



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/02033/2016

THE IMMIGRATION ACTS

Heard at Field House
On 22 February 2018

Decision & Reasons Promulgated
On 27 February 2018

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SATWANT SINGH SIDHU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr M. Iqbal, Counsel

For the respondent: Mr N. Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed against the respondent's decision date 19 April 2016 to refuse to grant leave to remain a Tier 4 (General) Student Migrant. The application was made on the 07 March 2014. This is an 'old style' appeal to be decided under the provisions in force before the changes made to Part V of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") by the Immigration Act 2014 ("IA 2014").
2. The respondent refused the application with reference to the General Grounds for Refusal contained in paragraph 322(1A) (false documents submitted with the

application) of the immigration rules. The applicant submitted a TOEIC English language certificate issued by Educational Testing Services (ETS) in support of the application. The certificate was obtained from Universal Training Centre on 22 January 2014. ETS had declared the certificate to be 'invalid' because there was "significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker".

3. First-tier Tribunal Judge Trevaskis ("the judge") dismissed the appeal in a decision promulgated on 22 September 2017. The judge considered the evidence put forward by the respondent, which included a 'look-up tool' print out relating to the particular test certificate, a 'look-up tool' print out for Universal Training Centre for 22 January 2014, the 'generic' statements of Rebecca Collings and Peter Millington and a Project Façade report of the criminal inquiry into fraud at Universal Training Centre.
4. The judge went on to consider the appellant's oral evidence. The appellant explained that he lived in Southall, but had taken the test in Watford because he didn't have much time to take the test and it was the nearest place. He denied that he went there because he heard that people were able to cheat at that centre. He told the judge that there were 15-20 people taking the test that day. His photograph was taken. He didn't see anyone cheating. The appellant relied on the fact that he had taken an English language test in 2011 and had no need to use a proxy. The judge noted the submissions made by both representatives and outlined relevant case law. The judge began his findings at paragraph 22 as follows:

"22. The approach to this decision is to begin by considering whether the respondent has met the burden of proof upon her to raise a reasonable suspicion that the test results were obtained by deception. I have considered the evidence relied upon by the respondent in that context; notwithstanding the absence of analysis of the voice recording, I am satisfied that the respondent has produced sufficient evidence to discharge her burden of proof of deception, so as to give rise to a burden of proof on the appellant to provide an innocent explanation. In doing so I am following the authority quoted above."

5. The judge had the benefit of hearing evidence from the appellant and noted that he was able to "understand and express himself effectively in English". He reminded himself that there might be many reasons why someone might cheat in a test regardless of their standard of English. He noted the appellant's explanation as to why he chose that particular test centre. The judge took into account the passage of time since the appellant took the test, but noted that the appellant's recollection of how many people took the test that day was markedly different from the ETS 'look-up tool' print out, which only showed that two tests were taken at Universal Training Centre on 22 January 2014. The judge went on to consider the evidence in the Project Façade report, which contained the "remarkable statistic" that 75% of the test results over a period of 23 months were deemed 'invalid'. The appellant's test was amongst them. The judge went on to state:

"28. The appellant has taken and passed a further test in 2011. While that shows that he may not have needed to cheat in the tests in 2014, it is not conclusive evidence that he did not do so."

6. After having considered the evidence as a whole the judge concluded that the test certificate was obtained fraudulently and that the General Grounds for Refusal applied.
7. The appellant appealed against the First-tier Tribunal decision on the following grounds:
 - (i) The First-tier Tribunal erred in failing to consider *why* the appellant would cheat when he passed a similar test in 2011 successfully and erred in finding that it was not “conclusive evidence” that he did not cheat in the 2014 test (grounds 1 & 3 make largely the same point).
 - (ii) The First-tier Tribunal failed to make clear findings on the credibility of the appellant’s oral evidence.
 - (iii) The First-tier Tribunal erred in referring to evidence from Project Façade when it was not included in the respondent’s bundle. This ground was abandoned at the hearing. It was accepted that there was a supplementary bundle before the First-tier Tribunal.

Decision and reasons

8. I find that none of the points raised on behalf of the appellant demonstrate that the First-tier Tribunal decision involved the making of an error of law that would have made any material difference to the outcome of the appeal.
9. Although the judge’s reference to “conclusive evidence” in relation to the test taken in 2011 was inaccurate, elsewhere in the decision the judge clearly had in mind the correct burden and standard of proof. He directed himself to relevant decisions in *R (Gazi) v SSHD* [2015] UKUT 00327, *SM & Qadir v SSHD* [2016] UKUT 00229, *SSHD v Shehzad* [2016] EWCA Civ 615 and *MA (ETS-TOEIC)* [2016] UKUT 00450. He began his findings with a legally accurate summary of the task ahead of him [22].
10. I agree that the judge could have made more detailed findings relating to the credibility of the appellant as a witness. However, I have considered whether what he said was sufficient in the context of the evidence before him. The appellant’s witness statement provided a limited response to the allegation of fraud. The only reasons put forward in response were that (i) his photograph was on the TOEIC certificate (implying that he attended the test centre); and (ii) he passed an earlier English language test successfully in 2011. Mr Iqbal accepted that the first point did not take the matter any further because a photograph is included on any TOEIC certificate whether it is genuine or false.
11. The judge summarised the evidence given by the appellant at the hearing. He made his own observations about the appellant’s ability to express himself at the hearing [23]. However, it was open to him to take into account that there could be many reasons why someone might cheat rather than taking the test themselves “regardless of their ability”. This approach was consistent with what was said in *MA (ETS-TOEIC testing)* at [57]:

“57. Second, we acknowledge the suggestion that the Appellant had no reason to engage in the deception which we have found proven. However, this has not deflected us in any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere. We are not required to make the further finding of why the Appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter.


12. The judge’s subsequent observation at [24] clearly followed on and formed part of his finding at [23] although it was not stated in terms. He noted that the appellant’s explanation for choosing Universal Training Centre was that he was “under time pressure to obtain the test certificate”. I find that it is reasonable to infer that the judge took this into account as a possible alternative explanation as to why the appellant might cheat despite his English language ability. It was open to the judge to take this information into account.
13. The judge set out the discrepancy in the appellant’s evidence as to how many people took the test on 22 January 2014. The judge considered whether the passage of time since the test might have impaired the appellant’s memory. I agree that the judge could have explained the point in more detail, however, the discrepancy between the appellant’s evidence that around 15-20 people took the test and the ETS ‘look-up tool’ evidence showing that only two tests were taken that day was so stark that I find little reasoning was in fact necessary. If the numbers had been closer I might have considered that further explanation was required, but the discrepancy was clear and was not adequately explained by the passage of time.
14. It is accepted that there was a supplementary bundle before the judge containing further information specific to Universal Training Centre. It was open to the judge to take into account the damning information in the Project Façade report, which stated that 75% of test results over a period of 23 months (including the date the appellant took the test) were deemed invalid. Although the judge did not outline the evidence in the decision, the report went further. It also stated that Universal Training Centre was one of the centres highlighted in the BBC Panorama programme that first uncovered widespread fraud. The report stated that the college owners, directors and agents have been charged with conspiring to facilitate a breach of immigration law although at the date of the report, the outcome of the trial was not yet known. During the Project Façade investigation, it was said that documents were discovered at Universal Training Centre, which related to the tests taken at the college listing the candidate name alongside that of the ‘pilot’ used, the fee paid, the agent details and the “score required”. In addition to this evidence the ETS ‘look-up tool’ relating to the tests taken at Universal Training Centre on the day that the appellant took the test showed that only two tests were taken and both were deemed ‘invalid’.

15. The combination of the generic evidence of widespread fraud at several test centres, as well as specific information relating to the level of fraud at Universal Training Centre, in combination with the ETS 'look-up tool' confirming that ETS had deemed the certificate 'invalid' due to evidence of a proxy test taker, was compelling evidence to support the respondent's allegation.
16. In offering an 'innocent explanation' to the evidence the appellant could only say that he spoke English well enough to pass a previous test and therefore had no motive to cheat. The judge took this explanation into account and rightly noted that there might be other reasons why a person might cheat. In this case, he noted that the appellant was "under time pressure" to obtain a test certificate. It was open to the judge to take into account a major discrepancy in the appellant's evidence, which could not be explained adequately by the vagaries of memory over the passage of time. Although I accept that more detailed reasons might have been given, what the judge said was sufficient given the limited evidence the appellant produced in response to the allegation. It is understandable that the appellant disagrees with the decision but it is not arguable that the judge's findings were outside a range of reasonable responses to the evidence. It was open to the judge to conclude that the respondent's evidence was sufficiently compelling to show that the appellant relied upon a false document in support of the application and that the General Grounds for Refusal applied.

DECISION

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

The First-tier Tribunal decision shall stand

Signed 
Upper Tribunal Judge Canavan

Date 22 February 2018