



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

Appeal Number: HU/08607/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 5 February 2019**

**Decision & Reasons  
Promulgated  
On 5 March 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN**

**Between**

**MR ABUL BASAR  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Wilcox, Counsel instructed by J S Solicitors  
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a national of Bangladesh born on 8 July 1980. He arrived in the UK on 5 November 2007 with a student visa and subsequently made applications for leave to remain as a Tier 4 Student valid until 7 December 2015. He then applied, in time, for leave to remain on the basis of family life and varied this application to a long residence application for indefinite leave to remain on 8 April 2016, which application was again varied to a family life application on 28 July 2016 and varied again to indefinite leave to remain on 22 November 2016, varied on 7 March 2017 for leave as a Tier 1 (Entrepreneur) and varied yet again on 18 September 2017 to an

application for indefinite leave to remain. This application was refused in a decision dated 29 March 2018. The Appellant appealed and his appeal came before Judge of the First-tier Tribunal N M Paul for hearing on 9 November 2018.

2. In a decision and reasons promulgated on 20 November 2018, the judge dismissed the appeal on the basis that he found that the Respondent was justified in refusing the application with reference to paragraph 322(2) of the Immigration Rules, on the basis of the evidence that the Appellant had utilised a proxy test taker in respect of his test taken at the London College of Media and Technology on 22 August 2012.
3. An application for permission to appeal to the Upper Tribunal was made in time on the basis of the following grounds: firstly that the judge had failed to engage with material evidence relating to the Appellant's education history and English language proficiency. The Appellant had set out a detailed explanation of his circumstances in his witness statement. He gave evidence in English and provided evidence of a high level of proficiency in English, which preceded the date of the TOEIC examination and had obtained an MSc from the University of Sunderland and previously achieved an above average score in his IELTS academic test.
4. Reference was made to the decision in SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC) at [67] to [69] in particular where the Upper Tribunal found:

*"We turn thus to address the legal burden. We accept Mr Dunlop's submission that in considering an allegation of dishonesty in this context the relevant factors to be weighed include (inexhaustively, we would add) what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated. Mr Dunlop also highlighted the importance of three further considerations namely how the Appellants performed under cross-examination, whether the Tribunals' assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic achievements are such that it was unnecessary or illogical for them to have cheated."*

5. It was asserted that the evidence demonstrated there is room for error in ETS's processing and storing of digital voice files and the way they are linked to particular candidate's test results. Computerised voice files purporting to be those created in the Appellant's ETS have been produced and the Claimant has accepted that the voice contained therein was not his: see the R (on the application of Mohibullah) (TOEIC - ETS - judicial review principles) [2016] UKUT 00561 (IAC) at [7] and Saha [2017] UKUT 00017 (IAC) at [14]. It was further asserted that the judge made findings that were not supported by any evidence before him in particular the finding the applicant had every motive to cheat in order to facilitate

further application for leave to remain was perverse given the level of his education and achievement in the UK.

6. The second ground of appeal is no longer pursued in light of the fact that the Respondent did, in fact, raise in the refusal letter the point that the applicant had acted in collusion with the college to obtain a fraudulent certificate.
7. The third ground of appeal asserted that the judge had materially erred by failing to engage with the evidence in respect of the Appellant's BNP membership and the circumstances relating to his family at [37].
8. Permission to appeal was granted by First-tier Tribunal Judge Birrell in a decision dated 21 December 2018 in the following terms:

*"In relation to ground 1 it is arguable that in assessing whether the Appellant had met the evidential burden of providing an innocent explanation the judge failed to engage with those factors that were set out in SM and Qadir [2016] EWCA Civ 1167 at 69.*

*In relation to ground 2 the Respondent's case was that the Appellant has deliberately cheated in his language test and therefore it was always their position that the Appellant had acted in collusion with the college and this was the challenge he had to respond to. I therefore find no arguable merit in ground 2.*

*In relation to ground 3 there is arguably no engagement with this claim at all other than one line in paragraph 37."*

#### *Hearing*

9. At the hearing before the Upper Tribunal, Mr Wilcox sought to rely on the grounds of appeal and made detailed submissions in respect of grounds 1 and 3. He submitted the judge had failed to take account of pertinent matters which were present in the case and highlighted as being typical cf. SM and Qadir (*op cit*) at [69]. This included the fact the Appellant has an extensive educational background including an MSc from the University of Sunderland and a previous IELTS score which is a more challenging test than the ETS test and had been undertaken by him at an earlier stage i.e. in 2007. The Appellant is a man of previous good character, he was a genuine student. Mr Wilcox also highlighted difficulties in Bangladesh owing to his inability to pay back his parents.
10. Mr Wilcox submitted that the Appellant's witness statement is drafted in fluent English and the Appellant gave oral evidence before the First-tier Tribunal, also in fluent English. He has no motive for cheating, given that his level of English is of a standard that would have enabled him to pass the test relatively easily. He sets out in his witness statement great detail as to the actual taking of the test.

11. Mr Wilcox submitted that many of the factors that should have counted in his favour were taken against him, absent any evidential basis, in particular at [29] that the Appellant obtained copies of the test files. This is evidenced also by the e-mail correspondence with the solicitors for the Secretary of State set out at pages 37 to 38 of the Appellant's bundle. Mr Wilcox submitted that this evidence should have at least been considered by the judge. He further submitted that the judge's finding was unsafe in that it seems to have been assumed by the judge that the fact that the Appellant sat his test at the London College of Media and Technology automatically meant that the test was fraudulent. However it has to be recognised that there is at least a vulnerability in the reliability of the evidence as is clear from the decision in MA [2016] UKUT 00450 (IAC). He submitted that it is clear from [32] of the judge's decision that this is unsafe.
12. Mr Wilcox submitted that it was flawed for the judge's approach to the fact that the Appellant is working part-time in Boots the Chemist indicates a flawed approach at [36] on the basis that the judge found this meant "*that he was seeking to facilitate the means for remaining in the UK*" which in itself was based on a submission by the Presenting Officer at [22] which lacked any evidential basis. Thus in finding that the Appellant had not provided an innocent explanation, the judge had failed to go through and consider the material factors, in particular, the vulnerability of the ETS system as evidenced by the expert in MA (Nigeria) *op cit*; the detailed nature of the Appellant's account, the lack of motive the Appellant had in that he did not need to cheat and the Appellant's previous academic achievements.
13. In respect of the third ground of appeal, Mr Wilcox submitted that whilst the judge may ultimately have not come down in the Appellant's favour on that point, he still needed to engage with the issues in a reasoned manner and to show that he was applying the test he was mandated to apply under the Rules and jurisprudence.
14. In his submissions, Mr Lindsay for the Secretary of State stated that although there was no Rule 24 response the appeal was formally resisted. He submitted that what the judge was required to do and did do was to make a finding that it was more likely than not that the fraud was so widespread at the specific test centre that the Appellant would have been involved in this fraud. The Appellant accepted that the voice on the recording was not his voice. He submitted that the weight to be attached to the evidence it was open to the judge in terms of that how he assessed the evidence. The Appellant had given an explanation but this had not been accepted by the judge.
15. In relation to SM and Qadir (*op cit*) Mr Lindsay submitted there was nothing to support the proposition that there is an exhaustive list of factors, nor that all the factors have to be considered in each case. All the judge was required to do was to give clear reasons for each of the points in the appeal. He submitted that the factors to be weighed included those

in respect of dishonesty and that what is important is the judge gave clear and rational reasons for the points that he found dispositive, which is precisely what he had done.

16. In respect of the alleged weaknesses in the ETS system, Mr Lindsay submitted that it was not seriously in doubt that the Secretary of State's evidence was capable of showing on balance of probabilities that there has been fraud. In respect of the assertion that the Appellant had no motive to cheat see [35] of the judge's decision. Mr Lindsay submitted that the Appellant clearly lacked respect for the UK system of immigration control and the judge found he had applied for leave to remain not because he is a genuine student, but simply in order to remain in the UK and work. Whilst not all judges would have reached such a finding on the evidence, the reasons provided by the judge were sustainable in law: see [34] and [36] of the judge's decision.
17. In relation to ground 3, Mr Lindsay submitted that having found that the Appellant has been deliberately complicit with the fraud conducted at the London School of Media and Technology, the Judge was entitled to find it was not credible. The Appellant's evidence as to the BNP membership in Bangladesh was not credible: see [37].
18. In reply, Mr Wilcox submitted that the judge's findings at [35] and [37] could apply to anyone. The issue is not that given the accepted weaknesses in the ETS evidence the judge is incapable of finding that an individual can be shown to have engaged in fraud to the civil standard, but rather that it cannot be a default position arrived at in a prejudged manner without any proper consideration of the evidence which was precisely the point the Presidential Panel were making in SM and Qadir (*op cit*). He submitted the evidence required to show that someone is engaged in fraud requires very careful consideration. The judge at [37] found that because the Appellant sat his ETS test at the London College of Media and Technology, he cannot provide an explanation innocently. He submitted there was clear evidence the judge is simply not considered material factors and that was the essential problem with the judge's decision and reasons.

#### *Findings and Reasons*

19. I have concluded that the Judge's decision does contain material errors of law in his findings and reasons. As the Judge found at [28] it was a striking feature of the case that the Appellant unusually had taken the trouble to obtain his test files with a view to proving his case. The Appellant provided in his witness statement as to how he came to take the test at the London College of Media and Technology and as to the procedure he underwent is also particularly detailed, running from [15] to [24].
20. I set out the judge's material findings below:

*"30. It is important to stand back for a moment to consider the circumstances that the Appellant was facing in 2012. In my*

*view, the Appellant has not been frank with the Tribunal when it comes to state that his purpose was to achieve a level of education that would enable him to get a good job in Bangladesh. I do not accept as being credible his assertion that his parents had borrowed heavily to fund his studies and that they are now in difficulty. On any view by 2012 he had, as he agreed the necessary qualifications to obtain work in Bangladesh. In my view, he had already decided he wanted to stay in the UK and study will be the route to facilitate that...*

*35. It follows therefore that anybody approaching that system would if willing be offered the opportunity for a fraudulent test. It follows therefore that I am satisfied on the evidence that in this case the Appellant was fully aware of what was going on and agreed to the fraudulent activity. In my view the supporting evidence for that comes from the fact that the Appellant was not genuinely committed to his studies in the sense that he was seeking to reach a level of qualification that would enable him to secure better employment. He had already achieved that level, and in my view all of this continuing education was with a view to facilitating his remaining in the UK. In my view he had every motive to want to cheat at that stage to facilitate a further application for leave to remain.*

*36. I take into account his character and conduct, in particular that notwithstanding that with the level of education reached he is currently working as a Boots sales operative. In my view, the Appellant at all stages was seeking to facilitate the means for remaining in the UK."*

21. I find that the Judge, in making his findings at [30]-[36] did not follow the guidance set out in SM & Qadir (*op cit*) in particular:
  - 21.1. there is no assessment of the Appellant's performance in cross-examination. Whilst at [30] he makes an adverse credibility finding, on the basis that the Appellant had, by 2012 achieved sufficient education so as to be able to obtain employment in Bangladesh, this is speculative, in the absence of any evidence as to what qualifications would have been required to obtain employment and fails to take account of the fact that, whilst the Appellant had obtained a Diploma in Business Administration in 2009 he then attempted to study an ACCA course but struggled with this but then went on, having taken the TOEIC test, to obtain a post-graduate diploma in Banking and Finance and a Master of Science in Tourism and Hospitality. Thus it was at least arguable that the Appellant had a lot to lose by being dishonest;
  - 21.2. there is no assessment of the Appellant's proficiency in English, both at the hearing and in light of the fact that the Appellant successfully passed the IELTS test prior to coming to the UK in July 2007 and had successfully obtained further post graduate qualifications once in the UK. These are clearly considerations relevant not only to assessing whether his

proficiency is commensurate with his TOEIC score and to the question of whether it would have been unnecessary or illogical for him to have cheated.

- 21.3. Whilst the fact that, despite his education, the Appellant is working as a sales operative in Boots is a factor to which the Judge was entitled to attach weight, I do not find in itself that it is sufficient to make an adverse finding and that it does not reflect the entirety of his character and conduct in light of the detailed witness statement. Thus I find more in the way of reasoning was required in this respect.
- 21.4. The primary focus of the Judge's findings was, unsurprisingly, that widespread fraud had been perpetrated by the London College of Media and Technology: [31]-[35] refer. Whilst this was clearly a finding open to him on the evidence before him, this does not necessarily mean that the Appellant was party to that fraud. I find, in light of the fact that the Appellant took the trouble to obtain copies of the audio files of the test, which were not of his voice, nor, he states at [32]-[35] of his witness statement did they reflect the content of the test he took and that the wrote back to ETS asking for them to provide him with detailed data that would conclusively show that the recordings were from his test and not someone else's but they were unable to assist further, that the Judge did not properly take account of this evidence in making his adverse finding against the Appellant.
22. I do not find that Ground 3 of the grounds of appeal takes matters any further, as it would not have been possible for the Appellant to succeed in his appeal on this basis. However, for the reasons set out above, I find material errors of law in the decision of First tier Tribunal Judge Paul on the primary issue of whether or not the Appellant utilised a proxy test taker in respect of his ETS test taken on 22 and 24 August 2012.

### **Notice of Decision**

The appeal is allowed to the extent that it is remitted back to the First tier Tribunal at Taylor House for a hearing *de novo*.

No anonymity direction is made.

Signed Rebecca Chapman

Date 4 March 2019

Deputy Upper Tribunal Judge Chapman