



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/33953/2015

THE IMMIGRATION ACTS

Heard at Field House
On 13 March 2018

Decision Promulgated
On 03 May 2018

Before

UPPER TRIBUNAL JUDGE GRUBB
UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD JAHIRUL ISLAM

Respondent

Representation:

For the appellant: Ms A. Fijiwala, Senior Home Office Presenting Officer
For the respondent: No appearance

DECISION AND REASONS

1. For the sake of continuity, we will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.
2. The appellant appealed the Secretary of State's decision dated 04 March 2013 to refuse leave to remain as a Tier 1 (Entrepreneur) Migrant. The respondent refused the application under the general ground for refusal contained in paragraph 322(1A) of the immigration rules because it was asserted that a false document was submitted in relation to the application. The respondent stated that Educational Testing Service (ETS) informed him that there was significant evidence to conclude that the English language certificate was fraudulently obtained by the use of a proxy test taker. ETS declared the test to be 'invalid' and the score was cancelled.

3. The second reason for refusal related to the evidence of funds made available by a third-party contributor. The respondent was not satisfied that the appellant had access to the £200,000 required because the letters from the Rupali Bank Ltd, the third-party contributor and the solicitor were all dated 10 October 2012 i.e. over six weeks after the date of the application on 30 August 2012. For this reason, the respondent was unable to accept the evidence relating to third party funding.
4. First-tier Tribunal Judge Malcolm allowed the appeal in a decision promulgated on 10 April 2017. She considered the evidence put forward by the respondent in support of the allegation of deception and heard evidence from the appellant in response to the allegation. It appears the submissions made by both parties focussed solely on this issue. The appellant's representative submitted that if his evidence was accepted, the matter would need to be referred back to the Secretary of State to consider whether it was appropriate to exercise discretion with reference to the 'evidential flexibility' policy (now contained in paragraph 245AA of the immigration rules). It is unclear from the decision whether this was an agreed position.
5. The judge found that the respondent had not discharged the burden of proof to show that the appellant produced a false document in support of the application. The appeal was allowed "to the limited extent that it is accepted that the appellant did not use deception in obtaining the English language test certificate". The judge stated:

"It is clear from the decision that the respondent having made the decision that deception had been used no further enquiry was made of the appellant for additional documentation in support of his application (as detailed in the reasons for refusal letter)." [67]
6. On the face of it, it seems unlikely that the rule relating to evidential flexibility would apply to a series of documents, claiming to be from different sources, which all made the same unusual error regarding the date. If the respondent did not agree with the approach taken by the First-tier Tribunal, it has not been raised as a ground of appeal before the Upper Tribunal. The respondent has only appealed on the narrow point relating to the ETS/deception issue. The Secretary of State appeals the decision on the following grounds:
 - (i) The judge failed to give adequate reasons to explain why the respondent did not meet the legal burden of proof in light of the evidence produced by the respondent and the relevant case law.
 - (ii) The judge failed to give adequate reasons to explain her finding that the appellant would have no reason to secure a test certificate by deception when he spoke English: *MA (ETS – TOEIC testing)* [2016] UKUT 450 referred.
 - (iii) A general submission that the evidence met the required evidential burden of proof and that it fell to the appellant to provide an innocent explanation in response.

7. There was no appearance by or on behalf of the appellant. Correspondence on file showed that the appellant's previous legal representative was no longer instructed. We were satisfied that a hearing notice was sent to the appellant's last known address and that he provided no explanation for his absence. In the circumstances, we were satisfied that we could proceed to determine the appeal in the appellant's absence.

Decision and reasons

8. After having considered the grounds of appeal and the submissions made by Ms Fijiwala, we are satisfied that the First-tier Tribunal decision did not involve the making of an error of law.
9. We accept that some criticism could be made of the judge's findings, which were not structured in a way that made clear findings on each of the legal steps normally required to assess whether the respondent has discharged the legal burden of proof. However, we are satisfied that any shortcomings in the reasoning were not sufficiently serious to be characterised as an error of law which would justify setting aside the decision.
10. The judge set out the evidence contained in the respondent's bundle in some detail earlier in the decision [12]. In her findings, she stated that she had considered "all of the documents lodged and have also given consideration to the case law of *Qadir*" [58]. The Upper Tribunal in *SM & Qadir (ETS - Evidence - BOP)* [2016] UKUT 229 concluded that, despite weaknesses in the evidence, the combination of the 'generic' evidence of Peter Millington and Rebecca Collings and a 'Look-up Tool' print out were sufficient to discharge the respondent's initial evidential burden of proof [68]. The Court of Appeal reached the same conclusion in *SSHD v Shehzad & Chowdhury* [2016] EWCA Civ 615 [26]. The same evidence was available in this case. In the circumstances, it was not necessary for the judge to explain in detail how and why the evidence discharged the evidential burden of proof.
11. To the extent that the evidential burden of proof then shifts to the appellant to provide an 'innocent explanation' in response to the allegation, the judge's description of the legal position "at its simplest level" was broadly correct. If she was satisfied, having heard evidence from the appellant, and having considered the other evidence, that it was likely that he genuinely took the test, then the respondent was unlikely to be able to discharge the overall legal burden of proof.
12. The judge found that the appellant had given detailed evidence in his statement and at the hearing. He explained how he booked the test. He gave a detailed description of his attendance at the test centre and the tests he undertook [57]. Having heard evidence from the appellant she was satisfied that his account was credible [64]. The fact that the appellant could speak English did not form a central part of her finding, although she acknowledged the respondent's submission that it was likely to have improved since he had been in the UK [65].

13. Although the reasoning could have been more structured, it seems clear that the judge considered all the documentary evidence relied upon by the respondent, but after having heard from the appellant, she was satisfied that he was a credible witness. Having accepted that it was likely that the appellant genuinely took the test, it was open to the judge to conclude that the respondent had not discharged the overall legal burden of proof to justify refusing the application with reference to paragraph 322(1A) of the immigration rules.
14. As we noted earlier, there is no challenge to the way in which the judge then allowed the appeal "to a limited extent". The effect of her decision is that the application is outstanding and is awaiting a fresh decision from the respondent.
15. We conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law. The decision shall stand.

DECISION

The First-tier Tribunal decision did not involve the making of an error of law

The decision shall stand

Signed  Date 03 May 2018
Upper Tribunal Judge Canavan