Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00053/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 October 2017	**On 23 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR HAFIZ FAISAL SHAHZAD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr A Chohan of Counsel, instructed by SZ Solicitors

DECISION AND REASONS

Background

1. The appellant in this case is a citizen of Pakistan born on 21 October 1986. He appealed to the First-tier Tribunal against the Secretary of State's decision dated 15 December 2015 to refuse to vary his leave to remain on the basis that the respondent maintained that the appellant submitted a false TOEIC certificate. Judge of the First-tier Tribunal allowed the appellant's appeal in a decision promulgated on 8 February 2017 and remitted the case back to the respondent for further consideration under

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paragraph 245 of the Immigration Rules. The appellant in this appeal is therefore the Secretary of State. However for the purposes of this decision I refer to the parties as they were before the First-tier Tribunal where Mr Shahzad was the appellant.

2. The Secretary of State appealed on the basis that the judge failed to correctly assess the burden of proof in line with **SM and Qadir (ETS – Evidence – Burden of Proof): UKUT 21 April 2016**. The respondent noted at paragraphs 20 and 21 of **SM** the findings are that the respondent has discharged the evidential burden of proof in respect of deception. If witness statements and spreadsheets have been provided then the burden shifts to the appellant, as detailed at paragraph 68, to raise an innocent explanation. If the judge accepts the explanation the burden shifts back to the respondent in order to address the legal burden and it was submitted that the First-tier Tribunal had failed to give adequate reasoning why the respondent had not met the legal burden in this case with no assessment of any innocent explanation from the appellant. It was submitted that the judge erred in law and in light of the evidence and failure to find an innocent explanation the judge was bound to dismiss the appeal.

3. Mr Tufan made detailed submissions, including in relation to the brevity of the decision of the First-tier Tribunal. He relied on the grounds that the judge had not done enough in relation to the burden of proof and pointed to the evidence before the Judge of the First-tier Tribunal, including the supplementary bundle which included the lookup tool and evidence in relation to the criminal inquiry into abuse at the Premier Language Training Centre where the appellant took his test on 23 May 2012. Mr Tufan submitted that the judge failed to engage with the evidence of Professor French, including that the likelihood of a false positive in such cases was very likely to be very substantially less than one percent.

4. Mr Tufan relied on the Tribunal case of **MA (ETS TOEIC testing) [2016] UKUT 450**, in particular paragraph 50, which gave reasons in relation to the cogent evidence as to the "lookup tool" which consists of an excel spreadsheet with the name, date of birth and nationality of the person identified. However I note that it was also said in **MA** that the question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact sensitive.

5. Mr Tufan pointed to the reasoning in **MA** that the suggestion that someone speaks English does not assist an appellant, as there are a range of reasons why persons proficient in English may engage in TOEIC fraud. Mr Tufan relied on the High Court decision in the judicial review case of **Gaogalalwe R (on the application of) v the Secretary of State for the Home Department [2017] EWHC 1709**, which he submitted had a similar factual matrix to the appeal before me. In that case it was indicated that it was common ground that the question to be asked was whether the Secretary of State had approached the matter in the manner directed by the Court of Appeal in **SM and Qadir [2016] EWCA Civ 1167**. This involves considering whether the Secretary of State has met the burden on her of identifying evidence that the TOEIC certificate was obtained by deception; second whether the claimant satisfies

the evidential burden on her of raising an innocent explanation for the suggested deception; and third, if so whether the Secretary of State can meet the legal burden of showing on the balance of probabilities that deception in fact took place.

6. Mr Tufan also indicated, although he accepted it was not a ground before me, that the judge was incorrect to remit the case back to the Secretary of State and that there were sufficient grounds to dismiss the appeal over and above the TOEIC issue.

7. Mr Chohan, in relation to the final point, submitted that the judge at paragraph 8 had considered this issue and taken into account the decision in **Mandalia v Secretary of State for the Home Department [2015] UKSC 59**, in particular paragraphs 7 and 8 and the judge took into account that the evidential defects in the appellant's evidence were minor and could be corrected and therefore considered it appropriate to allow the respondent to reconsider the matter under paragraph 245 of the Immigration Rules.

8. Mr Chohan submitted that the judge made findings, including the findings at paragraph [4] of the decision and reasons as to the circumstances of the appellant taking the test, who he went with, that he paid a fee, that he did not see any proxy present and that the first time that he heard of any allegations was in December 2015. He submitted it was open to the judge to find as he did that he accepted that the appellant was credible on this and that he had spent two hours taking the test and did not cheat.

9. It was Mr Chohan's submission that the judge was clearly aware of all the evidence, including of Professor French. Although the lookup tool shows that there were invalid tests, crucially the judge had found this appellant credible and had referred to the test in **SM and Qadir**. Mr Chohan further submitted that the appellant was cross-examined on his evidence and the judge was entitled to reach the decisions he did. Although the judge kept it simple he dealt with the issues.

10. In relation to the case law Mr Chohan submitted that essentially it is a question of the judge's credibility and other findings. Mr Tufan, in reply, referred me to the material in relation to a criminal inquiry into abuse at the Premier Language Training Centre in Barking and that there were no cases where there was no evidence of invalidity and that all the tests were either questionable or invalid, with 70% found to be invalid at this test centre which he submitted was very high.

Decision on Error of Law

11. I am not satisfied that any material error of law has been identified. In relation to the first part of the ground of appeal I am not satisfied that the Tribunal misapplied the burden of proof. At paragraph 7 the judge sets out:

> "Whilst the generic evidence undoubtedly establishes that there were false TOEIC tests taken, on the evidence placed before me, in which I find the appellant to be a credible witness, the respondent has failed to establish to the relevant standard that the appellant did not sit the test himself and fraudulently

obtained the English language qualification. I have taken into account the fact that the appellant apart from the TOEIC also obtained an IELTS certificate in the United Kingdom and clearly speaks good English and also the criticisms in relation to the generic evidence as set out in **Qadir v the Secretary of State for the Home Department [2016] EWCA Civ 1167** at paragraphs 22 and 23".

It is evident that the judge accepted that the respondent's evidence was sufficient to provide the appellant with a case to answer, the "innocent explanation" referred to as in **SM and Qadir**. The fact that the judge did not use these words and specifically set out the shifting burden of proof as outlined in the case law is not fatal to his decision.

12. The judge at [2] though to [4] set out the appellant's evidence in both his witness statement and in oral evidence and in cross-examination, including where he took the test, how he travelled to the test centre (by bus and train), where and when he registered for the exam and how much it cost. The judge noted the appellant's evidence in relation to the nature and construct of the exam and also that the appellant took the test where he did in Barking as it was close to East Ham where he was living at the time. He noted that he took the test with other friends who he knew from the college, that he saw no proxy present, was not aware of any allegation of deception, had not been in contact with ETS or the college and that he had spent two hours taking the tests and did not cheat.

13. I take into account that the judge had the benefit of hearing evidence from the appellant and hearing the appellant cross-examined on that evidence. On the basis of all the evidence, the judge went on at [7] to find the appellant credible. When read with the evidence that was set out at [2] to [4], that was a finding open to the judge to accept that the appellant had provided an innocent explanation that he did sit the test himself, in response to the respondent having established with the evidence provided that there was a case to answer. In addition to finding the appellant credible the judge also took into consideration that the appellant had obtained an IELTS certificate in the United Kingdom. Whilst his finding that the appellant speaks English is of little weight for the reasons set out in **MA** that was not the sole basis of his finding; it included that the appellant also held an IELTS certificate and that the judge found him credible. It was not suggested these findings reached the high threshold of irrationality and I am satisfied that the judge did provide brief but adequate reasons. It was also open to the judge to find that the respondent had not discharged the legal burden of demonstrating that on the balance of probabilities the deception in fact took place.

14. Although reference was made by Mr Tufan to both Professor French's expert report and the criminal inquiry, the judge indicates that he had considered all the evidence including the respondent's bundle which he refers to at [6] and [7]. It was open to the judge to find that he did, that the respondent had failed to discharge that legal burden that the test the appellant took was obtained by deception.

15. I am satisfied that the findings of the judge in relation to the appellant's TOEIC test were open to him and do not contain a material error of law and shall stand. I am not satisfied that the ground raised belatedly by Mr Tufan in relation to the remittal to the respondent was properly before me. Even if it were the judge gave adequate reasons for taking the course he did, including that in the judge's findings the defects were minor and could be corrected and that the appellant should not be deprived of a remedy to repair the deficit in the evidence.

Notice of Decision

16. The decision of the First-tier Tribunal does not disclose an error of law and shall stand.

There was no request for an anonymity direction and none is made.

Signed Dated: 20 October 2017

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

No fee award application was sought and none is made.

Signed Dated: 20 October 2017

Deputy Upper Tribunal Judge Hutchinson