Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35073/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 November 2019	**On 15 November 2019**
Extempore decision	

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MD MASUDUR RAHMAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr M Aslam, Counsel, instructed by Chancery Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Scott promulgated on 22 February 2017. We shall refer to the parties as they were before the First-tier Tribunal.

2. Judge Scott allowed the appeal of the appellant, a citizen of Bangladesh born on 31 December 1982, against a decision of the respondent dated 28 October 2015 to refuse his application for leave to remain as a Tier 1 Entrepreneur. That application had been submitted on 26 October 2012. The operative basis for the refusal decision by the Secretary of State was that the appellant had used a proxy test taker in an English language test he purportedly took at Colwell College in East London on 27 June 2012.

Factual background

3. This matter has a complex procedural history. The appellant is a citizen of Bangladesh born on 31 December 1982. He arrived in the United Kingdom with entry clearance as a student on 31 October 2009. He was granted leave to remain until 31 December 2012. On 26 October 2012 the appellant applied for leave to remain as a Tier 1 Entrepreneur under the points-based system. That application was initially refused on 25 March 2013, on the basis that the appellant had failed to provide the requisite specified evidence to demonstrate that he had at least £200,000 available to invest in the business in the United Kingdom. He appealed against that decision to Judge Sharp of the First-tier Tribunal, who allowed the appeal to the extent that the matter was remitted to the Secretary of State to consider the decision again, having failed to exercise or consider the exercise of evidential flexibility in favour of the appellant during the initial consideration of the application.

4. Having reconsidered the application pursuant to the remittal by Judge Sharp, the Secretary of State reached the decision which is under challenge in these proceedings. Although the Secretary of State had been directed to consider the evidential flexibility policy in the Immigration Rules, the operative reason for the refusal of the application on this occasion was because the appellant was said to have engaged in English language test fraud. That refusal decision triggered a further right of appeal which led to the decision before Judge Scott which is the decision under appeal before us.

5. The respondent was not represented before Judge Scott. The judge heard evidence from the appellant and found him to be a credible witness. The judge accepted that the appellant had attended Colwell College on 27 June 2012 and taken the test himself. The judge also noted that the appellant gave evidence in what he described as "good English", which appeared to be consistent with the scores that were recorded in his test results. The judge also ascribed significance to the fact that the appellant claims to have been educated in Bangladesh in English prior to his arrival in the United Kingdom. This led to the following conclusion at [19] of the judge's decision:

> "All of this suggests a proficiency with the English language which makes it very difficult to see why the appellant would have any need to use a proxy to take the TOEIC test for him."

The appeal was allowed, with the judge noting that the respondent still was to act upon the outcome of the previous appeal by applying the evidential flexibility policy contained in the Immigration Rules.

6. The Secretary of State obtained permission to appeal against that decision pursuant to an application which was advanced on essentially a single ground, namely that the judge had failed to give adequate reasons for a finding on a material matter. Permission to appeal was granted by Judge Hollingworth of the First-tier Tribunal.

7. The matter thus came before Deputy Upper Tribunal Judge McGeachy, who, in a Decision and Reasons promulgated on 7 December 2017, found that Judge Scott had fallen into error when concluding that the appellant had no motive to cheat. At [18] the deputy judge stated that: "The judge I consider reached a conclusion which was in effect perverse."

8. The deputy judge noted that the decision of this Tribunal in MA (ETS - TOEIC testing) [2016] UKUT 00450 (IAC) held that the motive to cheat in an English language test would not necessarily be on the basis of a lack of proficiency in the English language. At [57] of its decision in that case, this Tribunal noted that the reasons that people would adopt the use of a proxy in a test include "inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system." These are factors, noted Judge McGeachy, that the judge had failed to consider.

9. The deputy judge found an error of law in the decision of the First-tier Tribunal, and noted at [19] that he had "all the relevant evidence" before him to remake the decision and proceeded to remake the decision, allowing the Secretary of State's appeal to the effect that the appeal of the appellant before the First-tier Tribunal was overturned, and the decision of the Secretary of State to refuse the application was allowed to stand.

10. The appellant obtained permission to appeal to the Court of Appeal against Judge McGeachy's decision on three grounds. The first was that the Upper Tribunal had erred when finding that there had been an error of law. The second was that the Upper Tribunal fell into procedural unfairness by proceeding to re-make the decision, having not had live evidence from the appellant on the core issue going to the heart of his credibility and honesty. The third was that the Upper Tribunal had failed to provide adequate reasons when dismissing the appeal.

11. Permission to appeal was granted by Leggatt LJ on 31 October 2018 in relation to all grounds. The reasons given by His Lordship were as follows:

> "There is a real reason as to whether the Upper Tribunal was entitled not only to overturn the FtT's finding that the appellant had given truthful evidence but also to conclude that the appellant should be disbelieved and found to have committed deception without having heard him give oral evidence and without giving him an opportunity to address such matters as whether there were reasons why he might have reached a decision not to attend the course and why he had attended at Colwell College in any event (both matters which the UT identified as relevant at [18]). It is strongly arguable that the UT Judge was wrong to say at [19] that he had before him all the relevant evidence."

12. Pursuant to that grant of permission to appeal, the appellant and respondent agreed to settle the matter by consent. A proposed statement of reasons was provided to the Court of Appeal which stated at [7] that the parties agreed that the most appropriate venue for the "substantive appeal" to be heard would be the Upper Tribunal, and that together they considered that the most effective way to resolve the matter would be to consent to the appeal being allowed and then to have this matter remitted to the Upper Tribunal for a fresh determination of the "substantive appeal". That led to a consent order being issued by the Court of Appeal on 22 February 2019 in these terms:

> "By consent it is ordered that:
>
> 1. This appeal is allowed.
>
> 2. The Upper Tribunal determination of Deputy Upper Tribunal Judge McGeachy promulgated on 7 December 2017 be set aside.
>
> 3. The matter be remitted to the Upper Tribunal for a fresh determination of the appellant's appeal."

13. It was in those circumstances that the matter returned to the Upper Tribunal for a hearing before us. At the outset of the hearing we raised with the parties a query that we had in relation to the scope of the appeal. It was clear from the helpful skeleton argument provided by Mr Melvin on behalf of the Secretary of State that his understanding of was that the appeal's scope was confined to the matter being a rehearing of the appeal before the First-tier Tribunal. On behalf of the appellant, Mr Aslam submitted that there was no such ambiguity in the consent order issued by the Court of Appeal, and that the decision of Deputy Upper Tribunal Judge McGeachy was set aside in its entirety. So much is clear, he submitted, by [2] of that order.

14. We indicated to the parties at the hearing that we agreed with the submissions of Mr Aslam. There is no scope within the terms of the Court of Appeal's consent order for certain findings by Deputy Upper Tribunal Judge McGeachy to be preserved and certain other findings to be set aside. While we are mindful of the terminology in the statement of reasons which spoke in terms of the "substantive appeal" being reheard, we do not consider that that term in isolation provides sufficient clarity with which to read down or otherwise interpret the operative provisions of the Court of Appeal's consent order any differently. As such, the hearing before us proceeded on the basis that it was the first time the Upper Tribunal was considering the matter on appeal from First-tier Tribunal Judge Scott. We heard submissions from the parties as to whether Judge Scott fell into an error of law such that his decision need be set aside.

Discussion: the decision of the First-tier Tribunal

15. It is necessary to recite the full wording of the following operative paragraphs of Judge Scott's decision in order to analyse whether he fell into an error of law:

> "17. The appellant in the present case was able to give a detailed account of the TOEIC test which he claims to have taken, and the procedures followed at

> Colwell College on the date in question, 27 June 2012. I find this account and the other evidence given by him to be credible.
>
> 18. The appellant gave his evidence in good English, which appeared to be consistent with the scores recorded as having been achieved in his test results.
>
> 19. I also attached significance to the evidence, which I accept, that the appellant completed a BA degree in Bangladesh, which was taught in English, before coming to the United Kingdom; that he was not required to undertake an English course on arrival; that he undertook the ACCA [Association of Chartered Certified Accountants] course until his college was suspended; and that he was subsequently able to gain entry to a university from which he later graduated with an MBA degree. All of this suggests a proficiency with the English language which makes it very difficult to see why the appellant would have any need to use a proxy to take the TOEIC test for him."

16. The judge proceeded at [20] to find that the respondent had discharged the initial evidential burden incumbent upon her when seeking to establish allegations of deception, such that it was necessary for the appellant to provide an innocent explanation in response. Before us, there was no challenge to the judge's self-direction as to the burden and standard of proof in relation to allegations of deception and we find no reason to criticise him on this account. The core of Mr Melvin's criticism of the judge's reasoning lies in the central allegation that the judge failed to give sufficient reasons for his finding that the appellant had not engaged in the use of a proxy test taker.

17. Mr Melvin highlights the Project Façade Report into Colwell College in Leicester, a partial copy of which appears to have been before the judge, which stated that between 18 October and 15 January 2013 Colwell College undertook 2,901 TOEIC speaking and writing tests which had been identified by Educational Testing Services ("ETS"), the test administrator, as featuring 1,559 "invalid" tests and 1,342 "questionable" tests. Across that time period, there is not a single certificate that had been issued by ETS which was not withdrawn. This gave a total percentage of invalid test results as being 53%. Mr Melvin highlights the evidence contained in that report to support his submission that Colwell College was a fraud factory. It was highly unlikely, in his submission, that this appellant could have purported to have been taking the test genuinely in his own capacity without the use of a proxy test taker, and with no knowledge of any proxy test taking going on around him, given the prevalence of fraud and widespread irregularities taking place at Colwell College. Against that background, submits Mr Melvin, the judge's analysis at [17] to [19] of his decision is deficient. It was necessary, he submits, for the judge to have engaged with the findings of the report in addition to simply having accepted that the initial evidential burden had been satisfied.

18. We have considered submissions from Mr Aslam, who highlights that the judge made unchallenged credibility findings at [17] of his decision which found the appellant to be a credible witness and who had provided generally credible evidence before him. Mr Aslam accepts that the judge fell into a degree of error in relation to

ascribing significance to the fact that the appellant is able to speak English or was at the hearing able to speak English as there may be a number of reasons that an individual would cheat. However, he submits that any error on that account is immaterial. By the time the judge gave the reasons contained in [18] and [19] he had already found the appellant's evidence to be credible and therefore the findings at [18] and [19] were otiose and do not detract from the unchallenged findings at [17]. We accept Mr Aslam's submissions.

19. Returning to the central thrust of Mr Melvin's case, we consider that it amounts to a departure from the approach of the Court of Appeal, as underlined in a number of cases, which has consistently held that an intense fact-specific assessment is required in every case. In Majumder and Qadir v Secretary of State for the Home Department [2016] EWCA Civ 1167 Beatson LJ considered whether the Secretary of State's evidence adduced in cases of this nature was capable of discharging the legal burden for deception. At [27] His Lordship endorsed the decision of this Tribunal in the same case at [102] that each case will be fact-sensitive, with the outcome determined on the basis of the evidence adduced by the parties. In practical terms, we find that that means the Secretary of State's generic evidence, combined with the specific material said to link that generic evidence to the conduct of an appellant, will rarely, if ever, *automatically* be able to lead to a finding of deception regardless of the innocent explanation proffered by the appellant. In human rights cases a case-specific assessment will always be required.

20. We consider that that is precisely what the judge did in this case. He heard live evidence from the appellant concerning the process that he went through to attend the test, what took place when he registered, what took place during the conduct of the test itself and how long the test lasted. In light of that assessment, the judge reached his operative finding at [17] that the appellant had provided a credible account, and that he had essentially discharged the evidential burden which had swung to him pursuant to the initial case advanced by the respondent. We do not find Mr Melvin's submissions that the judge should have ascribed further significance to the Project Façade Report to be persuasive. In this respect, we recall that in MNM (Surendran guidelines for Adjudicators) Kenya [2000] UKIAT 00005 the "Surendran guidelines" were endorsed. The sixth guideline states as follows:

> "It is our view that it is not the function of a Special Adjudicator to adopt an inquisitorial role in cases of this nature. The system pertaining at present is essentially an adversarial system and the Special Adjudicator is an impartial judge and assessor of the evidence before him. Where the Home Office does not appear the Home Office's argument and basis of refusal, as contained in the letter of refusal, is the Home Office's case purely and simply, subject to any other representations which the Home Office may make to the Special Adjudicator. It is not the function of the Special Adjudicator to expand upon that document, nor is it his function to raise matters which are not raised in it, unless these are matters which are apparent to him from a reading of the papers, in which case these matters should be drawn to the attention of the appellant's representative who should then be invited to make submissions or call evidence in relation thereto."

21. In the present matter, the judge had a partial copy of a Project Façade Report in relation to Colwell College in Leicester. Only every other page had been photocopied. Although this appellant did take a test at Colwell College, it was at the East London branch. It is by no means clear from the incomplete documents before the judge and indeed, nor is it clear from the complete documents which we have had the benefit of viewing in preparation for this appeal, whether the figures contained in that report relate solely to Colwell College at Leicester or whether they cover the East London satellite branch of the college. As such, pursuant to the Surendran guidelines, it was not the role of the judge to expand upon the reasons given for refusal. The respondent had chosen not to appear at the proceedings before the judge in the First-tier Tribunal and had not applied to adjourn the matter so that she could be represented on a future occasion. There has been no challenge before us to the judge's decision to proceed in the absence of the respondent. It is not possible, therefore, for the respondent to contend at this stage that there were matters which had not been raised either expressly in the refusal letter or impliedly through a perusal of the incomplete papers which had been provided to him and which now should present the case in a different light.

22. As such, drawing this analysis together, we consider that the judge reached findings of fact which were open to him on the evidence, and which do not feature any irrationality or perversity. Although we note Mr Aslam's observation that the judge may be described as having fallen into error by virtue of his application of the case of MA, it is not necessary for us to reach detailed findings on that issue, other than to observe that in the case of MA itself, this Tribunal had recorded many paragraphs of detailed credibility concerns in relation to the appellant in those proceedings before dismissing the possibility that the credibility concerns that had been outlined in extensive depth could be undermined by virtue of the simple fact that the appellant would be able to speak English, and therefore had no basis to cheat.

23. The decision of this judge is in entirely different territory to the fact-finding task which the Tribunal in MA engaged in. This judge, as we have already noted, found the appellant to be a credible witness. He accepted the account that had been given before him and, as such, the consideration of the appellant's motive or lack of motive to cheat must be viewed in that very different context which may be distinguished from the case of MA. It may well be that the judge could have given express consideration of the reasons that people engage in cheating even when there is no ostensible reason for them to do so. However, ultimately, the judge did not fall into error because by the time the judge considered those matters, he had already found the appellant to be a credible witness.

24. For those reasons, this appeal of the Secretary of State is dismissed. The original decision of Judge Sharp that the matter be remitted to the Secretary of State for reconsideration of the original Tier 1 Entrepreneur application pursuant to the evidential flexibility provisions of the Immigration Rules stands. As such, the outcome of this decision is that it remains for the Secretary of State to consider the appellant's application as a Tier 1 Entrepreneur pursuant to those evidential

flexibility provisions and not to hold against him the suitability-based concerns that she outlined in the refusal letter of 28 October 2015.

Notice of Decision

This appeal is dismissed. The decision of Judge Scott, including the fee award, stands. The immigration decision is remitted to the Secretary of State in accordance with the earlier decision of Judge Sharp.

No anonymity direction is made.

Signed *Stephen H Smith* Date 14 November 2019

Upper Tribunal Judge Stephen Smith