



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

Appeal Numbers: IA/27548/2015
IA/27552/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 17 October 2017**

**Decision & Reasons
Promulgated
On 26 October 2017**

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

and

**MRS SAKUNTALA POUDYAL
MR GHANASHYAM BHATTARAI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellants: Mr Nath

For the Respondent: Mr A Gondal (Legal Representative)

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellants as the appellants herein.
2. The appellants are husband and wife. They are both citizens of Nepal born on 12 October 1988 and 27 February 1988 respectively. A reference to

the appellant is a reference to the first named appellant-her husband's appeal depends on the outcome of hers.

3. The appellant arrived in this country, accompanied by her husband, in November 2009 as a Tier 4 (General) Student. She was granted leave to remain until April 2013 in the same capacity. However, in May 2012 her leave was curtailed and it expired on 30 July 2012. Her application for leave to remain as a student was refused on 21 July 2015. The Secretary of State claims that according to information provided by Educational Testing Services (ETS) her Test of English for International Communication (TOEIC) undertaken at New London College on 6 February 2013 had been fraudulently obtained by the use of a proxy test taker. Her application was refused under paragraphs 322(1A) and 245ZX(a) of the Immigration Rules. The appeal of the appellant's husband was refused as he was a dependant on her application.
4. The appellant's appeal came before a First-tier Judge on 25 October 2016. The judge heard oral evidence from the appellant. She set out the respective submissions made by the parties and in paragraph 29 confirmed that she had made her credibility findings shortly after the hearing. In the course of her determination she made extensive reference to **SM and Qadir v Secretary of State (ETS - evidence - burden of proof) [2016] UKUT 00229 (IAC)**. She directed herself in paragraph 30 as follows:

“30. I note that the Upper Tribunal in **SM and Qadir** held that despite the generic nature of the evidence from the Secretary of State the evidential burden of proof resting on the Secretary of State has been narrowly discharged. They then considered if the appellants discharged their burden of raising an innocent explanation of the *prima facie* indications of deception on their part in the Secretary of States evidence. They then looked at whether the Secretary of State established, on the balance of probabilities, that the Appellant's *prima facie* innocent explanations are to be rejected with the legal burden of proof falling on the Secretary of State to discharge.”

The judge had the benefit of the generic material from Mr Millington and Ms Collings as well a report from Dr Harrison dated 5 February 2015-the report before the Upper Tribunal in **SM and Qadir**. The judge reminded herself that each case of this type would invariably be fact-sensitive, referring to paragraph 101 of **SM and Qadir**. The Upper Tribunal had had the benefit of hearing oral evidence from Dr Harrison and had accepted his expert opinion and conclusions. On the other hand, short comings had been identified in the generic material. No challenge had been mounted by the Presenting Officer to the expert report from Dr Harrison. The judge accepted his criticisms of the generic material. In paragraph 41 of her determination she states that the Presenting Officer's case “in a nutshell relies on the appellant's oral evidence to show that the appellant never sat

the spoken English language test because of her inability to recall details of that test.”

5. The judge accordingly focussed on credibility issues noting the difficulty in recalling details of a test sat three years ago. After a lengthy assessment, the judge resolved matters in favour of the appellant stating in paragraph 60 of her decision “taking an overall view of the evidence I therefore find the appellant is credible.” The judge accordingly allowed the appeal finding that the legal burden of proof falling on the Secretary of State had not been discharged.
6. The Secretary of State applied for permission to appeal and permission was granted on 21 August 2017 by a First-tier Judge. The judge noted that it was claimed that the First-tier Judge had erred in her approach to the burden of proof in a case involving alleged deception and found it arguable that she had failed to apply the correct test when considering deception in relation to an English test and had failed to apply **SM and Qadir**. It was submitted in the grounds that the Tribunal had misinterpreted the evidence and had properly read the witness statements and the spreadsheet extract showed the appellant’s English language test had been invalidated because of evidence of fraud in the test taken by the appellant. Had the judge properly considered the appellant’s evidence it would have been clear that deception had been demonstrated to the standard of the balance of probabilities. The burden would then shift to the appellant to raise an innocent explanation. If that explanation were to be accepted the burden would shift back to the Secretary of State in order to address the legal burden.
7. The judge had erred in relying on the appellant’s ability to speak English and there might be reasons why a person who was able to speak the language would nonetheless employ a proxy. Adequate reasons had not been given for the finding that a person who spoke English would have no reason to secure a test certificate by deception. The Secretary of State had met the evidential burden and this had not been appreciated by the First-tier Tribunal. The verification system was adequately robust.
8. Mr Gondal submitted that the judge had properly directed herself on the evidential and legal burden and had made appropriate credibility findings about the appellant’s credibility. In paragraph 58 of her decision the judge had expressly referred to paragraph 80 of **SM and Qadir** concerning the need for caution on relying on apparent fluency in and command of the English language. Apart from the appellant’s oral evidence the judge had had the report from Dr Harrison.
9. The judge had found the appellant had given her evidence without exaggeration and she was not evasive. Having found the appellant to be credible she directed herself correctly on the burden and standard of proof and found that the legal burden of proof on the Secretary of State had not

been discharged. She had applied the correct test as set out in **SM and Qadir**.

10. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the decision of the First-tier Judge if it was materially flawed in law.
11. I note that in paragraph 30 of her decision the judge refers to the correct approach as identified in **SM and Qadir** when considering the shifting burden of proof. She reminds herself as I have already indicated that each case was fact-sensitive. In considering the spreadsheet evidence she bore in mind the criticisms made of it by Dr Harrison and she noted that no criticism of Dr Harrison's report had been made by the Presenting Officer. She refers to the arguments made in the skeleton argument before her and to specific parts of Dr Harrison's report in paragraph 39 of her decision. She did not err in accepting the criticisms made of the evidence of the generic material for the reasons she gives and focussed on the argument from the Presenting Officer that the appellant's oral evidence showed she had never sat the English language test because of her inability to recall details of that test. She explains the reasons for her decision at some length noting, for example, in paragraph 47 that given the passage of time she would have found it unusual for the appellant to have recalled very specific details of what had occurred and indeed would have found it suspicious if she had been able to answer all of the Presenting Officer's detailed questions. She had sat two tests within two days of each other making it even harder to recall the specifics of one test after the passage of so much time.
12. The judge dealt with the submission made by the Presenting Officer about the structure of the test in 2016 and was in my view entitled to conclude that the test taken by the appellant in 2013 had not been shown to be of the same format as the 2016 test and no particular point appears to have been taken on this aspect. However, Mr Nath did raise the issue of the judge's reliance on the appellant's English language ability. The judge's consideration of this aspect is set out in paragraphs 51 to 57 of her decision. She noted the appellant's educational background, the appellant had received good marks in English and English had been one of her core subjects and she had obtained a reasonably high score in her English exam as shown by her school leaving certificate. She had been to an English school and she had passed her IELTS in April 2009 on the first attempt. She had found all the educational documents genuine. The judge then referred to the appellant's studies in this country and concluded that the appellant would have acquired a reasonable level of proficiency in English. The appellant had scored highly in the listening and reading test taken some two days after the disputed test in 2013. She had been found to be proficient in English when admitted in 2009 and when granted further leave to remain in 2011 and would have expanded and enhanced her English language abilities thereafter. She had no reason to jeopardize her career and future by cheating in the test.

13. I am not satisfied that the judge erred in law by referring to the appellant's English language ability. As I have already mentioned, in paragraph 58 the judge reminds herself of what is said in **SM and Qadir**. While there is a need for caution, English language ability is not necessarily an irrelevant consideration and I am not satisfied that the judge materially erred in law in referring to the appellant's education and so forth when reaching her conclusions. The judge had the benefit of hearing the appellant give evidence before her and makes it quite clear that she found that the appellant had not exaggerated her evidence and was not evasive and gave her answers in a careful and thoughtful manner. The Presenting Officer had concentrated on the appellant's credibility and the judge carefully considered all the material and resolved this issue in favour of the appellant. With the greatest respect to the arguments advanced on the Secretary of State's behalf I see no indication that the judge misdirected herself in any way on the burden and standard of proof to which she makes reference in paragraph 30 of her decision and to which she returns in paragraph 61. In effect, the grounds amount to no more than an expression of disagreement with this well reasoned decision.
14. The appeal of the Secretary of State is dismissed and the decision of the First-tier Judge stands.

Anonymity Order

15. The First-tier Judge made no anonymity direction and I make none.

TO THE RESPONDENT **FEE AWARD**

The First-tier Judge made a fee award of any fee which had been paid by the appellant and this fee award stands.

Signed

Date 25 October 2017

G Warr, Judge of the Upper Tribunal