



IAC-FH-LW-V1

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

Appeal Numbers: IA/35011/2015
IA/35013/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 21 June 2017**

**Decision & Reasons Promulgated
On 29 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS SADIA PERVEEN (FIRST RESPONDENT)
MR MUHAMMAD RIAZ DAUD CHAUHAN (SECOND RESPONDENT)
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellants: Miss J Isherwood, Home Office Presenting Officer
For the Respondent: Ms H Masood, Counsel instructed by Smb Solicitors

DECISION AND REASONS

1. The appellant in this case is the Secretary of State and the respondents are Mrs Sadia Perveen and Mr Muhammad Riaz Daud Chauhan. However, for the purposes of this decision I refer to the parties as they were before the First-tier Tribunal where the appellants were Mrs Perveen and Mr Chauhan.

2. Mrs Perveen and Mr Chauhan are both citizens of Pakistan. Mrs Perveen made an application for leave to remain in the United Kingdom on 29 September 2012 as an entrepreneur and the second appellant submitted an application as her spouse. Those applications were refused in a decision dated 1 December 2015 by the Secretary of State as it was considered that Mrs Perveen had submitted false documents in relation to her application.
3. In a Decision and Reasons promulgated on 13 February 2017, Judge of the First-tier Tribunal McGrade allowed the appellants' appeal. The Secretary of State appeals on the ground that the judge failed to give reasons for findings on a material matter.
4. In particular, it was noted that the judge had accepted at [14] that the certificates dated 21 August 2012 from Elizabeth College and 31 October 2012 from Queensway College "have been obtained by fraud" and that this was conceded by the appellants' representative. The Secretary of State went on to submit that it was unclear how the judge could then go on to find at [15] that the appellants had discharged the evidential burden to demonstrate that certificates had not been obtained by fraud.
5. It was submitted, including by Miss Isherwood, that the judge had applied an inappropriately high standard of proof and had he not done so he would have come to the conclusion that the first appellant was more likely than not to have cheated. The respondent's position was that whilst the Secretary of State accepted that the ETS verification system was not infallible, the Secretary of State maintained her view that it was adequately robust and rigorous. The appellants replied in the form of a skeleton argument dated 20 June 2017.
6. As noted by the First-tier Tribunal, the respondent served a supplementary bundle the day before the hearing containing evidence not previously served in the form of witness statements from Mr Millington and Miss Collings, as well as the witness statement of Henry Rickshaw, annexes and Professor French's expert report. The appellants' representative then provided, at the direction of the judge, further closing submissions dated 18 January 2017 which the judge referred to in his decision.
7. Although it might have been more clearly set out by the judge, I am satisfied that what he was referring to when he stated at [14] that the evidence was sufficient to discharge the evidential burden of proving that the certificates had been obtained by fraud which had been considered by the appellants, was the guidance from both the Court of Appeal and the Upper Tribunal in relation to how the burden of proof operates where deception is alleged.
8. **SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC)** discussed the shifting burden of proof. This was summarised by Beatson LJ in **SSHD v Shehzad [2016] EWCA Civ 615**:

"the Secretary of State bears the initial burden of furnishing proof of deception, and that this burden is an 'evidential burden'. That means that, if the Secretary of State provides *prima facie* evidence of deception, the burden 'shifts' onto the individual to provide a plausible innocent explanation, and that if the individual does so the burden 'shifts back' to the Secretary of State".

9. I accept, contrary to what was alleged in the Secretary of State's grounds of appeal, that the appellants' representative did not concede that the TOEIC certificates had been obtained by fraud, which was the only issue on appeal. Nor did the judge specifically find that the certificates "have been obtained by fraud". The concession that was made on behalf of the appellants in the closing written submissions (at paragraph 11) was that the Secretary of State had discharged the evidential burden **at the initial stage** (my emphasis) and which the Tribunal in **SM and Qadir** noted was a "comparatively modest threshold".
10. What this meant was that the evidential burden shifted to the appellants to provide a plausible and innocent explanation. The judge considered the evidence of the appellants which included their oral evidence. The judge acknowledged that it was a difficult appeal to determine ([20]) however, the judge made findings at [15] that the first appellant had provided:

"a reasonably detailed account of the circumstances in which she sat the speaking tests, including how she travelled to the venues, what she did once she got there, the layout of the room and the content of the speaking test itself. This is supported by the second appellant. I am satisfied the explanation given is sufficient to discharge the evidential burden upon the appellants of providing a plausible explanation that the certificate dated 21st August 2012 from Elizabeth College and 31st October 2012 from Queensway College have not been obtained by fraud."

11. Therefore the judge found the appellants credible. In reaching that finding the judge carefully considered all the evidence, outlining both the positive and negative factors in favour and against the appellants' case. This included that there was no need for the first appellant to cheat and that the first appellant had relied on her qualifications in Pakistan and the fact that she had previously passed at least two tests in English. However, the judge considered that argument to be weakened by the fact that the first appellant on her own evidence had failed to pass a test on 20 March 2012 at South Quay College. The judge properly took into consideration that this could have given the first appellant a motive to use a proxy to pass the test. The judge attached less weight to the first appellant's description of the room in which she sat on the basis that it was not in dispute that she had failed a speaking test in March 2012 and would have been able to describe the layout of the room. The judge also properly took into account that the allegations of the use of a proxy were made in respect of two tests not just one.

12. However, it was incumbent on the judge to consider all the evidence in the round and I am satisfied, from a proper reading of his Decision and Reasons, that is what he did, given that he found both the witnesses to have provided a “reasonably plausible account” including of the steps they took when the tests were taken and that he found both witnesses “reasonably credible”.
13. Although the judge was criticised in the grounds of appeal for not taking into account the content of the “Panorama” documentary in relation to such proxy tests, this was not specifically adduced/relied on in this appeal and it is not enough to simply allude to having provided a DVD of a documentary to “every hearing centre”.
14. The matter of what weight to attach to evidence was one for the judge and he had the benefit of hearing oral evidence, including it was submitted, lengthy cross-examination, from the appellants; having weighed what he found to be difficult issues, decided in favour of the appellants.
15. In doing so the judge criticised the evidence produced by the Secretary of State. Whilst the judge accepted that there was credible evidence of widespread fraud in relation to speaking tests, the judge noted that the extent of the error rate in the verification process used by ETS was in dispute. Professor French’s report, which the judge considered and took into account, gave the possibility of false positives of less than 2%. Whilst the Secretary of State claims that the judge was looking for a conclusive standard of proof, I do not find this to be the case in what was a very careful consideration by the judge of all the evidence, including that it appeared to the judge that the possibility of a false positive result being obtained could not be entirely excluded and that given the range of issues present, “assessing this in percentage terms is very difficult”; the judge took into account not only Professor French’s report, but also the detailed submissions on the difficulties with that report made by the appellants’ representative in her written submissions.
16. Whilst the judge reached a conclusion which might not have been reached by every Tribunal, it was one that was plainly open to him and for which he gave adequate reasons. The Tribunal properly addressed the shifting burden of proof and ultimately found that the respondent had not demonstrated on a balance of probabilities that the first appellant failed to undertake the speaking tests personally or that they were fraudulently obtained.

Notice of Decision

17. The decision of the First-tier Tribunal does not contain an error of law such that it should be set aside and shall stand. The appeal by the Secretary of State is dismissed.

No anonymity direction was sought or is made.

Signed

Dated: 28 June 2017

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

As the appellants' appeal before the First-tier Tribunal is allowed, I make a full fee award.

Signed

Dated: 28 June 2017

Deputy Upper Tribunal Judge Hutchinson