



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/15872/2019 (V)

**THE IMMIGRATION ACTS**

Heard at Field House (via Skype for Business)  
On 23<sup>rd</sup> November 2020

Decision & Reasons Promulgated  
On 25<sup>th</sup> February 2021

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR MD AMRAN HOSSAN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr S Karim instructed by Liberty Legal Solicitors

For the Respondent: Miss J Isherwood (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

1. The appellant appealed with permission against the determination of First-tier Tribunal Judge Row promulgated on 19<sup>th</sup> November 2019 in which he dismissed the appellant's appeal against the respondent's decision of 11<sup>th</sup> September 2019.
2. The appellant is a national of Bangladesh born on 2<sup>nd</sup> August 1989 and he entered the United Kingdom on 9<sup>th</sup> February 2009 with a student visa. Further grants of leave as a student were made until 20<sup>th</sup> October 2014. One of the applications was made on 25<sup>th</sup> January 2013. On 19<sup>th</sup> October 2014 the appellant applied for leave not as a

student but on the basis of his private life. This was refused on 23<sup>rd</sup> July 2015 because the appellant did not meet the suitability criteria; in his application for leave on 25<sup>th</sup> January 2013, he had used a TOEIC certificate from ETS and the respondent had evidence that the certificate had been fraudulently obtained by a proxy test-taker. He was thus refused under S-LTR.1.1 – 3.1 of the Immigration Rules. The second reason for refusal was that the appellant did not in any event meet the criteria for leave to remain on the basis of his private life. There were no circumstances outside the Immigration Rules which would enable him to succeed under Article 8 of the European Convention on Human Rights. The appellant did not challenge that decision.

3. Further submissions were made on the appellant's behalf on 27<sup>th</sup> May 2016 but rejected. He made a further application for leave to remain on the basis of his private life and this application was refused on 12<sup>th</sup> October 2017; he appealed, and his appeal was dismissed by the First-tier Tribunal after a hearing on 19<sup>th</sup> October 2018. The appellant then sought leave to appeal to the Upper Tribunal and his application was dismissed on 25<sup>th</sup> January 2019. That decision was subject to judicial review. On 11<sup>th</sup> July 2019 the High Court quashed the decisions of the First-tier and Upper Tribunal because the decision of 12<sup>th</sup> October 2017 only gave him an out of country right of appeal and thus neither the First-tier Tribunal nor the Upper Tribunal had jurisdiction.
4. The respondent reconsidered the application of 1<sup>st</sup> August 2016 and on 11<sup>th</sup> September 2019 refused the application granting an in-country right of appeal. That decision was appealed and came before First-tier Tribunal Judge Row and was dismissed. The determination was the subject of the challenge before me.
5. The lengthy grounds for permission to appeal set out the following:

**Ground 1: The First-tier Tribunal Judge failed to apply the approach to the burden and standard of proof mandated by the Upper Tribunal in SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC).**

In SM and Qadir, the Upper Tribunal concluded:

- a. The respondent bore the “evidential burden” of demonstrating that there is a case to answer, after which the appellant bears the burden of raising an “innocent explanation”. Where an “innocent explanation” is produced, the burden shifts back to the respondent.
- b. The generic evidence, taken with the look-up tool evidence, was sufficient to discharge the respondent's evidential burden albeit by a “*narrow margin*” (paragraph 68).
- c. What was required for an appellant to raise an “innocent explanation” such as to return the burden to the respondent, was for them to raise a factual account of having taken the test themselves that met the

“minimum level of plausibility” (applying **Shen (Paper Appeals: Proving Dishonesty) [2006]**).

The First-tier Tribunal in the present case failed entirely to apply the stepped approach in **SM and Qadir**, treating the respondent’s evidence as if it were sufficient to discharge the legal burden of proof rather than merely the *evidential* burden requiring a response. In effect the judge required the appellant to discharge the legal burden of proof.

**Ground 2: The judge erred by reversing the burden of proof**

The burden on the appellant was merely to give a plausible, innocent explanation that the appellant sat for his ETS (TOEIC) exam. The appellant gave his oral evidence in good English as said by the judge (at paragraph 29). In his witness statement, produced in the case bundle, there were various documents supporting his appeal including his previous English language certificates from IELTS prior to his arrival, his academic achievements in the UK, his letters from past employer and tutor who unequivocally confirmed the appellant’s proficiency in English at the relevant time.

The appellant gave a detailed account of his journey from home to the test centre and produced a bank statement which showed a payment for a rail ticket in order to travel to the test centre on the day of the test. There was clear evidence the appellant did attend the centre on the day of the test.

The respondent produced a statement from Professor French, a Home Office report ‘Project Façade – criminal enquiry into abuse of the TOEIC Queens’ College, London, a statement from Mr Anwar Tariq dated 14 November 2019 and also relied on the generic statements of Collings, Millington et al and a certificate of the appellant’s test result.

The judge failed to address the report of the APPG on TOEIC dated 19<sup>th</sup> July 2019, which highlighted fundamental flaws in the evidence produced by the ETS. This stated that the Home Office had relied extensively on the 2016 report by Professor Peter French and that in evidence to the APPG, Professor French stressed that his conclusion was only correct ‘if the results the ETS had given the Home Office were correct’. “The cornerstone of Government position undermined by expert who wrote it (sic)”.

Professor French in evidence to the APPG stressed his conclusions were only correct if the result that ETS had given to the Home Office were correct.

The appellant was merely required to raise an ‘innocent explanation’, such as to return the burden to the respondent by giving a factual account. His explanation together with the substantial evidence that he was present at the test centre on the day of the test and sat for himself should be accepted against the generic evidence which was highly questionable and the legal burden on the respondent could not be discharged.

The respondent did not rebut the appellant's innocent explanation and:

*"The FTTJ based on the project façade (sic), which was included in the Respondent's bundle, drew a legal presumption that even if the Appellant was present at the test centre on the day in question it did not necessary (sic) mean that he took the test. Such presumption of the FTTJ is completely erroneous."*

and

*"In the contrary (sic) the Appellant gave satisfactory explanation (sic) with evidence about his TOEIC exam"*.

Despite all the facts the judge still failed to shift the legal burden on the respondent and set the appellant an impossible task and required him to prove his innocence thus reversing the burden of proof.

**Ground 3** The judge erred in failing to give reasons for his conclusions on material matters.

The judge rejected the appellant's factual account largely in reliance on the respondent's evidence contrary to the approach in **SM and Qadir**. In doing so he said at paragraph 35 that:

*"There are two matters which go against the appellant. The first is that the evidence produced by the respondent is that 80% of the tests on that day were taken by proxy. There was insufficient evidence that the rest were taken by proxy, but they were cancelled because of the evidence of irregularity on the day"*.

And at paragraph 36:

*"If the appellant took this test, he must have been about the only one who did. It is difficult to see in what circumstances Queens College would organize a cheating session unless all the participants in the test were involved in it. An innocent person who was taking the test would realise what was going on and might object"*.

By asserting the above remark, the judge was ultimately saying that all the tests taken at Queens' College were taken by proxy. But the ETS did not make all the tests invalid because some of them were only questionable.

It was argued that the Appellant had been taught in English in Bangladesh and education establishments in the UK and the judge accepted this as a valid argument but said that even if the appellant spoke reasonable English at the time this did not mean that he took the test. At paragraph 34 the judge accepted that the appellant speaks good English now but said this did not mean he could speak it to the required standard in 2012; thus, the judge was inconsistent in his reasoning.

The judge seemed to have ignored or did not give due regard to the evidence submitted in the appellant's bundle which included the IELTS certificate obtained in 2008 with 5.5 in speaking, his academic certificates obtained in Bangladesh, and reference letters from a tutor and employer. Although some of his academic certificates were awarded after 2012, they were taught throughout the years before 2012 and showed the appellant had a reasonable level of skill to be able to pass an ETS test without the help of a proxy.

At paragraph 38 to 40 the judge heavily undermined the appellant's innocent explanation because he did not get in touch with his college or ETS demanding an explanation. The appellant did not have a right of appeal to challenge the respondent's decisions of 25<sup>th</sup> July 2014 or the 1<sup>st</sup> August 2016. The judge imposed a heavy burden on the appellant to discharge his duty to give an explanation whereas the appellant only had to discharge this burden with minimum plausibility.

The judge did not record any questions put in cross-examination and did not record anywhere any responses said to lack clarity.

The judge did not record the highly detailed account given by the appellant in his witness statement of the details of taking the test, including its content. The judge failed to take into account relevant material or failed to give adequate reasons for finding that the appellant's account was vague.

**Ground 4 the judge failed to apply the approach mandated in the Court of Appeal in *Majumder v the Secretary of State for the Home Department* [2016] EWCA 11 which held at paragraph 18:**

*"... The UT accepted (at [69]) the submission on behalf of the Secretary of State, that in considering an allegation of dishonesty the relevant factors included the following: what the person accused had to gain from being dishonest; what he had to lose; what is known about his character; the cultural environment in which he operated; how the individual accused of dishonesty performed under cross-examination, and whether the Tribunal's assessment of that person's English language proficiency is commensurate with his or her TOEIC scores; and whether his or her academic achievements are such that it was unnecessary or illogical for them to have cheated. There was no criticism in this court by Mr Kovats of that approach."*

The judge failed to apply that approach and failed to consider what was known about the appellant's character, failed to give any consideration as to whether the appellant's English was of a standard commensurate with the results he received, gave no consideration to what he would lose from cheating which was on its face unnecessary, and gave no consideration at all to the appellant's academic history.

6. Following the grant of permission and directions further written submissions were supplied by Michael West. Although at the hearing Mr Karim described these as 'expanding' on the grounds for which permission was granted, I note, in particular,

that it is asserted that the judge failed to have regard that the low evidential threshold on the appellant was “not the civil standard of balance of probabilities”, that the judge had reached “a perverse conclusion in the face of overwhelming evidence capable of amounting to an innocent explanation”, and the submissions identified that the APPG highlighted the serious deficiencies in the evidence used by the Secretary of State to condemn the test-takers.

7. It was asserted the judge arguably erred in overreliance on the generic evidence from the Project Façade. None of the generic evidence in the Project Façade report was relevant to the actual date the Appellant took the test on 12<sup>th</sup> December 2012. It was clear that from the generic evidence different methods were used when evidence was uncovered of the mode for using proxy test-takers including “remote testing” (i.e., when a real candidate does not attend) but also “pilots” being used i.e., when the real candidate does attend but a pilot takes the exam in their stead.
8. Again, it was repeated that the findings in respect of the appellant’s evidence at 31 was perverse. The judge used the fact that the appellant first failed a TOEIC test on 21<sup>st</sup> November 2012 to conclude that he may have wished to ensure that he passed but the look up tool did not reflect the fact that the appellant failed; his speaking test which indicated he scored 180, that was a pass and the appellant, and the judge may have become confused if the appellant failed his writing test on that day scoring 150. This point had been adversely held against the appellant when he had not actually failed his speaking test on the 21<sup>st</sup> November, he only failed overall due to his writing test and the appellant appears to have mistakenly intimated that he failed the speaking part.
9. The decision should be set aside.
10. In the hearing before me, Mr Karim submitted that the judge failed to apply the three stage approach as required. The appellant was not required to “rebut” but to provide an innocent explanation. The judge had not taken into account the relevant evidence such as the appellant’s ability to speak English, his studies and his diplomas and the fact that a tutor had given a reference stating he had taught him.
11. **SM and Qadir** particularly at paragraph 69, set out an inexhaustive array of factors to be considered and which the judge failed to address. The judge had only approached the evidence in a piecemeal fashion and had failed to consider the extensive evidence. There were inadequate findings from the judge and the reference at paragraph 36, such that the appellant was the only one who attended the centre was contrary to the evidence before the judge as disclosed by page 3 of the Project Façade report which demonstrated that there was evidence of remote testing seen. The academic achievements of the appellant were not appreciated, and it was illogical to draw the conclusion that he could not speak English. Another factor was what was known about the character and the conduct of the appellant which was not acknowledged despite being evidence from the cricket club showing he had a reasonable command of the English language. There was a wholesale failure to grapple with the evidence.

12. The lookup tool showed that the previous test was classified as invalid which suggested that a proxy would have taken and failed the test which was not credible. Mr Karim confirmed that the appellant took all the components of the test on the second occasion. In essence this called into the question the reliability of all of the evidence.
13. As could be seen from the Court of Appeal's judgment in **SSHD v Shehzad [2016] EWCA Civ 615**, it was only where there were invalid results where there was a detection of a proxy. This undermined the judge's conclusion at paragraphs 35 and 36 that the appellant was the only person who genuinely took the test.
14. Mr Karim then referred to the APPG report and although Mr Karim argued that it should be considered, it was established that this was not before the First-tier Tribunal, the report is dated 18<sup>th</sup> July 2019 and the appellant has been represented throughout.
15. Miss Isherwood relied on the written submissions of Mr Clarke and also submitted that there was no application to put to the APPG report before this Tribunal. Many of the grounds of submissions relied on the fact that the appellant could speak English at the time but that did not take account of **MA (ETS- TOEIC testing) [2016] UKUT 450 (IAC)** at paragraph 57 and there were a lot of reasons why people cheated even if they were proficient in English.
16. Looking at the structure of the decision it was clear that the judge had taken into account **SM and Qadir** and for example, paragraph 41 described the prima facie case to answer. Miss Isherwood referred to paragraphs 15 and 16 where the judge had set out the burden and standard of proof and then gone through the evidence. The evidence had been covered in extensive detail. It was clear from paragraph 20 that the judge accepted that the generic evidence provided a prima facie case and the ball passed to the appellant which the judge then fully took into account. He noted at paragraph 25 that the appellant stated he had taken the test and remarked at paragraph 39 that there was a lack of action from the appellant albeit that he was legally represented throughout. The judge at paragraph 30 considered the clear evidence that he attended the centre.
17. At paragraph 32 it was not the case that the judge ignored the letter from the teacher or the cricket team and it was clear that there was an acknowledgement of that evidence. There may be many reasons why the appellant took the test, and the judge factored this in. At paragraph 37 the judge was persuaded that there was no action of the appellant to rectify the issue albeit that he was aware in 2014 that he had been considered to have cheated.
18. I was urged to uphold the determination.

### **Analysis**

19. I question whether the grounds of appeal, together with the further submissions, are in fact based on a cut and paste undertaking from a template or other grounds of

appeal in other cases. I say this because ground 2, which asserted a reversal of the burden of proof, refers to the First-tier Tribunal Judge failing to address the report of the APPG on TOEIC dated 19<sup>th</sup> July 2019. Much was made of this document in the grounds of appeal on which permission was granted. The permission grant dated 26<sup>th</sup> February 2020 specifically referred to ground 2 and stated as follows:

*“The grounds in support of the (in time) application first argued that the Judge failed to apply a final legal burden upon the respondent to prove that the appellant used a proxy as alleged. This argument would have no merit by itself given the reference at [41] to correct the burden. Nonetheless the individual points of complaint contained in the second and third grounds create an arguable case that the judge did not actually apply a burden. The Judge attaches such great weight to the respondent’s ‘generic’ evidence that, at this permission stage at least, I cannot see how any appellant could realistically have overcome it. The Judge did find two specific matters undermined credibility, but the logical difficulties set out in the grounds are arguable. The grounds therefore cross the threshold of arguability, notwithstanding that they challenge findings of fact. Any such error would likely be material, the issue of suitability being at the centre of the appeal.*”

20. As Mr Karim acknowledged at the hearing before the Upper Tribunal (I note there was no indication that Mr Karim settled the grounds) the APPG on TOEIC document was not before the First-tier Tribunal. There was no formal application to admit it. Even if an application had been made under **Ladd v Marshall** [1954] 1 WLR 1489, principles it would not have succeeded. The appellant was legally represented at all points and the document, according to the grounds of appeal, was published on 19<sup>th</sup> July 2019 well before the hearing before the First-tier Tribunal on 15<sup>th</sup> November 2019 and the decision being promulgated four days later.
21. Similarly, reliance on a document, even if it is in the public domain should be specifically identified and drawn to the attention of the judge at the First-tier Tribunal. As held in **BH (policies/information: SOS’s duties) Iraq** [2020] UKUT 189 (IAC) despite their experience, judges in the Immigration and Asylum Chamber cannot reasonably be expected to possess a comprehensive knowledge of each and every policy of the Secretary of State in the immigration field, even less each and every document at large and in the public domain on which the appellant wishes to rely. By analogy reports said to be in the public domain should be brought to the attention of the judge by the party wishing to rely upon it.
22. Following the grant of permission on 26<sup>th</sup> February 2020, directions were issued in the light of the COVID pandemic to the effect that the parties should comment on whether the appeal was to be determined on the papers and invited to make further submissions thereon on 7<sup>th</sup> May 2020. In response to those directions thirteen pages of further submissions were submitted by Michael West of Counsel. In response to my enquiry, according to Mr Karim these grounds “expanded” on the grounds within the challenge but did not raise fresh grounds. I can see that the challenge in relation to the burden and standard of proof has been raised previously in the grounds on which permission was granted, but at paragraph 16 onwards there is a



challenge in relation to perversity and there is further reference to the APPG report which, as I have said, was not before the FtT. The further submissions set out large sections of that report to support the argument that the judge erred in the overreliance upon generic evidence concerning TOEIC.

23. A further argument raised in the further submissions was that none of the generic evidence in the Project Façade report was relevant to the actual date the appellant took the test (on the 12<sup>th</sup> December 2012) (paragraph 43 of the further submissions).
24. Perversity was not specifically raised in the grounds granted permission. Perversity has a very high threshold. The APPG report was not before the judge.
25. I turn to address the grounds on which permission was actually granted.
26. Ground 1, that the judge failed to apply the approach to the burden and standard of proof as set out in **SM and Qadir**.
27. The approach in **SM and Qadir** is set out at paragraph 57:

*“57. Both the applicable principles and the jurisprudence were reviewed by this Tribunal in its recent decision in Muhandiramge (Section S-LTR.1.7) [2015] UKUT 00675 (IAC), at [9] – [11]:*

- ‘9. Burdens and standard of proof have progressively, and almost with stealth, become an established feature of decision making in the field of immigration and asylum law. Their emergence may properly be described as organic. They have featured particularly in cases where it is alleged by the Secretary of State that the applicant has engaged in deception or dishonesty with the result that the application in question should be refused. This discrete line of authority is not recent, being traceable to the decision of the Immigration Appeal Tribunal in Olufosoye [1992] IMM AR 141. In tribunal jurisprudence, the origins of this particular lineage can be traced to the decision of the House of Lords in R v Secretary of State for the Home Department, ex parte Khawaja [1984] AC 74, which concerned the inter-related issues of procuring entry to the United Kingdom by deception and precedent fact in the Secretary of State's ensuing decision making process. It is well established that in such cases the burden of proof rests on the Secretary of State and the standard of proof belongs to the higher end of the balance of probabilities spectrum.*
10. *One of the more recent reported decisions belonging to this stable is that of Shen (Paper Appeals: Proving Dishonesty) [2014] UKUT 236 (IAC). This decision is illustrative of the moderately complex exercise required of tribunals from time to time. Here the Upper Tribunal held, in harmony with established principle, that in certain contexts the evidential pendulum swings three times and in three different directions:*

- (a) *First, where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue: for example, by producing the completed application which is prima facie deceitful in some material fashion.*
- (b) *The spotlight thereby switches to the applicant. If he discharges the burden - again, an evidential one - of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.*
- (c) *Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's prima facie innocent explanation is to be rejected.*

*A veritable burden of proof boomerang!*

11. *Shen is preceded by a lengthy line of Tribunal jurisprudence to this effect: see JC (Part 9 HC 395 - Burden of Proof) China [2007] UKAIT 00027, at [10]; MZ (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 919, at [25]; Mumu (Paragraph 320; Article 8; Scope) [2012] UKUT 143 (IAC); and Kareem (Proxy marriages - EU law) [2014] UKUT 24 (IAC). In short, in cases of alleged deceit, the legal rules are well settled.'*

In this context, we highlight what was stated at [11] of Shen:

*'At the end of the day the SSHD bears the burden of proof. This is a proposition which is uncontroversial and has been confirmed on many occasions.'*

We record here the submission of Mr Biggs on behalf of the second Appellant, with which we agree, that, doctrinally, a legal burden of proof does not 'shift'."

28. The grounds advanced that the judge failed entirely to apply the stepped approach in SM and Qadir. The judge at paragraph 15 made a general statement as to the appellant fulfilling the requirements of the immigration rules but showed at paragraph 16 that he was aware that where the respondent alleged fraud it is for the respondent to demonstrate that on the balance of probabilities.
29. The judge demonstrated in the determination that he was clearly aware that there was a shifting burden of proof and careful reading of the decision discloses a reference to the use of the concept of 'a prima facie case'. This is language that would not have been used had the judge been unaware of the shifting burden of evidential proof.

30. In his opening paragraph, under ‘consideration of evidence and findings’ at [20] the judge referred to the ‘generic statements of Collings, Millington et al used in these cases and a certificate of the appellant’s test results’. This shows the judge was aware of the first step under **SM and Qadir**.
31. Indeed, the written submissions correctly pointed out that at paragraph 21 that the judge stated:
- “It is well-established case law that these generic statements together with the relevant results of test certificates of the appellant provide a prima facie case that the test was taken by proxy. The appellant can rebut this with evidence.”*
32. Mr Karim took issue with the use of the word “rebut” but this merely means “remove the effect of the other sides facts or arguments”. This can no doubt include reference to the evidential burden. The judge was clearly aware having applied the first step, that the evidential burden then shifted to the appellant.
33. The judge did proceed to consider the appellant’s explanation and evidence in depth from paragraph 25 onwards. Rather than setting out self-directions in law the judge simply applied them. His approach thus also accorded with the second stage of the approach to burden and standard of proof because as stated at the second stage in **SM and Qadir** “the spotlight therefore switches to the applicant. If he discharges the burden – again an evidential one – of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs”.
34. The judge at paragraph 25 took into account that the appellant gave evidence that he had taken the test himself and that he had not used a proxy. The judge clearly considered the appellant’s evidence.
35. Finally, at paragraph 41 in particular the judge states:
- “There is a prima facie case for the appellant to answer. The appellant can rebut this with evidence. On the evidence before me I do not find that he has. I find the respondent has established on the balance of probabilities that the appellant used a proxy test and to obtain the certificate on 12<sup>th</sup> December 2012”.*
36. This identifies that the judge was aware of the shifting burden of proof and that the ultimate responsibility lay in the respondent when discharging the legal burden of proof.
37. The judge between paragraphs 22 and 24 referred to the additional evidence which was relied upon by the respondent and that this evidence was referred to at that stage in the determination does not undermine the validity of the judge’s overall approach. Mr Karim affirmed that the analysis of the relevant facts could be taken under stage 2 or stage 3.
38. It is not apparent from a careful reading of the determination that the judge failed to apply the approach of **SM and Qadir**.

39. Turning to ground 2, it was asserted that the judge reversed the burden of proof. Much of that ground relied on the APPG report. I have already pointed out that the APPG report was not before the judge. According to the further written grounds the judge applied the wrong standard of proof. The judge made clear reference to the correct standard of proof at the outset of his determination at paragraph 16.

40. Having referred to the evidence on which the respondent relied, at paragraphs 20 to 24, the judge went on to acknowledge that the appellant's plausible, innocent explanation. This, together with paragraph 41, does not indicate that the judge reversed the burden of proof. Indeed, the appellant's explanation is set out at paragraph 25 where the judge states the appellant gave evidence that he had taken the test himself and had not used a proxy. The judge stated:

*"25. The appellant gave evidence that he had taken the test himself. He had not used a proxy. He had failed a test at Queensway College the month before. He re-sat the test. He travelled from Watford to the test centre to take the test. He produced a bank statement which showed a payment for a rail ticket in order to travel there that day. He gave a detailed account of the journey and of the test procedure. He said that the certificate issued bore his photograph which had been taken at the test centre on the day of the test. He was not able to produce the certificate as it had been sent to the respondent."*

41. Reference was made in the further submissions to the "minimum level of plausibility" but as identified in **Shehzad** at paragraph 3, the civil standard of proof is just that, the balance of probabilities.

*"3...The approach in Re B (Children) [2008] UKHL 35, [2009] 1 AC 11 to the standard of proof required to establish that a child "is likely to suffer significant harm" under section 31(2) of the Children Act 1989 is of relevance in the present context. It was held in that case that the standard required is the balance of probabilities. Baroness Hale stated (at [70]) that "neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies."*

42. The question as to whether it is more likely than not that the balance of probabilities is fulfilled will rest on the assessment of the evidence. The weighing of that evidence is a matter for the judge, and in this case, he went through a careful analysis of all the evidence and ultimately rejected the appellant's explanation. That does not mean he has reversed the burden of proof as shown by paragraph 41 of the determination.

43. The grounds state that the "respondent's generic evidence" is "highly questionable at paragraph 13 and indeed that is repeated in the further submissions but **SM and Qadir** accepted that the generic evidence was sufficient albeit just.

44. From a reading of the decision, it cannot be argued that the judge set the appellant an impossible task of requiring him to prove he is innocent by reversing the burden of proof. The judge as can be seen took into account all of the evidence and was

cognisant of the relevant facts and spelt out at paragraph 41 that “*the respondent* has established on the balance of probabilities that the appellant used a proxy to sit the test and obtain the certificate”. That clearly identifies that the judge was aware that the ultimate legal burden of proof rests with the respondent.

45. The grounds in effect are an attempt to reargue the evidence.
46. Ground 3 asserts that the judge failed to give reasons for his conclusions on material matters. There was criticism in the further submissions that the judge had not considered all relevant evidence. The judge, however, acknowledged the substantial evidence which had been produced by the appellant and indeed engaged with that evidence.
47. The points in the written further submissions also criticise the weight the judge gave to parts of the evidence for example the Project Façade report and the appellant’s own evidence and material. The approach was construed as perverse. As the Court of Appeal said at [18] of Herrera v SSHD [2018] EWCA Civ 412, it is necessary to guard against the temptation to characterise as errors of law what are in reality no more than disagreements about the weight to be given to different factors. The judge had the benefit of seeing the appellant give evidence first-hand and McCombe LJ in Lowe v SSHD [2021] EWCA 62, at paragraph 25, explains the caution to be exercised by appellate courts in interfering with evaluative decisions of first instance judges who will have had the ‘whole sea of evidence before them’ and the first-hand experience of hearing the appellant give evidence.
48. From paragraph 25 onwards, the judge analysed the evidence put forward by the appellant in his “innocent explanation” comprehensively and acknowledged that the appellant had produced a bank statement which showed a payment for a rail ticket for an order to travel to the test centre on the day. The judge noted that the appellant spoke English in Bangladesh, had passed an English language test when he was there, had studied in the United Kingdom for an HND and various diplomas and had taken an MBA at Sunderland University and that all the college courses were in English. This was set out at paragraph 26.
49. The judge also identified that the appellant had produced a letter from a former tutor confirming that the appellant spoke English well and identified that the appellant gave evidence at the hearing in good English. The judge clearly sets out the appellant’s case at paragraph 30, having reviewed that evidence. Only then did the judge proceed to bring the strands of evidence together; the judge stated that

*“The evidence produced by the respondent indicated that the candidates for tests on other days were present when others took the test for them. Candidates would have had to attend the test centre to produce their identification.[31]”*

The judge thus accepted that the appellant would have had to have made the journey on that day and he would know the way there and he would know what happened at the test centre but that particular finding of the judge at paragraph 36 was criticised when saying that

*“If the appellant is tested he must have been about the only one who did”.*

First this statement does not categorically state that the appellant was the *only* one because of the use of the word “about”. Secondly it is not made out that it is a fundamental misreading of the Project Façade report. That in fact stated, “evidence of remote testing was *seen*”. Paragraph 4 of the Project Façade report, specifically notes that different methods were used when evidence was uncovered of the mode for using proxy test-takers *including* “remote testing” (i.e. when the real candidate does not attend) and “but also ‘pilots’ being used i.e. where the real candidate does attend but a pilot takes exam in their stead.” This could be read either way that some of the candidates attended and some of them did not but logged on remotely. It was open to the judge to make the comments that he did in this regard and to find that it was logically feasible for the appellant to indeed have attended on that day.

50. There was criticism of the judge’s findings at paragraph 35 and 36 by reliance on **Shehzad** in that only where proxies were used could a certificate be classified as invalid and that not all of the certificates were found to be invalid and some were questionable. In other words, the appellant may have been one of the ‘questionable’ ones. That criticism would appear to ignore the fact that there was a ‘look up tool’ which specifically declared the appellant’s test to be invalid along with a very significant statistical figure of 80% of those who took the test on that day being declared to have used proxies. Nothing in **Shehzad** undermines the judge’s finding in that regard. Those are the figures of ETS.
51. It is clear that the judge did not ignore the IELTS certificates obtained in 2008 or the academic certificates obtained as these were specifically identified at paragraph 26. As noted in the grounds, some of the appellant’s academic certificates were awarded after 2012. It was submitted that “all these evidences (sic) could sufficiently prove that the appellant had a reasonable level of English language skill to pass an ETS test without the help of a proxy test-taker”. That may be the conclusion by the author of the grounds, but it was for the judge to assess the evidence overall which he did.
52. Mr Karim also ran an argument that the previous test of 21<sup>st</sup> November was classified as invalid, and that it would be ludicrous to suggest that a proxy would have sat a test only to fail it. That was not an argument that was run before the First-tier Tribunal but moreover, the judge, as I pointed out, proceeded on the evidence that the appellant *himself* put forward that *he* failed the exam. As Mr Karim identified, the appellant was to take all of the components of the test and indeed failed the writing test on 21<sup>st</sup> November 2012 but achieved 30 points higher, 180, not three weeks later. It was entirely open to the judge to find that the appellant had the incentive to cheat because of time pressures.
53. The argument that it was absurd for a proxy to have taken a test previously and failed does not alter the spotlight from the later test under scrutiny. As pointed out by the judge, it was the appellant’s *own* evidence and not just the evidence of the ETS, that the appellant had taken a test and failed it on 21<sup>st</sup> November 2012 and thus the appellant “*was under pressure to pass the test to enable him to make his application of*

23<sup>rd</sup> January 2012” (in fact the leave expired on 28<sup>th</sup> January 2013 but I do not find this slip material). In the further submissions in writing, it was detailed (as it was not in the grounds given permission) that the appellant had not ‘failed’ a speaking test in November; it was submitted that at the hearing the appellant was confused but that does not mean that the judge was not entitled or erred when relying on his oral evidence. The fact is that the appellant did fail even if it were only the writing element. He needed to pass both sections. Secondly the speaking part of the test in November scored 180 whereas it appears the writing test scored 150. From the lookup tool, it appears the ETS description ‘invalid’ was ascribed as a composite description of the status. In other words, it is not necessarily absurd for ‘the proxy to have failed a speaking test’ because it appears whoever took the test did not fail; that test was classified as invalid. The criticism proceeds on the basis that the same person took both the writing and the speaking test. The writing test element in November however only scored 150 and notwithstanding was a fail, and, the applicant needed to pass both sections.

54. As the judge recorded with regard the appellant “He was under pressure to pass the test to enable him to make his application...If he failed, his leave would have run out”. It was submitted to me at the hearing that six weeks was sufficient time within which to take another test, but I consider that these are arguments which should have been raised before the judge at the First-tier Tribunal and in any event without merit. There were clearly only three weeks between the tests taken and failed on 21<sup>st</sup> November 2012 and the retake on 12<sup>th</sup> December 2012 and immediately prior to the Christmas vacation. The visa expired in January the following year and within a matter of weeks of the first failure. The judge clearly found and was entitled to find that to be a short period of time. The judge’s reasoning was not inadequate on this basis.
55. Notwithstanding, the period of the test dates was not lost on the judge, but moreover he found, at paragraph 33, for a cogent reason that the appellant “may simply have wished to ensure that he passed”. The judge was entitled to make that finding.
56. The grounds also submit that the appellant did not have a right of appeal to challenge the respondent’s decisions dated 25<sup>th</sup> July 2014 or 1<sup>st</sup> August 2016. The grounds also criticised the judge’s analysis of the failure of the appellant to get in touch with Queens’ College or ETS prior to 9<sup>th</sup> November 2019 and criticised the weight the judge attached to this failure.
57. The point made by the judge in context, is that the appellant was fully represented throughout but on receipt of the refusal letters did not, as an intelligent well-educated man, challenge those decisions either by statutory appeal or judicial review or by reference to ETS. That finding was open to the judge.
58. The judge, however, states at paragraph 37

*“the appellant gave evidence that he became aware that there were issues with his certificate before the respondent raised this in the refusal letter of 25 July 2014’. He had applied for a PH.D. course at London Southbank University. He was told that*

*the University would not accept his TOEIC certificate because there were irregularities with it. He made other applications to other establishments all of which were refused for the same reason”.*

And at paragraph 38:

*“An innocent man presented with that allegation [cheating in an exam] would have got in touch with Queensway College immediately to demand an explanation. He would have contacted ETS to seek clarification. He would want to obtain the test results and listen to recordings to see if someone else was speaking on the recording. He would have insisted upon knowing how the results were recorded and how it was known that the recording considered was unequivocally linked to him’...‘The appellant did none of those things”.*

59. Bearing in mind the appellant became aware before 2014 of the difficulties with his certificate, it was entirely open to the judge to state at paragraph 39 that the appellant effectively took no action, even when he received the refusal letter of 25<sup>th</sup> July 2014. If the appellant was unable to appeal it was still open to him to contact ETS and Queensway College and open to him to take a judicial review as he clearly did later. The fact is the refusal was certified as clearly unfounded on 23<sup>rd</sup> July 2015 and there was apparently no challenge to the certification, rather, the appellant waited until May 2016 to make further submissions. The judge noted that the appellant had made an application to the High Court and was legally represented throughout. The judge also noted that the appellant, apparently of good character, was having his applications to study rejected because of the issue around his test certificate.
60. In **The Queen (On the application of) Abbas v the Secretary of State for the Home Department** the court observed that

*‘No steps were taken by the Claimant to obtain the recording’*

and the appellant’s explanation was disbelieved. At paragraph 24 Mr Justice Davis held

*“The Claimant had no sensible explanation for his failure to obtain the voice recording. Mr Malik made the point that it is not for the Claimant to prove his case and that the Secretary of State could also have obtained the recording. That would not have got her very far in the absence of a sample of the Claimant's voice with which to compare it”.*

61. The judge in this instance did consider the appellant’s explanation for the failure to obtain a recording as noted at paragraph 38 and identified that one week before the hearing of the appeal the appellant sent an email to ETS to request information about the test. It was open to the judge to observe that this was a belated attempt to give some explanation for his failure to investigate or challenge the test results in the five years between 23<sup>rd</sup> July 2014 and 15<sup>th</sup> November 2019 and to give weight to it.



62. In response to the criticism that the judge failed to record the oral evidence put to the appellant the decision references the appellant's oral evidence throughout the decision for example as paragraphs 25, 26, 29, 37 and 40. The judge has clearly woven the evidence into the decision and referenced the written evidence throughout.
63. The judge did not impose a heavy burden on the appellant to discharge his duty to give an innocent explanation but merely assessed the evidence and found on balance that the explanation was wanting.
64. The evidence with regards to Queensway College, that is the Project Façade report, is further evidence to that referred to in **SM and Qadir** being the statements of Collings, Millington et al and Professor French. The lookup tool was specific to the appellant was provided. The additional evidence, which was relied on by the respondent, identified at paragraph 22, that 80% of the tests taken on the day the appellant was stated to have taken his test were established as having been taken by a proxy and were invalid. The rest (eleven) were regarded as questionable. That is not an insignificant number of fraudulent tests. The judge also noted at paragraph 23 that between 20<sup>th</sup> March 2012 and 5<sup>th</sup> February 2014, 2,793 tests were taken, and investigations revealed that 1,971 had been taken by proxy and 'the rest were cancelled as being questionable'. Contrary to the grounds, that did, in fact, as the Project Façade report noted, cover the period during which the appellant took the test on 12<sup>th</sup> December 2012. Albeit that the audits occurred on 16<sup>th</sup> April 2013 and 17 September 2013, the evidence nonetheless indicated that ongoing and longstanding fraud had occurred at the college. The judge was fully aware of the dates as per paragraph 23 and was entitled, as he did, to include this report in his assessment of the final legal burden resting on the respondent.
65. In the instant case the tests were either invalid or questionable, that means there were no validated tests at that test centre on the day the appellant was said to have legitimately taken the test, and as stated in **The Queen (On the application of) Abbas v the Secretary of State for the Home Department** [2017] EWHC 78 at paragraph 14 '*it is of evidential significance that there were no apparently genuine candidates on the day in question*'.
66. Ground 4 submits that the judge failed to apply the approach mandated by the Court of Appeal in **Majumder v the Secretary of State for the Home Department** [2016] EWCA Civ 1167 at paragraphs 18, that is all the relevant factors relating to the appellant.
67. I repeat, for convenience, the relevant factors set out in **Majumder** which include
- 'what the person accused had to gain from being dishonest; what he had to lose; what is known about his character; the cultural environment in which he operated; how the individual accused of dishonesty performed under cross-examination, and whether the Tribunal's assessment of that person's English language proficiency is commensurate with his or her TOEIC*

*scores; and whether his or her academic achievements are such that it was unnecessary or illogical for them to have cheated’.*

68. It is not evident that the judge failed to take into account these elements and I refer to the approach and findings of the judge covered above. Not every piece of evidence needs necessarily to be set out in the decision but that said, the judge addressed the salient factors. The judge set out what the accused had to gain (further leave in the UK), and what he had to lose; at paragraph 38 the judge properly notes that exam cheating has very serious consequences. There was no suggestion that the appellant had a history of dishonesty.
69. The judge referred to the appellant’s college background and cricket environment and was aware of his academic achievements in Bangladesh and the UK; that is the cultural environment, in which the appellant operated. The judge specifically referred to the appellant’s academic certificates, his studies in Bangladesh and in the UK, and at paragraph 32, to the evidence that the appellant brought to bear on the case that he had been taught in Bangladesh and in the UK in English.
70. The judge specifically at paragraph 34 noted that the appellant was able to speak good English now. There was no inconsistency in the finding of the judge that the appellant may have been able to speak good English at the hearing but not necessarily in 2012 and, further, the judge found there were many reasons why someone might wish to cheat. There was no indication that the appellant did not bear up under cross-examination and at paragraph 25 the judge noted that he gave a detailed account of the journey and the test procedure. That does not mean that the evidence has to be accepted. However, as the judge noted, the evidence produced showed that candidates engaged in fraud could in fact attend the centre on the day in question. That some operated by ‘remote means’ as identified by the Project Façade report does not undermine the judge’s point.
71. Turning to the assessment of the appellant’s English by the judge; as stated in **Majumder** at paragraph 25, the assertion that the UT erred in failing to have regard to the quality of the respondent’s English at the hearing when concluding that neither of them had cheated in their TOEIC exams went “nowhere.” The Court of Appeal remarked upon the relevance of the passage of time between the date of the test and the hearing.
72. As to the tutor’s reference, there was no indication of the threshold or benchmark set by the tutor, who confirmed that the appellant spoke English well and the judge identified this at paragraph 27.
73. Critically, the judge rightly stated at paragraph 33 that “*even if the appellant spoke reasonable English at the time this does not mean that he took the test*”. It is relevant to note that the test failed by the appellant in November 2012 was a writing test, but it was open to the judge to find the appellant, notwithstanding that he was conversant with English “*may simply have wished to ensure that he passed*”.

74. As set out in **MA (ETS- TOEIC testing)** [2016] UKUT 450 (IAC) at paragraph 57 motive can be difficult to determine and

*“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”.*

75. Many of the points raised in this challenge were in fact answered in **The Queen (On the application of) Abbas v the Secretary of State for the Home Department** by Mr Justice Davis. He reiterated that each case was fact sensitive as to the factors to be considered when assessing whether the Secretary of State had discharged the legal burden in any case (paragraph 26) and as Mr Justice Davis stated at paragraph 27

*“In any event it will be difficult if not impossible for a fact finding tribunal (whether in my position or that of the First Tier Tribunal) to reach clear conclusions as to motive. As the Upper Tribunal observed in MA (supra) ... there may be many reasons why even someone proficient in English may engage in TOEIC fraud. The crucial issue is whether the evidence in a particular case proves to the necessary standard that the individual concerned has knowingly provided a fraudulent TOEIC certificate.”*

Indeed, Mr Justice Davis also referred to the fact that the appellant appeared to be the only person at the hearing centre on the day.

76. I repeat it was held in **Majumder** every case will be fact-sensitive and the outcome determined on the basis of the evidence adduced by the parties. The judge factored into his conclusions, when assessing whether the respondent had discharged the legal burden, his findings following an evaluative assessment of the weight to be given to the evidence. It is not apparent from the determination that the judge failed to take into account all the relevant evidence or erred materially in his approach. At paragraphs 37 to 39, the judge took into account that the appellant in fact knew of the irregularities with his test certificate even before the Secretary of State took issue with it on 25<sup>th</sup> July 2014 because he was told by London Southbank that his TOEIC would not be accepted and still did not take it up with the ETS. It was open to the judge to find it weighed against the appellant that he had done nothing about the allegation of cheating at the time, even by writing to ETS or writing to Queensway College. Additionally, the judge identified that there had been a Project Façade criminal investigation into Queensway College.
77. There must be sound reasoning but in **Lowe v SSHD** [2021] EWCA Civ 62 McCombe LJ at paragraph 29 cited paragraphs 114 and 115 of **Fage UK Ltd. v Chobani UK Ltd.** [2014] EWCA Civ 5 as follows:

*‘At [114] – [115], Lewison LJ explained the caution to be exercised by appellate courts in interfering with evaluative decisions of first instance judges’*

Lewison LJ in particular reasoned

*'In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.'*

78. **Shizad (sufficiency of reasons: set aside)** [2013] UKUT 00085 (IAC) confirms there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, but those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge. A careful reading of the determination under challenge demonstrates that the judge applied the correct legal approach, took full cognizance of material matters and relevant evidence and weighed the evidence properly.
79. On the basis of the findings in relation to the TOEIC certificate, which were sound, it was open to the judge to make the findings he did on Article 8.

*Notice of Decision*

80. I find no material error of law in the First-tier Tribunal determination. The decision shall stand.

No anonymity direction is made.

Signed *Helen Rimington*

Date 23<sup>rd</sup> February 2021

Upper Tribunal Judge Rimington