



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

Appeal Number: IA/26757/2015

THE IMMIGRATION ACTS

**Heard at Newport
On 5 September 2017**

**Decision & Reasons Promulgated
On 01 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR SANDUN KAUSHALIYA MUNASINGHE
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr H Kannangara, Counsel

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant before me was the respondent in the proceedings before the First-Tier Tribunal. For ease of reference I shall refer to the parties as they were known below.
2. The appellant is a national of Sri Lanka, born in 1986. He entered the United Kingdom in October 2009 as a Tier 4 general student migrant. His leave was variously extended until 16 August 2014. On 2 May 2013, his leave was curtailed to 1 July 2013, and a few days before he made an

application to extend as a Tier 4 general student migrant. On 10 July 2015, the application was refused on the basis that to support his application the appellant submitted a false TOIEC certificate from ETS. The respondent relied on evidence from ETS confirming that there was significant evidence to conclude the use of a proxy test taker. ETS declared his test result to be invalid.

3. The appellant appealed and in a judgement promulgated on 2 December 2016 judge Hussain allowed his appeal finding:
 - (a) the appellant's English-language qualifications obtained in Sri Lanka showed that he had no reason to hire the services of a proxy taker because he was able to undertake test himself
 - (b) the appellant's ability to give evidence fluently in English before the judge adds credibility to his claim
 - (c) the individualised spreadsheet was unreliable stating that the test was taken on 21 March 2012 whereas the certificate shows that it was taken on 23 March 2012 and no explanation had been offered for the discrepancy
 - (d) the appellant's score in the listening paper taken on 23 March 2012 was low so that he resat the test on 13 June 2012, when he scored a much higher result. The judge found it inconsistent that if he had used a proxy taker on 23 March 2012 he had failed the listening test. Particularly as it was not alleged that he had used a proxy taker on 13 June 2012.
4. The judge found the respondent's evidence insufficient to meet the burden on the respondent of showing the appellant had used deception.
5. The respondent was granted permission to appeal on the basis that the judge had failed to give adequate reasons for his findings and failed to assess properly the burden of proof following the case law of SM and Qadir (ETS - evidence - burden of proof); U.T. IAC 21 April 2016.

The hearing at the Upper Tribunal

6. There is no application to adduce additional evidence in the Upper Tribunal.
7. Mr Kotas relied on the grounds concerning the failure to give reasons. The judge placed significant weight on the appellant's English-language abilities at the hearing. In addition as the case law of MA (ETS - TOEIC testing) Nigeria [2016] UKUT 450 identifies many reasons for fraud including convenience, and finds motive speculative rather than determinative. The case of SM and Qadir, cautions against such an approach given that there had been a significant passage of time between the certificates of 2012 and the hearing of 2016, and reminds judges

should be cautious of making such an assessment themselves, absent expert evidence.

8. Mr Kannangaran addressed me to persuade me that the judge had correctly identified the relevant evidence and reached sustainable conclusions. The judge's references to the test results for the 21st and 23rd of March were a typographical error. He realised that the relevant evidence was that for the 21 March.
9. The judge correctly self-directed. He correctly identified the burden at [14]. The judge identified the specific evidence of the spreadsheet relating to the test on 21 March 2012. That was the relevant evidence. The judge found that the burden shifted to the appellant and recognised that his task was to consider whether or not the appellant's explanation was adequate. The judge accurately describes the appellant's explanation, and finds it sufficient. That was exactly what he had to do. The appellant was cross-examined as to why he chose the test place where and how he travelled and provided the information about the test that he'd taken on different dates and the test that he'd taken in Sri Lanka. The judge had not relied purely on the appellant's ability to speak English, and there was nothing in the case law which prevented proficiency in English to constitute part of the explanations and reasons. The case of MA could be distinguished because in MA the respondent produced the actual voice recordings and the appellant accepted that it was not him speaking so that he was faced with the position of having to explain how it was that somebody else's voice had been used. In that case there was a lot more specific evidence and there had been here when really what had been relied upon was generic. The judge's findings were entirely consistent with the guidance of SM and Qadir.
10. I find it is self-evident from the judge's conclusions that he has failed to understand the respondent's evidence in respect of the test taking system, and plainly misreads the evidence in respect of the tests. The bundle contains 2 certificates from March 2012. One certificate is for a test for speaking and writing taken on 21 March 2012. The 2nd is a certificate for a test of listening and reading taken on 23rd of March 2012. Accordingly, the documents are not inconsistent as the Judge thought. The spreadsheet is the evidential basis for the assertion of the appellant's use of a proxy taker at the speaking test taken on 21 March 2012 at European College for Higher Education. Further the evidence of the respondent relates to voice recognition software which is plainly only applicable to speaking tests, to the point that it provides no evidence in respect of the other tests. In particular the judge fails to appreciate that the use of a proxy in respect of the speaking test is not relevant to the score in respect of the listening test, and that the success fire a proxy in the speaking test on 21 March 2012, is not inconsistent with the appellant's failure of a listening test on 23 March 2012. Further contrary to the judge's consideration, it was never the respondent's case that the appellant was using a proxy on 23 March 2012 when he took the listening test. The judge's conclusion that it was unlikely the appellant would be using a

proxy in the listening test in March, given that he was able to pass it in June, is flawed in terms of its factual matrix, but also misdirected at the issue as to whether or not the appellant in fact used a proxy in the speaking test on 21 March 2012.

11. I am satisfied that the judge has given inadequate reasons for finding that the appellant's explanation was sufficient to discharge the burden upon him. I set the decision aside. The muddle that the judge made of the evidence means that none of the factual findings can be preserved. Having considered the senior President's practice statements at paragraph 7, I decided that it was appropriate to remitted to the First-tier Tribunal to be heard again. This is because the nature of the fact-finding required, means that it is more appropriate for the appeal to be decided at the First-Tier Tribunal, than the Upper Tribunal, which is not primarily a fact-finding tribunal.

Decision

12. The decision of the First-tier Tribunal allowing the appeal is vitiated by legal error and is set aside. The appeal is remitted to the First-tier Tribunal for rehearing by a judge other than Judge Hussain.

Signed

E. Davidge

Date 26 October 2017

Deputy Upper Tribunal Judge Davidge