



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

Appeal Number: IA/01587/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 24th September 2018**

**Decision & Reasons
Promulgated
On 22nd October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR PINKESHKUMAR MAHENDRABHAI PATEL
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Presenting Officer
For the Respondent: Mr H Patel of Hiren Patel Solicitors

DECISION AND REASONS

1. In this decision the Appellant is referred to as the Secretary of State and the Respondent is referred to as the Claimant.

2. The Claimant a national of India date of birth 14 March 1990 appealed against the Secretary of State's decision dated 7 March 2016 to refuse an application made on 13 January 2015 for further leave to remain as a Tier 2 (General) Migrant. That application was refused because the TOEIC certificate which was submitted as part of a Tier 4 application as long ago as 29 October 2012 had been obtained using a proxy test taker. The Secretary of State also did not make any final determination on the certificate of sponsorship (COS) and the matter was left unresolved.
3. His appeal came before the IAC and on 7 February 2018 First-tier Tribunal Judge Herbert promulgated his decision [D] allowing the appeal. At that hearing Mr H Patel appeared for the Claimant.
4. The Judge then clearly erred in law because he allowed the appeal outright notwithstanding the status of the COS element of the matter had not been resolved. The Judge however heard the evidence and accepted that the Appellant had taken a valid TOEIC test with Colwell College (erroneously referred to in the decision as Caldwell).
5. The Judge heard, essentially by reference not least to a detailed skeleton argument, a substantive challenge to the reliability of the generic evidence in giving what are called "false positives". The Judge in the extensive argument heard a number of points being taken against the generic evidence relied upon by the Secretary of State. It rather seemed to me the Judge failed to put his mind to the considerations which the Upper Tribunal gave to such evidence in SM Qadir [2016] UKUT 00229 and also appeared to have forgotten that at date of decision that the Court of Appeal in the case of Majumber and Qadir [2016] EWCA Civ 1167 had generally supported the approach taken by the Upper Tribunal in Qadir. The Judge's analysis really did not address the basis that the TOEIC ETS evidence was being challenged. It also seems to me that the Judge perhaps by reference to another college, not the Colwell College, took

some view on the extent of the audits. It may be just it is a typographical error, I do not exclude that possibility.

6. In considering the case the Judge heard, although it is not entirely clear whether he was satisfied that the evidential burden had truly shifted to the Claimant, or if so accepted the latter's innocent explanation of the events in 2012. The Judge recited [D23] the fact that as heard by him in 2018 the Claimant had very good English with some accent but a good command of the English language and grammar. Plainly at the time of the taking of the TOEIC language test it seems unlikely that the Claimant's English was as good as it had become. Indeed since the taking of the test in September 2012 the Claimant has gone on to undertake further and more difficult studies to which the English language was plainly going to be necessary and at an acceptable standard.
7. Mr Tufan drew my attention to the case of MA (ETS TOEIC testing) [2016] UKUT 450 and in particular to the familiar paragraph 57 which identify in considering amongst other things the motives for using a proxy test taker in paragraph 57 which are so familiar as to need not repeating. Mr Tufan points to the fact that that analysis has not been substantively challenged since the case of MA. Rather he relied upon the reported judicial review decision of Nawaz [2017] UKUT 00288 and its general support given for the Tribunal's approach to the issue of the TOEIC tests and proxy test takers.
8. The case law has also to a degree developed in the case of Gaogalalwe [2017] EWHC 1709 (Admin) which is a High Court decision in which the issue of Professor French's analysis of the material is considered and accepted in relation to the generic evidence and the general outcomes.
9. The case law therefore to some extent plainly supports the Secretary of State's position that faced with the wealth of that report notwithstanding

the skeleton argument and arguments by Mr Patel it needed to be properly addressed by way of the reason.

10. Ultimately it seemed to me the Secretary of State's challenge was essentially one as to the adequacy and the sufficiency of the reasons for accepting the Claimant's explanation was a "innocent explanation" of the taking of the test. The Judge's reasoning as to why he concludes that the test was undertaken is broadly contained in D23 to D27.
11. The primary consideration the Judge gave weight as evidence of an innocent explanation was the Claimant's current English language ability demonstrating similar ability in 2012 and thus no need to use a proxy test taker. The Judge heard the Claimant's past ability actually i.e. by reference to a test which he had done and his Level 5 HND passed in September 2012. However, the Judge appeared to accept the following factors. First, there was no motive to use a proxy test taker. Secondly, whilst it was a requirement for studying at Sunderland University the Judge was satisfied that the Claimant's study in English was sufficient to show the false test result was unlikely. Thirdly, what the Judge describes in the following terms:

"I also took the view that the Appellant's (Claimant) did not appear before me to exhibit any dishonesty on the basis that he spoke without hesitation and with no sign of any embarrassment with explaining what he had done, how he had done it, and why he had sat the test."

12. I find, given the generic evidence and later English language skills, the Judge gave inadequate and insufficient reasons for accepting the Claimant had not used a proxy test taker and that is an error of law. Accordingly I find in addition to the COS issue the Original Tribunal's decision cannot stand. The matter will have to be remade in the First-tier Tribunal.

NOTICE OF DECISION

The Secretary of State's appeal is allowed to the extent that the matter is returned to the First-tier Tribunal (not before F-t TJ Herbert) to be decided in accordance with the law.

No anonymity direction was necessary and none was sought.

Signed

Date 10 October 2018

Deputy Upper Tribunal Judge Davey

TO THE RESPONDENT

FEE AWARD

No fee award is appropriate.

Signed

Date 10 October 2018

Deputy Upper Tribunal Judge Davey