



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/35073/2015

THE IMMIGRATION ACTS

Heard at Field House
On 16 November 2017

Decision & Reasons Promulgated
On 7 December 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MD MASUDUR RAHMAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms C Litchfield, of Counsel instructed by Messrs Simon Noble
Solicitors or Nova Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of Judge of the First-tier Tribunal I M Scott who in a determination promulgated on 22 February 2017 allowed the appeal of Mr Md Masudur Rahman against a decision of the Secretary of State made on 28 October 2015 to refuse him leave to remain as a Tier 1 (Entrepreneur) under the of the points-based system.
2. Although the Secretary of State is the appellant before me I will for ease of reference refer to her as the respondent as she was the respondent in the First-tier. Similarly, I will refer to Mr Md Masudur Rahman as the appellant.

3. The appellant is a citizen of Bangladesh born on 31 December 1982 who came to Britain as a student in 2009. He made an application for leave to remain as a Tier 1 (Entrepreneur) Migrant under the points-based system on 26 October 2012. That application was refused and on 20 January 2014 his appeal against that decision was heard by Judge of the First-tier Tribunal Sharp. The appeal turned on the documentary evidence submitted by the appellant. Judge Sharp found that the relevant documents had not been submitted but rather found that the Secretary of State should have employed the provisions of “evidential flexibility” when making the decision. Judge Sharp on that basis allowed the appeal “to the extent that the decision was not made in accordance with the law” and then remitted the case to the Secretary of State for further consideration. The Secretary of State then considered the application again reaching a decision made on 28 October 2015 to again refuse the application. The reason given for the refusal was under the general grounds that the appellant had used deception in obtaining a TOEIC certificate from ETS. The letter of refusal stated:-

“ETS has a record of your speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker. ETS have declared your test to be ‘invalid’ due to the aforementioned presence of a proxy tester who sat the test in your place, and the scores have therefore been cancelled by ETS.”

4. When the application was refused for a second time the appellant again appealed and his appeal was determined by Judge Scott after a hearing on 8 December 2016.
5. Judge Scott noted the history of the case and the fact that the Secretary of State had not complied with the direction of Judge Sharp that the application be considered in the light of the “evidential flexibility” provisions but then considered whether or not the application should have been refused on the general grounds under paragraph 322(1A) of the Immigration Rules.
6. Judge Scott noted the provisions of paragraph 322(1A) and then considered the background evidence which had led the Secretary of State to reach the decision to refuse the application. He noted that the certificate had been issued by ETS following a test taken at Colwell College on 27 June 2012 and that voice verification software had detected when a single person was undertaking multiple tests and that ETS considered that there was “significant evidence” from which to conclude that the appellant’s certificate had been fraudulently obtained.
7. Judge Scott heard evidence from the appellant regarding his attendance at Colwell College to take the test and he noted moreover that the appellant spoke clear English and that he had not only studied in English for his first degree in Bangladesh but also that he had obtained a Masters of Business Administration from Anglia Ruskin University in July 2015.

8. Having noted the ETS invalid test analysis document and a supplementary bundle which included a report regarding fraud at Colwell College in respect of TOEIC tests there and the issuing of ETS language certificates, nevertheless went on to make findings on which he allowed the appeal although in so doing he stated that:-

“This appeal is allowed but the respondent still has to act upon the outcome of the previous appeal by applying her evidential flexibility policy, seeking the necessary additional evidence from the appellant in support of his application and reconsidering her decision.”

9. The reason the judge reached his decision to allow the appeal was based on his reading of the determination in **SM & Qadir v SSHD (ETS - evidence - burden of proof) [2016] UKUT 229 (IAC)** in which the Tribunal had stated that the Secretary of State’s generic evidence sufficed to discharge the evidential burden of proving that certain TOEIC certificates were being procured by dishonesty. However he noted that the Tribunal had also written:-

“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 on their part.”

10. The judge then stated that he took into account the appellant’s English at the hearing, his degree from Bangladesh, the fact that he had not been required to undertake an English course on arrival when he had intended to study an ACCA course until his college where he had hoped to study was suspended, and that the appellant had subsequently gained entry to university from which he had graduated. He then stated:-

“All this suggests a proficiency with the English language which makes it very difficult to see why the appellant would have any need to use a proxy to take the TOEIC test for him.”

He then stated that he was applying the ratio of the decision in **SM & Qadir** and said that:

“I find... in view of the ‘multiple frailties’ identified in that evidence in **SM & Qadir** and in light of the evidence given by the appellant, that the respondent has not discharged the legal burden of proving dishonesty on the part of the appellant.”

He therefore allowed the appeal.

11. The Secretary of State appealed. It was argued that the judge had not given adequate findings on a material matter. The grounds referred to the judgment in **MA (ETS - TOEIC testing) [2016] UKUT 00450 (IAC)**. The appellant in **MA**, like the appellant in this case had gone to the test centre himself, had his photograph taken but had still cheated – that judgment indicated that mere attendance at the test centre did not prove that the appellant had taken a test. Moreover, it was argued that the

appellant's ability to speak English had been taken into account by the judge incorrectly. The reality was that there might be many reasons why a person was able to speak English to the required level would nonetheless cause or permit a proxy candidate to undertake an ETS test on their behalf or otherwise cheat. It was stated the judge had failed to give adequate reasons for holding that a person who clearly speaks English would therefore have no reason to secure a test certificate by deception.

12. At the hearing of the appeal before me Mr Tufan relied on the grounds of appeal and referred to the bundle of documents which was before the judge which related to tests taken at Colwell College and the report of Professor French which clearly stated that the ETS results could only be wrong in a tiny minority of cases. He pointed out that all this information had been before the judge. Moreover the judge had before him the "lookup tool" which would indicate why the results had been declared to be invalid. He also referred to what is stated in paragraph 57 of the judgment in MA in which the court had said:-

"...we acknowledge the suggestion that the appellant had no reason to engage in the deception which we have found proven. However, this has not deflected us in any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why a person who is proficient in English may engage in TOEIC fraud. These include, exhaustively, a lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere. We are not required to make the further finding of why the appellant engaged in deception and to this we would add that the issue was not explored during the hearing."

13. He also referred to paragraph 51 in that judgment in which the court had stated regarding the lookup tool that:-

"....the use of this tool generated an Excel spreadsheet, spreadsheet, included in the evidence, in familiar form relating to the second of the TOEIC certificates. This contains the ETS assessment of the scores recorded as 'invalid'. While we take into account the questions and doubts expressed by the experts these focus more on the ETS and test centre methodologies than the ETS mechanisms and processes for the analysis of the computerised files holding suspect speaking tests. We record further that there was no frontal challenge to this particular piece of evidence. The 'invalid' assessment is also supported by our findings above. Overall we are satisfied that we should treat the 'invalid' assessment as reliable."

14. Mr Tufan also took me to the report of The Criminal Inquiry into abuse of the TOEIC tests at Colwell College. In paragraph 11 of that report it is stated that between October 2011 and January 2013, 2,901 TOEIC speaking and writing tests were taken of which ETS had identified as invalid 1,559 tests, and questionable 1,342. The results showed, Mr Tufan pointed out, that no tests were accepted as being valid.
15. Moreover the report from Dr French clearly considered the methodology of ETS and the conclusion in that report was that he:

“...would estimate the rate of false positives to be very substantially less than 1% after the process of assessment by trained listeners had been applied.”

16. Dr French gave reasons as to why he had reached that conclusion.
17. Ms Litchfield argued that the judge had reached conclusions which were not perverse and were fully open to him. She referred to the report on Colwell College and stated that it was only 53% of the decisions which were thought to be invalid. She referred to the decision in **SM & Qadir** and stated that the judge had taken into account all evidence including that of the appellant and the documentary evidence which he produced regarding his various qualifications and had reached a conclusion that the appellant had not used deception, which was fully open to him.

Discussion

18. The reality is that the judge had before him the papers relating to the inquiry into the testing at Colwell College but did not appear to place any weight thereon or give any reasons as to why he did not place weight on that. Moreover he did not deal with the report of Dr French. The Secretary of State did not appear before him and therefore the judgment in **MA** was not placed before the judge. However, the reality is that it had been handed down before the hearing (it was handed down on 16 September 2016). The judge I consider reached a conclusion which was in effect perverse. He accepted the evidence of the appellant without considering reasons why the appellant would have decided not to take the test. Moreover, he considered the appellant's English language ability as at the date of the hearing rather than that in 2012. He had, in paragraph 20 stated that the respondent had discharged the evidential burden incumbent upon her but then went on to find that had been unseated by the appellant's evidence. That was clearly wrong. In reaching the conclusion he reached he had not taken into account all the evidence of the Secretary of State nor considered the reasons why the appellant might have reached a decision not to attend the course nor indeed why he had attended at Colwell College in any event and I therefore consider that he reached a conclusion which was not open to him and in so doing had erred in law. I therefore set aside the decision of the Judge of the First-tier.
19. I had before me all the relevant evidence including the generic evidence of the affidavits from Collings and Millington but also the report of Dr French and the general inquiry into abuse of the TOEIC at Colwell College. I can only conclude on that evidence that, notwithstanding the fact that the appellant had produced documentary evidence to show that he had graduated three years after the test from Anglia Ruskin University but also that he spoke good English at the hearing, that not only was the judge not entitled to allow the appeal but on the evidence which is now before me that the appeal should be dismissed.
20. I therefore, having set aside the decision of the judge in the First-tier dismiss this appeal. It is not argued before me that there could be any human rights application

which could succeed and having considered the evidence before me I see no basis on which the appellant would be entitled to remain on human rights grounds.

Notice of Decision

21. The appeal is dismissed on immigration grounds. The appeal is also dismissed on human rights grounds.

No anonymity direction is made.

Signed



Date 29 November 2017

Deputy Upper Tribunal Judge McGeachy