



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

Appeal Number: IA/27395/2015

THE IMMIGRATION ACTS

Heard at Field House

On 22 June 2017

**Decision &
Promulgated**

On 3 July 2017

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**SHAMIN AHMED
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation

For the Appellant: Mr S. Kotas, Home Office Presenting Officer

For the Respondent: Mr M. Blundell, Counsel instructed by Taj Solicitors

DECISION AND REASONS

1. The respondent (hereinafter “the claimant”) is a citizen of Bangladesh born on 18 December 1987. On 3 November 2013 he applied for leave to remain in the UK on the basis of his family and private life. On 29 June 2015 his application was refused. The primary reason for the refusal was that Educational Testing Services (“ETS”) notified the Home Office that his

score on a Test of English for International Communication (“TOEIC”) they had administered had been obtained through deception. Consequently, the Secretary of State found that the claimant did not meet the suitability requirement in S-LTR 2.2(a) of Appendix FM to the Immigration Rules.

2. The claimant appealed to the First-tier Tribunal and his appeal was heard by Judge O’Rourke. In a decision promulgated on 24 August 2016, the judge allowed the appeal. The Secretary of State now appeals against that decision.

Burden and standard of proof

3. The burden and standard of proof, where it is alleged that an ETS test is invalid, was discussed in SM and Qadir v SSHD (ETS-Evidence-Burden of Proof) [2016] UKUT 00229), and is as follows:
4. The legal burden of proving that the test taker used deception lies on the Secretary of State albeit that there is a three stage process.
 - a) Firstly, the Secretary of State must adduce sufficient evidence to raise the issue of fraud.
 - b) Secondly, the test taker then has a burden of raising an innocent explanation which satisfies the minimum level of plausibility.
 - c) Thirdly, if that burden is discharged, the Secretary of State must establish on a balance of probabilities that this innocent explanation is to be rejected.
5. There is one civil standard of proof (which is the standard to be applied). The seriousness of the consequences does not require a different standard of proof but flexibility in its application will involve consideration of the strength and quality of the evidence. The more serious the consequence, the stronger must be the evidence adduced for the necessary standard to be reached

Decision of the First-tier Tribunal

6. The judge found that the Secretary of State failed to discharge the legal burden of proving dishonesty.
7. The judge, following the Upper Tribunal in SM and Qadir, found that the Secretary of State discharged the initial evidential burden through the ‘generic’ statements of Ms Colling and Mr Millington, taken together with the data from the “look up tool” showing the claimant’s test as being “invalid”.
8. The judge then considered the claimant’s innocent explanation, stating at paragraph 16 (iii):

"I note the [claimant's] evidence as to alternative explanations for the allegation against him (on a similar basis to those set out in SM and Qadir) and considered that he discharged the evidential burden upon him. I note also that he gave evidence in good English today and has undergone extensive third-level education in this country."

9. The judge also stated, at paragraph 10, that:

"[The Claimant] gave evidence today in good English. He described in detail how he arranged the TOEIC test and the process of taking it".

10. At paragraph 17(i) the judge concluded:

"In respect of the TOEIC test, the [Secretary of State] has failed to discharge the legal burden of proving dishonesty on the [claimant's] part, because I am satisfied that there are potentially innocent explanations for the test results."

11. The judge then considered whether the claimant met the requirements of EX.1 of Appendix FM of the Immigration Rules and concluded that he did on the basis of insurmountable obstacles to his relationship with his wife continuing outside the UK.

Grounds of appeal and submissions

12. The grounds of appeal concern only the issue of whether the claimant used deception in obtaining an English language test certificate. The grounds submit that the judge failed to explain how the claimant met the evidential burden to offer an innocent explanation. They criticise the decision for relying on the claimant's English language ability without considering that a person who speaks English to the required level might nonetheless use a proxy candidate. It is also argued that the judge failed to exercise caution in making observations about the claimant's apparent command of English.

13. Mr Kotas argued that the judge failed to give adequate reasons to explain why he decided that the claimant met the evidential burden of giving an innocent explanation. He submitted that the judge's reasons have not been particularised and that the judge has failed to engage with potential reasons a test taker might cheat even if they speak good English.

14. Mr Blundell submitted that the judge's reasoning was adequate. He noted that the Secretary of State was not represented at the First-tier Tribunal hearing. At that hearing, the claimant explained to the judge the steps he took in taking the test, and answered questions the judge put to him on this point. This is reflected in the decision where the judge stated that the claimant described in detail how he arranged, and took, the TOEIC test.

15. Mr Blundell argued that the judge followed the approach established by the authorities, which is to draw together various strands and determine if the burden is discharged. He argued that there is only a limited amount any person can do to give the innocent explanation. They can show how they speak English and show how they took the test. This, argued Mr Blundell, is what the claimant did.

Consideration

16. The issue in this appeal is whether the judge gave sufficient reasons to justify his conclusion that the claimant gave an innocent explanation to counter the allegation of deception.

17. There are a range of factors that are relevant to the question of dishonesty, as set out in paragraph 69 of SM and Qadir. They include: what a person 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 he performed under cross examination, whether his English appears commensurate with the TOEIC scores, and whether his academic scores make it illogical or unnecessary to cheat.

18. Although the judge's reasoning is brief and lacking in detail, it is clear that the reasons the judge found the claimant had given an innocent explanation included that he:

- a) was able to explain how he arranged to take the test;
- b) was able to explain the circumstances in which he took the test;
- c) had a high level of education in the UK; and
- d) had a good command of English.

19. It is also apparent that the judge compared the factual matrix of the claimant to those of the appellants in SM and Qadir. At paragraph 16(iii) the judge stated that he had taken into account the claimant's submissions as to alternative explanations for the allegations against him "on a similar basis to those set out in SM."

20. As explained in Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge. In this appeal, although the reasoning is undoubtedly brief and lacking in elaboration, I am satisfied that it is sufficient. Having accepted, and found credible, the claimant's explanation of taking the test, and observed the claimant's capability in English as well as his educational background, the judge was entitled to find that the claimant had met the evidential burden. Accordingly, the Secretary of State's appeal on the basis of inadequate reasoning cannot succeed.

Decision

A. The appeal is dismissed.

B. The judge has not made a material error of law and the decision of the First-tier Tribunal stands.

Signed

A handwritten signature in black ink, appearing to be 'SJ', followed by a horizontal line extending to the right.

Deputy Upper Tribunal Judge Sheridan

Dated: 30 June 2017