



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/33957/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 24 May 2017

Decision & Reasons Promulgated  
On 25 May 2017

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

MR RAJIB KUMAR MALAKER  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Murphy, counsel instructed by Chancery Solicitors  
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge I Burnett, promulgated on 27 October 2016. Permission to appeal was granted by Resident Judge of the First-tier Tribunal Zucker on 31 March 2016.

Anonymity

2. No direction has been made previously, and there is no reason for one now

## Background

3. The appellant first arrived in the United Kingdom on 22 October 2009 with leave to enter as a student, valid until 25 February 2013. On 1 December 2012, he applied for further leave to remain under Tier 1 (Entrepreneur). That application was refused on 22 August 2013 because the evidence of funds submitted by the appellant was not in accordance with paragraph 41 of Appendix A; he had not provided evidence that he had passed a test in reading and writing English as required by Appendix B of the Rules and the evidence of funds was dated more than 31 days prior to the date of the application and did not therefore meet the requirements of Appendix C.
4. The appellant appealed the decision of 22 August 2013 and his appeal was allowed. That decision was set aside by the Upper Tribunal on 9 May 2014 and remade, allowing the appeal on the limited basis that the respondent's decision was not in accordance with the law and therefore the appellant's application remained outstanding before the Secretary of State. The error made by the Secretary of State was in failing to have proper regard to paragraph 245AA of the Rules.
5. The respondent reconsidered the appellant's Tier 1 application and on 23 October 2015, a decision was made to refuse the appellant further leave to remain in the United Kingdom. Firstly, the application was refused under paragraph 322(1A) of the Rules because Educational Testing Service (ETS) had informed the respondent that the appellant's TOEIC certificate in relation to a test taken at Elizabeth College on 22 August 2012 was fraudulently obtained. Secondly, the appellant continued to fail to provide the specified evidence in relation to access to funds set out in paragraph 41 of Appendix A. Thirdly, the appellant failed to provide a bank statement dated no more than 31 days prior to the date of the application. The decision letter advised the appellant that further information had not been requested under evidential flexibility as "*instructed*" by the Upper Tribunal because the application fell to be refused on other grounds. In addition, it was said that the information regarding deception was received after the first decision on this application was made, that is on 22 August 2013.

## The hearing before the First-tier Tribunal

6. At the hearing before the First-tier Tribunal, the appellant sought an adjournment to obtain further evidence regarding the maintenance issue. That application was refused as the parties agreed that if the appellant succeeded on the deception issue, he would also succeed in his argument that the respondent failed to consider evidential flexibility under the Rules by seeking further evidence. The appellant alone gave evidence and denied that he used a proxy during his English language test. The judge found that the evidence submitted by the respondent discharged the initial burden of proof which was upon her.
7. For various reasons, the judge concluded that the appellant had not put forward an innocent explanation and dismissed his appeal against the refusal under Tier 1. The appeal on Article 8 grounds was also dismissed.

### The grounds of appeal

8. The grounds of appeal in support of the application argued that the judge failed to consider the evidence, the case law and was not entitled to conclude that the appellant cheated when he had the ability to pass the test. Furthermore, the judge was wrong to determine that there was no evidence the appellant had asked for his individual voice recording, there was no recognition of the appellant's previous successful appeal in which the same TOEIC certificate was in issue and there was a failure to consider the appellant's private life.
9. Permission to appeal was granted on the basis that the judge arguably erred in "*placing the burden of proof upon the Respondent.*" While permission was not refused on any ground, Judge Zucker noted that there was no real reliance placed on human rights by the appellant.
10. The respondent's Rule 24 response, received on 20 April 2017 indicated that the appeal was opposed and that the judge correctly referred to the initial burden of proving fraud being on the respondent.

### The hearing

11. Mr Murphy made three succinctly expressed points. Firstly, at [27] the judge had stated that the burden of proof was on the appellant to establish the facts and indeed the grant of permission was on that basis. Mr Murphy conceded that [29] and [42] indicated otherwise, however he argued that the judge was confused on this matter.
12. Secondly, he argued that it was not likely that the appellant, who gave evidence in English, would cheat if he could pass the English language test and in this he relied on [89] of SM and Ihsan Qadir v SSHD [2016] UKUT 229 (IAC) where a similar argument was raised, as set out below;

*"We are satisfied, objectively, that at the stage when this Appellant took the tests in question there was no need for him to engage in any form of cheating. He would have been sufficiently proficient in English to secure the necessary qualification legitimately. Furthermore, given his extensive familiarity with the immigration system, he would have been aware of the grave consequences of any form of deception. To have cheated would have entailed engaging in a game of risk with very high stakes indeed. Furthermore, having considered all the evidence, we have no reason to question the Appellant's good character generally.*

13. Thirdly, as to the judge's findings at [36] regarding the appellant not having contacted ETS to ask for the voice recordings, Mr Murphy asked me to note that the appellant mentioned having tried to contact his college for evidence that he sat the examination, however it was closed.
14. Mr Clarke argued that the grounds were misconceived. He relied on the rule 24 response, expanding upon it to take me through the judge's decision in considerable detail. He asked me to find that the judge's findings were comprehensive, followed Qadir, they took into account all of the evidence and resulted in no error of law.
15. Mr Murphy had very little to add.

16. At the end of the hearing, I announced that the First-tier Tribunal Judge made no error of law and that his decision was upheld. My reasons are set out below.

#### Decision on error of law

17. Addressing the issue of the burden of proof, it is the case that at [27] the judge set out the general burden of proof in his detailed five-paragraph self-direction as to the burden and standard of proof. The judge did not err in starting in this manner, given there were two other matters at issue in this appeal, other than the deception issue. In any event at [29] the judge correctly identifies that the burden of proving fraud is on the respondent; he appropriately directed himself with regard to Qadir and SSHD v Shehzad & anor [2016] EWCA civ 615 as well as to the civil standard, following the approach of Lady Hale in Re B(Children) [2008] UKHL 35 [2009]. Thereafter at [32] and [33] the judge correctly directs himself, referring to the aforementioned authorities, before concluding at [33]; *“the respondent provided sufficient evidence of fraud in respect of this case for the appellant to provide an explanation.”*
18. Having rightly found that the respondent had discharged the initial burden of proof, the judge undertook a fact-sensitive assessment as to whether the appellant had provided an innocent explanation. The judge provided a series of sustainable reasons, noting that the respondent provided more evidence in the instant appeal, in the form of an Operation Façade report into Elizabeth College and an expert report of Dr French, than had been provided in Qadir, where the respondent only just discharged evidential burden.
19. The judge was entitled to take into account the Project Façade report which showed that there was a significant prevalence of invalid reports at the College concerned in general and that on the date the appellant said he took his tests, 76% of the tests were declared invalid with the remainder being termed questionable. The judge considered the appellant’s explanation or rather assertion that he did not cheat against the background of the prevalence of cheating at Elizabeth College. Mr Murphy’s arguments did not adequately address the relevance of the appellant attempting to obtain evidence to support his case from the college which had been closed-down. The judge rightly considered his failure, despite being represented, to contact ETS to dispute matters or to ask for his individual voice recording and took this into account along with all the other evidence before him. The appellant adduced nothing other than his unsupported account as evidence that he did not cheat. As remarked upon by the judge, he had no witness nor independent evidence to support his contentions and his own evidence was found by the judge to be *“lacking in substance and detail.”* The latter finding was not challenged.
20. It is recorded by the judge as part of his findings and conclusions that the appellant provided his explanations in English. He also considered the argument that the appellant would have no good reason to cheat. but for reasons set out at [37] the judge did not accept that this was determinative of the deception issue.
21. Mr Murphy concentrated his submissions upon the appellant’s ability to give his evidence in English and maintained that this removed any incentive to cheat. I note what was said in Qadir at [80] regarding such simplistic conclusions;

“In some of the FtT decisions in this field one finds observations concerning the appellant’s apparent fluency in, and command of, the English language. We consider that Judges should be cautious in adopting this approach for at least three reasons. The first is the passage of time. The second is that Judges are not language testing or linguistics experts. The third is that, to date, there has been no expert linguistic evidence in any of these cases. “

22. Given that the appeal concerns test results dating from 22 August 2012 and the appeal was heard over 4 years later, the weight the judge gave to the appellant’s English language ability and whether this removed the motivation to cheat cannot be impugned.
23. The approach of the judge in deciding the deception issue cannot be faulted in any respect.

### Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of First-tier Tribunal Judge I Burnett is upheld in its entirety.

No application for anonymity was made and I saw no reason to make such a direction.

Signed

Date 18 July 2017

Upper Tribunal Judge Kamara