Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11200/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 September 2021	**On 2 November 2021**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

SIKANDER ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Karim, Counsel, instructed by AWS Solicitors
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan. His date of birth is 20 April 1987. His appeal against the decision of the Secretary of State on 14 June 2019 to refuse his human rights claim was dismissed by Judge Bart-Stewart in a decision that was promulgated on 25 November 2019 following a hearing at Taylor House on 30 October 2019. The Appellant was granted permission by Upper Tribunal Judge Sheridan on 9 July 2020.

2. The Secretary of State refused the Appellant's application on grounds of suitability because he had submitted with a previous application a TOEIC test certificate

relating to a test on 22 February 2012 which had been obtained by fraud (a proxy test taker). The Appellant had made an application for ILR on 4 January 2016 which was refused on the same date.

3. The Appellant's appeal against the decision of the 4 January 2016 was allowed by the First-tier Tribunal. That decision however was set aside.

4. The appeal against the decision of 4 January 2016 was dismissed by First-tier Tribunal Callow (the first judge) in a decision dated 3 September 2018. The first judge found that the English language test certificate relating to 22 February 2012 was fraudulent.

5. The Appellant produced evidence that was not before the first judge. Judge of the First-tier Tribunal Bart-Stewart, engaged with that evidence and made the following findings:-

> "44. The Appellant was therefore aware of the criticism made of his failure to explain why he did not confront ETS and seek to obtain the recordings. His explanation in oral evidence for failing to contact ETS until a few weeks before the hearing because his previous solicitor did not advise him to does not stand scrutiny. He was also represented throughout from the initial application. In their letter of representation the representatives, AWS stated that they acted for Qadir. I do not find it credible that having received the decision which included the specific references to the lookup tool as attachments the Appellant would not have been advised about obtaining evidence in rebuttal.
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> 45. The first attempt to contact ETS is an e-mail dated Friday 4 October 2019 23:58 BST. The Appellant has not provided a credible explanation for the delay. He left it to the day at the end of the day on the last day of a working week to contact a large organisation in the United States less than three weeks before his appeal hearing. The e-mail is vague requesting all 'relevant test documents which can use as evidence to prove my innocence to the hearing court'. He does not give the place where he took the test or the certificate number. He does not specifically ask for the test recordings. There is reply from ETS on Monday 7 October at 10:39 BST requesting further information so that they can provide an appropriate response. It appears that the Appellant does not reply until Tuesday 15 October. This does not suggest any sense of urgency on his part. He also failed to give the name of the test centre as Colwell College.
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> 46. The bundle contains a copy of a similar e-mail he sent to ETS with regards to the test taken at Elizabeth College on 14 December 2011 which he denies taking. The e-mail was sent on 8 October 2019. By then he would have had the Colwell College response from ETS detailing the information they require but does not provide this until prompted by their response of 10 October 2019.
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> 47. The Appellant claims to have tried to telephone ETS on two occasions but the call did not go through. The Appellant on his own evidence is well educated. I find it surprising that he did not realise that an international dialling code was required. Even he did not notice, he could have made further attempts to contact ETS by e-mail and informed them of his difficulties in contacting them by telephone. The approach is half hearted at best. I do not consider that the Appellant made a genuine attempt to contact ETS. The delay in making any

attempt to do so until recently further undermines the credibility of his claim that he genuinely took the TOEIC test.

48. The Appellant does not deny taking the speaking test at Colwell College on 22 February 2012. In his witness statement he says his reason for doing so was that his college was closed. His Tier 4 Sponsor college had its licence suspended during the summer vacation 2011 and he was advised at that time to take the English language test at level B2. There is no explanation for why he waited until February 2012 to take the test. A test at Elizabeth College in December 2011 would be consistent with his explanation of being aware that there was an issue with the college licence in the summer of 2011. He may have various reasons not to use that certificate. Any test that he may have taken at Elizabeth College is irrelevant to the issue before me as the Respondent does not rely on it. The Appellant claims to have been unaware that his visa was curtailed and he does not explain the timeline and delay between taking the test in February 2012 and submitting an application on 6 December 2012. These matters I consider also go to the credibility of the explanation offered by the Appellant.

49. Colwell College was one of those where it was concluded that the majority of tests were not conducted under genuine test conditions and the results reported are not a true reflection of the English ability of the candidates. In voice analysis carried out proxy test takers were identified in 178 of the 2006 speaking and writing test sessions indicating that abuse is widespread and occur throughout the entire period that Colwell College was offering TOEIC tests. Analysis of speaking and writing test results shows speaking results heavily weighted towards the higher end of the score range. Written test results form a distinctive double peak pattern inconsistent with results conducted under genuine test conditions. With regards to listening and reading tests the batching and clustering of results towards specific areas of the score range correspond to the requirements of Immigration Rules. This indicates the results were manipulated in order to provide candidates with the scores that they require for immigration purposes.

50. The Appellant has failed to provide an innocent explanation in respect of the invalid certificate which he used in his application. On considering the evidence in the round, I find that the Appellant has failed to discharge the evidential burden and I am satisfied that the Appellant knowingly took part in this deception".

Conclusions

6. I heard full submissions from both parties. Mr Kotas relied on a Rule 24 response of 27 August 2020. I will engage with each ground separately.

Ground 1

7. Mr Karim relied on the grounds of appeal. He expanded on ground 1 in respect of the burden and standard of proof. The judge did not have regard to the fact that the evidential threshold on the Appellant is low and not the usual balance of probabilities. The judge appears to reverse the burden as is apparent from paragraph 45 where the judge is critical of the Appellant's apparently belated attempts to contact ETS. It seems that the judge incorrectly formed the view that it was for the

Appellant to prove that he did not take the test. In oral submissions Mr Karim submitted that the judge did not consider the applicable three stage test and that she failed to appreciate that the burden on the Appellant is a low burden (see [42]). She reversed the burden (see [45]). At [50] the judge disclosed that she did not understand the burden of proof.

8. Mr Kotas submitted that the ground is without merit. Paragraphs 36 and 40 disclose that the judge properly applied the standard and burden of proof in accordance with SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC)

9. Mr Kotas relied on, what was said by the Court of Appeal in AA (Nigeria) and Secretary of State [2020] EWCA Civ 1296 at paragraph 9:-

> "… I would associate myself with what Coulson LJ said at paragraph [37] of UT (Sri Lanka) and Secretary of State for the Home Department [2019] EWCA Civ 1095, that it is an impediment to the efficient working of the Tribunal system in this area for judges to have numerous cases cited to them or to feel the need to set out extensive quotation from them, rather than focusing primarily on their application to the factual circumstances of the particular case before them. Judges who are experienced in these specialised courts should be assumed by any appellate court or Tribunal to be well familiar with the principles, and to be applying them, without the need for extensive citation, unless it is clear from what they say that they have not done so".

10. Mr Kotas drew my attention to the fact that this is an Appellant whose "innocent explanation" had already been considered and dismissed by a previous Tribunal. Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702

11. The judge was entitled to reject the Appellant's explanation why he had not contacted ETS and the college until shortly before the hearing. The judge was entitled to take into account that the solicitors who represented him were involved in the case of Qadir. The judge was entitled to attach weight to the Appellant choosing not to contact ETS until shortly before the hearing. There is no merit in ground 1.

12. I do not accept Mr Karim's submissions. The judge properly directed herself on the burden and standard of proof (see paragraphs 36 and 40). The judge referred to the 2018 determination where the first judge recorded (at paragraph 17) that there was a concession that there is evidence of deception and therefore the onus rests with the Appellant to raise an innocent explanation (see paragraphs 40 and 50). Albeit in the context of the first stage of the three stage test, at paragraph 40, the judge disclosed an understanding that an evidential burden entails a comparatively modest threshold. In any event, the judge did not need to set out the law. The issue is whether she properly applied it. Mr Karim has not draw to my attention anything that could support the judge in this case misapplying the standard and burden of proof. The judge did not simply adopt the previous decision. There is no properly articulated challenge to the decision on Devaseelan grounds. In any event, the judge considered all the evidence including that which was not before the first judge when considering the evidence.

Ground 2

13. Ground 2 asserts that the judge erred in failing to make findings in respect of the APPG Report. The judge at paragraph 40 stated that there was nothing in the evidence before her to lead to a departure from the finding that the Secretary of State had discharged the evidential burden. However in submissions it was suggested that this is no longer the case with reference to a report from Professor Sommer however the judge said that the document was not included in the evidence before her. In Counsel's skeleton argument before the First-tier Tribunal it was clearly stated that the Appellant relied on the criticisms of the Respondent's approach in the recently published APPG Report giving an online reference in order to support that the decision making process adopted by the Respondent was flawed and that there was a lack of independent critical analysis. The judge materially erred in failing to consider and make findings in respect of this report especially as it was published after the decision of the first judge and as recently as July 2019.

14. In oral submissions, Mr Karim stated that ground 2 was still relied on post DK and RK (Parliamentary privilege, evidence) [2021] UKUT 0061. Mr Karim referred me to DK and RK and specifically the findings at paragraphs 12, 13 and 23:-

> "12. It is common ground that the APPG Report is not within the scope of Article 9. Its report is not a proceeding of parliament. The APPG has no official parliamentary status, unlike the Public Accounts Committee or the Home Affairs Select Committee. As is stated at page 35 of the APPG Report:-
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> > 'This is not an official publication of the House of Commons or the House of Lords. It has not been approved by either house or its committees. All party parliamentary groups are informal groups of members of both houses with a common interest in particular issues. The views expressed in this report are those of the group'.
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> 13. The APPG Report, however, makes reference to proceedings before the Home Affairs Select Committee and the Public Accounts Committee. Paragraph 1.1 of the report expresses a view about the findings of the Home Affairs Select Committee and the National Audit Office (to which we shall turn in due course). At paragraph 2.1 and its footnote, further reference is made to evidence provided by the Respondent to the Home Affairs Select Committee. At paragraph 2.3, under the heading 'misuse of expert evidence' reference is made in the footnote to what is said at the Public Accounts Committee hearing on 10 July 2019. At paragraph 2.5, under the heading 'questionable students unjustly targeted', doubt is thrown over evidence given by the Respondent to the Public Accounts Committee. By contrast, evidence given to the Home Affairs Select Committee by an individual who runs a college is referred to in approbatory term.
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> 23. We do, however, consider that once verified, the record of what was actually said to and by Professors Sommer and French and Dr Harrison on 11 June 2019 should be admitted. Those three individuals have given expert evidence in other ETS cases. What they had to say on that date may, therefore, be of relevance. Admitting the transcript on this basis would not infringe Parliamentary privilege

or the principle that courts and tribunals make up their own minds about the matters to be decided by them on the basis of the evidence before them."

15. Mr Karim referred to the grant of permission by Upper Tribunal Judge Sheridan to support that it was recognised by Judge Sheridan that the report in this case is material.

16. Mr Karim submitted that the Lookup Tool suggested that the Appellant had in fact taken the speaking and writing test twice and on both occasions it was "invalid" but the Appellant denies having taken the first test, in December 2011, which was not part of the Respondent's case. Despite showing as invalid on the Lookup Tool, it was a failed test. This according to Mr Karim is capable of challenging the reliability of the Secretary of State's evidence and supporting what the expert said to the APPG. The evidence of the APPG needed consideration. At paragraph 48 the judge found that "any test that he may have taken at Elizabeth College is irrelevant to the issue before me as the Respondent does not rely on it". However Mr Karim submits that it was a relevant consideration when assessing the reliability of the Secretary of State's evidence.

17. Mr Kotas drew my attention to Mr Sharma's skeleton before the First-tier Tribunal. It provided a link to the APPG report. There was no transcript of the evidence. There were no submissions made about this piece of evidence. In any event he relied on R (Mahmud) and UTIAC and Secretary of State [2021] EWCA Civ 1004. The case concerned the Appellant seeking to rely on the transcripts of evidence given to the APPG where Dingemans LJ at paragraph 50 stated as follows:-

> "50. Further in my judgment, the fresh evidence on which Mr Mahmud seeks to rely on the hearing of this appeal, namely the transcripts of evidence given to the APPG, would not have an important influence on the appeal. It is apparent that some of the evidence in the transcripts is directed to the process by which the evidence on behalf of the Home Office came to be presented, and there was evidence directed to the failing of ETS, and those contracted to ETS, and the consequences for the reliability of the evidence from ETS. Although the evidence did identify the absence of information provided from ETS, and although Mr Turner highlighted the absence of continuity evidence relating to the voice tape from ETS, none of the evidence in the transcript descended into detail about the coincidence of the numbering of the voice file in Mr Mahmud's case with the numbering on the test result, which was a point which had been relied on by the FtT judge. The evidence on which Mr Turner sought to rely was at a high level of generality and did not, for understandable reasons, descend to explain away the evidence which the FtT Judge had considered decisive. In the case of Mahmud this included the journey which took him past other English language test centres and to a test centre where every result that day was either invalid or questionable. This was a case where the FtT Judge had heard Mr Mahmud's explanations for taking his test at a College where there were a very significant number of invalid tests and did not accept it. In these circumstances the fresh evidence would not have afforded a basis for allowing the appeal. It might be noted that, even if the fresh evidence had been admitted the court might, as a matter of fairness to the Secretary of State have had to consider taking account of the fact that it was common ground that Mr Mahmud had not scored sufficient

> marks to pass the earlier English language test referred to in paragraph 20 above. As it is this point does not arise because the fresh evidence is not admitted".

18. I reject Mr Karim's submission. First, there were no submissions made either orally or in writing concerning the impact of the report on the evidence and the connection with this and the first test (in December 2011). A link to a 35 page report in a skeleton argument is not without further explanation a submission that the part of the evidence contained therein should be considered by the judge. Secondly; and, in any event, post DK and RK, the report is not admissible. The Appellant has not sought to adduce transcripts of the evidence. I do not need to engage with R (Mahmud) and UTIAC and Secretary of State to which Mr Kotas drew my attention.

19. Mr Karim referred me to paragraph 34 of the decision where the judge sets out Mr Sharma's submissions. While no reference is made in the skeleton argument before the First-tier Tribunal to the two tests disclosed in the Lookup tool, the judge recorded Mr Sharma's oral submission that "it made no sense to have taken two tests". Mr Karim drew my attention to the unreliability of the Lookup tool in respect of that test. The failed test is shown in the Lookup Tool to being invalid. I understood Mr Karim's argument was that because the Lookup Tool shows the test as failed, it cannot also be invalid and therefore the Lookup Tool cannot be correct. I am not sure that the Appellant's case was advanced on this basis before the First-tier Tribunal. I cannot find any reference to this argument in the grounds before the First-tier Tribunal or even the grounds before me. However, the argument is wholly tenuous. The suggestion that the APPG report should carry more weight in the light of the evidence about the December 2011 is even more so.

20. I find that a test could be taken and failed by a proxy test taker. However, the judge did not have to make findings about this or engage with it. It is irrelevant because the deception which is the subject of these proceedings is not the sitting of a test by proxy in 2011. The alleged deception is the Appellant's reliance on a fraudulent certificate pertaining to a test taken in 2012 in an application to the Home Office.

Ground 3

21. Ground 3 asserts that the judge's credibility assessment is inadequate and contains legal errors and material factors have not been taken into account. In support of this ground the Appellant relies on paragraph 69 of SM and Qadir which reads as follows:-

> 69. We turn thus to address the legal burden. We accept Mr Dunlop's submission that in considering an allegation of dishonesty in this context the relevant factors to be weighed include (inexhaustively, we would add) what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated. Mr Dunlop also highlighted the importance of three further considerations, namely how the Appellants performed under cross-examination, whether the Tribunal's assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic

> achievements are such that it was unnecessary or illogical for them to have cheated.

22. Mr Karim submitted that it was imperative for the Tribunal to consider these factors and make findings. In addition there was evidence from a witness, Ms Bailey, commenting on the Appellant's character and confidence in using the English language. The judge was required to make a credibility assessment in relation to this evidence and have regard to the factors set out in SM and Qadir. The approach of the judge is contrary to the guidance in MK (duty to give reasons) Pakistan [2013] UKUT 00641. Mr Karim drew my attention to Ms Bailey's witness statement (AB/22-23). She was not cross-examined. Her evidence was not challenged. Her evidence was that she had always found the Appellant to be honest and trustworthy. She has known him since August 2013 when she was seeking someone to support her adult son who has learning difficulties by providing company and reassurance during overnight stays and at weekends. She says that the Appellant was of great benefit to her son and he is a kindly and thoughtful man. There are photographs in the bundle of the Appellant and the witness and the witness's son. The judge was obliged to make findings on Ms Bailey's evidence but did not do so.

23. The judge set out paragraph 57 of MA (ETS – TOEIC testing) [2016] UKUT 00450 (see paragraph 41); where the following was stated:

> "In the abstract, of course there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere".

24. The Appellant submits that what is said at paragraph 57 is *obiter* and refers to "in the abstract." In any event, it contradicts what the UT said in at paragraph 69 of SM and Qadir.

> "We turn thus to address the legal burden. We accept Mr Dunlop's submission that in considering an allegation of dishonesty in this context the relevant factors to be weighed include (inexhaustively, we would add) what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated. Mr Dunlop also highlighted the importance of three further considerations, namely how the Appellants performed under cross examination, whether the Tribunal's assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic achievements are such that it was unnecessary or illogical for them to have cheated"

25. Mr Kotas submitted that there is no suggestion that the Appellant was found to be of bad character. The evidence of Ms Bailey was no more than a neutral factor. It was not highly relevant evidence but marginally peripheral.

26. I reject Mr Karim's submission in respect of the evidence of Ms Bailey. The grounds do not make clear the context of this appeal. The starting point for the judge was the finding of the first judge, properly applying Devaseelan.

27. The judge at paragraphs 44-49 considered the evidence that the Appellant relied on that was not before the first judge. The judge attached weight to the Appellant having contacted ETS very late in the day to seek to obtain the recordings. She attached weight to the vague nature of the communication and did not accept that the Appellant would be aware that an international dialling code would be required. The judge was entitled to take the view that the Appellant's attempts to seek evidence to raise an innocent explanation was "half-hearted". There is no specific challenge to these findings. Ms Bailey's view of the Appellant was positive. There is nothing to suggest that her evidence was not believed by the judge. The judge summarised the evidence at paragraph 32. It was evidence that was not before the First-tier Tribunal. It is one person's view of the Appellant. There is no suggestion that the judge rejected her evidence. There was no reason to. Her evidence was not challenged. It is difficult to see how a person's opinion of another could be the subject of a challenge. There is no reason to believe that Ms Bailey's view of the Appellant was not a matter to which the judge had regard when considering the evidence overall and properly applying Devaseelan.

28. In respect of Mr Karim's oral submission that there is a contradiction between SM and Qadir at paragraph 69 and MA at paragraph 57. The judge erred in applying the latter which was obiter dicta, I find there is no substance in it. Paragraph 57 of MA states:-

> "We acknowledge the suggestion that the Appellant had no reason to engage in the deception which we have found proven. However, this has not deflected us in any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere. We are not required to make the further finding of why the Appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter.

29. I fail to see any contradiction between the two cases. It was for the Appellant to advance evidence engaging with the factors identified as relevant in SM and Qadir.

30. I find that the judge properly engaged with the evidence before her. She made findings that were open to her and which are adequately reasoned. The Appellant took the test in 2012. In respect of what the UT said in SM and Qadir, it is difficult to see how in a case like this, the Appellant's English language ability in 2019 could be relevant to his skills in 2012. He did not adduce evidence of his English language skills in 2012. He said (see paragraph 26) that he had no reason to cheat and put his future career at stake. This evidence was not fully developed in oral evidence or in is statement. It relates to the Appellant's state of mind and circumstances in 2012. In respect of evidence of the Appellant's character, what weight to attach to the evidence of Ms Baily was a matter for the judge.

31. It was a matter for the Appellant too adduce evidence to support assertions to engage with the relevant factors identified in SM and Qadir. A hearing before the First-tier Tribunal is not inquisitorial. The judge engaged with the represented Appellant's case as it was advanced before her.

Ground 4

32. Ground 4 asserts that the Article 8 assessment was inadequate and that factors in the Appellant's favour were not given due weight. At pararagraphs 51-53 the judge co ncluded that there would not be very signifcant obstacles to integration, the Appellant has spent most of his life in Pakistan, he has no family ties here and his leave was curtailed 7 years ago. There is no material evidnece identified in the grounds or by Mr Karim in oral submissions that the judge did not take into account when assessing proportionality which is capable of making any difference to the outcome in this case. The judge assessned proportionality taking into account all material matters.

33. The grounds do not identify a material error in the decision of the First-tier Tribunal. The decision to dismiss the Appellant's appeal is maintained.

34. The appeal is dismissed

No anonymity direction is made.

Signed *Joanna McWilliam* Date 1 October 2021

Upper Tribunal Judge McWilliam