



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

Appeal Numbers: IA/33433/2015  
IA/33436/2015  
IA/33438/2015  
IA/33437/2015  
IA/34017/2014  
IA/34019/2014  
IA/34025/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 31<sup>st</sup> May 2017**

**Decision & Reasons Promulgated  
On 12<sup>th</sup> June 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**(1) MR MUNIR AHMAD  
(2) MRS SAIMA MUNIR  
(3) [M HA]  
(4) [M HF]  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr Z Malik (Counsel)  
For the Respondent: Mr T Melvin (Senior HOPO)

**DECISION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge N M Paul, promulgated on 1<sup>st</sup> November 2016, following a hearing at Taylor House on 13<sup>th</sup> October 2016. In the determination, the judge dismissed the appeals of the Appellants, whereupon they subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellants**

2. The Appellants are all citizens of Pakistan. They comprise a family. They consist of a husband and wife and their two children. Their dates of birth are as follows. The principal Appellant, the husband, was born on 12<sup>th</sup> March 1973. The second Appellant, his wife, was born on 20<sup>th</sup> June 1976. Their two children were respectively born on [ ] 2010 and on [ ] 2005, and are both male.
3. The issue in this appeal arises on account of an application dated 28<sup>th</sup> February 2013, by the principal Appellant, whereby he had submitted a TOEIC certificate from the Educational Testing Service (ETS), which contained a record of the Appellant's speaking test, and using voice verification software tests, it had been concluded that the test was taken by a proxy test taker. In a decision dated 12<sup>th</sup> October 2015, it had been decided that the Appellants' applications to remain in the UK on the basis of their family and private life should be rejected because of the specified fraudulent activity. There was an earlier decision of 22<sup>nd</sup> August 2014 to similar effect.

### **The Judge's Findings**

4. At the hearing before him on 13<sup>th</sup> October 2016, Judge N M Paul had expressly asked the principal Appellant the circumstances in which he had taken the test. The principal Appellant had replied that there was no legal requirement to take it in 2012, but he had done it just in order "to improve his English" and that, "he said he was free at the time, and he was not engaged in any other college" (paragraph 20). The judge also asked the Appellant why it was that at the age of 43 he was still seeking to engage in full-time education, having originally come to the UK as a student in 2008, and the Appellant answered that "he had decided that future career possibilities in Pakistan involved tourism and development, and he did not want to return to a career as a pharmaceutical salesman" (paragraph 20).
5. Second, the judge had regard to both generic evidence before him as well as specific evidence in relation to the circumstances in which the principal Appellant sat the test on 5<sup>th</sup> December 2012, because this showed a high level of fraudulent activity on that day. It was concluded that the Appellant had not been able to put forward a satisfactory explanation as to the circumstances in which he sat the test and that the Respondent

Secretary of State had been able to demonstrate that the test had been taken by a proxy test taker.

6. The appeal was dismissed.

### **Grounds of Application**

7. The grounds of application state that the judge erroneously failed to consider the Appellant's Article 8 rights, taking the view that these had been withdrawn in the appeal before him, even though there was a family here in issue with young children, which made consideration of Article 8 issues to be plainly obvious. Second, that he had applied the wrong burden of proof. This was set out in **SM and Qadir [2016] UKUT 00229**. Third, a letter from Synergy Business College was overlooked by the judge providing an explanation for the test taken on 5<sup>th</sup> December 2012.
8. On 8<sup>th</sup> April 2017 permission to appeal was granted, although it was stated that there did not appear to be the letter of 10<sup>th</sup> December from Synergy Business College on the file as was now being maintained.
9. A Rule 24 response dated 30<sup>th</sup> May 2017 makes it clear that the judge (at paragraph 22) accepted that there was generic evidence put forward on behalf of the Respondent Secretary of State, and that the principal issue before him was, "whether or not he (the Appellant) engaged in dishonest activity in relation to ETS" and this was the correct test to apply by the Tribunal. Second, the reasons given by the judge for finding dishonesty are expressly set out at paragraphs 23 to 27 of the determination. These include:
- (a) a total inaction by the Appellant to approach Synergy Business College with a view to them verifying the results and rejection by the judge of the reason given by the Appellant;
  - (b) the high level of fraudulent activity, as set down in the objective evidence, such that it was not credible that the Appellant did not on that day notice such fraudulent activity when he sat the test; and
  - (c) the rejection, as unreliable, of the Appellant's own evidence as to why he needed to take the TOEIC test in 2012 when there was no need for him to do so.

Finally, there was also the fact that the Appellant took a test at the cheapest college available.

### **Submissions**

10. At the hearing before me on 31<sup>st</sup> May 2017, Mr Malik, appearing on behalf of the Appellants, made the following three submissions. First, that the judge had erred with respect to where the burden of proof lay. Second, that the judge had failed to make a decision on Article 8 ECHR grounds.

Third, that there was a failure to apply the strictures set out by the Court of Appeal in **Shehzad [2016] EWCA Civ 615**.

11. Mr Malik made good his submissions in the following way. First, as far as the burden of proof was concerned, the judge was clear (at paragraph 21) that, “the burden is on the Appellant to show, on a balance of probabilities, that his application meets the requirements of the Rules”. This was plainly wrong because there is no legal burden on the Appellant at all. He simply has to provide an explanation that is reasonable as to his having taken the test. Second, in **SM and Qadir [2016] EWCA Civ 1167**, the Court of Appeal sets out the approach to be followed in such cases. This is that, in considering an allegation of dishonesty, the relevant factors that need to be taken into account include, what the person accused had to gain from being dishonest; what he had to lose; what is known about his character; the culture and environment in which he operated; how the individual accused of the 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 (see paragraph 18).
12. In the instant case, Judge Paul did not take these matters into account. Furthermore, the fact that the Appellant did not take any action to pursue Synergy College, either for a refund, or to issue a letter of complaint, was irrelevant, as there was no such obligation upon him to so do. The burden of proof was upon the Secretary of State. It was not on the Appellant. In the same way, if there was a high score generated in respect of all the tests, this should not be surprising because the standard of English is not particularly high in these tests. Third, as far as Article 8 is concerned, the judge states (at paragraph 2) that, at the outset of the appeal Mr O’Callaghan stated that, “the appeal in respect of the Article 8 matters was being withdrawn.
13. The appeal was to proceed only in relation to the refusal for leave to remain based on the decision in respect of the Educational Testing Service procedure”. However, it was simply not plausible for a reputable Counsel to be withdrawing his appeal in relation to Article 8, given that there was in this case a “qualifying child” who had come to the UK on 9<sup>th</sup> June 2009, and by 9<sup>th</sup> June 2016, had completed seven years in this country. In fact, paragraph 9 of the Grounds of Appeal explains that what the Appellants had done was to confirm that they were not proceeding with a challenge under paragraph 276ADE.
14. The First-tier Tribunal Judge appears to have erred in determining that the withdrawal of this element of the appeal was based on there being no Article 8 claim. This did not make sense because if the Article 8 appeal was withdrawn then there would have been no statutory appeal before the Tribunal.

15. For his part, Mr Melvin referred to the Rule 24 response. He submitted that the determination had to be read as a whole, with a view to determining where the judge held the burden of proof to lie. Whereas it was true that in paragraph 21 the judge had stated that “the burden is on the Appellant”, this was immediately followed thereafter with paragraph 22 where the judge states that, “I am satisfied that the *prima facie* case has been established, by reference to the generic evidence that has been adduced, and also the specific evidence relating to the circumstances of the test on 5<sup>th</sup> December 2012 ... ” (paragraph 22).
16. This clearly demonstrates that the judge had proceeded on the basis of the burden of proof being upon the Respondent Secretary of State. That burden, the judge felt, had been satisfied with regard to the generic evidence and to the specific evidence on the day. He had then gone on to say that, “I evaluate the Appellant’s evidence with care and I am satisfied that it is unreliable in a number of material respects” (paragraph 22). He then goes on to set out why it is unreliable in the ensuing paragraphs. That was the correct approach.
17. Second, as far as the case of **SM and Qadir [2016] UKUT 00229** was concerned, what is said at paragraph 18 is not an exhaustive list of factors to be taken into account, and, given the allegation against the Appellant, it simply was not credible that he would not have pursued Synergy College for either a refund, or a letter of complaint with a view to having the college independently check and verify his results, and the judge was correct in having regard to this matter at paragraph 23. In the same way, one of the factors set out at paragraph 18 of **SM and Qadir**, is as to how the Appellant performed under cross-examination, and the judge’s view here was that the Appellant did not perform well, and so regard had properly been had to the relevant factors in this case. The judge could not be criticised for that.
18. Finally, as far as Article 8 was concerned, this was an experienced judge, and it was simply not credible for the judge to specifically have said that the Article 8 appeal was withdrawn, if it had not indeed been withdrawn by Counsel appearing before him. First, there was no witness statement from Counsel from the hearing below explaining exactly how he had withdrawn the paragraph 276ADE aspect of the appeal, if that was the case, rather than the Article 8 appeal. Second, the Home Office Presenting Officer’s notes of that day are quite clear (and Mr Melvin handed these up to the Tribunal) that “rep advised at the start of the appeal that they were formally withdrawing the Article 8 limb of the appeal, as the child now exceeded the seven years and has a right to claim on their own. The appeal would proceed purely in respect of the ETS element”.
19. In reply, Mr Malik made the following submissions. First, whilst it was true that at paragraph 22 the judge appears to be stating that the burden of proof is upon the Respondent and that the *prima facie* case has been established, this could not overcome the fact that the judge at the outset

had said at paragraph 21 that, “the burden is on the Appellant”. This is entirely contrary to what the Court of Appeal in **Shehzad [2016] EWCA Civ 615**.

20. Second, whereas paragraph 18 of **SM and Qadir [2016] EWCA Civ 1167** does not indeed specify an exhaustive list of factors to be taken into account, they are nevertheless relevant factors, and a failure to take these into account is in error. The judge concludes his determination (at paragraph 28) by stating that the high scores generated in respect of the tests were inconsistent “with the lack of other evidence to suggest that he spoke, wrote or understood English to a very high standard” because the judge had not set out what this other evidence was. Nor had he explained how it was inconsistent with the high test scores achieved.
21. Third, as far as Article 8 was concerned, he could take the matter no further, but to say that the Grounds of Appeal do suggest, as drafted by reputable Counsel, that the Tribunal had misinterpreted the fact that only the paragraph 276ADE appeal was being withdrawn.
22. Finally, as far as the letter from Synergy Business College was concerned, this was before the judge, because it is on file, and the judge does indeed refer to it (at paragraph 10), and it does appear at page 285 of the bundle.

### **No Error of Law**

23. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law, such that I should set aside the decision (see Section 12(1) of TCEA 2007) and re-make the decision. My reasons are as follows.
24. First, despite Mr Malik’s laudable efforts to persuade me otherwise, the determination has to be read as a whole, and when this is done, it is clear that the judge has not applied the wrong burden of proof. When read as a whole, it is clear that what the determination exhibits is a proofreading error because the standard statement in immigration cases, of the burden of proof being on a balance of probabilities, on the Appellant, is inserted at paragraph 21, but this is immediately followed with the correct burden being applied at paragraph 22, with the judge stating that, “I am satisfied that the *prima facie* case has been established” by the Respondent Secretary of State.
25. Second, I do not find that this error is material in any way because it does not infect the subsequent findings that the judge makes from paragraphs 23 to 28 of the determination, where it is made abundantly plain that the judge is approaching the appeal on the basis of the burden having been satisfied by the Respondent Secretary of State, with an unsatisfactory explanation being given by the Appellant as to the manner and method by which he took his test.

26. Third, I do not find that the factors set out at paragraph 18 of **SM and Qadir [2016] EWCA Civ 1167** have been ignored by the judge. In fact they are at the forefront of his mind. The judge does not accept the explanation that the Appellant, when it came to his test, “had done it just to improve his English”, and that “he was free at the time” and that “he was not engaged in any other college” (paragraph 20). He was not satisfied as to why at the age of 43 the Appellant would be seeking to engage in full-time education, having already come as a student to this country in 2008. He was not satisfied why the Appellant had not sought to approach Synergy College for a refund, or to even ask them to independently check out and verify his results (paragraph 23). The judge expressly rejected the explanation that there was a gap between the application and the decision and that is why the Appellant had no reason to go back to the college (paragraph 24).
27. In addition to all of this, there had been a high level of fraudulent activity at Synergy Business College, and especially on 5<sup>th</sup> December when the Appellant took the test, and it was simply not credible for him to say that he could see no such activity going on (paragraph 25). Furthermore, the Appellant was “hunting around for colleges which could do the test cheaply” and at lower cost, and he yet then found Synergy Business College. It was also significant that the Appellant had scored the highest score of 200 in his speaking test, and this maximum score on that day was consistent with “the high scores generated in respect of all tests” on the day. The reasons that the judge gave are to be read cumulatively and so do make it quite clear that the explanation given by the Appellant was not found by the judge to be a credible one.
28. Finally, as far as Article 8 is concerned, Mr Malik is wise not to press the point any further, but to simply refer to the grounds of application which state (at paragraph 9) that what was being withdrawn was the paragraph 276ADE appeal, but not the Article 8 appeal, but this is inconsistent both with the Presenting Officer’s notes of the hearing, where he makes it clear that the Appellant was “formally withdrawing the Article 8 limb of the appeal, as the child now exceeded the seven years and has a right to claim on their own”, and is consistent with the judge’s own recording of this fact at paragraph 2 of the determination. It is clear, therefore, that a strategic decision was taken on the day of the hearing not to proceed with the Article 8 claim because one of the children was now a “qualifying child”. That being so, there was simply no Article 8 appeal for the judge to determine. All in all, therefore, this appeal fails for the reasons that I have given.

### **Notice of Decision**

29. There is no material error of law in the original judge’s decision. The determination shall stand.
30. No anonymity direction is made.

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Signed

Date

Deputy Upper Tribunal Judge Juss

10<sup>th</sup> June 2017