



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/15165/2017

**THE IMMIGRATION ACTS**

Heard at Manchester Civil Justice Centre  
On 3<sup>rd</sup> September 2018

Decision & Reasons Promulgated  
On 13<sup>th</sup> September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD ZAKRIA  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr A Tan, Senior Home Office Presenting Officer  
For the Respondent: Mrs L Barton of Counsel, instructed by Sabz Solicitors

**DECISION AND REASONS**

**Introduction and Background**

1. The Secretary of State appeals against a decision of Judge Parker (the judge) of the First-tier Tribunal (the FtT) promulgated on 10<sup>th</sup> May 2018.
2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to him as the claimant.

3. The claimant is a citizen of Pakistan born 22<sup>nd</sup> October 1975. He applied for leave to remain in the UK on the basis of ten years' lawful residence.
4. His application was refused on 8<sup>th</sup> November 2017. The Secretary of State refused the application with reference to paragraphs 322(2) and (5) of the Immigration Rules. This was because it was contended that the claimant had obtained an English language certificate from ETS by deception, in that he had employed a proxy test taker. The claimant had taken the English language test at Darwin's College on 18<sup>th</sup> October 2011 and used the certificate in applications that he made to the Secretary of State in October 2011 and January 2013.
5. The appeal was heard by the FtT on 23<sup>rd</sup> April 2018. The judge found that the Secretary of State had not discharged the initial evidential burden, but made an alternative finding that if that burden had been discharged, the Secretary of State had not discharged the legal burden of proving that the claimant had used deception to obtain the ETS English language certificate. The claimant's appeal was allowed.
6. The Secretary of State applied for permission to appeal to the Upper Tribunal. Permission to appeal was granted by Judge Grimmett of the FtT in the following terms;

"It is arguable that the judge erred in allowing the appeal after concluding that the Respondent had failed to show evidence of fraud in light of the conclusions in SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC)."
7. Following the grant of permission the claimant's solicitors lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending that the judge had not erred in law. It was contended that the judge had provided sufficient reasons to justify the decision to allow the appeal. The judge had carried out a balancing act and had relied on information submitted by both parties and had found the claimant to be a credible witness who had provided a valid explanation, supported by evidence where possible.
8. Directions were subsequently issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision must be set aside.

### **The Upper Tribunal Hearing**

9. Mr Tan relied and expanded upon the grounds contained within the application for permission to appeal. In summary the following was contended.
10. The judge had failed to follow guidance in Shehzad and Chowdhury [2016] EWCA Civ 615 in relation to the burden of proof. It was submitted that the evidence relied upon by the Secretary of State, that being the generic witness statements of R Collings and P Millington and the spreadsheet produced by ETS in relation to the claimant, sufficed to discharge the evidential burden. The judge had erred in law by failing to appreciate this. The judge had erred by finding that the claimant had provided an innocent explanation for the invalidation of his English language test. The claimant had not in fact provided any explanation for that invalidation. The judge had erred by placing reliance upon the claimant's English language ability as an indication that

he had not practised deception in October 2011. The judge had erred by failing to give adequate reasons for concluding that a person now able to speak English would have no reason to secure a test certificate by deception, and reliance was placed upon MA Nigeria [2016] UKUT 450 (IAC) at paragraph 57.

11. Mr Tan also submitted that the judge had erred by failing to take into account or make any reference to material evidence contained within the Home Office supplementary bundle that was before the FtT. Mr Tan produced a Record of Proceedings prepared by the Presenting Officer before the FtT, and pointed out that the claimant had stated when cross-examined that he had listened to an audio copy of his test, and had confirmed that the person speaking thereon was not him. This had not been referred to by the judge.
12. Mrs Barton relied upon the rule 24 response and submitted that the judge had not materially erred in law. It was submitted that the judge had produced a lawful and well-structured decision. I was asked to place no reliance upon the Record of Proceedings produced by Mr Tan. It was submitted that the Secretary of State was attempting to relitigate the hearing and that the judge had been entitled to find that the initial evidential burden was not discharged, but even if that burden had been discharged, the judge was entitled to find that the claimant had provided an innocent explanation, and did not err in concluding that the Secretary of State had not discharged the legal burden of proof.

### **My Conclusions and Reasons**

13. SM and Qadir confirms that if it is alleged that an individual has exercised deception in obtaining an ETS certificate, the legal burden of proof is upon the Secretary of State. There is an initial evidential burden on the Secretary of State, which is discharged by the generic witness statements of R Collings and P Millington dated 23<sup>rd</sup> June 2014, if that evidence is accompanied by the “ETS Lookup Tool” which relates to the individual concerned.
14. This was confirmed by the Court of Appeal in Shehzad and Chowdhury. At paragraph 24 Beatson LJ stated;
 

“It appears that the FtT’s decision rests only on its refusal to accept that the Millington/Collings’ evidence, together with identification of the individual as a person whose test has been invalidated, suffices to shift the evidential burden.”
15. At paragraph 28 Beatson LJ found;
 

“In my judgment Mr Chowdhury’s case must be remitted to the Upper Tribunal. If my ladies agree with my conclusion that the material submitted by the Secretary of State in his case sufficed to shift the evidential burden to Mr Chowdhury, the Tribunal will have to consider the Secretary of State’s evidence in the light of that decision.”
16. The Court of Appeal was unanimous in finding that the Secretary of State’s evidence sufficed to shift the evidential burden.

17. In this appeal the judge in fact refers to the conclusion in SM and Qadir that the Secretary of State's generic evidence combined with evidence that relates in particular to the individual, was sufficient to discharge the evidential burden.
18. However the judge then goes on, in this appeal, to find that the evidential burden is not discharged. I find that to be a material error of law. The evidence required to discharge the evidential burden was before the FtT, and is contained in the Home Office supplementary bundle. That evidence consists of the witness statements of R Collings and P Millington which are items 4 and 5 in the bundle. The certificate issued by ETS confirming that the test taken by the claimant at Darwin's College on 18<sup>th</sup> October 2011 had been invalidated is item 2 of the Home Office supplementary bundle.
19. Therefore the Secretary of State had produced to the FtT evidence which had been described both by the Upper Tribunal and the Court of Appeal as being sufficient to discharge the initial evidential burden upon the Secretary of State, and the judge was wrong in law at paragraph 21 in concluding that this evidence did not discharge the initial evidential burden.
20. In my view the judge erred in failing to take into account potentially material evidence. At paragraph 21 the judge does not accept "that the Respondent has done anything more than make a bare assertion, without evidence, that the Appellant is guilty of fraud".
21. The judge goes on to comment that the Secretary of State has failed to "provide anything more than a statement that the Appellant acted fraudulently and two generic witness statements". In my view that is not in fact correct. The Secretary of State produced in addition to the generic witness statements, and the certificate by ETS confirming that the claimant's test had been declared invalid, a further document listed at item 3 of the Home Office bundle, that being the 'ETS TOEIEC Test Centre Lookup Tool' which relates to ETS tests taken at Darwin's College on 18<sup>th</sup> October 2011, the date that the claimant took his test.
22. This document confirms that on that date 131 tests were taken, of which 62 (47%) were questionable, and 69 (53%) were invalid.
23. The judge has also made no reference to the expert report of Professor French listed at item 6 of the Home Office bundle. At paragraph 4 of that report, the expert when considering the evaluation by ETS of the English language tests in question, estimated the rate of false positives to be very substantially less than one percent.
24. The evidence before the judge was therefore substantially different, and arguably substantially stronger than the evidence considered by the Upper Tribunal in SM and Qadir. In my view the judge has not adequately explained why the totality of the Secretary of State's evidence was not analysed.
25. The judge concludes at paragraph 22 that the claimant has provided an innocent explanation, but has failed to adequately reason that conclusion. Having considered the evidence provided by the claimant, there appears to be no explanation as to why

ETS declared his test result to be invalid. The evidence provided by the claimant amounts to an assertion that he did not use a proxy test taker.

26. My conclusion is that the decision made by the FtT is unsafe and contains material errors of law as described above.
27. The decision needs to be remade. I have considered paragraph 7 of the Senior President's Practice Statements and find that it is appropriate to remit the appeal back to the FtT because of the nature and extent of judicial fact-finding that is necessary in order for this decision to be remade.
28. The appeal will be heard at the Manchester Hearing Centre and the parties will be advised of the time and date in due course. The appeal will be heard by an FtT Judge other than Judge Parker.

### **Notice of Decision**

The decision of the FtT discloses a material error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the First-tier Tribunal with no findings of fact preserved.

There was no request for anonymity and no anonymity direction is made.

Signed

Date 5<sup>th</sup> September 2018

Deputy Upper Tribunal Judge M A Hall

### **TO THE RESPONDENT FEE AWARD**

The issue of any fee award will need to be considered by the FtT.

Signed

Date 5<sup>th</sup> September 2018

Deputy Upper Tribunal Judge M A Hall