



IAC-AH-SAR-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/44077/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 5 April 2016**

**Decision &
Promulgated
On 20 April 2016**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

**MR REZAUR RAHMAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Zahir (Solicitor)

For the Respondent: Mr D Clarke (Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant whose date of birth is 13 April 1984 and is a citizen of Bangladesh. He appeals against a decision of the First-tier Tribunal (Judge Miles) ("FTT") who in a decision and reasons promulgated on 22 September 2015 dismissed his appeal on immigration and human rights

grounds. The central issue before the FTT was whether or not the appellant used deception to obtain his English language certificate. The arguable error identified is whether or not the FTT applied the correct burden and standard of proof.

2. This matter comes before me as an error of law hearing.

Background

3. The appellant had a long immigration history having been granted various periods of leave as a student from 2006 until 2014. He was then given leave as a spouse until 6.7.2016. The appellant arrived in the UK on 19 October 2014 from Dhaka, Bangladesh. He was questioned and subsequently interviewed by an immigration officer. A refusal notice was issued on 20 October 2014 cancelling the appellant's leave as the spouse of a British citizen, on the grounds that false representations were employed for the purposes of obtaining leave and/or there had been a change of circumstances such that leave should be cancelled.
4. It was the respondent's contention that the appellant had used a proxy test taker in order to obtain an English language qualification certificate which he had then used in connection with two applications for leave, the last of which was leave as the spouse of a British citizen. Enquiries made by an Immigration Officer revealed that the appellant's ETS certificate had been declared invalid and cancelled.
5. At the hearing before the FTT the respondent relied on evidence of a printout of the relevant ETS record, the record of interview and generic witness statements made by Rebecca Collings and Peter Millington, Home Office officials.

FTT decision

6. The FTT had regard to the oral and written evidence of the appellant and his wife. He denied using a proxy tester. He stated that he had taken two English language tests and passed overall with high bands. The FTT found that at the appeal hearing he had demonstrated proficiency in English to a high standard.
7. The FTT placed weight on the evidence of Mr Millington and Ms Collings. Whilst accepting that the voice recognition analysis was imperfect, the FTT found that the respondent had built a very strong case that the English language certificates provided by the appellant were false documents to the extent that they were obtained using a proxy test taker. The FTT [24] took into account the appellant's response at interview on being informed that his ETS was invalid. He replied "I did not know that. This is the first time that this has happened. I got the results and I submitted it to the UKBA. I have no idea what happened. There was disruption". The FTT considered the response to be striking by the absence of any response

from the appellant along the lines of an assertion of innocence. Accordingly the FTT at [26] found that the respondent had discharged the burden to the standard on the balance of probabilities that the English language certificate had been obtained by deception. The FTT referred at [19] to the burden being on the respondent and the standard the civil standard, namely balance of probabilities.

Grounds of Application

8. The FTT erred by failing to apply **RP (proof of forgery) Nigeria [2006] UKAIT** which held that “in judicial proceedings an allegation of forgery needs to be established to a high degree of proof, by the person making the allegation”.

Permission

9. Permission to appeal was granted by First-tier Tribunal Judge Hollingworth on 15 February 2016 in the following terms:

“In the light of the references made by the judge at paragraphs 8, 19 and 26 to the standard of proof in relation to the use of deception and falsity, without particularising or using appropriate words to indicate the place on the spectrum of the balance of probabilities which would need to be reached by the respondent in this regard, it is arguable that an error of law has taken place. The reference by the judge at paragraph 26 of the decision to the building of a very strong case is arguably insufficient to demonstrate the qualification to the standard of proof in relation to the balance of probabilities which is necessary in cases of this nature”.

Rule 24 Response

10. The respondent opposed the appeal. The respondent’s position was that to suggest that an allegation of forgery requires a high degree of proof was inconsistent with the House of Lords reasoning in **Re B (Children) [2008] UKHL 35** where Lord Hoffmann stated “I think that the time has come to say once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not”.

Error of Law Hearing

11. Mr Zahir submitted that the FTT failed to apply the correct standard of proof having regard to the need for strong and cogent evidence where an allegation of forgery or deception is made. Furthermore, he submitted that the FTT erred by concluding that the generic evidence of Ms Collings and Mr Millington was reliable and capable of meeting the standard of proof. Mr Zahir relied on a summary of the recent presidential judgment in **SM Qadir (IA 31380/36319/2014)**. He argued that the Upper Tribunal (“UT”) found their evidence to be intrinsically limited and having

subjected all of the evidence to detailed and careful scrutiny, concluded that the Secretary of State had not discharged the legal burden of establishing that the appellant procured his TOEIC certificate by dishonesty to the requisite standard. Mr Zahir submitted that following **Qadir** no reliance whatsoever could be placed on the evidence of Ms Collings and Mr Millington. Accordingly the FTT erred in law and the decision fell to be set aside.

12. Mr Clarke relied on the Rule 24 notice with reference to **Re B (Children)** as regards the standard of proof. He also cited **R (on the application of Gazi) v SSHD (ETS - judicial review) IJR [2015] UKUT 00327 (IAC) (para 35)** where the UT considered the respondent's generic evidence in ETS cases. The UT found that the evidence had the hallmarks of care, thoroughness, underlying expertise and sufficient reliability such as to warrant an assessment that the applicant's TOEIC had been procured by deception. However the UT did not state that the generic evidence was infallible and, indeed, at paragraph 14 the UT suggested that all cases involving ETS certificates would be "unavoidably fact-sensitive". The UT said that "each litigant will put forward his or her individual disputed assertions, agreed facts, considerations and circumstances", which must be assessed alongside the generic evidence submitted by the respondent.
13. Mr Clarke submitted that the appellant's grounds of appeal asserted that the FTT was required to import a high degree in the standard of proof, whereas the issue raised by Mr Zahir was the FTT's failure to discharge the burden of proof. This was a misunderstanding of the law and the issues raised went beyond what was asserted in the grounds of appeal.
14. Mr Clarke submitted that it was hard to see any error in the decision and reasons as the FTT had carried out the required fact-finding exercise and had not simply relied on the generic evidence. The judgment in **Qadir** was in summary form and was not therefore capable of supporting the appellant's submissions.
15. Mr Zahir responded that the judgment in **Qadir** now overturned **Gazi** and was effectively a landmark decision.

Discussion and Decision

16. The legal principles involved where there is an allegation of forgery were considered in **SM Qadir** from paragraph 56 and included reference to a recent review conducted by the UT in **Muhabdiramge (section S.LTR 1.7)[2015]UKUT 00675 IAC (PARS 9-11)**. That review approved the three staged approach in **Shen(Paper appeal; proving dishonesty) 2014 UKUT 236 IAC**. The judicial task was to decide whether the evidence adduced was of sufficient cogency to warrant the conclusion that the burden of proof had been discharged to the civil standard. This is consistent with **R (N) v MHRT (Northern Region) [2005] EWCA Civ 1605** in which Richards LJ expressed it as "the flexibility lies not in any

adjustment to the degree of probability required for an allegation to be proved ... but in the strength or quality of the evidence that will in practice be required". In **R (on the application of Beckett) v SSHD [2008] EWHC 2002 (Admin)** Ouseley J held that the "high probability" standard of proof, was addressed to the cogency of the evidence required to prove an allegation of this type rather than to a shift in the standard of proof itself.

17. The UT outlined the correct approach to be followed in ETS cases in **Gazi and SM Qadir**. In the latter the UT had the benefit of hearing oral evidence from the two witnesses Collings and Millington and from the language expert Dr Harrison. In **Qadir** the UT found that the generic evidence had significant shortcomings and when considered together with the expert evidence and the appellant's evidence, the UT concluded that the respondent failed to discharge the civil standard of proof required.
18. In reaching its decision the FTT failed to express or follow the qualified or staged approach to the standard of proof in cases involving an allegation of deception. It made no reference to the flexibility needed in such cases. No reference was made to the need for strong and cogent evidence. Further the FTT failed to take proper account of the appellant's evidence as to his two IELTS qualifications, which the FTT specifically excluded as irrelevant [18]. This is evidence relevant to motivation for using a proxy test taker and ought to have been assessed in reaching findings as to the appellant's linguistic ability and which would have had greater force than consideration of the language skills of the appellant at the hearing. Further such consideration was relevant to the weight to be attached to the appellant's comments, from which the FTT drew adverse inference [24].
19. In the light of the FTT's failures and the reservations expressed as to the reliability of the generic evidence in **Qadir**, I am satisfied that the FTT decision and reasons amounts to a material error in law.

Notice of Decision

20. There is a material error of law. The decision shall be set aside. In terms of future disposal I have decided to remit the matter to the First -tier Tribunal for rehearing at Taylor House on a date to be given.

No anonymity direction is made.

Signed
GA Black
Deputy Upper Tribunal Judge G A Black

Date 15.4.2016

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award as it was necessary to have a hearing.

Signed
GA Black
Deputy Upper Tribunal Judge G A Black

Date 15.4.2016