



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA323012015

THE IMMIGRATION ACTS

Heard at Field House
On 14 June 2017

Decision & Reasons Promulgated
On 6 July 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD MAHFUJ AHMED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr J Whitwell, Home Office Presenting Officer
For the Respondent: Mr S Karim of Counsel instructed by Kalam Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State, to whom I shall refer as such, against a decision by Judge Lingam of the First-tier Tribunal allowing an appeal by the

appellant, Mr Ahmed, against a decision by the Respondent dated 21 September 2015 refusing to vary his leave to remain as the partner of Miss Shahanara Begum.

2. The basis for the refusal by the Secretary of State is that the claimant, as I shall call Mr Ahmed, had relied on an invalid TOEIC that was fraudulently obtained to process the previous student application, and thus his presence was not conducive to the public good under the suitability requirements of Appendix FM of the Immigration Rules.
3. Further reasons for refusal were given, but the main focus of the appeal before the judge was the issue of whether or not the claimant had utilised a proxy test taker in respect of his English language test. The judge found in the claimant's favour, having heard evidence and submissions on his behalf and on behalf of the Secretary of State who submitted copies of his English language test certificates which were dated both 13 December 2011 and 17 January 2012, an ETS spreadsheet in respect of the test on 13 December 2011, a copy of his CAS, statements of Ms Rebecca Collings and Mr Peter Millington and a report on Project Façade, a criminal inquiry into abuse of the TOEIC at Westlink College, Essex, where the claimant had taken the tests. The judge concluded at [30] that the claimant showed a competent level of spoken English language, she was satisfied that he gave a fluent account of how he had travelled to the college, and at [31]:-

“With reference to the appellant's English language test results at pages 14 to 17, I am satisfied on his explanation that he had repeated the speaking part of his English language paper because his score of 150 on the first attempt (13 December 2011) was not sufficient to meet the requirement of level B2 for his college needs. I am satisfied he had a plausible explanation for the re-take. I am satisfied that his second test result (taken in January 2012 and, that which is not in dispute) showed that the attained level B2 score for his purpose. I am satisfied that the appellant had declared both test results to process his application lodged on 15 May 2012.”

4. The judge went on to find at [32]:-

“... Indeed, I am satisfied the Respondent's position is severally undermined for a lack of evidential force because she disputes with the appellant's score that he had attained on 13 December 2011 rather than his second test result issued in January 2012. To add, it is the appellant's evidence that in respect of his language paper of 13 December 2011, he only relied on the 'writing' aspect of the test result because the 'speaking' aspect of the test was only sufficient to meet a level B1 standard. Therefore, he decided to repeat only his 'speaking' part of his language ability of the second language test paper (see his test results at pages 14-17).”

5. The judge concluded at [34]:-

“It is on the Respondent's onus to prove that the appellant was guilty of fraud – *Qadir* [58] pointed out that it was necessary to ask if having regard to the

context, the Respondent's adduced evidence is of sufficient cogency to warrant the conclusion that the burden of proof has been discharged to the civil standard."

The judge noted at [35] that the Tribunal in SM & Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC).had found that the generic evidence relied on to date in all the ETS cases had been held to be insufficient to discharge the legal burden of proof on the Secretary of State of proving that the TOEIC certificates were procured by dishonesty and at [35] the judge concluded:-

"For the reasons stated in Qadir, I am satisfied that the '... legal burden of proof falling on the Secretary of State has not been discharged'. Indeed, the Respondent has relied on the wrong test paper to challenge the appellant's lack of credibility."

At [37]:-

"In so far as the core issues relating to my decision pertaining to the appellant's English language test result, I am satisfied that the Respondent's conclusion his present (sic) in the UK was not conducive to public good under para S LTR.1.6 of the Rules lacks any evidential basis and therefore is not lawful."

At [41]:-

"In the instance appeal, I am satisfied that the Respondent has failed to adduce satisfactory evidence to support the allegation against the appellant. Additionally, no prosecution investigation or proceeding was brought against the appellant."

6. The judge therefore allowed the appeal to the limited extent that the Secretary of State must now make a lawful decision with reference to Appendix FM and paragraph 276ADE(1) of the Immigration Rules in light of the decision in Greenwood (No. 2) (para 398 considered) [2015] UKUT 00629 (IAC) under the third power of disposal of the appeal. Permission to appeal was sought by the Secretary of State in time on 30 November 2016. The grounds in support of the application asserted that:-
 - (a) the First-tier Tribunal Judge had erred in failing to make any findings in respect of information contained in the report from the Home Office Project Façade Report on Westlink College, Essex; and
 - (b) that the judge failed to assess correctly the burden of proof in line with the decision in SM and Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC).

In essence it was submitted that the judge had materially erred in misdirecting herself in law on this material matter.

7. Permission to appeal was granted by First-tier Tribunal Judge Grimmett on 12 May 2017 on the basis that it was arguable that the judge erred in failing to note that the burden shifted to the claimant if the Respondent showed evidence of deception following SM and Qadir (op cit).

Hearing

8. At the hearing before me, Mr Whitwell appeared on behalf of the Secretary of State and Mr Karim of Counsel on behalf of the claimant. Mr Whitwell sought to adopt the grounds of appeal, accepting that the grounds were relatively limited and asserted that the judge failed to make a finding on the evidential burden of proof as per SM and Qadir.
9. He submitted that if the Secretary of State was correct, there had been a proxy test taker and the element of the English language was disputed. He submitted that the judge at [13] of her decision had directed herself as to the legal burden and standard of proof, i.e. the standard of proof was a civil standard on the balance of probability and there was no reference therein to the legal and evidential burden as set out in SM and Qadir. He further submitted that there was no reference or findings in respect of the Home Office Operation Façade document which the judge mentions at [6] and [8] of the decision. He submitted that this, therefore, was not factored into the judge's consideration of whether or not a proxy test taker was used and this does have an effect on the safety of her credibility findings as this was specific evidence in relation to the college in which the claimant took the test, not just the generic evidence of Ms Millington and Mr Collings and the spreadsheet in respect of the claimant's test taker.
10. Mr Karim in his submissions submitted that this was a case where the Secretary of State's challenge has multiple frailties. The claimant's case was not premised on the fact that he relied on the certificate where the test scores were too low for him to attain a B2 result, and it was illogical for him to have employed a proxy test taker who would then fail that test. He referred to [29] and [31] of the judge's decision. Mr Karim stated that the claimant only re-took the speaking part of the test on 17 January 2012 as he had passed the writing part of the test on 13 December 2011, scoring 190. He submitted that the evidential burden has nothing to do with the judge's findings at [32] and [35] of the decision. The judge accepted what the claimant had said in his evidence and that there was no challenge to the judge's specific findings of fact in relation to the claimant's evidence.
11. Mr Karim drew my attention to the Court of Appeal decision in Majumder and Qadir [2016] EWCA Civ 1167 at [18]:-

"I have stated that the UT decided that the Secretary of State had discharged the evidential burden that lay on the Secretary of State so there was a burden, again an evidential one, on Mr Majumder and Mr Qadir of raising an innocent explanation. The UT accepted (at [69]) the submission on behalf of the Secretary of State, that in considering an allegation of dishonesty the relevant factors included the following: what the person accused had to gain from being dishonest; what he had to lose; what is known

about his character; the cultural environment in which he operated; how the individual accused of dishonesty performed under cross-examination, and whether the Tribunal's assessment of that person's English language proficiency is commensurate with his or her TOEIC scores; and whether his or her academic achievements are such that it was unnecessary or illogical for them to have cheated. There was no criticism in this court by Mr Kovats of that approach."

12. Mr Karim submitted that the judge clearly found at [31] that the claimant had taken both tests and this was not challenged by the Respondent in her grounds and there was therefore no material error in the judge's decision. Mr Karim further submitted that when at [35] the judge refers to the fact that the legal burden of proof has not been discharged, this pre-supposes that she accepted that the evidential burden had been discharged by the Secretary of State which is why she then goes on to consider the claimant's evidence. It is a three-step process. The judge was clearly aware of the decision in SM and Qadir and had correctly applied the tests set out therein. He submitted that this was a case that would fall within the third category of the Court of Appeal judgment in Majumder and Qadir:-

"The third category also consists of appeals by the Secretary of State, but where the appeal is against the decision in which it was held that the generic evidence had not discharged the initial evidential burden and was thus erroneous in that respect, but that other evidence meant that the Secretary of State would not have been able to discharge the legal burden. Mr Kovats indicated that in this class of case, also without giving an undertaking in respect of any particular case, the Secretary of State was minded to concede and to abandon the appeal."

13. Mr Karim submitted that the judge relied on the fact that the second test taken on 17 January 2012 was not challenged by the Secretary of State and he concluded by submitting that even if there was an error in respect of their evidential burden, it was not a material error.
14. In relation to the Project Façade Report, Mr Karim submitted that ETS cases are intrinsically fact-sensitive, that generic evidence does not pinpoint an individual and has little value. He submitted it was trite law that the judge does not have to refer to each and every document before her, however the judge does note that it was before her at [6] and at [8] and crucially at [22] she states in terms that she had paid attention to all the evidence relied on by the Secretary of State, including the documents filed by the Presenting Officer which included the Project Façade Report. He also drew my attention to paragraph [29] and the fact that the focus of the Secretary of State's submission was that the claimant had failed to provide a reasonable explanation against the allegation of using a proxy test taker, however this was not accepted by the judge who went on to find that the claimant did take the test. He submitted it was difficult to see that a different outcome would have been achieved by virtue of the judge making express reference to the Secretary of State having discharged the evidential burden of proof as per SM and Qadir.

Decision and reasons

15. I found no material error of law in the decision of First-tier Tribunal Judge Lingam and I now give my reasons.
16. I accept the submissions of Mr Karim that it is clear from the judge's decision that she clearly had in mind the decision in SM and Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC) and she correctly applied the test set out therein which is, in essence, a three-part test. Firstly, that the evidential burden is on the Secretary of State. Initially, if that burden is discharged then the burden shifts to the claimant to provide an innocent explanation. If that explanation is accepted, the judge then has to go on to consider whether the Secretary of State has discharged the legal burden of proving that there had been a proxy test taker.
17. In this case the judge cited extensively from the decision in Qadir at [20] and [21] of her decision. The judge then considered carefully the “generic” evidence of Rebecca Collings and Peter Millington at [23] through to [25]. She took account at [28] of the evidence, including the ETS SELT source data which purports to show that the claimant's test result sat on 13 December 2011 was invalid.
18. However, having heard evidence from the claimant the judge went on at [30] through to [33] that she accepted his evidence and the judge found at [32] that the Secretary of State's position was undermined because she had only taken issue with the first test score on 13 December 2011 rather than the second test result in relation to January 2012. I find that the judge correctly directed herself as to the burden and standard of proof and that is clear from [34] of her decision cited above. The judge clearly found at [35] that the respondent had not discharged the legal burden and there is no material error of law in her decision in this respect.
19. In relation to the second ground, I accept the submission of Mr Karim that permission to appeal was not expressly granted in relation to the challenge to the judge's decision by virtue of an apparent failure to make any findings as to the information contained in the Home Office Project Façade Report concerning Westlink College. The grant of permission to appeal is silent on that particular ground, but for the avoidance of doubt, having heard submissions from both parties I find no material error of law in this respect either. It is clear that the judge was aware of the document and its contents. It is referred to expressly at [6] where the judge records that the Presenting Officer handed up the document entitled “Project Façade – criminal inquiry into abuse of the TOEIC, Westlink College Essex Criminal Investigations (Immigration)” recorded the fact that it was in the Respondent's bundle at [8], and at [22] made express reference to the fact she had paid attention to all the evidence, including that evidence relied on filed at the hearing by the Presenting Officer. I accept Mr Karim's submission that in any event this is also general evidence as to the test taking at that college. It does not identify the claimant and has no specific application to this particular claimant.

Notice of Decision

20. In light of the fact that there is no challenge by the Secretary of State to the judge's findings of fact, I find that those findings stand and the effect of my decision that there is no material error of law is that the judge's direction at [44] that the claimant's appeal is allowed to the extent that the Respondent must make a lawful decision under Appendix FM and paragraph 276ADE(1) of the Immigration Rules should now be implemented.
21. I maintain the fee award that the First-tier Tribunal Judge made, given my decision to uphold her decision.
22. No anonymity direction is made.

Signed *Rebecca Chapman*

Date 5 July 2017

Deputy Upper Tribunal Judge Chapman