



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

Appeal Number: IA/34960/2015

THE IMMIGRATION ACTS

**Heard at Birmingham Employment Decision & Reasons
Centre Promulgated
On 22nd June 2017 On 3rd July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MISS YUK WA LI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Christopher Lane (Counsel)
For the Respondent: Mr David Mills (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Phull, promulgated on 20th October 2016, following a hearing at Birmingham on 13th September 2016. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary

of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Hong Kong, a female, and was born on 9th August 1987. She appealed against the decision of the Respondent Secretary of State dated 3rd December 2015, whereby her application for leave to remain as a Tier 4 Student in the UK, was refused.

The Appellant's Claim

3. The Appellant's claim is that she had come to the UK as a student in 2008, and had been granted further extensions of stay, until she gave birth to a son, [J], on [] 2013, when her last application for leave to remain was refused. Her appeal was then successful before the Tribunal and the Home Office was ordered to make a new decision on 17th September 2014, allowing her a further 60 days to find an alternative college. It took the Home Office a further year to decide the application. In that time, she could not seek an alternative place of study and simply had to wait.
4. On 3rd December 2015, her application was refused once again, and this time on the basis of an allegation that she had obtained an English language test by deception. The Appellant maintains that she did on 6th March 2013 take an English language test at Eden College International. She has the ability to speak, read, and write English. Judge Phull records that

“She believes she is a victim of great injustice. She has asked ETS for evidence to prove that she cheated in the test. She has always complied with the visa requirements. She should be given 60 days to find a new college and get a CAS to continue with her studies”. (Paragraph 8).

The Judge's Findings

5. The judge started with the observation that Judge Stokes, in the earlier appeal decision that was promulgated on 11th September 2014, had found the Appellant “to be a credible witness” and had also ruled that the Secretary of State should grant the Appellant 60 days in which to identify a new college and to make a further application (see paragraph 23). This said, the Respondent reconsidered the Appellant's application and alleged that she had submitted a false TOEIC English language certificate in support of her application (paragraph 23).
6. The judge went on to look at the evidence that had been levied against the Appellant and observed that the evidence was general in nature and that in **SM and Qadir [2016] UKUT 00229**, the Upper Tribunal held that the onus rests on the Secretary of State to prove that the Appellant was guilty of fraud in respect to the allegation raised. However, what had been furnished was generic evidence in the form of two spreadsheets and two

witness statements. The judge held that, “I found the Appellant to be a credible witness. The Appellant gave oral evidence in English. I accept her evidence she could not sit the English test at her college and had to look at other colleges” (paragraph 26). The judge went on to record that the Appellant had approached a college in Bath to sit the English language test, but was refused because she did not have her passport as proof of identity. She then travelled from Wales to London by bus, by underground, and then walked to the test centre in the East End of London where she took the test at Eden College International (paragraph 26).

7. The judge went on to refer to the English test certificates dated 17th June 2011 and the scores that the Appellant obtained (paragraph 27). Finally, the judge decided on the basis of the evidence, when taken in the round, and on balance, she found that the detailed explanation given by the Appellant in her oral evidence, with supporting documentary evidence, satisfied her personally that the speaking test she had taken was genuinely taken by her (paragraph 28).
8. The appeal was allowed.

Grounds of Application

9. There are two Grounds of Appeal. One by the Appellant and the other by the Respondent. Both allege that there was an error of law by the judge. First, it is alleged by the Appellant that the appeal should have been allowed outright rather than to the limited extent, whereby the judge had, (in the same way as Judge Stokes), remitted the matter back to the Secretary of State, to grant the Appellant a further 60 days to enable her to find a college that would issue her with a CAS. The Appellant takes the view, that this decision by Judge Phull is made in exactly the same way as was made by Judge Stokes in her previous appeal in 2014, and the result has been an unreasonable delay.
10. For the Respondent, it is stated that the English language test had been invalidated because of evidence of fraud in the test taken by the Appellant, and the Tribunal had failed to analyse this evidence. Since the Respondent had presented this evidence, she had satisfied the evidential burden and the burden now fell on the Appellant to offer an innocent explanation and this was entirely in accordance with the case of **Shehzad [2016] EWCA Civ 615**. It does not matter that the Appellant can display an English language ability. What matters is that the Appellant had not been able to provide evidence of taking the test. She provided no credible evidence as to why, living in Wales, she had sat the test at Eden College in London.
11. On 28th March 2017, permission to appeal was granted.

Submissions

12. In his well-crafted and comprehensive skeleton argument, Mr Lane sets out the case for appeal for the Appellant. He states, as he repeated in his oral submissions before me, that Judge Stokes had already on 27th August 2014 decided that the Respondent should grant the Appellant the usual 60 days in which to identify a new college, obtain a CAS, and make a further application. That was three years ago. The Respondent did not comply with that decision and did not grant the Appellant 60 days as directed by the judge.
13. Second, instead, the Respondent took one year and nearly three months to make a decision on 3rd December 2014, and to now allege that the Appellant had used deception in her application by using a proxy to take her English language test with ETS. It was additionally also said that the college itself had had its licence revoked. This was the second main reason in the Appellant's case for now asking for the appeal to be allowed outright.
14. Third, when it came to a further appeal before another judge, namely, Judge Phull, she once again decided that the Appellant should be granted the 60 days to identify a new college, but given that she had found that there was no deception exercised by the Appellant in sitting the ETS test, she ought to have allowed the appeal outright, because a failure to do that simply caused an unnecessary delay to the Appellant, on a matter which had been ongoing for a number of years.
15. Fourth, the Respondent's Grounds of Appeal should be rejected (see paragraph 6 of the skeleton), essentially because the ETS provided no evidence (see paragraph 63) but only general evidence, and there was no voice recording provided which would enable the Respondent Secretary of State to say that there was indeed a proxy used here. This was very similar to the "multiple frailties" identified in **Qadir [2016] UKUT 00229** (at paragraph 100). In that case the Respondent had not been able to satisfy the legal burden because the innocent explanations given by the Appellants led to their being "clear winners" (paragraph 101). Moreover, that was the case where the test had been declared "invalid" and here it had not been declared invalid, but the judge still in **Qadir** ruled that the Respondent did not discharge the legal burden on her. It is insufficient to say that the disclosure of the voice recording is the property of the ETS, because no request has been made by the Respondent to the ETS, and in some cases the voice recording has indeed been provided.
16. Fifth, the judge in this case found the Appellant to be a "credible witness" (see paragraphs 23 and 26 to 28). All of the information that the Respondent stated had not been considered was set out in the oral evidence (see paragraphs 9 to 10 and paragraph 12). It was also in the witness statement. (See paragraph 28).
17. For his part, Mr Mills submitted that the Respondent's appeal should be allowed for the following reasons. First, in **Shehzad**, the Court of Appeal decided that the declaration of a test as being "invalid" was enough to

shift the burden upon the Appellant, so that this was seen as the provision of sufficient evidence by the Secretary of State. Yet, in this case Judge Phull states that, “The Respondent has failed to produce any evidence ...”. This was untrue. There was a report of Professor French. He was the Employer (and senior) of Dr Harrison, whose report was before the Upper Tribunal in **Qadir**, and whose report could not be presented in time before the Upper Tribunal, because the Respondent Secretary of State had delayed in complying with directions, but had still wanted to make disclosure of his report. In the instant case Professor French’s report was there for the judge to look at. What he states is that the rate of false positives is less than 1% in the ETS results. Dr Harrison had simply said that he could not be sure on the information what the level of false positives were. However, Professor French, in whose organisation Dr Harrison works, has now made it clear that it is less than 1%. Judge Phull failed to take Professor French’s report into account. Third, if one looks at the position of Eden College International itself, on that day 73 tests were taken and 65 were invalidated, so that was a rate of 89% tests that were declared to be fraudulent. A report into Eden College International also confirms that the college ran 2,500 ETS tests over two years, and 77% of these were invalidated.

18. In his reply, Mr Lane submitted that the Grounds of Appeal from the Respondent state that the evidential burden was not considered by the judge, but one only has to look at the determination to see that it was considered and was treated as having been discharged by the Appellant. It cannot reasonably be asserted that the burden upon the Secretary of State had, on the other hand, been discharged, by the fact that there was a report from Dr French. This is because the judge makes it quite clear that the Respondent has failed to file any material facts or evidence, the most important of which is the ETS recording. The judge could legitimately have regard to this because the refusal letter states that, “ETS has a record of the speaking test. ETS ... confirmed to the SSHD that there was a significant evidence that your certificate was fraudulently obtained by using a proxy test taker ...” (see paragraph 25 of the determination). That the judge rightly concluded from this that “The Respondent has not provided the recording of the speaking test that they referred to in the refusal” (paragraph 25). Accordingly, the legal burden had simply not been discharged by the Respondent Secretary of State.

No Error of Law

19. I am satisfied that the making of the decision of the judge did not involve the making of an error of law (see Section 12 of TCEA 2007) such that I should set aside the decision and remake the decision. I have not found this an easy case to determine. The following matters, however, are relevant. On the one hand, Mr Mills is entirely correct in saying that it is not the case that only spreadsheet evidence of a generic nature has been provided, because what there is here is the expert report of Professor French, which the judge has failed to consider, and this was very specific evidence in relation to the Appellant. On the other hand, Mr Lane is

equally correct in asserting that the refusal letter had specifically referred to the voice recording test of the Appellant's speaking test, and if this had been disclosed to the Appellant, this indeed would be specific to the Appellant, in a way that Professor French's expert report is not.

20. On top of both these considerations it remains the case that this is an appeal whereby the Appellant's test was specifically invalidated, and this was in the context of the majority of tests on that day having been invalidated, and against a background of some 77% of the tests over a period of two years being invalidated.
21. It is also a feature of this case that the Appellant, who lives in Wales, travelled to the East End of London to sit a test at a centre, which was not only so far away, but also had the distinction of undertaking a large number of fraudulent tests, such that it led to the centre's licence being eventually revoked.
22. On balance, I find that the judge did not err in law. My reasons are as follows.
23. First, the judge heard an explanation, which she accepted, that "She approached a college in Bath to sit the English language test but was refused because she did not have her passport as proof of identity" (paragraph 26). That explains why she went to the East End of London from Wales.
24. Second, the judge found the Appellant to be credible, "because she has previously studied English in the UK and passed the IELTS test" (paragraph 28). Third, whereas it is the case that the report by Professor French has not been considered, in order to discharge the legal burden of proof upon the Respondent Secretary of State, what would have been necessary in a case such as this was for the Respondent to have produced the ETS record of her speaking test, if only because the refusal letter relies so heavily upon the ETS record, because it is that which the Appellant has to rebut, given that her evidence in every other respect has been found by the judge to have been credible and plausible. Accordingly, the judge did not materially err in law.

Notice of Decision

25. There is no material error of law in the original judge's decision. The determination shall stand.
26. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

2nd July 2017