



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/20561/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 20 April 2018

**Decision & Reasons
Promulgated
On 09 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

**MR MOHAMMED ALAUDDIN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Nath, Solicitor

For the Respondent: Mr M Biggs, Senior Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, the sake of convenience, I shall continue to refer to the parties as they were referred to in the First-tier Tribunal.
2. The appellant is a citizen of Bangladesh born on 1 December 1980. He appealed against the decision of the respondent dated 11 August 2016 refusing him indefinite leave to remain in the United Kingdom under the Immigration Rules as the Secretary of State claimed that the appellant produced a false ETS certificate document for indefinite leave to remain in the United Kingdom.

3. First-tier Tribunal Judge Sweet allowed the appellant's appeal in a decision promulgated on 11 January 2018.
4. The respondent appealed against the decision and a Judge of the First-tier Tribunal granted permission to appeal on 26 January 2018 stating that it is arguable that the Judge may have erred in the failure to accept that the Secretary of State has discharged her initial evidential burden of proof relying on the generic evidence and evidence that at that particular test centre at which the appellant sat exams, 75% of the certificates were obtained fraudulently on that particular day and when the appellant sat his exam, it was as high as 97%. It is also arguable that the Judge applied the burden of proof in correctly.
5. Thus, the appeal came before me on an error of law hearing.

The First-tier Tribunal's findings

6. The First-tier Tribunal made the following findings which I summarise. The burden of proof is on the appellant and the civil standard of the balance of probabilities applies. This case revolves around the appellant's Article 8 rights under the European Convention on Human Rights because it is accepted that he cannot satisfy the Immigration Rules. The appellant and his wife have three children who were born in the United Kingdom on 29 July 2011, 1 July 2013 and 22 August 2017.
7. The appellant has achieved a number of educational qualifications in the United Kingdom including an MBA certificate from the University of Wales in November 2013 and an MBA certificate from American University in Bangladesh in 2007, an advanced diploma in business studies from Barbican University in Washington DC in February 2008 and completed a number of ACCA exams in December 2016. He has also successfully taken in IELTS exam in June 2006 and February 2009.
8. The TOEIC certificate which the appellant took on 28 August 2013 is the subject of this appeal. The appellant did not rely on that certificate for his further application, but the respondent submits that it was obtained fraudulently based on expert and other evidence which has been obtained in respect of a number of ETS test centres. The respondent has produced evidence, including an expert report from Prof French a witness statement from Rebecca Collings, Peter Millington and Oliver Addy. There has also been evidence produced by another expert, Dr Harrison. The important case of **SM and Kadir [2016] (ETS - evidence - burden of proof) UTI AC of 21 April 2016** has been considered.
9. In essence the respondent satisfies the burden of proof that the certificate was obtained fraudulently. There is some evidence on behalf of the respondent that at that particular centre 75% of the certificates were obtained fraudulently through proxy takers and on the day in question, it was as high as 97%. However, this methodology has been challenged by contrary expert evidence and case law.

10. Taking all this into account, I do not consider that the respondent has satisfied the burden of proof that the certificates were obtained fraudulently.

The respondent's grounds of appeal

11. The respondent in his grounds of appeal relies on the case of **SM and Qadir** which he maintains makes it abundantly clear that the e Secretary of State's generic evidence combined with evidence particular to an appellant did, in fact, discharge the evidential burden of proving that a TOEIC certificate had been produced by dishonesty. The grounds of appeal state that the test is whether on the balance of probabilities, the appellant employed deception.
12. The witness statements and the spreadsheet provide the necessary evidence to demonstrate that the appellant did employ deception. Furthermore, in the case of **Sheizad and another [2016] EWCA Civ 615** stated "the question in these appeals may concern the initial stage and whether with the evidence of Mr Millington and Mr Collins, the evidential burden is on the Secretary of State is satisfied. It is then incumbent on the individual whose leave has been curtailed to provide evidence in response raising an innocent explanation. The guidance in this decision makes it clear that there is "in limine rejection of the Secretary of State's evidence is even sufficient to shift the evidential burden was an error of law". Therefore, the respondent had satisfied her evidential burden of proof.
13. The Judge placed weight on the fact that the appellant is able to recall details of the examination process, however this does not mean that the appellant personally took the test. The BBC panorama programme showed students at Eton College standing next to terminals while proxy test takers did the test for them which would not preclude the candidates from having travelled to the test centre and having knowledge of the procedures and contents of the test itself, even though they had not taken it personally.
14. The Judge finds that there is no reason for the appellant to have taken the test fraudulently because he has other English qualifications. It is submitted that this is not determinative of whether or not the appellant cheated. Plainly, there may be reasons why a person who is able to speak English to the required level would nonetheless cause or permit a proxy candidate to undertaking ETS test on their behalf, or otherwise to cheat. The case of **MA Nigeria [2016] UKUT 50 at paragraph 57** was referred.
15. The First-tier Tribunal Judge has materially erred by failing to give adequate reasons for holding that a person who speaks English would have no reason to secure a test certificate by deception.

The Hearing

16. I heard brief submissions from both parties as to whether there is an error of law in the decision.

Findings as to whether there is an error of law

17. In respect of the respondent's refusal the precedent fact on which this application of this provision depends is that the appellant produced a false English test result and the burden of establishing this fact lies on the respondent. The First-tier Tribunal Judge at paragraph 27 stated that "the burden of proof is on the appellant and the civil standard of the balance of probabilities applies". This is a clear error of law and it is also material. The Judge's error in this respect has clearly impacted his reasoning.
18. The Judge did not take the step-by-step approach set out in the case of **Secretary of State for the Home Department v Shehzad and Another [2016] EWCA Civ 61** referred to me by the respondent and thereby fell into material error. He failed to appreciate that the Secretary of State bears the initial burden of furnishing proof of deception and that this burden is an evidential burden. That means if the Secretary of State provides prima facie evidence of deception the burden shifts back onto the individual to provide a plausible innocent explanation and if the individual does so, the burden shifts back to the Secretary of State.
19. The main reason the Judge gave for why the appellant had no need to use deception and not take the English language test is because the appellant is fluent in English and has obtained previous educational certificates in the English language from IELTS in 2006 and 2009 and has completed a number of significant academic qualifications, all of which will have been conducted in the English language.
20. The Judge did not take into account the case of **MA Nigeria [2016] UKUT 50** which states at paragraph 57.

"an acknowledgement of this suggestion that the appellant has no reason to engage in deception which we have found proven. However, this does not deflect it in any way from reaching our main finding and conclusion. In the abstract of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. This includes, not exhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. The reason 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 in this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter".

21. The Judge failed to give reasons for rejecting respondent's evidence including the fact that at this particular test centre and on the day that the appellant claims that he sat the test, proxy test takers were up to 97%. It was not for the Judge to speculate about the appellant's motivations and make a finding that he had no reason to cheat.
22. For the reasons given above, I set aside the decision of the First-tier Tribunal and remit the appeal to the First-tier Tribunal to be heard by any judge other than Judge Sweet.

Notice of Decision

The appeal be remitted to the First-tier Tribunal

Signed

Dated this 3rd day of May 2018.

A Deputy Judge of the Upper Tribunal
Ms S Chana