 for the following reasons. It was alleged that for the purposes of his application dated 31 December 2011, the appellant gave a fraudulently obtained TOEIC certificate from Educational Testing Service (ETS) to his sponsor for them to provide him with a Confirmation of Acceptance for Studies (CAS). ETS informed the respondent that a proxy test taker had been used and declared the appellant's test to be invalid and cancelled his scores. The application for further leave was therefore refused under paragraph 322(1A) of the Immigration Rules for using deception in "this" application as well as 322(2) as it was considered that the appellant's presence was not conducive to the public good. Furthermore, the respondent noted that the Academy De London who assigned the CAS were not listed on the Tier 4 Sponsor Register when it was checked on 19 February 2016. No points were, therefore, awarded for attributes or funds because the appellant had failed to provide a valid CAS. The respondent also refused the application under paragraph 322(9) of the Rules because the appellant failed to produce documents requested by the respondent (by letter dated 8 December 2015) which were submitted in advance of the appellant's hearing before the First-tier Tribunal on 25 November 2014. The decision letter also stated that there was no right of appeal because the appellant's leave expired on 31 December 2011.

6. The appellant unsuccessfully sought to judicially review the decision. In refusing the renewed permission application on 25 July 2017, Upper Tribunal Judge King decided that it must have been the case that Judge Drabu accepted jurisdiction in 2014 and therefore the appellant had an alternative remedy of appealing to the First-tier Tribunal.

7. In appealing to the First-tier Tribunal, the grounds of appeal asserted that the application made on 31 December 2011 was "*returned by the respondent for payment issue*." The grounds also contended that the appellant had not been given a period of 60-days to find a new Tier 4 sponsor following his allowed appeal, with reference to *Patel (revocation of sponsor licence – fairness) India* [2011] UKUT 00211 (IAC), that he had received no communications from the Home Office regarding providing his documents and that he had not used deception.

8. Owing to the respondent's contention that the appellant was not entitled to appeal, the First-tier Tribunal considered the validity of the appeal on 11 October 2017 and directed that the issue of jurisdiction be considered as a preliminary issue at the appeal. The directions stated as follows:

> "*Following the decision in Basnet (validity of application – respondent) [2012] UKUT 00113 (IAC) the onus of proof is on the Respondent to show that the correct fee was not paid.*"

The hearing before the First-tier Tribunal

9. At the hearing before the First-tier Tribunal, it was argued on the respondent's behalf that the application of 31 December 2011 was rejected because the appellant had not completed mandatory sections of the application form. Reference was made to the respondent's letter dated 24 January 2012 which rejected that application as invalid. The judge considered that the issue of jurisdiction was not dealt with by the previous judge; that the previous application was not invalidated owing to a fee issue but that the respondent's conduct assumed jurisdiction at the 2014 Tribunal hearing. The judge accepted jurisdiction and determined the issue of deception, finding that the appellant was not a credible witness and that he had not provided an innocent explanation in relation to the allegation of deception.

The grounds of appeal

10. The grounds of appeal argued that the judge took into consideration an irrelevant matter, namely that the appellant had been untruthful regarding the reasons his application was returned by the Secretary of State. It was further argued that the judge applied a higher test than the "*minimum level of plausibility*" referred to in *SM and Qadir (ETS – Evidence-Burden of Proof)* [2016] UKUT 00228 (IAC). The judge's finding that the appellant wrongly stated the number of people who took the test was said to be unsound. Otherwise, it was submitted that the appellant had discharged the evidential burden upon him by providing an account of having sat the test without using a proxy.

11. Permission to appeal was granted on the basis sought. In addition, the grant of permission stated that "the appellant maintained that the issue was not raised with him adequately prior to the hearing."

12. The respondent did not file a Rule 24 response.

The hearing

13. Mr Gilbert relied on the grounds, except for the matter of proper notice of the letter of 24 January 2012 which he said did not form part of the grounds and was not an issue. He argued that the Tribunal misdirected itself as to the law where an allegation of fraud was made in the following manner. At the second stage, the Tribunal did not assess whether the evidence satisfied the minimum level of plausibility, applying *SM and Qadir v SSHD (ETS-Evidence-Burden of Proof)* [2016] UKUT 00229 (IAC) at [67].

14. The appellant was not given the benefit of the third stage because his prima facie innocent explanation was rejected. Mr Gilbert accepted that the respondent had discharged the initial burden. He asked me to note that the appellant sat two TOEIC tests and only the first was said to be fraudulent.

15. Mr Gilbert argued that the judge failed to consider relevant matters which were in the appellant's favour and taken into consideration irrelevant matters such as the inconsistency in the number of people who took the test on the day in question. The respondent's evidence was that over 100 people took the test that day, but the appellant did not witness the whole day but just one batch and the judge did not take this evidence into account. Mr Gilbert further argued that the Judge did not weigh or consider the appellant's evidence other than noting that he needed the highest score possible. Nor did the judge note that the appellant sat both tests. Mr Gilbert questioned that if the appellant was paying for one test which was invalid, why would he take a second test other than for the reason he gave. This was not considered by the judge in assessing the appellant's conduct. The judge noted that the second test scores were much better than the first ones and it was plausible that they were. With reference to *MA (ETS – TOEIC testing)* [2016] UKUT 00450 (IAC) at [46-48], Mr Gilbert emphasised the requirement for a fact-sensitive analysis which would include a consideration of the account of attendance and whether it was plausible. While the judge noted that 70 per cent of tests were invalidated, he did not consider that 30 per cent of candidates were genuine.

16. Mr Gilbert considered it doubtful that the return of the appellant's previous application could materially affect the second stage even if untruthful regarding the reason for invalidation. He stressed that he was not saying that the judge not entitled to take this matter into account but that he was only required to do so at the third stage.

17. Ms Isherwood argued that there was no material error of law by the First-tier Tribunal. Referring to the application form submitted by the appellant in February 2012, Ms Isherwood made the point that the appellant could not claim to be unaware of the reason his application of 31 December 2011 was invalidated because he

submitted the same passport in both applications. The same passport having been returned to him along with the letter of 24 January 2012 which indicated why his application was invalidated. Thus, the appellant had full knowledge that the invalidity was not due to a fee issue.

18. Ms Isherwood contended that the judge was correct at [10] to note the respondent's position that the appellant has had no leave to remain since 31 December 2011.

19. Ms Isherwood characterised Mr Gilbert's submissions as a disagreement with the weight which was placed on the appellant's evidence. She drew my attention to [35] of the decision, where the judge noted that the appellant could not now remember why his application was invalid. She argued that this issue went to the appellant's credibility and the judge was entitled to assess the appellant's explanation and reject it. Regarding the second TOEIC test, this was also termed invalid.

20. In reply Mr Gilbert accepted that the appellant enclosed the passport which was returned to him with the letter of 24 January 2012 with his subsequent application. He emphasised that the appellant could not remember the basis of the refusal given the amount of time which had elapsed and that the judge's reliance on this issue was unsustainable.

21. At the end of the hearing, I reserved my decision as to whether the First-tier Tribunal made a material error of law and give my reasons below. Mr Gilbert requested that the judge's findings regarding jurisdiction be maintained.

Decision on error of law

22. It is not in dispute that the respondent met the initial evidential burden of raising a case that requires the applicant to provide an innocent explanation. This raises a *prima facie* case of fraud.

23. The first ground of challenge was that the judge took into consideration that the appellant had been untruthful in relation to the reason that his 2011 application was returned and that this was an irrelevant matter in considering whether he had put forward an innocent explanation in response to the allegation of deception.

24. The correct approach to determining whether a person engaged in TOEIC fraud was set out in *Majumder v SSHD* [2016] EWCA Civ 1167:

> *"…in considering an allegation of dishonesty the relevant factors included the following: what the person accused had to gain from being dishonest; what he had to lose; what is known about his character; the cultural environment in which he operated; how the individual accused of dishonesty performed under cross-examination, and whether the Tribunal's assessment of that person's English language proficiency is commensurate with his or her TOEIC scores; and whether his or her academic achievements are such that it was unnecessary or illogical for them to have cheated."*

25. The judge's approach to the consideration of the appellant's explanation was in accordance with what was said in *Majumder.* The judge's findings on the deception issue are set out from [39] to [55] of his decision and include the following. At [43], the judge considers the appellant's oral evidence as to the circumstances in which he states he took the TOEIC tests; at [44] the judge lists the appellant's, somewhat limited, academic achievements; at [45] the judge finds that the appellant demonstrated a "fair command" of the English language and accepted that he had shown that he had passed other examinations at around the time of the TOEIC tests. In short, the judge took into consideration all the factors which worked in the appellant's favour.

26. As is apparent from the above extract from *Majumder,* what is known of an appellant's character is also a relevant factor. The judge rightly noted that in his 2018 witness statement (paragraph 4), the appellant maintained that the respondent returned the 2011 application "*due to some payment issue*." Indeed, the appellant has been vigorously and continuously challenging the respondent's claim that his leave lapsed on 31 December 2011 since 2013, solely on the basis that the respondent failed to correctly take the fee. It was only once the appellant was confronted with the evidence that his fee was refunded, the respondent's letter of 24 January 2012 and GCID entries which showed that the application was invalidated owing to several incomplete sections of the application form that the appellant changed his account during the hearing, stating that he could not remember the reason for the rejection of his application and could not remember his fee being refunded.

27. At [46] the judge rejects the appellant's oral evidence and finds that the appellant would have been aware of why his application was returned and his fee refunded. The judge's finding on this matter establishes that the appellant has been dishonest regarding a matter other than the allegation of deception in question. This is clearly a relevant matter.

28. The appellant has been making dishonest claims about the 2011 application for over 5 years and has pursued that claim previously before the First-tier Tribunal and the Upper Tribunal in the form of a judicial review claim. He has had at least two different firms of solicitors representing him during that time. The judge was fully entitled to reach the conclusion he did as well as to find that it reflected adversely on the appellant's credibility.

29. The judge did not simply rely on the appellant's dishonesty regarding the returned application in rejecting his explanation but considered other matters including that the appellant had done very little to assert and prove his claimed innocence[48-49], that even if the appellant did not need to cheat this did not mean that he had not done so [52] and that a Project Façade inquiry into Synergy Business College, London referred to evidence of widespread cheating. At this point, it is worth mentioning that the Project Façade document stated that during audits pilots were observed to be taking the test on behalf of candidates who were located in a separate room. Of 4894 tests taken between 24 November 2011 and 15 January 2013, 2410 were invalid and the remainder questionable. The appellant says he took the test in question on 16

November 2011 and on that date 113 tests were taken with 79 (70 per cent) being invalid and the remainder questionable.

30. It is argued that the judge was wrong to take into consideration the appellant's evidence as to the number of people who took the test on 16 November 2011. At [47] the judge noted that the appellant described 10-15 people taking the test and compared that with the significantly larger number of tests taken referred to in the respondent's evidence. Mr Gilbert suggested that there would have been tests taken at different times of the day and the appellant could have no way of knowing how many people took their tests in an entire day. At first there appeared to be some merit in that submission, however the appellant's witness statement is clear in that the following is said about the test on 16 November 2011 at paragraph 20 "*there were approximately 10 to 15 candidates taking the examination on that day at that centre.*" Furthermore, the ETS data does not give any indication that there were varying test times on 16 November 2011, indeed the test time section is blank. In these circumstances, the judge cannot be criticised for taking this discrepancy into consideration.

31. There is no basis for the submission that the judge applied a higher test than the "*minimum level of plausibility*" referred to in *SM and Qadir (ETS – Evidence-Burden of Proof)* [2016] UKUT 00228 (IAC). The judge appropriately directed himself on the relevant authorities at [28] of his decision and a fair reading of his decision showed that he applied those authorities to the case at hand.

32. The judge's conclusion that the appellant failed to discharge the evidential burden upon him by providing an innocent explanation to the allegation of deception was wholly sound and was not vitiated by errors of law.

Conclusion

The making of the decision of the First-tier Tribunal did not involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is upheld.

Signed **Date: 23 August 2019**

Upper Tribunal Judge Kamara