



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

Appeal Numbers: IA/34421/2015
IA/34422/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 3 November 2017**

**Decision & Reasons Promulgated
On 13 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MOHAMED IRUFAN MOHAMMADU SULTHAN
FATHIMA SAHINA NAINA MOHAMMADU
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation

For the Appellant: Mr Jarvis, Home Office Presenting Officer

For the Respondents: Mr Jafar, instructed by Liyon Legal Ltd

DECISION AND REASONS

1. The first respondent (hereinafter “the claimant”) is a citizen of Sri Lanka. The second respondent is his wife and dependent.
2. On 28 August 2014 the claimant applied for indefinite leave to remain in the UK on the basis of 10 years' continuous lawful residence. On 9 November 2015 the application was refused on the ground that the claimant had previously obtained leave to remain by deception.

3. In a previous application (for leave to remain as a Tier 4 student), the claimant had submitted, inter alia, a certificate of completion of the test for English for international communication (“TOEIC”) provided by Education Testing Service (“ETS”). The test was taken at Portsmouth International College on 21 February 2012. The Secretary of State rejected the claimant’s 2014 application for indefinite leave to remain on the basis that she considered there to be significant evidence that the TOEIC certificate in respect of the test taken on 21 February 2012 was fraudulently obtained by the use of a proxy test taker and consequently ETS had declared the test he had taken to be “invalid”.
4. The claimant maintained that he had taken the test himself and appealed to the First-tier Tribunal where his appeal was heard by Judge Hodgkinson. In a decision promulgated on 24 February 2017 the judge allowed the appeal. The Secretary of State is now appealing against the decision of the First-tier Tribunal.
5. Applying SM & Qadir [2016] EWCA Civ 1167, the First-tier Tribunal found that the evidence submitted by the Secretary of State satisfied the initial evidential burden of proof to show deception had been deployed. However the Tribunal found the claimant to be credible, describing his oral evidence as being “entirely consistent with content of his [written] statement” and a finding was made that the claimant would have no logical reason to jeopardise his career by cheating in an English language test. At paragraph [27] the judge concluded that “the [claimant] has adduced evidence which establishes a prima facie innocent explanation for the alleged deception and that the evidence currently available falls materially short of discharging the relevant legal burden upon the [Secretary of State] in establishing such deception.”
6. In reaching his conclusion, the judge made a number of comments and findings about the evidence relied upon by the Secretary of State. This included:
 - a) At paragraph [22] the judge described as anomalous that the claimant’s test scores were declared invalid over two years after the test was taken when ETS’s policy indicated that scores were retained for only two years; and
 - b) At paragraph [26] the judge stated, in respect of the report by Professor French adduced by the claimant to show that the methodology and approach to identify fraud was robust and errors were infrequent, that it had never been tested and arguably lacking in detail.
7. The Secretary of State’s grounds of appeal contend that the judge failed to assess correctly the burden of proof in line with SM & Qadir and failed to appreciate the initial evidential burden was established. It is also argued that had the judge properly considered the Secretary of State’s evidence, it would have been clear deception had been demonstrated.

8. Before me, Mr Jarvis did not seek to pursue the grounds set out in the Grounds of Appeal. He commented that he would have difficulty challenging the decision for the reasons in the grounds as he accepted that the First tier Tribunal had correctly approached the burden of proof and had in fact found the initial evidential burden had been satisfied. He instead applied for permission to amend the grounds to challenge (a) the First-tier Tribunal's finding about test scores not being preserved for more than two years; and (b) the First-tier Tribunal's analysis of Professor French's report. The new grounds of appeal differ fundamentally to those in the written Grounds of Appeal. Mr Jarvis made clear that if permission to amend was not granted he would have to accept that the Secretary of State's appeal could not succeed.
9. Rule 5(3)(c) of the Tribunal Procedure Rules 2008 permits the amendment of a document. This is subject to the Upper Tribunal's case management powers which must be exercised to promote the overriding objective of dealing with the case justly and fairly.
10. In my view, it would be incompatible with the overriding objective to permit the Secretary of State to raise a fundamentally different ground of appeal (for which permission has not been granted) at the substantive hearing when there was ample time to make the application at an earlier time, thereby leaving the claimant no chance to consider it and where the only justification for the delay is that Mr Jarvis only recently had sight of the file.
11. As explained in *Azimi-Moayed and others (decisions affecting children; onward appeals)*[2013] UKUT 00197(IAC) at [16]:

“What should have happened in this case, is that if the appellant wanted to fundamentally depart from the grounds of appeal on which permission was obtained he should have lodged an application to amend the notice of appeal in good time and secured that a copy of such a notice was served on the respondent.....any application to fundamentally change the grounds should be made as soon as practicable with some explanation of why a legally assisted person did not include the amended grounds in the original notice.”
12. Accordingly, I refuse the Secretary of State's application to amend the grounds of appeal and the Secretary of State is limited to the grounds set out in the written grounds of appeal.
13. Following SM and Qadir, the legal burden of proving that the test taker used deception lies on the Secretary of State albeit that there is a three stage process.
 - a) Firstly, the Secretary of State must adduce sufficient evidence to raise the issue of fraud.

b) Secondly, the test taker then has a burden of raising an innocent explanation which satisfies the minimum level of plausibility.

c) Thirdly, if that burden is discharged, the Secretary of State must establish on a balance of probabilities that this innocent explanation is to be rejected.

14. The grounds argue that the judge erred by failing to recognise the first stage had been satisfied. The difficulty with this contention, as acknowledged by Mr Jarvis, is that the judge clearly found that the Secretary of State had adduced sufficient evidence to raise the issue of fraud (ie he found the first stage was met). The Judge proceeded to consider the claimant's innocent explanation (the second stage) and whether the legal burden had been discharged (the third stage). The judge has approached the case in accordance with SM and Qadir, and has properly applied the burden of proof. Accordingly, the Secretary of State cannot succeed under the (un-amended) grounds of appeal and her appeal is dismissed.

Decision

A. The appeal is dismissed.

B. The judge has not made a material error of law and the decision of the First-tier Tribunal stands.

Signed



Deputy Upper Tribunal Judge Sheridan Dated: 10 November 2017