



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

Appeal Number: IA/29446/2015

THE IMMIGRATION ACTS

Heard at Field House

On 8th May 2017

**Decision & Reasons
Promulgated
On 5th October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

**MR MD MONIRUZZAMAN
(ANONYMITY NOT DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. M Bhuiyan, Haque & Hausman Solicitors (London)

For the Respondent: Ms. K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal (“FtT”) Judge Andonian promulgated on 14th September 2016. The Judge allowed the appellant’s appeal against a decision made by the respondent on 26th August 2015 to refuse the appellant’s application for leave to remain in the UK as a Tier 4 (General) Student Migrant.

2. The respondent's grounds for refusing the application were twofold. First, on 4th April 2012, the appellant had made a previous application for leave to remain as a Tier 4 (General) student. In support of that application, the appellant submitted a TOEIC certificate from Educational Testing Service ("ETS") to the respondent and his sponsor in order for them to provide him with a Confirmation of Acceptance for Studies ("CAS"). According to information provided to the respondent by ETS, there was significant evidence to conclude that the certificate of the test that the appellant took at London College of Social Studies, was fraudulently obtained by the use of a proxy test taker. ETS declared the appellant's test to be 'Invalid', and the scores were therefore cancelled by ETS. The respondent was satisfied that the appellant's certificate was fraudulently obtained. As false documents had been submitted in relation to the appellant's previous application, his application was refused under paragraph 322(2), of the Immigration Rules.
3. Second, the appellant had claimed 30 points under Appendix A of the Immigration Rules for a valid CAS but no CAS reference number had been submitted with the application. The respondent was not satisfied that the appellant met the requirements to be awarded 30 points under Appendix A of the Immigration Rules.
4. At paragraph [13] of his decision, the Judge referred to the evidence relied upon by the respondent. The respondent relied upon statements made by Hilary Rackstraw, Rebecca Collings, Peter Millington and Professor Peter French. The Judge noted that there is no direct evidence as regards this appellant, and no evidence that can show that this particular appellant practised deception.
5. The Judge concluded, at [14], that the burden of proof is on the respondent to satisfy the Tribunal, on the civil balance of probabilities that there has been deception practiced by this appellant in obtaining the TOEIC pass test. The Judge stated:

“...apart from the limited hearsay evidence of Mr Millington and Ms Collings there was no evidence from the ETS organisation. I base my decision on the oral evidence I have heard. The legal burden of proof is on the respondent to prove on the civil balance of probabilities that her accusation that the appellant practised deception should stand. I regret her accusation has not been proven to the requisite standard. As regards this particular appellant. Therefore the SSHD has not discharged the legal burden of proof incumbent upon her.”

6. Although the Judge of the FtT allowed the appeal, the appellant appealed the decision, drawing the Tribunal’s attention to the fact that the respondent had also refused the application on the grounds that no CAS reference number had been submitted with the application, and that the appellant had conceded at the hearing of the appeal, that no CAS had been submitted, and so the substantive requirements of the relevant rules could not be met.
7. Permission to appeal was granted by FtT Judge Cruthers on 22nd March 2017. The Judge noted that the FtT Judge should have dealt with the “CAS issue” as well as the “ETS test result issue”, and that in light of the concession made by the appellant that he was not able to provide a CAS, that matter should have been fatal to the appellant’s appeal. The matter comes before me to consider whether the decision of the FtT Judge involved the making of a material error of law, and if the decision is set aside, to re-make the decision.
8. It was common ground at the hearing before me, that although the Judge allowed the appeal, the decision of the FtT Judge fails to address whether the substantive requirements of the relevant rules could be met by the appellant, given the concession made by the appellant, that he was not able to provide a CAS. That in my judgement is itself a material error of law that is capable of affecting the outcome of the appeal, such that the decision of the FtT Judge must be set aside.

9. The failure to provide a CAS is in my judgement fatal to the appeal under the immigration rules. Ordinarily, I would not in the circumstances need to consider the remaining ground. There is however, the secondary issue as to the approach adopted by the FtT Judge as to the evidence in respect of the appellant's ETS test result, and the question of whether the appellant has used deception.
10. On behalf of the respondent, Ms Pal submits that the Judge erred in his assessment of the evidence before him. She relies upon the decision of the Tribunal in **SM and Qadir -v- SSHD [2016] UKUT 229 (IAC)**. It was held that the respondent's generic evidence, combined with her evidence particular to the two appellants in that case, was sufficient to discharge the evidential burden of proving that their TOEIC certificates had been procured by dishonesty. The Tribunal stressed that "every case belonging to the ETS/TOEIC stable will invariably be fact sensitive" and that "every appeal will be determined on the basis of the evidence adduced by the parties".
11. As is set out at paragraph [13] of the decision of the FtT, the evidence here included not only the generic evidence of Peter Millington and Rebecca Collings, but also the additional witness statement from Hilary Rackstraw and the report of Professor Peter French. Applying the approach in **SM and Qadir**, that evidence was sufficient to discharge the evidential burden upon the respondent. Where the respondent has provided prima facie evidence of deception, the burden shifts to the individual, to provide a plausible innocent explanation, and if the appellant does so, the burden shifts back to the respondent.
12. Ms Pal submits that the Judge of the FtT erred in his approach to the evidence. The Judge proceeds upon the basis that the respondent must satisfy the Tribunal on a balance of probability, that the appellant has practiced deception in obtaining the TOEIC certificate. She submits that the evidence that was before the FtT was sufficient to discharge the evidential burden upon the respondent and the Judge should then

have considered whether the appellant is able to provide a plausible, innocent explanation.

13. Mr Bhuiyan submits that if it is found that the Judge erred in reaching his decision because he did not consider whether the respondent has discharged the initial evidential burden upon her, that error is immaterial because the Judge considered the explanation that was given by the appellant. At paragraphs [8] to [10] of his decision, the FtT Judge refers to the evidence of the appellant and the submissions made on his behalf.
14. In my judgement, it is clear that the FtT Judge failed to apply the three-stage process identified in the case law. The Judge did not consider whether the respondent had discharged the initial evidential burden, before considering the appellant's explanation. The Judge proceeds upon the basis that there was simply no evidence that this particular appellant practiced deception. In my judgement, the Judge did not properly consider the evidence relied upon by the appellant and the explanation advanced, in a way that is required. The Judge noted at paragraph [10] of his decision that the appellant relied upon the fact that he has since completed a Masters of Business Administration Course. The Judge noted, correctly in my judgement, that the TOEIC certificate that is in issue relates to a test taken in 2012, and not a certificate that the appellant obtained some years later. That aside, all that was relied upon by the appellant was a bare assertion that he had paid for the TOEIC test, and attended the test centre for two days, taken the tests and passed them. Unsurprisingly, given the approach adopted by the Judge, the Judge does not set out any or any adequate reasons for concluding that the appellant has satisfied the burden that had shifted to him, to provide a plausible innocent explanation. I therefore reject the submission made by Mr Bhuigan that any error in the Judge's approach is immaterial. The Judge does not give adequate reasons for his conclusion that the appellant's explanation was sufficient to discharge the evidential burden that had shifted to him.

15. As to the disposal of the appeal, both Mr Bhuigan and Ms Pal agree that if I find that the Judge of the FtT made a material error of law as to his approach to the TOEIC certificate, the correct course to adopt is for the appeal to be remitted to the First-tier Tribunal for hearing afresh. I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having taken into account paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. In my view, the nature and extent of any judicial fact-finding necessary will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

16. The appeal is allowed. The decision of FtT Judge Andonian promulgated on 14th September 2016 is set aside.
17. The appeal is remitted the FtT for a fresh hearing of the appeal with no findings preserved.

Signed _____ Date 3rd July 2017
Deputy Upper Tribunal Judge Mandalia

FEE AWARD

As I have set aside the decision of the FtT, I also set aside the fee award made by the FtT Judge. Whether or not a fee award is appropriate will be considered by the FtT when the appeal is heard.

Signed _____ Date 3rd July 2017
Deputy Upper Tribunal Judge Mandalia