



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/27722/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Centre City Tower,
Birmingham
On 5th June 2017**

**Decision & Reasons
Promulgated
On 20th June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**MD JOYNUL ABEDIN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mrs H Aboni, Senior Home Office Presenting Officer
For the Respondent: Mr N Ahmed of Counsel instructed by Eurasia Legal Services

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against the decision of Judge Mathews of the First-tier Tribunal (the FTT) promulgated on 27th March 2016.
2. The Respondent before the Upper Tribunal was the Appellant before the FTT and I will refer to him as the Claimant. The Claimant is a male citizen of Bangladesh born 20th January 1990. He entered the United Kingdom on 1st October 2009 with leave as a Tier 4 Student valid until 15th April 2013.

On 7th June 2013 the Appellant was granted further leave to remain as a Tier 4 Student until 2nd September 2014.

3. On 1st September 2014 the Appellant applied for further leave to remain as a Tier 4 Student. This application was refused on 20th July 2015. The application was refused with reference to paragraph 245ZX(a), (c) and (d), and paragraph 322(2) of the Immigration Rules. The Respondent noted that in a previous application for leave to remain the Appellant had submitted a TOEIC certificate from Educational Testing Service (ETS). ETS had subsequently undertaken verification checks, and concluded that the Appellant's test had been taken by a proxy, and therefore the Appellant's results had been cancelled and declared invalid. On the basis of the information provided by ETS, the Secretary of State was satisfied that his ETS certificate had been fraudulently obtained.
4. The Claimant's appeal was heard by the FTT on 5th April 2016. The Secretary of State was not represented. The FTT heard evidence from the Claimant and found that the Secretary of State had not discharged the legal burden of proving dishonesty, and allowed the Claimant's appeal.
5. The Secretary of State applied for permission to appeal to the Upper Tribunal. This application was initially refused by an FTT judge, and thereafter a renewed application was submitted to the Upper Tribunal. It was contended that the FTT had erred by failing to consider material evidence, that being an ETS spreadsheet which was specific to the Claimant. It was contended that the correct approach is contained within Shehzad and Chowdhury [2016] EWCA Civ 615 and the FTT had erred by not following that approach.
6. It was contended that witness statements submitted by the Secretary of State together with the ETS spreadsheet discharged the evidential burden of proof upon the Secretary of State, and an evidential burden then switched to the Claimant to provide an innocent explanation. The FTT had erred by not appreciating that the evidential burden was met, and had failed to consider material evidence.
7. Permission to appeal was granted by Upper Tribunal Blum.
8. The Upper Tribunal issued directions dated 2nd November 2016 making provision for there to be a hearing before the Upper Tribunal to ascertain whether the FTT decision contained an error of law such that it should be set aside. Those directions indicated that if a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 was to be provided, such a response must be lodged within one month of the date of directions. No rule 24 response was submitted within that timeframe.

The Upper Tribunal Hearing

9. At the commencement of the hearing a rule 24 response was submitted.
10. Mrs Aboni in making oral submissions relied upon the grounds contained with the application for permission to appeal. Mrs Aboni submitted that

there was evidence specific to the Claimant, that being the ETS spreadsheet, which had not been considered by the FTT. This amounted to a material error of law, and the FTT failed to consider that the evidential burden upon the Secretary of State had been discharged.

11. Mr Ahmed relied upon the rule 24 response dated 22nd May 2017. I was asked to find that the FTT decision did not contain an error of law. The FTT was entitled to reach the conclusion that the Secretary of State had not discharged the legal burden of proof. The fact that the Secretary of State had not been represented was a matter of choice.
12. It was contended that the Claimant had provided an innocent explanation, and the Claimant's evidence had been accepted by the FTT.
13. Mr Ahmed submitted that even if the evidential burden was discharged, the Secretary of State had failed to discharge the legal burden. Mr Ahmed submitted that the Secretary of State's appeal should be dismissed.
14. By way of response Mrs Aboni reiterated that evidence specific to the Claimant had been submitted and had not been considered by the FTT. The case law referred to by the Upper Tribunal Judge in granting permission, indicated that such evidence was sufficient to discharge the evidential burden, thereby placing an evidential burden upon the Claimant.
15. I indicated that in my view the FTT had erred in law and explained orally my reasons for reaching that conclusion, which I confirmed would be put into writing and submitted to the parties.
16. I then asked the representatives to express their views as to how the decision should be re-made.
17. Mr Ahmed submitted that I should remake the decision, and allow the Claimant's appeal, based upon the FTT's acceptance of the Claimant's evidence. I indicated that I did not accept that I was bound by any findings made by the FTT, because the FTT had taken a legally incorrect approach, and failed to take into account material evidence.
18. Mr Ahmed, although clearly reluctant to accept this conclusion, then suggested that it would be appropriate if no findings were preserved, for the appeal to be remitted to the FTT to be considered afresh.
19. Mrs Aboni indicated that the decision could be remade by the Upper Tribunal.
20. I indicated, that in my view it was appropriate, in the circumstances, to remit this appeal back to the FTT for a fresh hearing and again gave my reasons orally which would be confirmed in writing. Mrs Aboni indicated to the Tribunal and Mr Ahmed, that the Secretary of State intended to adduce further evidence. Mr Ahmed mentioned that he would be seeking some directions, and I advised that if that was the case, it would be

appropriate to make any request for directions to the FTT once my written decision had been published.

My Conclusions and Reasons

21. I now provide my written reasons for setting aside the decision of the FTT, and remitting the appeal back to the FTT to be considered afresh.
22. The FTT, when deciding this appeal, did not have the benefit of the guidance contained in SM and Qadir [2016] UKUT 00229 (IAC) and Shehzad and Chowdhury [2016] EWCA Civ 615, as these decisions were not published when the FTT decision was promulgated. The case law referred to above sets out the correct approach to be adopted when considering appeals such as this. It is made clear that there is an evidential burden upon the Secretary of State, and that this evidential burden is discharged by the generic witness statements of Peter Millington and Rebecca Collings both dated 23rd June 2014, together with evidence specific to the Appellant, which I shall refer as the ETS spreadsheet showing the tests taken to be invalid. I set out below paragraph 68 of SM and Qadir:

“68. As our analysis and conclusions in the immediately preceding section make clear, we have substantial reservations about the strength and quality of the Secretary of State’s evidence. Its shortcomings are manifest. On the other hand, while bearing in mind that the context is one of alleged deception, we must be mindful of the comparatively modest threshold which an evidential burden entails. This calls for an evaluative assessment on the part of the Tribunal. By an admittedly narrow margin we are satisfied that the Secretary of State has discharged this burden. The effect of this is that there is a burden, again an evidential one, on the Appellants of raising an innocent explanation.”

23. I also set out the first paragraph of the headnote to SM and Qadir;

“(i) The Secretary of State’s generic evidence, combined with her evidence particular to these two appellants, sufficed to discharge the evidential burden of proving that their TOEIC certificates had been procured by dishonesty.”

24. The above was confirmed by the Court of Appeal in Shehzad and Chowdhury. At paragraphs 24 and 25 of that decision the Court of Appeal made reference to the FTT misunderstanding the nature of the Secretary of State’s evidence, and in particular misunderstanding the significance of the ETS spreadsheet confirming that tests taken were invalid.
25. The evidence considered by the FTT in the appeal now being considered by me, was the generic statements of Mr Millington and Ms Collings, together with the ETS spreadsheet showing that the tests claimed to have been undertaken by the Claimant on 27th February 2013 had been declared invalid. That evidence was sufficient to satisfy the evidential burden upon the Secretary of State, and the FTT erred in law in not appreciating this.

26. The FTT erred in law by failing to consider material evidence. At paragraph 13 the FTT described the Secretary of State's evidence as follows;

"The evidence relied upon in that assertion is in the form of two witness statements, not specific to this case, that make general observations as to the process of obtaining such certificates from ETS. The evidence in my judgment does not address this Appellant's particular case and is not specific to the circumstances of his assessment, and shows no sufficient examination of his individual results. It does not discharge the legal burden of establishing that the Appellant procured his language certificate by dishonesty."

27. The above is evidence that the FTT was not aware of the evidential burden upon the Secretary of State, which if satisfied thereafter placed an evidential burden upon the Claimant. It also demonstrates that the FTT did not consider the ETS spreadsheet showing the tests to have been invalidated. Failure to analyse material evidence amounts to an error of law.
28. Having explained why I found an error of law, I now turn to consider the re-making of the decision. I did not accept Mr Ahmed's submission that I was bound to follow the FTT conclusion that the Secretary of State had failed to discharge the burden of proof. This is because the FTT adopted a legally incorrect approach to considering the case, although no blame attaches to the FTT for that, as authoritative case law had not been published at the time of the FTT decision and in addition, the FTT had not considered material evidence, that being the ETS spreadsheet. For those reasons I found the findings made by the FTT to be unsafe and reliance should not be placed upon them.
29. I therefore decided, having taken into account paragraph 7.2 of the Senior President's Practice Statements, that because credibility is in issue, and no findings of fact are preserved, it would be appropriate to remit this appeal back to the FTT to be heard afresh. This is because the nature of the judicial fact-finding involved, means that it is more appropriate that this be carried out by the FTT rather than the Upper Tribunal.
30. The parties will be advised of the time and date of the hearing in due course. The appeal is to be heard by an FTT judge other than Judge Matthews. An interpreter will not be provided, unless the Claimant specifically requests otherwise.

Notice of Decision

The decision of the FTT involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the FTT with no findings of fact preserved.

Anonymity

The FTT made no anonymity direction. There has been no request for anonymity and I see no need to make an anonymity order.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

8th June 2017

**TO THE RESPONDENT
FEE AWARD**

No fee award is made by the Upper Tribunal. The issue of any fee award will need to be considered by the FTT.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

8th June 2017