



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

Appeal Number: IA/00635/2016

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 27<sup>th</sup> July 2017**

**Decision & Reasons  
Promulgated  
On 23<sup>rd</sup> August 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE**

**Between**

**MISS TONG ZHUANG  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Z Malik (Counsel)

For the Respondent: Mr T Melvin (Home Office Presenting Officer)

**DECISION AND REASONS**

1. I make no anonymity order neither party requesting the same and there being nothing apparent in the papers or evidence indicating the need for such an order.

**Introduction**

2. The Appellant is a Chinese national born on 11<sup>th</sup> January 1987. I am not aware of the date of her arrival but some time after she was issued with a student entry clearance valid from 4<sup>th</sup> September 2008 until 31<sup>st</sup> October 2009, and during its currency, she entered the United Kingdom. Leave was

subsequently extended on the same basis until 31<sup>st</sup> January 2014. Shortly before, on 27<sup>th</sup> January 2014, she applied for further leave to remain supporting her application with a TOEIC certificate from Educational Testing Service (ETS) providing the same to her Sponsor to be provided with a Confirmation of Acceptance for Study (CAS). Further leave was then granted until 27<sup>th</sup> October 2014.

3. On 23<sup>rd</sup> September 2014, the Appellant applied for leave to remain as a Tier 2 (General) Migrant. On 14<sup>th</sup> January 2016, the application was refused on the basis that there was significant evidence to conclude that her English language certificate was fraudulently obtained using a proxy test taker. Thus, ETS had cancelled the scores from the tests taken on 1<sup>st</sup> January 2014 at International School of Business Studies.
4. The Appellant appealed on standard unparticularised grounds, asserting that the decision was not in accordance with the Immigration Rules, was unlawful because it was incompatible with her ECHR rights, was not in accordance with the law, and that a discretion should have been exercised differently. The date of lodgement is 29<sup>th</sup> January 2016. The appeal came before Judge Rodger on 31<sup>st</sup> March 2017, when the Appellant attended with her Counsel Mr Raw. No bundle had been served by or on her behalf. Mr Raw told Judge Rodger that he was not going to call the Appellant to give evidence and that the appeal would proceed on submission only. The Respondent relied on her bundle served on 16<sup>th</sup> November 2016 which included a witness statement of Peter Millington, a witness statement of Rebecca Collings, an ETS invalid test analysis document containing the Appellant's details, an ETS SELT source data document. Mr Raw submitted that the documentary evidence submitted by the Respondent in the bundle was insufficient to establish the Respondent's position to the point that there had been no shift in the evidential burden, there was nothing for the Appellant to answer, consequently nothing could flow from the absence of a bundle or the lack of any oral evidence/witness statement.
5. The judge found that the evidence was sufficient to shift the evidential burden of proving, to the standard of the balance of probabilities, that she did not cheat, to the Appellant. The judge found that in the absence of any evidence, there being no bundle and the Appellant not giving any evidence and not being tendered for cross-examination, the Appellant had failed to meet the burden upon her, and dismissed the appeal.
6. Judge Rodger considered the case law of **SM and Qadir v SSHD (ETS - evidence - burden of proof) [2016] UKUT 00229 (IAC)** as well as the earlier case of **R (Garvey) v SSHD (ETS - judicial review) (IJR) [2015] UKUT 327 (IAC)**, **MA (ETS - TOEIC testing) [2016] UKUT 00450 (IAC)**, **Muhandiramge (Section S-LTR1.7) [2015] UKUT 00675 (IAC)**, as well as **SSHD v Shehzad and Chowdhury [2016] EWCA Civ 615**.
7. Judge Rodger found at paragraph 25:

*"I am satisfied that the respondent had sufficient cause to raise the allegation of the certificate being fraudulently obtained and I am satisfied that the Secretary of State's generic evidence, combined with her evidence particular to this appellant, suffices to discharge the evidential burden of proving that the appellant's TOEIC speaking certificate had been procured by dishonesty. The ETS Invalid Tests Analysis makes specific reference to the appellant's details and is an analysis of the ETS SELT Source Data document which is also within the respondent's bundle of documents. The test date said to be 01/01/2014, which is the date on the appellant's TOEIC speaking test certificate and there is a specific reference to the Test being invalid. The generic evidence relied upon by the respondent explains the process by which someone is identified as someone who had sought to obtain leave by deception through use of a fraudulently obtained English language certificate and looking at matters in the round I am satisfied that the respondent has discharged the evidential burden of proving that the certificate was obtained by fraud."*

8. And at Paragraph 26:

*"Save for production of her TOEIC certificates and previous IELTS Test Results and a certificate of a Master of Arts for Marketing and Information dated August 2014, there is an absence of any further evidence adduced by the appellant and she has failed to raise an innocent explanation of any element of the prima facie case of deception established against her. She did not provide a witness statement to confirm that she had sat the test in issue and there was no oral evidence from her to confirm such matters and the respondent were not able to test her case that her certificate had not been obtained fraudulently or in relation to the other documents that she produced via her counsel at the oral hearing. I accept that the appellant has previously been granted Leave to Remain following English speaking tests that have not been raised in issue or as fraudulently obtained. I also acknowledge that her test scores for all four parts of the tests taken in 2014 were extremely high and I accept that she was in possession of a certificate for a Master of Arts from Anglia Ruskin University. However, in the absence of any written or oral evidence from the appellant to confirm her account as to her previous studies and tests obtained and in the absence of any evidence regarding whether she had actually sat the speaking test on 01/01/2014, I was not able to be satisfied that the appellant had raised an innocent explanation or had satisfied me that she had sat the test herself. It follows that there is no further transfer of proof to the Secretary of State. The appellant has provided no explanation for the invalid test result save for broad criticisms of the evidence relied upon by the respondent and the evidence that she is not the sort of person who would use a proxy test taker. I am satisfied that the respondent discharged its initial burden of showing that there was a fraud and that the appellant has failed to provide any persuasive explanation to show that her certificate was not obtained fraudulently. The respondent was not able to test her account made through submissions that she did not need to use a proxy test taker or that she did not do so."*

**Appeal to the Upper Tribunal**

9. The Grounds of Appeal assert that the judge relied merely on the generic evidence of Peter Millington and Rebecca Collings and that it was not

enough because it could not avoid the occurrence of false positives and there was no evidence that there had been any individual consideration of the Appellant's case. Further the fact that the Appellant had provided a number of academic certificates including the satisfaction of other parts of the English language test relating to reading and such like from the same date, and in any event, she had a certificate of Master of Arts from Anglia Ruskin University. In short there was other evidence before the Tribunal, so that the judge was wrong to say there was nothing else and to criticise the Appellant for failing to give testimony. In any event given that there was no transfer of proof to the Appellant it was maintained that there was no need for her to give such evidence.

10. On 9<sup>th</sup> June 2017 Judge Andrew granted permission on the basis of the ground that the generic statements were not supported by any evidence referring specifically to the Appellant and accordingly there had been no shift of the evidential burden.
11. In a rule 14 response the Secretary of State reminds that her bundle contains evidence specific to the Appellant at documents B and C, and relied on the Respondent having satisfied the test in **SM and Qadir v SSHD**.
12. At the hearing before me the Appellant was represented by Mr Malik who apologised for his late arrival as a result of involvement in another case. He indicated that he resiled from the grounds as pleaded, acknowledging that there is no merit in the ground on which permission was granted: that Judge Rodger had had insufficient before him to shift the burden because plainly there was individual consideration. Instead Mr Malik, without any written amendment to the grounds, asked me to find an error of law on a different basis. He submitted that the Appellant must have been poorly represented as any professional would have known how important it was to bring forward evidence to rebut the dishonesty allegation, so, he enjoined me, I should be sympathetic to his informally enlarging the grounds. He argued that the judge had made an error of law firstly in his approach to the burden of proof and secondly in the way in which he approached the evidence as to the ETS allegation.
13. Mr Malik, reiterating that the evidential burden had been met by a combination of the generic witness statements and the look up tools, pointed out the judge next had to look to see if the Appellant provided a plausible innocent explanation. It was not necessary for an Appellant to provide a "good or persuasive" explanation, so that the judge misdirected himself at paragraph 26 when he says:

*"The appellant has failed to provide any persuasive explanation to show that her certificate was not obtained fraudulently."*
14. Judge Rodger had set the standard too high. The error was compounded when at paragraph 27 the judge states:

*“The appellant has failed to provide any persuasive explanation such as to transfer the burden back to the respondent.”*

15. Further evidence of the error, Mr Malik argued, was that the statement opening paragraph 27:

*“I find that she has failed to prove that her application was wrongly rejected or that she otherwise fell within the Immigration Rules.”*

16. Mr Malik argued the judge had misunderstood, there was no burden upon the Appellant to show that her application was wrongly rejected. The burden was on the Respondent. The judge has confused plausible explanation with persuasive. The Appellant was represented and it was plain that by bringing the appeal she was making the submission that she was innocent. In all the circumstances, bearing in mind the examination certificates, the judge should have proceeded to the third stage, accepting that the Appellant had raised an innocent explanation, and found the legal burden on the Respondent was not discharged.
17. Mr Melvin relied on the rule 24 response and the findings of the judge.
18. I am satisfied that there is no error. I leave aside the speculative point as to whether the Appellant was poorly represented which depends, not least, on her instructions to her representatives and Mr Raw. At best, it is right to say the submission Mr Raw made was legally hopeless. Even allowing the enlargement of the grounds embarked upon by Mr Malik the new grounds reveal no error but dance on a semantic pinhead. Reading the decision as a whole, and as the extracts above show, it is clear that the judge has given detailed consideration of the correct legal test to be applied and completely understood his task. Whilst the words relied upon by Mr Malik appear in the judgment, and in isolation appear infelicitous, they must be read as part of the whole. When the judgement is read in its entirety they do not detract from the judge’s clear statement that the problem with the Appellant’s case was that she faced an evidential burden and offered no explanation.
19. The grounds of the appeal to the First-tier Tribunal do not include an evidential assertion that the Appellant took the test. Contrary to Mr Malik’s submission, at paragraph 26 of his decision, Judge Rodger makes clear that what he is concerned about is that the Appellant failed to raise any innocent explanation of any element of the prima facie case of deception. She did not provide a witness statement confirming that she had sat the test in issue, and there was no oral evidence from her to confirm such matters, and the Respondent was not able to test her case that her certificate had not been obtained fraudulently, or in relation to the other documents that she produced via her Counsel at the oral hearing. In these circumstances, it is a nonsense to suggest that the judge did not appreciate that by bringing the appeal she was asserting that she had not obtained the test result fraudulently, and was thereby proffering or asserting an innocent explanation, to be inferred from the evidence of her MA from Anglia Ruskin University and the other, reading and writing, as

opposed to the speaking part, of the test results of 2014. As the case of **SM and Qadir** clearly sets out a bare assertion, let alone an implication to be inferred from the fact of an MA from Anglia Ruskin and high test marks in respect of the remaining three examination papers taken on the same date, fall so far short of amounting to a plausible explanation, so as to shift the burden back to the Respondent, that to conclude so would be arguably perverse.

20. It follows that this last-minute challenge, even had it been properly brought forward as amended grounds, does not give succour to this unmeritorious appeal.
21. No issue was taken with the judge's dismissal of the Appellant's Article 8 claim.
22. I note for completeness that both representatives were of the view that jurisdiction in this appeal had been provided by transitional provisions although neither was able to take me to them at the time.

### **Notice of Decision**

23. The decision of the First-tier Tribunal reveals no error of law and stands.

Signed

A handwritten signature in grey ink that reads "E. Davidge". The signature is written in a cursive, slightly slanted style.

Date 22 August 2017

Deputy Upper Tribunal Judge Davidge

### **TO THE RESPONDENT** **FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

A handwritten signature in black ink that reads "E. M. Davidge". The letters are cursive and somewhat stylized, with the first name "E. M." being more compact and the last name "Davidge" being more spread out.

Signed

Date 22 August 2017

Deputy Upper Tribunal Judge Davidge