



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/34171/2015**

Appeal Numbers:

IA/34173/2015

IA/34174/2015

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 22 November 2017

On 04 December 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS HASINA KHANOM
MR FAKIR TAREKUL ISLAM
MR HASIBUL BIN TAREQ
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer

For the Respondents: Mr J Collins, Counsel, instructed by Visa Inn Solicitors

DECISION AND REASONS

1. This is an appeal from the decision of First-tier Tribunal Judge Lingam that was promulgated on 21 March 2017. It is one of a number of appeals which have their origin in allegations of fraud in the procurement of ETS language certificates. The appellant in this instance is the Secretary of State.

2. The grounds allege a misdirection concerning the application of the now well known decisions of **Secretary of State for the Home Department and Shehzad and Another [2016] EWCA Civ 615** and **SM and Qadir v Secretary of State of the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC)**. It is submitted that the judge fell into error by rejecting wholesale the so-called “generic” evidence of the Secretary of State, and by misinterpreting the evidence more generally.
3. The position in **SM and Qadir** is helpfully summarised in the headnote which makes two broad propositions. First, the Secretary of State’s generic evidence combined with her evidence particular to the two appellants sufficed to discharge the evidential burden of proving that their TOEIC certificates had been procured by dishonesty. However given the multiple frailties from which this generic evidence was considered to suffer, and in the light of the evidence adduced by the appellants, the Secretary of State failed to discharge the legal burden of proving dishonesty of their part.
4. The central plank of the decision is that when fraud is alleged, it is for the Secretary of State to satisfy the Tribunal on the evidential standard of a prima facie case of fraud, thus calling for an explanation from the appellant. Thereafter comes a second stage, where the Tribunal must assess, having regard to the totality of the evidence, whether the Secretary of State has discharged the legal burden of proving such fraud.
5. I have some sympathy for Mr Duffy in advancing the appeal on behalf of the Secretary of State. It is unfortunate that at paragraph 25, where the judge summarises the evidence, she states “therefore the generic witness statements as found in **Qadir** have little or no evidential value”.
6. Mr Duffy argues that the judge effectively came to the view that the generic evidence was so insubstantial that it was not sufficient to discharge the evidential burden and therefore ascribed to it a zero sum when looking at the case overall including the evidence adduced by the appellant in relation to the taking of that test.
7. It would certainly have been better had the judge acknowledged that the generic evidence of the Secretary of State did indeed discharge the evidential burden, thereby placing her in the second stage of having to assess the totality of the evidence to establish whether the legal burden had been discharged.
8. Mr Duffy submits that because there was no express resolution at the first stage, one cannot be satisfied that the second stage assessment was properly conducted. It is said that the judge may have closed her

mind to according proper weight to the evidence adduced by the Secretary of State.

9. Mt Duffy's submission, in my opinion, cannot be maintained. In this instance, the second stage was conducted meticulously leading the judge at paragraph 39 to say:

"For the reasons in **SM and Qadir** I am satisfied that the legal burden of proof falling on the Secretary of State has not been discharged".

10. This finding, when the decision is looked at holistically, was rooted in a number of key factors which the judge took into account, mindful that cases of this nature are always fact specific. Among features the judge considered are (i) that there was a perfectly legitimate reason why the appellant chose to take the test at the particular centre she chose which militated against the allegation of fraud; (ii) that the judge gave cognisance to the fact that evidence drawn from other sources indicated that Mrs Khanom was accomplished in English; and, perhaps most significantly, (iii) that the evidence which the appellant gave on oath was largely unchallenged.

11. Paragraph 18 reads:

"I am satisfied that [Mrs Khanom's] evidence as set out above (or her witness statement including supporting documents) was not challenged therefore her evidence stands accepted".

12. It is not appropriate for the Secretary of State to raise issues in the Upper Tribunal concerning the adequacy of the material relied upon by Mrs Khanom when there was no challenge in the First-tier Tribunal to the credibility of the appellant or to the content of the evidence which she gave.

13. The principle in **SM and Qadir** was clearly much in the judge's mind although as a counsel of perfection it would have been more prudent to deal expressly with a conclusion on the first stage. However, the judicial function of analysing the totality of the evidence and coming to the second stage conclusion was one that cannot faulted.

14. To the extent that the omission to make an overt first stage conclusion, might constitute an error of law, it is certainly not one which is material in the context of this case. On the basis of what was before the First-tier Tribunal, as found by the judge, the ultimate conclusion was inevitable.

15. It therefore follows that this appeal is to be dismissed.

Notice of Decision

The appeal is dismissed and the decision of the First-tier Tribunal in respect of all appellants affirmed.

No anonymity direction is made.

Signed *Mark Hill*
Deputy Upper Tribunal Judge Hill QC

Date 4 December 2017