Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/00084/2016
IA/00086/2016, IA/00089/2016
IA/00090/2016, IA/00092/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 March 2018	**On 6 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

SHAKIL [R]
ROBINA [S]
[K F]
[M U]
[I U]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Malik, Counsel
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS ON ERROR OF LAW

1. The appellants are citizens of Pakistan. The first-named appellant (hereinafter "the appellant") appealed a decision of the respondent made on 3 November 2015 to refuse his application for leave to remain as a Tier 1 (Entrepreneur). The other appellants are his wife and children who appealed as his dependants.

2. The respondent refused the appellant's application primarily by reference to paragraph 322(1A)[1] of the Immigration Rules because:

> "For the purposes of your application dated 07th March 2013, you submitted a TOEIC certificate from Educational Testing Service ("ETS") to the Home Office. According to information provided to the Home Office by ETS, you obtained TOEIC certificate 0044203504013006 as a result of a test that you took at Universal Training Centre on 24 April 2013.
>
> ETS has a record of your speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker. ETS have declared your test to be "Invalid" due to the aforementioned presence of a proxy test taker who sat in your place, and the scores have therefore been cancelled by ETS.
>
> On the basis of the information provided to her by ETS, the SSHD is satisfied that your certificate was fraudulently obtained."

3. The fact the application was refused under the mandatory general grounds for refusal meant the application could not succeed under the rules of the Points-Based System. The English language requirement was not met because of the ETS matter. In any event, the application was also refused because the appellant had not provided sufficient evidence to show he was engaged in business activity. Nor were his advertising materials considered to be sufficient to satisfy the specified evidence rules. Next, the letter provided from the Bank of Azad Jammu & Kashmir did not contain the mandatory information showing it was regulated by the appropriate body, such that the appellant had failed to show he had access to £50,000. Finally, the maintenance requirement was not met because the bank statements provided by the appellant did not show his name.

4. The appellant's solicitors submitted lengthy grounds of appeal which maintained that the appellant had sat the TOIEC test himself. With regard to the other reasons

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[1] 322. In addition to the grounds for refusal of extension of stay set out in Parts 2-8 of these Rules, the following provisions apply in relation to the refusal of an application for leave to remain, variation of leave to enter or remain or, where appropriate, the curtailment of leave except that only paragraphs (1A), (1B), (5), (5A), (9) and (10) shall apply in the case of an application made under paragraph 159I of these Rules.

Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom are to be refused

…

(1A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application.

given not to award the appellant points, the grounds argued the respondent had not properly considered the documents provided. The respondent had not acted fairly and evidential flexibility should have been applied.

5. The appeal was heard in Birmingham on 24 July 2017 by Judge of the First-tier Tribunal Parkes. Counsel for the appellant indicated that, if he was successful on the ETS deception point, the appellant would seek to argue that he had accrued ten years' lawful residence, entitling him to a grant of settlement. However, if he failed on the deception point, his article 8 claim would become "unrealistic". The appellant gave evidence. The judge concluded the respondent had shown the appellant had used deception in taking the test and dismissed the appeal.

6. Permission to appeal was granted by the First-tier Tribunal in relation to all four of the grounds advanced on behalf of the appellant. These can be summarised as follows:

    (1) The judge did not follow the three-stage approach to the application of the burden of proof set out in *SM and Qadir (ETS – Evidence – Burden of Proof)* [2016] UKUT 229 (IAC);

    (2) The judge failed to make findings on all the matters he was required to do in line with *SM and Qadir* and *Majumder and Qadir* [2016] EWCA Civ 1167;

    (3) The judge relied on his understanding that the appellant had failed to approach ETS following the allegation of deception but this ignored evidence before him that the appellant had emailed ETS on 17 December 2015; and

    (4) The judge's reliance on Professor French's opinion on the rate of false positives was inconsistent with the conclusions of the Upper Tribunal in *MA (ETS – TOEIC testing)* [2016] UKUT 00450 (IAC).

7. The respondent has not filed a rule 24 response opposing the appeal.

8. I heard detailed submissions from the representatives on the question whether the Judge made a material error of law in his decision. They are recorded in my record of the proceedings. The submissions covered all four grounds. Mr Malik, who had represented the appellant in the First-tier Tribunal, expanded on his written grounds. Mr Avery argued that none of the grounds showed the judge had made a material error of law.

9. It is only necessary for one of the grounds, which are mutually exclusive, to show that the judge made a material error for the appeal to succeed and for his decision to be set aside. I indicated at the end of the hearing, having listened to the submissions of the representatives, that I found the judge had erred in relation to the third ground. I shall therefore only set out the arguments and my reasons in relation to that ground.

10. The judge gave a number of reasons for his ultimate conclusion that the respondent had established that the appellant had gained his TOEIC certificate by means of deception. Among them, he gave the following reason:

> "16. It is not clear if the ETS issue was raised in the first Refusal Letters that were issued to the Appellants. In any event the ETS issue was raised as the central issue in the Refusal Letters of the 5th of November 2015 and the Appellants have been aware since then what the attitude of the Secretary of State was to the test results and how it is said that they were obtained. It was not until the 27th of February 2017 that the Home Office were approached for the ETS voice recognition file, some 15 months later, there is no evidence to show that ETS have been approached and there has been no application for an adjournment for the evidence to be obtained and analysed."

11. Evidently, the judge drew an adverse inference from what he perceived to be delay on the part of the appellant in taking the obvious step of contacting ETS on learning that the respondent believed he had used a proxy to sit the speaking test.

12. Mr Malik characterised that approach as "irrational" and "perverse" because the appellant had filed evidence in his first bundle that he had emailed ETS on 17 December 2015. In fact, there was a series of emails going between the appellant and ETS in which the appellant sought to establish what the problem was.

13. Mr Avery accepted there had been an error but argued it was immaterial. It would not have affected the outcome.

14. In my judgment, it is not possible to say that, had the judge considered this evidence, he would have come to the same conclusion. It is plain the judge proceeded on an incorrect basis in that he believed the appellant had not contacted ETS on receiving the decision. His conclusion on the deception point was based on a mistake as to the state of the evidence. The error was material.

15. The appellant's appeal is allowed and the First-tier Tribunal's decision to dismiss the appeal is set aside.

16. It was not possible to proceed to re-make the decision. The representatives were in agreement that the appropriate course was for the appeal to be heard again in the First-tier Tribunal with none of the judge's findings preserved.

17. It is unclear why the appeal was listed in Birmingham as the appellant lives in Harrow and his legal team are in London. The appropriate venue for the remitted appeal is Hatton Cross.

Notice of Decision

The Judge of the First-tier Tribunal made a material error of law and his decision dismissing the appeal is set aside. The appeal is remitted to the First-tier Tribunal to make fresh findings on the deception allegation.

No anonymity direction is made.

Signed Date 27 March 2018

Deputy Upper Tribunal Judge Froom