



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10000/2016

THE IMMIGRATION ACTS

Heard at Field House
On 3rd August 2018

Decision & Reasons Promulgated
On 21st August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SUNDAS ALI SHAH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer

For the Respondent: Mr M Aslam of Counsel, instructed by Zakk Associates and Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a decision of Judge Coutts (the judge) of the First-tier Tribunal (the FtT) promulgated on 31st January 2018.
2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to her as the claimant.

3. The claimant is a citizen of Pakistan born 19th November 1986. Her application for leave to remain in the UK was refused on 24th March 2016 and she appealed to the FtT. The reason for refusal, in the main, was that in an application for leave to remain dated 30th August 2012 the claimant submitted a TOEIC certificate from Educational Testing Service (ETS) which had been obtained by deception. The Secretary of State was satisfied, because of evidence received from ETS, that a proxy had taken the speaking test for the claimant at Premier Language Training Centre on 15th May 2012. As a result, the test result had been cancelled and declared invalid. The Secretary of State invoked S-LTR.1.6 which states that an applicant will be refused leave to remain if the presence of the applicant in the UK is not conducive to the public good because their conduct, character, associations or other reasons makes it undesirable to allow them to remain in the UK.
4. The judge heard evidence from the claimant and allowed her appeal. The judge did not accept that the Secretary of State had discharged the legal burden of proving dishonesty on the part of the claimant.
5. The Secretary of State applied for permission to appeal to the Upper Tribunal. The grounds are summarised below.
6. It was submitted that the judge had erred in law by failing to give adequate reasons for a finding on a material matter. It was submitted that the judge had failed to have regard to the weight of evidence submitted by the Secretary of State, in relation to the use of the claimant of a proxy to take the English language test on her behalf.
7. It was submitted that the judge failed to give any reasons for rejecting the evidence before him submitted on behalf of the Secretary of State.
8. It was submitted that the error in failing to engage with the Secretary of State's evidence, infected the findings made in relation to the Immigration Rules and Article 8 of the 1950 European Convention on Human Rights.
9. Permission to appeal was granted by Judge J M Holmes of the FtT in the following terms;

"3 This decision arguably fails to properly engage with the relevant current jurisprudence, or the evidence that was before the Tribunal. The judge's decision is arguably inconsistent with the guidance to be found in Shehzad [2016] EWCA Civ 615 and Qadir [2016] EWCA Civ 116 and Nawaz [2017] UKUT 288. The judge had to engage with the evidence of Professor French, indeed it was arguably perverse for him not to do so. His evidence, which his colleague Dr Harrison has not rebutted, is that the number of false positives on checking for proxy test sitters is less than one percent. Moreover the evidence indicated fraud on an industrial scale had been used. Given the applicable standard of proof the conclusion that the Respondent had discharged the legal burden of proof was arguably one that ought to have followed. Arguably the judge erred in describing this as an evidential burden [34].

- 4 As to the evidential burden upon the Appellant that resulted, the judge arguably failed to apply the guidance of the Upper Tribunal (to be found in Qadir [18], and MA [2016] UKUT 450) as to the proper approach. Arguably the judge appeared to overlook the fact that it was not alleged the Appellant had never attended the test centre – merely that having done so, a proxy had sat the actual test.
 - 5 Arguably the decision displays a failure to understand either the evidence, or the relevant jurisprudence, and a failure to apply one to the other. All the grounds may be argued.”
10. Directions were subsequently issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision must be set aside.

The Upper Tribunal Hearing

11. Mr Kotas relied upon the grounds contained within the application for permission to appeal in submitting that the judge had erred in law, and had done so materially, which meant that the decision should be set aside.
12. It was submitted that the judge had failed to grasp the strength of the Secretary of State’s case, and had failed to direct himself appropriately. It was submitted that the judge was wrong at paragraph 31 to record that the Respondent must firstly discharge an evidential burden to show that the test had been procured by dishonesty, and if this is established, must then discharge a legal burden proving dishonesty. Mr Kotas submitted that if the initial evidential burden is discharged by the Secretary of State, there is then an evidential burden upon the claimant to provide an innocent explanation. If that is done, it is for the Secretary of State to discharge the legal burden.
13. The evidence of the Secretary of State, before the FtT, was contained in a Home Office bundle indexed 1-6 and dated 22nd August 2017. The judge had erred by not engaging with that evidence. The judge had not appreciated that the Secretary of State’s evidence in this case was considerably stronger than that considered in SM and Qadir [2016] UKUT 00229 (IAC) as accepted by the Upper Tribunal at paragraph 44 of MA (ETS – TOIEC testing) [2016] UKUT 00450 (IAC). Mr Kotas submitted that the approach adopted by the judge at paragraphs 38-39 was cautioned against by the Upper Tribunal in MA at paragraph 57.
14. Mr Aslam disagreed with the submissions made by Mr Kotas and submitted that the judge had not materially erred in law.
15. It was submitted that it was clear that the correct legal test had been applied by the judge. At paragraph 34 the judge had recorded that it was conceded by the claimant that the evidence submitted by the Secretary of State discharged the evidential burden.
16. Therefore it was submitted that the judge must have taken into account the Secretary of State’s evidence, as if he had not done so, he would not have found the initial evidential burden to be discharged.

17. The judge at paragraph 34 of his decision had referred both to the generic and specific evidence. It was submitted that the judge was correct, having found the initial evidential burden discharged, to go on and consider whether the legal burden on the Secretary of State had been discharged. It was contended that he did not err in law in finding the legal burden had not been discharged.
18. I was asked to accept that the judge was entitled, at paragraph 36, to record that he found the evidence of the claimant to be compelling. The claimant had been examined and cross-examined before the judge.
19. I was asked to note that the claimant had initially failed an ETS test on 17th April 2012, and thereafter revised, enabling her to pass the test on 15th May 2012. The test in April 2012 was taken at the same test centre as the test in May 2012.
20. Mr Aslam questioned why the claimant, if she was going to commit fraud, had not done so initially when she took the test in April 2012.
21. The judge was entitled to take into account that the claimant had passed an English language test prior to coming to the UK although it was accepted that this was not determinative, it was submitted that it was relevant.
22. It was submitted that the judge was entitled at paragraph 38 to record that he agreed with the claimant's 'plausible submission that there would be no reason for her to obtain a fraudulent test certificate when she was perfectly capable of passing one herself'.
23. Mr Aslam submitted that the judge was entitled to find the claimant credible and accept her innocent explanation, and therefore he need take the matter no further.
24. Mr Kotas expressed disagreement with Mr Aslam's view, arguing that if an innocent explanation was given, the next step would be for the judge to consider and assess the legal burden upon the Secretary of State, and the judge had not done that because he had failed to engage with the evidence and explain his conclusions.

My Conclusions and Reasons

25. The Secretary of State complains that the judge has not provided reasons for concluding that the Secretary of State had not discharged the legal burden of proving dishonesty. I set out below the head note to Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC) which provides guidance on the obligation of a judge to provide reasons for decisions;

"It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost."

26. It is clear that the judge was well aware and appreciated that there was an initial evidential burden upon the Secretary of State, as this is recorded at paragraph 31 of the judge's decision. In that paragraph the judge goes on to record that if the evidential burden is discharged, there follows a legal burden on the Secretary of State. That is correct, although the judge neglects to set out that there is in fact an evidential burden upon the claimant, if the Secretary of State discharges the initial evidential burden.
27. The judge sets out the evidence produced by the Secretary of State at paragraphs 32-33. At paragraph 34 the judge notes that it is conceded on the claimant's behalf, that the Secretary of State's evidence discharges the evidential burden.
28. What should then follow is consideration by the judge of whether the claimant then discharges the evidential burden upon her of raising an innocent explanation. The judge at paragraph 36 records that he "found the evidence of the Appellant to be compelling." The judge of course had the benefit not only of considering the documentary evidence, but of considering the claimant's oral evidence. However, it is not clear from reading the decision what compelling evidence the claimant gave to discharge the evidential burden and raise an innocent explanation. The judge considers the evidence in four relatively brief paragraphs, 37-40. Paragraph 40 comprises the conclusion by the judge that he is not satisfied that the legal burden has been discharged by the Secretary of State. Therefore the evidence is in fact considered at paragraphs 37-39.
29. The judge at paragraph 37 records that the claimant failed the speaking test on 17th April 2012, and thereafter revised and passed the test on 15th May 2012. At paragraph 38 the judge agrees with the claimant's "plausible submission that there would be no reason for her to obtain a fraudulent test certificate when she was perfectly capable of passing one herself."
30. At paragraph 39 the judge records that the claimant was able to describe the test centre layout, including how many people were there on the day of the test, the format of the tests, and was able to describe sitting at a computer and speaking into a microphone.
31. In my view the findings recorded above, in relation to the claimant's evidence do not engage with the evidence submitted by the Secretary of State. At paragraph 57 of MA the Upper Tribunal records that there are many reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustibly, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system.
32. It is unclear what caused the judge to believe the claimant was perfectly capable of passing a test. On her own admission she had failed an earlier test. Therefore the fact that she had passed a test before coming to the UK did not indicate that she would automatically pass a further test in the UK. It has been stated that the claimant completed an MA degree, but she had not undertaken and passed that degree in May 2012, the time period that is under consideration.
33. Paragraph 39 is not relevant. It is not the Secretary of State's case that the claimant did not attend the test centre. On the contrary, it is contended that individuals would

attend the test centre, and while there, their place would be taken by a proxy who would sit the test on their behalf.

34. In my view, there is no indication that the judge adequately engaged with the evidence provided by the Secretary of State. That evidence comprises both generic and specific evidence. There is the ETS SELT source data which is specific to the claimant, confirming that her test taken on 15th May 2012 is invalid. There was also evidence that related to Premier Language Training Centre, the test centre attended by the claimant, on 15th May 2012. That indicated that on the morning of 15th May 2012 44 TOEIC tests were taken, of which 82% were found to be invalid and the remaining 18% questionable. In the afternoon 71 tests were taken with 77% being found to be invalid and 23% questionable.
35. The Secretary of State also provided evidence about Project Facade, a criminal inquiry into abuse of the TOEIC, with particular reference to Premier Language Training Centre. That evidence indicated that between 20th March 2012 and 5th February 2014 Premier Language Training Centre undertook 5,055 TOEIC speaking and writing tests. Of those tests 3,780 were found to be invalid, with the remaining 1,275 found to be questionable. Therefore 75% of all tests were invalid.
36. The evidence indicates that organised and widespread abuse of the TOEIC took place at the test centre. An employee admitted that cheating took place. Documents relating to TOEIC exams were discovered on 16th June 2014. These listed tests taken between 19th November 2013 and 5th February 2014 and involved 167 candidates, and alongside the names of the candidates were the names of “pilots” (imposters) who sat the test on behalf of the candidates. I accept that the search on 16th June 2014 related to tests taken after the claimant, but nevertheless this was clearly evidence that needed to be considered and analysed by the judge.
37. In addition there is the expert report of Professor French, referred to by the judge granting permission. This gives the opinion “I would estimate the rate of false positives to be very substantially less than one percent after the process of assessment by trained listeners had been applied.”
38. The evidence relied upon by the Secretary of State was substantially stronger than considered by the Upper Tribunal in SM and Qadir [2016] UKUT 00229 (IAC), and it was incumbent upon the judge to analyse this evidence and consider what innocent explanation had been raised by the claimant.
39. The decision of the FtT does not demonstrate that the judge adequately engaged with and analysed the evidence, and the innocent explanation appears to be an assertion by the claimant that notwithstanding the evidence to the contrary, she undertook the test without using a proxy.
40. Failure to engage with evidence and failing to resolve conflicts in the evidence, and failing to explain reasons for findings, amounts to a material error of law.

41. I conclude that the decision of the FtT is unsafe and must be set aside and re-made. When I indicated at the error of law hearing that I intended to reserve my decision to reflect upon the submissions that had been made, I canvassed the views of the representatives as to the appropriate course if a material error of law was found. It was suggested that the appeal be remitted to the FtT to be heard afresh.
42. Having considered paragraph 7 of the Senior President's Practice Statements, I find that it is appropriate to remit the appeal back to the FtT because of the nature and extent of judicial fact-finding that will be necessary in order for this decision to be re-made.
43. The appeal will be heard at the Hatton Cross Hearing Centre and the parties will be advised of the time and date in due course. The appeal is to be heard by an FtT Judge other than Judge Coutts.

Notice of Decision

The decision of the FtT discloses a material error of law and is set aside. The appeal is allowed to the extent that it is remitted to the FtT with no findings of fact preserved.

Anonymity

The FtT made no anonymity direction. There has been no request made to the Upper Tribunal for anonymity and I see no need to make an anonymity order.

Signed

Date 6th August 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The Upper Tribunal makes no fee award. The issue of any fee award will need to be considered by the FtT.

Signed

Date 6th August 2018

Deputy Upper Tribunal Judge M A Hall