



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/29171/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Manchester

On 6th July 2017

**Decision & Reasons
Promulgated
On 13th July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M S S

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr A McVeety, Senior Home Office Presenting Officer

For the Respondent: Mr C Timson of Counsel instructed by HSK Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a decision of Judge Burnett of the First-tier Tribunal (the FtT) promulgated on 24th November 2016.
2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to him as the Claimant.

3. The Claimant is a male Indian citizen born 28th July 1991. On 27th March 2015 the Claimant applied for leave to remain in the UK as the spouse of a British citizen.
4. The application was refused on 12th August 2015 with reference to S-LTR.1.6.
5. The Secretary of State concluded that the Claimant had submitted a TOEIC certificate issued by Educational Testing Service (ETS) which had been obtained by deception. The Secretary of State believed that the Claimant had employed a proxy test taker.
6. The Claimant appealed to the FtT who heard the appeal on 7th November 2016. The FtT found that the Secretary of State had failed to prove that the Claimant obtained his English language test certificate by the use of a proxy tester and therefore allowed the Claimant's appeal.
7. The Secretary of State applied for permission to appeal to the Upper Tribunal. In summary it was contended that the FtT had erred by failing to give adequate reasons for concluding that the Claimant had not obtained the ETS certificate by deception. The Secretary of State had provided generic witness statements from Peter Millington and Rebecca Collings and a certificate issued by ETS confirming that the Claimant's tests had been declared invalid.
8. Permission to appeal was granted by Judge N J Bennett of the FtT in the following terms;

"Permission to appeal is granted because it is arguable that the judge erred by failing to analyse the claim in accordance with the President's decision in SM and Qadir [2016] UKUT 229 by finding whether the generic evidence discharged the initial evidential burden and, if so, by finding whether the Appellant had provided an innocent explanation and that this failure arguably led the judge to err in concluding that the Respondent had not proved that the Appellant obtained his test certificate fraudulently."
9. Following the grant of permission the Claimant did not lodge a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008. Directions were issued making provision for there to be a hearing before the Upper Tribunal to decide whether the FtT decision contained an error of law such that it should be set aside.

Submissions

10. Mr McVeety relied upon the grounds contained within the application for permission to appeal, and the grant of permission. I was asked to find that the FtT had not adopted the correct approach, and had erred by not finding that the Secretary of State had discharged the initial evidential burden of proof.
11. Mr Timpson argued that the FtT had not materially erred in law. I was referred to paragraph 24 of the FtT decision in which the FtT described the burden of proof as being on the Claimant to establish the facts in respect

of the matters relied upon. Mr Timpson submitted that this indicated that the FtT had accepted that the initial evidential burden had been discharged, and therefore there was a burden on the Appellant to provide an innocent explanation. The FtT had analysed all the evidence, and concluded that the Secretary of State had failed to discharge the legal burden of proof, and therefore there was no error of law.

12. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

13. The FtT correctly referred to the relevant case law. In paragraph 26 there is reference to Qadir [2016] UKUT 229 (IAC) and Shazad and Chowdhury [2016] EWCA Civ 615. The FtT sets out an extract from the latter decision, which confirms that in a case such as this the Secretary of State bears the initial burden of furnishing proof of deception. This is an evidential burden, which if satisfied, means that the burden shifts onto the individual to provide a plausible, innocent explanation and if the individual does so the burden shifts back to the Secretary of State.

14. In setting out findings and conclusions the FtT does not demonstrate that approach has been followed as there is no reference to the initial evidential burden and whether or not this is discharged.

15. It is common ground that the generic statements of Mr Millington and Ms Collings, together with specific evidence in relation to an individual, such as the certificate issued by ETS confirming that the test result is invalid, is sufficient to shift the evidential burden. That evidence was submitted in this case, and therefore it fell to the Claimant to provide a plausible innocent explanation.

16. Although there is no specific reference to the evidential burden being satisfied, the FtT must have found that to be the case, because the FtT goes on to consider whether the Claimant has provided a plausible and innocent explanation. At paragraph 34 there is specific reference to consideration of the Claimant's explanation.

17. The FtT analyses all material evidence, noting at paragraph 35 that there "was little evidence presented to me other than the Appellant's oral evidence that he undertook the test himself."

18. Having examined all the evidence presented, and the Respondent did not present any further evidence, other than the generic witness statements and the certificate issued by ETS confirming the test to be invalid, the FtT concluded that the Secretary of State had failed to discharge the legal burden of proof. The FtT accepted as a plausible innocent explanation, the Claimant's account that he undertook the test himself.

19. In my view the FtT was entitled to reach that conclusion having considered all the evidence, and has given adequate reasons for that finding. Of course it may be said that some FtT judges would not have reached the

same conclusion, but that is not relevant, and not the test to be considered.

20. The challenge made by the Secretary of State amounts to a disagreement with the conclusion reached by the FtT, but does not disclose a material error of law.

Notice of Decision

The FtT decision does not disclose a material error of law. The decision of the FtT stands and the appeal of the Secretary of State is dismissed.

Anonymity

The FtT made an anonymity direction. I continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Unless and until a Tribunal or court directs otherwise, the Claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

7th July 2017

TO THE RESPONDENT FEE AWARD

Because the decision of the FtT stands so does the decision not to make a fee award.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

7th July 2017

