



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05780/2016

THE IMMIGRATION ACTS

Heard at Field House
On 8 August 2018

Decision & Reasons Promulgated
On 4 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SOHAIL ADAM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Tarlow, Home Office Presenting Officer

For the Respondent: Mr Shrestha, Counsel instructed by Moorehouse Solicitors

DECISION AND REASONS

1. The appellant in this appeal is the Secretary of State. For convenience I will refer to the parties as they were referred to in the First-tier Tribunal and therefore Mr Sohail Adam will be referred to as the appellant.
2. The appellant is a citizen of Pakistan, born on 16 March 1985, who applied for leave to remain in the UK as the spouse of a British citizen.

3. His application was refused on 26 February 2016 on the basis that Educational Testing Service (ETS) had informed the respondent that there was significant evidence to conclude that fraud by the use of a proxy test taker was committed by the appellant in respect of an English language test taken on 17 July 2013 at Universal Training Centre. The respondent therefore took the view that the appellant did not meet the suitability requirements under Appendix FM of the Immigration Rules. It is apparent from the respondent's Reasons for Refusal Letter dated 26 February 2016 that this was the sole reason for the appellant's application being rejected.
4. The appellant appealed to the First-tier Tribunal where his appeal was heard by First-tier Tribunal Judge Boyes. In a decision promulgated on 1 February 2018 Judge Boyes allowed the appeal. The respondent is now appealing against that decision.

Decision of the First-tier Tribunal

5. The judge considered the evidence adduced by the respondent to show that the appellant had engaged in fraud. This consisted of witness statements from civil servants Rebecca Collings and Peter Millington, expert evidence in relation to the investigations of fraud at ETS test centres, and a statement by a Home Office employee, Michael Sartorius, appended to which were documents purporting to link the appellant to the widespread practice of deception as summarised in the witness statements of Rebecca Collings and Peter Millington.
6. The evidence said by the respondent to link the appellant to the widespread fraud comprised of the following:
 - An extract from a spreadsheet which is titled ETS SELT SOURCE DATA where the name and date of birth of the appellant is given, along with the test centre (Universal Training Centre) and a test date of 17 July 2013. Under a heading "Inv/Quest" it is stated that the test was "invalid".
 - Two documents headed ETS TOEIC TEST CENTRE LOOK UP, both giving the date of 17 July 2013 and the test centre as Universal Training Centre. One of the documents gives as test time "A.M." and states that there were a total of three tests taken, all of which were given the status of "questionable". None were said to be "invalid". The other document with the same name is identical, other than the test time is given as P.M. and the 10 tests are said to have been taken. The status of all 10 tests is said to be "questionable" and none are said to be "invalid".
7. At paragraphs 27 - 29 of the decision the judge stated:
 27. *The respondent has provided a document entitled ETS SELT source data. It refers to the result of the test taken by the appellant on 17 July 2013 at Universal Training Centre as being invalid. I understand that the data in this document is provided to the respondent by ETS. The respondent has also provided two documents both entitled ETS TOEIC test centre look up tool for Universal Training Centre for 17 July 2013. One document includes the results for the morning of that day and one for the afternoon of the same day. For the morning of that day it*

states that three tests were taken, none were released, three (100%) were questionable and none were invalid. For the afternoon it states that ten tests were taken, none were released, ten (100%) were questionable and none were invalid. Mr Sartorius states at paragraph 10 of his witness statement that the information in the ETS TOEIC test centre look up tool is taken from the same ETS data. If that is the case I am unable to reconcile what is stated in the ETS SELT source data with what is recorded in the ETS TOEIC test centre look up tool. It is unclear how the appellant's test results could be invalid if the only results recorded for 17 July 2013 were questionable rather than invalid. This inconsistency raises serious concerns regarding the reliability of the data relied upon the respondent as both documents cannot be correct.

28. *I have not been provided with the voice recording of the appellant's test.*

29. *Taking into account the above factors including the Secretary of State's generic evidence combined with her evidence particular to this appellant which is unclear as to whether ETS classified the test as questionable or invalid, the respondent has not discharged the evidential burden of proving that the appellant's TOEIC certificate was procured by dishonesty.*

8. The judge allowed the appeal on the basis that the respondent had failed to meet the initial evidential burden of showing the TOEIC certificate was procured by dishonesty. The judge also found that even if the initial burden had not been met he would have allowed the appeal as he found that the appellant's innocent explanation was persuasive and that the respondent was unable to discharge the legal burden of proving dishonesty.

Grounds of appeal and submissions

9. The grounds of appeal argue that the judge failed to assess correctly the burden of proof in line with established case law concerning allegations of fraud where an appellant has been accused of using deception in an ETS test. The grounds state that the case law makes it clear that the evidence submitted by the respondent in this appeal was sufficient to discharge the evidential burden and it is contended that the judge erred by failing to appreciate this.
10. The grounds also maintain that the judge's reasoning as to the appellant's innocent explanation was inadequate and in particular it is contended that the judge erred by placing weight on the appellant's ability to speak English.
11. Before me, Mr Tarlow relied on the grounds and reiterated the arguments in them. He acknowledged the discrepancy between the document headed ETS SELT SOURCE DATE and the documents headed ETS TOEIC TEST CENTRE LOOKUP TOOL, but maintained that notwithstanding this the combination of generic evidence and these documents was sufficient to discharge the initial evidential burden on the respondent. He maintained that the judge's alternative case was not adequately reasoned.

Analysis

12. The burden and standard of proof, where it is alleged that an appellant's ETS test is invalid, was discussed in SM and Qadir and is as follows:

- (a) The legal burden of proving that the appellant used deception lies on the respondent albeit that there is a three stage process.
 - a) Firstly, the respondent must adduce sufficient evidence to raise the issue of fraud.
 - b) Secondly, the appellant then has a burden of raising an innocent explanation which satisfies the minimum level of plausibility.
 - c) Thirdly, if that burden is discharged, the Secretary of State must establish on a balance of probabilities that this innocent explanation is to be rejected.
- (b) There is one civil standard of proof (which is the standard to be applied). The seriousness of the consequences does not require a different standard of proof but flexibility in its application will involve consideration of the strength and quality of the evidence. The more serious the consequence, the stronger must be the evidence adduced for the necessary standard to be reached.

13. There are two elements that must be satisfied in order for the respondent to show that the initial evidential burden to raise the issue of fraud is met. The first is what is typically referred to as the “generic evidence”, and comprises of the statements of Rebecca Collings and Peter Millington along with expert evidence regarding the methodology used to detect fraud. This evidence, taken together, shows that there has been widespread deception at test centres and that there is a reasonably robust, but not error-free, methodology to detect where deception has occurred. The second element necessary to establish the initial evidential burden is that there must be a link between the widespread deception and the individual who is being accused of committing fraud. This was made clear by the Court of Appeal in *Shehzad* [2016] EWCA Civ 615 where it was stated:

“In circumstances where the generic evidence is not accompanied by evidence showing that the individual under consideration’s test was characterised as invalid I consider that the Secretary of State faces a difficulty in respect of the evidential burden at the initial stage”.

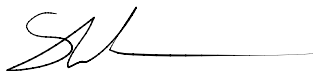
14. In this case the respondent sought to link the appellant to the widespread deceptive practice by reference to three documents. The first of these is a document headed ETS SELT SOURCE DATA which states that the appellant’s test has been classified as “invalid”. The other two documents relied upon by the respondent to connect the appellant to the use of deception are the documents headed ETS TOEIC TEST CENTRE LOOKUP TOOL. These documents show that a total of thirteen tests were taken at the Universal Training Centre on 17 July 2013, all of which were classified as “questionable”, none of which were classified as “invalid”. There is a clear discrepancy between the document which describes the appellant’s test as being “invalid” and the documents which indicate that on the day the appellant claims to have taken the test no tests were declared “invalid” (as they were all deemed “questionable”).

15. I asked Mr Tarlow if he was able to explain the discrepancy and he was not. I also asked Mr Tarlow if the respondent had asked Mr Sartorius or another person or persons at the Home Office or ETS to explain the discrepancy but he was not aware of any such enquiries having been made.
16. There is a clear contradiction within the evidence put forward by the respondent to link the appellant to the widespread ETS deception and no explanation for the discrepancy has been given. I therefore do not consider the evidence appended to Mr Sartorius' statement to be reliable. As there is no reliable evidence linking the appellant to the fraudulent activity at test centres, it was open to the judge to find that insufficient evidence had been adduced by the respondent to raise the issue of fraud in relation to the appellant.
17. It follows that the judge was entitled to find that the suitability requirements under Appendix FM were satisfied and that there was no basis under the Immigration Rules to refuse the appellant's application. Accordingly, I find that the decision of the First-tier Tribunal does not contain a material error of law and should stand.

Decision

- A. The decision of the First-tier Tribunal does not contain a material error of law and shall stand.
- B. The appeal against the decision of the First-tier Tribunal is dismissed.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 25 August 2018