



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/34183/2015

THE IMMIGRATION ACTS

Heard at Field House
On 3 November 2017

Decision & Reasons Promulgated
On 21 November 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ATA ULLAH ATIF
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation

For the Appellant: Mr Jarvis, Home Office Presenting Officer
For the Respondents: Mr Jones, instructed by Connaught Law

DECISION AND REASONS

1. The respondent (hereinafter "the claimant") is a citizen of Pakistan born on 14 May 1983.
2. The claimant entered the UK in October 2009 as a Tier 4 (General) Student. He subsequently made several applications (including on 28 January 2012) to extend his leave to remain.
3. On 13 August 2014 he applied for leave to remain as a Tier 1 (Entrepreneur) Migrant. On 5 November 2015 this application was refused under paragraphs 322(1A) and 322(2) of the Immigration Rules on the basis that the claimant had made false representations by submitting a fraudulently obtained TOEIC certificate. In the Secretary of State's refusal letter it is stated that there was significant evidence to

conclude that the claimant had used a proxy test taker to take an English language test administered by Educational Testing Service (“ETS”). The test in question was taken at Synergy Business College on 20 December 2011 and the certificate from this test was submitted by the claimant with his application for leave to remain made on 28 January 2012.

4. The claimant maintains that he took the test himself and appealed to the First-tier Tribunal where his appeal was heard by Judge Wylie. The judge allowed the appeal.

Decision of the First-tier Tribunal

5. Before the First-tier Tribunal, in order to establish that the claimant had acted fraudulently through the use of a proxy test taker, the Secretary of State relied upon evidence that has been used in numerous similar cases where it has been alleged that a test conducted by ETS was invalid because a proxy test taker was used. This included statements of Mr Millington and Ms Collings (both civil servants) concerning the processes by which fraudulent conduct has been detected at ETS test centres and a report from Professor French on the methodology used by ETS to detect fraudulent activity. In addition, the Secretary of State submitted a print out from a spreadsheet (known as the “look up tool”) showing that the claimant’s test had been categorised by ETS as invalid and a report from ‘Project Façade’ showing that between 24 November 2011 and 15 January 2013 49% of tests undertaken at Synergy Business college were identified by ETS as invalid. The ETS TOEIC Look up Tool states that of 45 tests taken on the date of the claimant’s test (20 December 2011) at Synergy Business college 73% were identified as invalid.
6. The conclusions of Judge Wylie are set out in paragraphs 16 to 22 of the decision.
7. The judge, at paragraphs 16 to 18, discussed the Secretary of State’s evidence, highlighting the evidence concerning the high number of tests taken on 20 December 2011 that were classified as invalid by ETS.
8. The judge then turned to consider the claimant’s claim to have taken the test in person.
9. At paragraph 19 the judge stated:

I acknowledge that the [claimant] was able to give evidence at the hearing in English, but this was 5 years after the date of the test, and I do not give any weight to this. However it seems, given his studies, and the fact that he achieved his MBA educational qualification in 2012, that the claimant was sufficiently competent in English to have passed the examination in December 2011. There would therefore be no reason for him to jeopardise his career and future by cheating in the test”

10. At paragraph 21 the judge stated that the claimant “has provided a satisfactory explanation of his actings. I find the [claimant] to be credible in his explanation of sitting the test on the two dates”.

11. At paragraph 22 the judge concluded by stating that he was “not satisfied that it has been shown that the [claimant] fraudulently obtained a total certificate following a test on 20 December 2011.”

Grounds of Appeal

12. The grounds of appeal submit that the judge failed to assess correctly the burden of proof in line with the Upper Tribunal decision SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC). The grounds argue that the judge erred by not recognising that the Secretary of State had satisfied the initial evidential burden.
13. The grounds further contend that the judge failed to properly consider the Secretary of State’s evidence. It is maintained in the grounds that had the judge properly considered the Secretary of State’s evidence it would have been clear that deception had been demonstrated. The grounds note in particular the evidence that on the day the test was taken 73% of the tests were found to be invalid.
14. The grounds also argue that the judge has failed to give adequate reasoning why the Secretary of State has not met the legal burden and why it is accepted that the claimant gave an innocent explanation. The grounds maintain that the judge failed to give adequate reasons for holding that because the claimant speaks English he would have no reason to use deception when the case law makes clear that there could be many reasons why a person who is proficient in English might engage in fraud. See MA Nigeria [2016] UKUT 450.

Submissions at Hearing

15. Mr Jarvis on behalf of the Secretary of State argued that the only innocent explanation identified by the judge was that the claimant had no reason to cheat. This, he argued, is the full extent of the judge’s reasoning, and it is not sufficient.
16. Mr Jarvis was critical of the judge for failing to engage with Professor French’s report, which in his view authoritatively shows that the margin of error is under 1%. Mr Jarvis maintained that the judge reached the conclusion that the Secretary of State did not meet the legal burden without properly considering and appreciating the strength of the evidence adduced by the Secretary of State to support the case against the claimant.
17. Mr Jones, for the claimant, argued that it is clear, when reading the decision as a whole, that the judge has followed SM and Qadir, which is mentioned in paragraph 12. He noted that the judge explicitly stated at paragraph 16 that he gave careful scrutiny to the evidence.
18. Mr Jones argued that if the judge took into account all of the material evidence, correctly identified the burden of proof, reached a reasonable view on credibility, and gave reasoning that was sufficient for the unsuccessful party to understand the basis of the outcome, then there is no error of law. Mr Jones submitted that the judge heard

detailed evidence including cross examination of the claimant before concluding that he was credible and his credibility findings cannot reasonably be challenged.

Analysis and Decision

19. The burden and standard of proof, where it is alleged that an ETS test is invalid, was discussed in SM and Qadir, and is as follows:
20. 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.
21. There is one civil standard of proof (which is the standard to be applied). The seriousness of the consequences does not require a different standard of proof but flexibility in its application will involve consideration of the strength and quality of the evidence. The more serious the consequence, the stronger must be the evidence adduced for the necessary standard to be reached.
22. In SSHD v Shehzad [2016] EWCA Civ 615 the Court of Appeal concluded that the “generic evidence” (comprising in that case of the same statements of Ms Collings and Mr Millington submitted in this appeal) together with the evidence that the test of individual in question has been assessed as “invalid”, was sufficient for the Secretary of State to meet the initial evidential burden (the first of the three stages) thereby shifting the evidential burden onto the test taker to raise an innocent explanation (the second of the three stages). At paragraph 26 the Court of Appeal in Shehzad concluded that “the in limine rejection of the Secretary of State’s evidence as even sufficient to shift the evidential burden was an error of law”.
23. In this case, the Secretary of State submitted the statements of Ms Collings and Mr Millington (the generic evidence evaluated in Shehzad) along with evidence showing the claimant’s test had been assessed by ETS as invalid.
24. In addition, the Secretary of State submitted a report by Professor French giving opinion evidence on ETS’s methodology for detecting fraud. Professor French’s expertise was not questioned before the First-tier Tribunal and it is noted that the High Court in Gaogalalwe [2017] EWHC 1709 (Admin), considering the same report, described Professor French as a “singularly well qualified expert”. Professor French’s conclusion was that ETS’s error rate in identifying fraud was very low.

25. Moreover, the Secretary of State submitted evidence to show that almost three quarters (73%) of the tests taken on the dates the claimant took the test were found to be invalid and that during the relevant period 49% of tests undertaken at Synergy Business college were identified by ETS as invalid.
26. As argued by Mr Jarvis, the Secretary of State has put forward a substantial amount of evidence which strongly indicates deception was engaged in by the claimant and that it is unlikely a mistake was made in identifying the claimant as having used deception.
27. The judge's analysis of the Secretary of State's evidence is very brief. However, it is not necessary for a judge to recount in detail the contents of a party's evidence and it is clear from the decision (in particular paragraphs 15 and 16) that the judge was aware of, and had regard to, all of the material evidence, including the report of Prof French and the evaluation of cheating at Synergy business college.
28. Reading the decision as a whole, I am of the view that the judge's approach to the evidence is consistent with SM and Qadir. Although not stated explicitly, it is apparent that the judge accepted that the Secretary of State satisfied the initial evidential burden to raise the issue of fraud.
29. The judge then proceeded to address whether the claimant was able to raise an innocent explanation. The claimant submitted a detailed witness statement and was cross examined. Assessing the claimant's evidence was a matter for the judge and the judge was entitled to conclude that the claimant was credible and accept his account of taking the test. It might have been an error of law if the sole reason the judge found the claimant credible was that he had a good level of English when the test was taken and therefore did not need to cheat. However, this is only part of the reason the judge gave for accepting the claimant's account. It is clear from the decision that the judge also had regard to the claimant's account of attending and taking the test as well as his educational background.
30. Having found that the initial evidential burden was satisfied by the Secretary of State and that the claimant had raised an innocent explanation, it fell to the judge to assess whether the Secretary of State had discharged the legal burden of showing fraud had been engaged in by the claimant, which is what the judge has done.
31. The Secretary of State's evidence established it was likely the claimant acted fraudulently but not that he definitely did so. It was for the judge to form a view on the claimant's credibility and "innocent explanation" and weigh this against the Secretary of State's evidence. The relative weight to give to the evidence was a matter for the judge and I am satisfied that the judge, having taken into account all of the material evidence, reached a conclusion that was open to him.

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

A handwritten signature in black ink, consisting of a stylized 'S' followed by a horizontal line.

Deputy Upper Tribunal Judge Sheridan

Dated: 17 November 2017