



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/34269/2015

THE IMMIGRATION ACTS

Heard at Field House
On 31 October 2017

Decision & Reasons Promulgated
On 14 November 2017

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MASUM AHMED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr C Bates, Home Office Presenting Officer
For the Respondent: Mr S Karim of Counsel instructed by Thamina Solicitors

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of Bangladesh born on 30 December 1980, as the appellant herein.

2. On 5 November 2015 the Secretary of State refused to grant the appellant leave to remain under paragraph 245DD of HC 395. The reason for the decision was in essence that the appellant had used deception to obtain an Educational Testing Services (ETS) Test of English for International Communication (TOEIC) certificate. The appellant had undertaken a test at Synergy Business College of London on 17 July 2012. Following a check by ETS it was the Secretary of State's case that there was "significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker". The appellant's test had been declared to be invalid. The Secretary of State was satisfied that the appellant's certificate had been fraudulently obtained.
3. The appellant appealed against the decision and his appeal came before a First-tier Judge on 7 February 2017. The judge heard oral evidence from the appellant. The judge reached his conclusions as follows:
 - "12. In his evidence before me the appellant stated that the ETS test about which the respondent complains was not obtained by deception. In support of his assertion the appellant he (sic) pointed to his achievement in obtaining a diploma in business administration for the academic season 2008-2009 and an MBA from the Thames Valley University on the 10th August 2010. Both courses were taught and assessed in English. His argument is that the standard achieved in 2012 is consistent with the abilities revealed by those earlier qualifications.
 13. Having heard the appellant and considered the evidence he cites in support of his case I am satisfied as to his credibility.
 14. The respondent's finding is expressed thus, '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 tester. ETS have declared your test to be 'Invalid' due to the aforementioned presence of a proxy tester who sat the test in your place, and the scores have therefore been cancelled by ETS.'
 15. It was put to the appellant that he was involved in the fraudulent obtaining of his ETS in 2012. To further this suggestion the respondent had served on the Tribunal and the appellant a bundle of documents including generic statements from Rebecca Collins and Peter Millington, both dated 23rd June 2014, the Home Office report on Synergy Business College, London and Professor Peter French's report, dated 20th April 2016. None of the evidence provided attached explicitly to the test undertaken by the appellant.

16. This issue has been considered by the Court of Appeal in **Sharif Ahmed Majumar (sic) and Ihsan Qadir v. SSHD [2016] EWCA Civ 1167**. In that decision Beatson LJ considered the adequacy of the material then submitted by the respondent to discharge the legal burden of proof on her of proving that the certificates were produced by dishonesty. When the appeals were heard the evidence relied upon was that of Rebecca Collins and Peter Millington. The finding of the Court (relevant to this appeal) was that the evidence submitted by the respondent was capable of discharging the initial evidential burden, but when challenged by the appellant with other evidence sufficient to shift the burden to the respondent, it did not discharge the legal burden of proving on the balance of probabilities on her of proving that the certificates were produced by dishonesty.
 17. Here the appellant states that it was he who undertook the test at Synergy Business College on the 17th July 2012 and that the “invalid” conclusion reached is one of the small number of “false positives” spoken of by Professor French. In support of his contention he cites the qualifications he obtained in the UK in the years before [he] sat this English test and his own testimony as to the precise nature of the test, the number and nature of the questions asked.
 18. The evidence adduced by the respondent allows for the possibility of false positives. The appellant has attained a qualification taught in English in a technical subject, namely business administration, to degree level in 2010, before he undertook the ETS test. When considering the totality of the evidence I am not satisfied the evidence adduced by the respondent has discharged the legal burden upon her.
 19. Having considered all the material submitted by the respondent in support of her assertion I am not satisfied she has discharged the legal burden upon her.
 20. Not being satisfied the leave spoken of was obtained by deception, and having found the appellant credible, that being the only basis upon which the appellant was found to have failed to satisfy paragraph 245DD I am satisfied he is entitled to the 10 points he sought under Appendix B English Language.”
4. The judge was accordingly satisfied that the appellant met the relevant requirements of the Rules and allowed the appeal.
 5. The Secretary of State applied for permission to appeal arguing that the First-tier Judge had failed to give an adequate explanation as to how the appellant had raised an innocent explanation given the small number of false positives that had been identified by Professor French. The judge had relied on the appellant’s English

language ability and the Secretary of State referred to paragraph 57 of **MA (Nigeria) [2016] UKUT 450** where the Tribunal had referred to a range of reasons why persons proficient in English might engage in fraud, such as “lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system”.

6. The judge had failed to give adequate reasons for concluding that a person who clearly spoke English would have no reason to secure a test certificate by deception and the Secretary of State had discharged the evidential burden upon her and it was for the appellant to offer an innocent explanation. It was clear from the decision that the First-tier Judge had not appreciated that the evidential burden had been met. While it was accepted that the verification system was not infallible it was adequately robust and rigorous. Permission to appeal was granted by the First-tier Tribunal on the basis that the judge had failed to provide adequate or sufficient reasoning for accepting the appellant’s version of events.
7. A response was filed by the appellant’s representatives on 16 October 2017 submitting that the judge had considered the matter appropriately following the decision of the Court of Appeal in **Majumder** referred to by the judge in paragraph 16 of his decision.
8. Mr Bates relied on the grounds of appeal. The decision was not adequately reasoned. The judge had referred to the material relied upon by the Secretary of State in paragraph 15 of his decision. Among that material was the report on Synergy Business College entitled “Project Façade – Criminal Inquiry into Abuse of the TOEIC”. This report covered the relevant period when the appellant had undertaken the test. It was not simply generic evidence. Imposters had been observed taking the test on behalf of candidates who were located in a separate room. There was evidence of widespread cheating. He submitted that the 2% figure was a generous estimate. In 98% of the cases ETS was (as he put it) “bang on the money”. The fact that an appellant had no need to cheat was not enough – he referred to **MA (Nigeria)** as set out in the grounds of appeal. The decision was materially flawed in law and should be remitted for a fresh hearing.
9. Counsel submitted that he struggled to see any errors in the determination. The grounds were no more than a disagreement with the decision. The judge had found the appellant to be credible and he had given oral evidence and had been cross-examined.
10. The appellant had not simply undertaken English language courses at random colleges but had an MBA from Thames Valley University, apart from the Diploma in Business Administration and both courses had been taught and assessed in English. The judge had heard oral evidence and had been satisfied with the appellant’s credibility. It is quite clear that the judge was aware of the shifting burden and he had been guided by relevant authority. The decision was reasoned. In reaching his conclusions the judge had had the benefit of a lengthy witness statement and in paragraph 17 of the decision he had referred to the appellant’s testimony as to the

precise nature of the test, the number and nature of the questions asked. These were set out in the witness statement. In that statement the appellant had referred to the reasons why he had chosen Synergy Business College and had given details of his journey to the test centre. The material relied on by the Secretary of State had been handed in to the First-tier Judge on the day of the hearing. The judge had had regard to the Project Façade report which was dated 15 May 2015. Counsel submitted it was out of date and there was no evidence of any prosecution. The burden on the appellant was not a heavy one and he had given a detailed account and had been cross-examined. Counsel drew a distinction between the ETS cases and the Cambridge College of Learning cases where there had been no courses run at all.

11. The judge had conducted a holistic assessment having considered all the material before him and was not satisfied that the legal burden had been discharged. What had been said at paragraph 57 of **MA (Nigeria)** was obiter and expressed as an hypothesis. The appellant had a degree at university and the judge had not taken into account an irrelevant matter when considering English language ability.
12. Counsel submitted that the position in the instant appeal fell into the second category of case identified in paragraph 30 of **Majumder** -

“The second category of case is one in which the Secretary of State is the appellant and the Tribunal correctly decides that she had discharged the initial evidential burden with her generic evidence but in the light of other evidence had not discharged the legal burden. This category is broadly the scenario in the two cases before us. Mr Kovats stated that the Secretary of State would review those cases and, without giving an answer in respect of a particular case for understandable reasons, also stated that she would be minded to concede the appeal. He thus indicated what he described as a broad departure of travel.”

13. In reply Mr Bates accepted that he had no up-to-date evidence following the Façade report. The material before the judge included the ETS look-up tool. The judge was required to weigh up the evidence and balance it against the material in the Project Façade report. The fact that the appellant knew how to get to the test centre and so forth had to be seen in the context that proxy test takers as well as the individual candidate were both observed in the building. The report was more than a generic report and the judge was required to consider it. Reliance was placed on paragraph 57 of **MA (Nigeria)**. It was accepted that the judge had referred to the report.
14. At the conclusion of the submissions I reserved my decision. I remind myself that I cannot interfere with the decision of the First-tier Judge unless it was flawed in law.
15. Prior to the hearing before the First-tier Judge the usual directions had been issued giving notice of the hearing on 7 February 2017. In compliance with those directions the appellant’s representatives had filed an indexed and paginated bundle of documents before the hearing including a seven page witness statement from the appellant giving specific details of the test he had undertaken and why he had taken

it. He gives details of his travels and what happened at reception. He gave full details of the various tests. I should mention that Counsel submitted that the length of the tests appear to conform to the material contained in a user guide which Counsel had culled from the internet. I do not place much reliance on this particular point as the evidence was not, I understand, before the First-tier Judge.

16. It appears that while the appellant had lodged material in advance as required by the directions the respondent simply lodged material at the hearing. No objection was taken by the appellant and it is clear in my view that the judge had full regard to the material submitted, apparently at a very late stage.
17. As Counsel submitted the judge made a positive credibility finding in respect of the appellant who had given oral evidence and had been cross-examined.
18. It is true that the judge took into account in reaching his decision the appellant's English language ability, but I accept Counsel's submission that this was not a misdirection. English language ability is not an irrelevant matter and the judge had regard to it as part of his assessment, which he was entitled to do. The judge records the argument advanced was that the standard achieved in the disputed test was consistent with the abilities revealed by the earlier qualifications.
19. It is accepted by Mr Bates that the judge did refer to the material lodged by the respondent including the Project Façade report. As counsel observes there was no updating material in relation to this report. I see nothing in the argument that the judge misdirected himself on the burden and standard of proof – he sets out the learning in paragraph 16 of his decision. There is no indication he did not apply that correct burden. It was open to the judge to find that the appellant had met the initial evidential burden for the reasons he gives. As I have said, he did not simply rely on the appellant's qualification but all the material put forward by the appellant including his detailed evidence both in his witness statement and his oral evidence to which the judge refers in paragraph 17. The judge states, and I have no reason to doubt that he considered the totality of the evidence when reaching his conclusion.
20. While the decision is not a lengthy one it covers the ground satisfactorily and is not inadequately reasoned as claimed. I remind myself that the judge had the benefit of hearing oral evidence and came to a positive view of that evidence.
21. Despite Mr Bates's well-argued submissions I am not satisfied that the decision is materially flawed in law, and accordingly I dismiss the Secretary of State's challenge and direct that the decision of the First-tier Judge shall stand.
22. Appeal dismissed.
23. The First-tier Judge made no anonymity order and I make none.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award for reasons he explains and I make none.

Signed

Date 13 November 2017

G Warr, Judge of the Upper Tribunal