



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

Appeal Number: IA/27525/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 7 April 2017**

**Decision & Reasons Promulgated  
On 10 May 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ESHUN**

**Between**

**MR AQDUS ALI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr R Sharma, Counsel instructed by Sky Solicitors Ltd  
For the Respondent: Mr P Armstrong, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a national of Pakistan born on 20 September 1989. He has been granted permission to appeal the decision of First-tier Tribunal Judge Juss dismissing his appeal against the respondent's decision to refuse his application for leave to remain as a student with reference to paragraphs 245ZX and 322(1A) of the Rules.

2. The respondent's refusal notice said that the appellant had claimed 30 points under Appendix A of the Immigration Rules for a valid CAS assigned by the Birmingham Institute of Education Training and Technology. However, the respondent was not satisfied that the appellant had a valid CAS because the Tier 4 Sponsor Register was checked on 21 July 2015 and the Birmingham Institute of Education Training and Technology was not listed as of this date. Therefore, the appellant had not met the requirements to be awarded 30 points under Appendix A.
3. Furthermore, the appellant had for the purposes of his application dated 11 January 2014, submitted a TOEIC certificate from the Educational Testing Service (ETS) to the Home Office and his sponsor in order for them to provide him with a Confirmation of Acceptance for Studies. According to the information provided to the Home Office by ETS, the appellant obtained the TOEIC certificate 004420518201.3013 as a result of a test that he took at the College of Skills and Learning on 27 November 2013. According to ETS, the appellant's test was taken by a proxy. Accordingly, he could not meet the requirements of paragraph 245ZX(a) of the Immigration Rules.
4. The judge noted that despite the fact that a serious allegation of impersonation had been levied against the appellant, and the appellant had set out to contest the serious allegation, no witness statement was filed before him or served upon the respondent. It was only at the hearing that the appellant's representative submitted a witness statement which she herself had signed and dated on behalf of the appellant.
5. The judge said it was agreed that there were two issues before him. First, that the appellant had previously been refused entry in 2007 and that there was an issue of non-disclosure by him when he made his online application. Second, whether he took the TOEIC test himself. The judge said however that there was a third issue and that was in relation to the appellant claiming 30 points on the basis of his studying at the Birmingham Institute of Education Training and Technology, for which he had no CAS, and whereby the register had been checked on 21 July 2015, only to find that the institution was no longer registered there.
6. The judge said at paragraph 2 that *"in immigration appeals, the burden of proof is upon the Appellant and the standard of proof is on a balance of probabilities."*
7. The judge found as follows:

*"17. I find that the Appellant does not discharge the burden of proof for the reasons given in the refusal letter. First, the Appellant had been refused in 2007 and the issue was raised of material non-disclosure. When expressly asked about this, the Appellant was adamant that he had disclosed everything on his form."*

*When it was put to him that this could not be true because A4 directly showed him answering 'No' in relation to whether he had been denied entry, he had to accept, in the face of the evidence, that he had not disclosed this fact. I find that there is an element of dishonesty here and of material non-disclosure.*

18. *Second, as far as the TOEIC certificate is taken from the Educational Testing Service, I find that the Appellant has indeed submitted a false document in that I am not satisfied that he himself undertook the test, when he was not attending college, but claims to have been at home engaging in 'self-study' which I find very difficult to believe given the overall circumstances of this case. It is significant that his witness statement only arrives on the day of the hearing and then purports to reject everything that has been alleged against him.*
  19. *Third, and no less importantly, the Appellant could not have been granted 30 points because upon a check being made of the register on 21<sup>st</sup> July 2015 it transpired that Birmingham Institute of Education Training and Technology had not been listed as of this date. Even more significantly than that, the Appellant knew as long as a year before then in July 2014 that the college had actually closed down and he so admitted in evidence before this Tribunal, and yet he took no steps to rectify his position in a timeous and efficient manner.*
  20. *Finally, there is the issue of article 8, and although I accept that the Appellant maintains that his parents would expect him to return back with a qualification from the UK, it is clear that he himself has done nothing whatsoever to prosecute his intentions in any realistic or committed way, letting six months to pass him by, then providing a TOEIC certificate which I have found to be fraudulent, and then enlisting at a college that itself has been closed down in 2014, and his taking no steps whatsoever to inform the authorities of this.*
  21. *The case for **Patel** makes it quite clear that there is no Article 8 right to education and in the particular circumstances of this case this is all the more so and Article 8 cannot be treated as a general dispensing power for such an Applicant."*
8. First-tier Tribunal Judge Hodgkinson granted the appellant permission to appeal. He said that the grounds argued that the judge erred first, in paragraph 2 of his decision, in applying the wrong burden of proof, the burden being upon the respondent to establish deception; second, in paragraph 18 of his decision, in relying upon general evidence, rather than evidence particular to the appellant, in concluding that the appellant had used a proxy test taker in relation to an ETS English test; third, at paragraph 19 of his decision, by failing to take into account the fact that

the respondent had acted unfairly in failing to provide the appellant with 60 days in order to obtain an alternative Confirmation of Acceptance for Studies (CAS).

9. FtTJ Hodgkinson said:

*“It is trite law that the burden of proving deception lies upon the respondent. Nowhere in the decision does the Judge indicate this; rather, he clearly states that the burden of proof lies upon the appellant and he appears to have applied that burden throughout his decision. That in itself amounts to an arguable error of law and it cannot be said that it has not arguably tainted the entirety of his findings.”*

10. In respect of the first ground, I find that the judge did not err in law when he said that “In immigration appeals, the burden of proof is upon the appellant and the standard of proof is on a balance of probabilities”. I find that this is generally the case. I find however that the judge was wrong at paragraph 17 to place the burden of proof on the appellant when considering the issue of dishonesty and material non-disclosure. As stated by FtTJ Hodgkinson, the burden of proving deception lies upon the respondent. Nevertheless, I find that the error was not material to the judge’s findings at paragraph 17 in light of the evidence that was before the judge and his analysis of the evidence. The appellant’s representative below said she would have to accept that non-disclosure does, however, require an element of “dishonesty”, but this had not been proven on the facts of this case. Her argument was that all that the appellant was guilty of was a mistake. I find that if that was indeed the case, the appellant would have come up with that explanation rather than claiming in evidence that he had disclosed everything on the form. I find on the evidence that the judge’s decision that there was an element of dishonesty and of material non-disclosure did not disclose an error of law. Consequently, I find that the respondent discharged the burden of proof upon her.
11. The next issue was in respect of the ETS test taken by the appellant which was said to have been taken by a proxy test taker.
12. Mr Sharma submitted that at paragraph 13 of the decision the judge conflated the closure of the sponsor, namely the Birmingham Institute of Education Training and Technology and the college where the appellant took the ETS test. I disagree. Paragraph 13 was a continuation of the judge’s recording of the closing speech by Mr Swaby who was the Home Office Presenting Officer before the judge. It was Mr Swaby who conflated the two colleges, not the judge. The judge had correctly recorded at paragraph 5 that in the respondent’s refusal notice, it was stated, “according to the information provided to the Home Office by the ETS, the appellant obtained the TOEIC certificate 004420518201.3013 as the result of a test that he took at the College of Skills and Learning on 27 November

2013". It is therefore right that the appellant could not have taken the TOEIC test at the Birmingham Institute of Education Training and Technology as the college had been closed down.

13. Mr Sharma submitted that in relation to the ETS test results, the judge had reversed the burden of proof. I accept this argument in light of what the judge said at paragraph 2 of the decision. Nevertheless, in **SM & Qadir (ETS - evidence - burden of proof) [2016] UKUT 229 (IAC)**, it was held that the respondent bore the evidential burden of proof; that in the light of the information provided by ETS, the respondent had discharged the evidential burden on her as per **Shehzad v Secretary of State for the Home Department [2016] EWCA Civ 615**.
14. The next stage according to **SM & Qadir** was for the appellant to provide an innocent explanation; the third stage was for the matters to be considered in the round in order to assess whether the respondent had discharged the legal burden.
15. I accepted Mr. Sharma's argument that the judge erred in law in failing to apply the three stages as per **SM & Qadir**.
16. I therefore proceed to apply the three stages to this appellant's appeal.
17. As already stated above, the first stage has been discharged by the respondent.
18. In respect of the second stage, Mr Sharma submitted that the appellant has done through his witness statement. Mr Sharma relied on **Shen (paper appeals; proving dishonesty) [2014] UKUT 00236 (IAC)** to argue that the explanation needs only meet a basic level of plausibility. He submitted that notwithstanding that the appellant's evidence was bad, his account was plausible. I was not persuaded by Mr. Sharma's argument. The judge at paragraph 6 said that what the appellant's witness statement does is to simply contest the allegation that the appellant did not use another person to undertake his voice speaking test. I agree with the judge that it is unsatisfactory, that on a matter of such central and crucial importance, the allegation levied against the person in question is not immediately dealt with, with a clear-cut response. Consequently, I do not accept that the appellant's explanation meets the basic minimum level of plausibility.
19. Mr Armstrong referred to Appendix C1 and C2 which had the ETS Selt Source Data and the Mida Matched Data. The data showed that the appellant's test certificate was invalid. Mr Sharma argued that this was not the ETS Look-up Tool Document which was referred to in paragraph 26 of **Shehzad**. I find that while the evidence at C1 and C2 was not the ETS Look-Up Tool Document, it contained sufficient information to lead me to find that the appellant's test results were invalidated by ETS.

Consequently, I find that the respondent has discharged the legal burden in establishing that the appellant's test results were fraudulently obtained.

20. I now come to the issue of the CAS. The evidence from the respondent is that when she checked the register on 21 July 2015, the Tier 4 sponsor, namely Birmingham Institute of Education Training and Technology was not listed as of this date. Mr Sharma argued that the appellant's application should have been stayed for 60 days and for the respondent to issue him notice to vary his application within 60 days with a new CAS from a different Tier 4 Sponsor. He relied on the argument in the grounds that the respondent failed to adopt the fairness policy.
21. I note that the appellant's application for leave to remain in the UK as a Tier 4 Student was made on 11 January 2014. He submitted a TOEIC certificate from ETS to the Home Office and his sponsor in order to provide them with a Confirmation of Acceptance for Studies. According to information provided to the Home Office by ETS the appellant had obtained the TOEIC certificate by use of a proxy test taker. Accordingly, the respondent refused his application because he had applied deception. In view of my finding that the appellant's test certificate was invalid, I find that the respondent's decision was sustainable.
22. From the evidence that was before the judge, the appellant had been aware since July 2014 that the Birmingham Institute of Education Training and Technology had actually closed down. As stated by the judge he took no steps to rectify his position in a tireless and efficient manner. At paragraph 9 of the determination it is recorded that in cross-examination the appellant said he had come to the UK in 2011 to study for a year at Cambridge Western Academy but the college closed in mid 2012 and he had not studied since then, save to do some work at home. He confirmed, however, that he had leave in this country up until 2014. I find on this evidence that the appellant had ceased to be a student from mid 2012. He had not communicated this information to the Secretary of State. Therefore, when he put in his application for further leave to remain as a student on 11 January 2014, the appellant was, in my view, deceiving the Home Office by pretending to be a student when he was not. Accordingly, I find that the respondent was under no obligation to apply the policy of fairness and grant him 60 days to find a new college.
23. Having applied the three stages in **SM & Qadir**, I find that the respondent has discharged the burden of proof on her.

### **Notice of Decision**

24. The appellant's appeal is dismissed.

No anonymity direction is made.

Signed

Date: 4 May 2017

Deputy Upper Tribunal Judge Eshun