



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

Appeal Number: IA321782015

THE IMMIGRATION ACTS

**Heard at the Royal Courts of Justice
On 27 June 2017**

**Decision and
Promulgated
On 14 July 2017**

Reasons

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

**MR UDDIN SALEEM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss D. Qureshi instructed by Legend Solicitors
For the Respondent: Ms K. Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India who was born on 16 January 1980. He appeals against the determination of First-tier Tribunal Judge R. G. Walters promulgated on 18 November 2016 following a hearing that had taken

place on 26 October. In that appeal the appellant was neither present nor represented. This was an ETS appeal.

2. The basis of the decision made by the respondent was that a false document had been submitted in relation to the appellant's application. The false document was a TOEIC certificate from Educational Testing Service, known as ETS. ETS had informed the Secretary of State that the test apparently taken by the appellant at the London College of Social Studies on 11 December 2012 was invalid. It was on the basis of reliance upon what ETS had said, and in particular on its use of the word '*invalid*', that the respondent contended that a false document had been submitted in connection with the appellant's application, thereby justifying her refusing the application under paragraph 322(1A) of the Immigration Rules.
3. In the course of the hearing it was apparent that there was before the judge what is now universally referred to as '*the generic evidence*' in cases such as these. The generic evidence dealt with the issue of invalidity. It took the form of the well-known witness statements which had been provided in many similar cases by Peter Millington and Rebecca Collings.
4. The appellant appealed against the decision in circumstances to which I shall later refer. The position has now been settled by the judgment of Beatson LJ in the Court of Appeal in *Qadir v Secretary of State for the Home Department* [2016] EWCA Civ 1167, 25 October 2016. The appeal was brought by the Secretary of State against the determination of the Upper Tribunal in *SM and Qadir* (ETS - evidence - burden of proof) [2016] UKUT 229. That was a decision of the President of the Immigration and Appeal Chamber and of Deputy Upper Tribunal Judge Saini. The challenges advanced by the Secretary of State were made on a number of grounds but the great majority related to the evidence relied upon by the Secretary of State to prove that the English language qualifications recorded in TOEIC certificates had been obtained by deception and fraud in the use of proxy test takers. The Secretary of State had relied on the generic evidence as explained by Ms Collings and Mr Millington. The same material had been the subject of a decision by the Court of Appeal in *Secretary of State for the Home Department v Shehzad and Chowdhury* [2016] EWCA Civ 615. That case determined that the generic evidence relied upon by the Secretary of State was sufficient to discharge the initial evidential burden of proof placed upon her of proving deception in an ETS appeal.
5. The Court of Appeal then went on to deal with whether there was also a legal burden that had to be discharged. The Upper Tribunal in *Qadir's* case determined in favour of Mr Majumder and Mr Qadir. It found that the initial evidential burden had been established in favour of the Secretary of State and it did so by what was described as 'a narrow margin'. However, it then went on to consider the evidential burden placed then upon the appellants, Mr Majumder and Mr Qadir, of raising an innocent explanation.

The Upper Tribunal had found that the evidence included an expert report by Dr Harrison. In addition the two claimants provided explanations which the Upper Tribunal found were both plausible and truthful. In paragraph 19 of the decision in the Court of Appeal, the Court records the findings made by the Upper Tribunal that there was no suggestion that the claimants' evidence was false or that they used falsified or forged documents in support of their claim. Mr Majumder had given oral evidence in English at the First-tier Tribunal and the Upper Tribunal had the opportunity of assessing his demeanour and the oral evidence that he had provided. There was no indication of invention, exaggeration of evasiveness, and that he consistently presented himself as a witness of truth. It was therefore said in Mr Majumder's case that he had discharged the evidential burden such that the Secretary of State failed to discharge the legal burden. Similar considerations applied as far as Mr Qadir's evidence was concerned. There were no significant flaws in the documentary evidence produced by either appellant, see paragraph 21 of the decision in the Court of Appeal. Consequently it was open to the Upper Tribunal to determine that the Secretary of State had failed to discharge the legal burden placed upon her.

6. The situation in the current appeal is very different. The original grounds of appeal are in the court bundle. They contend that the impugned decision was unjustified, arbitrary, wrongful and flawed, that it was unsupported by evidence and that the respondent had 'completely ignored the disclosed facts'. The grounds go on to say that the requirements for a Tier 4 (General) Student Migrant on the points-based system had been met by the appellant and accordingly he should be entitled to leave to remain on that basis. They fail to make any reference to the issue of deception. They fail to address what was said in the reasons for refusing the application, namely that deception had been used. There is no express statement that the appellant had sat the relevant test.
7. The case was heard by the First-tier Tribunal Judge at which the appellant was neither present nor represented. He therefore did not give any evidence that he had not used deception nor did he produce a witness statement in which he made that crucial allegation. Instead it was advanced on the basis of the grounds of appeal, which I have already identified are wholly inadequate to counter the suggestion that no deception was employed. It was therefore inevitable that the generic evidence was sufficient to establish both the evidential burden and, absent any explanation, the legal burden.
8. In the grounds for permission advanced in the Upper Tribunal, there is, once again, a failure to make any express reference to the evidence of the claimant himself. It is merely a recital of the established case-law and a claim that the generic evidence relied on by ETS was no longer sufficient in such cases. That is a misunderstanding of what both the Upper Tribunal said in *SM and Qadir* and what the Court of Appeal said in the case of *Qadir v Secretary of State*. It is significant that the grounds of permission to appeal to the Upper Tribunal do not contain any express averment that

the appellant sat the test. They do not offer anything by way of evidence that might operate as an innocent explanation.

9. In my judgment the grounds of appeal both to the Tribunal and to the Upper Tribunal are wholly inadequate by reason of this failure. The judge was bound, as indeed I am bound, by the decisions of the Upper Tribunal and of the Court of Appeal to the effect that these cases are evidence-based, that there is an initial evidential burden placed upon the Secretary of State which is discharged by the generic evidence but which can be displaced by evidence from the claimants themselves which amounts to an innocent explanation. That was a process which both Mr Majumder and Mr Qadir succeeded upon in the Upper Tribunal but it is entirely lacking in the circumstances of this case.
10. Accordingly I find that the First-tier Tribunal Judge made no error of law in refusing this claim.

DECISION

The First-tier Tribunal made no error on a point of law and the decision dismissing the appellant's appeal shall stand.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL