



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

Appeal Number: HU/20292/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 31 October 2018**

**Decision & Reasons
Promulgated
On 8 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ZAHID AL MAHMUD
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer

For the Respondent: Ms S Akinbolu, of Counsel instructed by Messrs Howard Kennedy LLP

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of Judge of the First-tier Tribunal Barlow who in a determination promulgated on 1 February 2018 allowed the appeal of Mr Zahid Al Mahmud against a decision of the Secretary of State made on 12 August 2016 to refuse his application for indefinite leave to remain in the United Kingdom.
2. Although the Secretary of State is the appellant before me I will for ease of reference refer to him as the respondent as he was the respondent in the

First-tier. Similarly I will refer to Mr Zahid Al Mahmud as the appellant as he was the appellant before the First-tier Tribunal.

3. The appellant arrived in Britain on 8 November 2005 and then had made various applications for leave to remain as a student, leave being granted in that capacity until an application made in January 2010 was refused. That decision was successfully appealed. On 15 November 2012 he made an application for an extension of stay as a Tier 1 (Entrepreneur) That application was refused and appealed and then remitted to the Secretary of State for a further decision on 24 March 2014. While that application was outstanding the appellant made an application for indefinite leave to remain on the basis of long residence. That was refused in February 2016. After judicial review proceedings the decision was withdrawn, but a further decision to refuse was then made on 12 August 2016 which is the subject of this appeal. The decision was based on the conclusion of the respondent that the appellant could not meet the suitability requirements as it was alleged that he had used a proxy to take an English language test and therefore used deception in his application. The respondent had also alleged that documents submitted from Brac Bank were not genuine.
4. The judge, although he accepted that the appellant had not discharged the burden of proof with regard to the documentation from the Brac Bank, did, however, consider that the Secretary of State was wrong to find that the appellant was not a suitable applicant on the basis that he had submitted a false certificate. The judge properly considered the evidence and found that the Secretary of State had discharged the burden of proof upon her and therefore placed the burden of proof on the appellant to produce a cogent reason that he had attended the test centre. The judge accepted the appellant's arguments that he had attended the relevant test centre and had himself taken the test and concluded that he that the certificate produced was genuine.
5. The judge set out his findings and reasons in paragraphs 35 onwards of the determination and properly noted the evidence supporting the assertions of the Secretary of State which also included enquiry into the London College of Media and Technology which showed that in the period May 2012 to March 2013, 43 of the tests taken at that centre had been identified as invalid and it was stated that that showed that 57 of the tests had been identified as not being invalid. The judge said that the appellant had with some difficulty obtained the relevant voice recording which ETS stated was from the appellant's test and noted that it was accepted by both parties that the recording was not of the appellant. The judge took the view that there was evidence of poor systems at ETS which would mean that the appellant's recording was not necessarily the one that was produced by ETS. The judge took into account the appellant's detailed description of the tests he had sat in 2012 and furthermore noted that the respondent's officer, when interviewing the appellant, had described him as relaxed and that he had answered all questions in a fluent manner with a high standard of English. The judge noted the appellant's qualifications

which included a degree in dental surgery from the University of Dacca and a certificate in intensive English studies from Guildhall College dated 18 May 2017 and IELTS tests in July 2007 and May 2009.

6. The judge also noted a postgraduate diploma in dental clinical sciences from the University of London dated 1 November 2009 and a postgraduate certificate in public health and health promotion from London Southbank University dated 13 September 2012 as well as an entry level certificate in ESO International (speaking and listening) (entry 3) CRF level B1.1 in February 2016. The judge concluded that these showed a well-educated person who is developing his professional qualifications. She stated that his tests in July 2007 and May 2009 had not been challenged and that by 2012 he would in the normal course of living in Britain be expected to have improved his English language abilities.
7. The judge also noted numerous letters of support and that the appellant had been working as a locum dental nurse at various London Hospitals. He had been described by his employers as demonstrating a high standard of verbal and written communication skills at work and it was said of him that he had been able to give clear and concise information to colleagues and patients. A consultant from University College London Hospital described him as having a good working command of English. The judge noted that those letters were dated 2017 and the appellant could have been expected to have improved by then but stated that there was no evidence that at an earlier stage his English was weak or inadequate. The judge referred to the judgment in **MA Nigeria [2016] UKUT 450** which concluded that there were inconsistent descriptions of the uploading of data and that the registrations systems created the risk of data provided by the test centre to ETS mismatching the candidates in their tests and that the files did not contain particulars of the time, date and location of the recordings. The judge having taken all these matters into account concluded that the respondent had not discharge the legal burden of proving that the appellant's English test certificates were procured by dishonesty. Although the judge then went on to find that the certificate from the Brac Bank was not genuine the judge concluded that the appellant satisfied the requirements for indefinite leave to remain. The judge then went on to consider the issue of the appellant's rights under Article 8 outside the Rules.
8. The Secretary of State appealed, in effect asserting that the judge had not taken into account the fact that the appellant might have had reasons for using a proxy test taker and arguing that the judge had materially erred by failing to give adequate reasons why a person who spoke English would have no reason to secure a test certificate by deception. It was stated that the judge's reasons for accepting the appellant's explanations as to what had happened was inadequate. The judge, it was argued, had failed to identify compelling circumstances such as to justify consideration of whether or not there would be a breach of Article 8.

9. I granted permission on the grounds of appeal but also added that I was concerned about the fact the judge had placed no weight on the fact that the certificate from the Brac Bank was not found to be genuine.
10. I raised this issue at the beginning of the appeal. It was however pointed out to me by Ms Akinbolu that the refusal of the human rights application related to the suitability requirements with regard to the test and it had not been argued that the fact that the appellant may at one stage have relied upon a certificate from a bank which was not accepted as genuine. That was not a factor on which the suitability issue was based. The reality was that the application made was for indefinite leave to remain on the basis of the ten years' lawful residence and that the appellant's lawful residence had been built up on the basis that he had had leave to remain until 2012 but thereafter had had 3C leave and therefore he had lived in Britain for ten years lawfully. Mr Duffy accepted that that was the case. I consider that I was therefore wrong to focus on the issue of the bank certificate.
11. Mr Duffy in his submissions having accepted that the provisions of paragraph 322(5) had not been triggered by the bank certificate emphasised that the grounds related only to the issues raised in **MA Nigeria**. He submitted briefly that the key issue was that the judge had not considered whether or not it would have been appropriate or useful for the appellant to use the services of a proxy test taker. He accepted, however, that if that issue fell away the other factors to which the judge referred could, when taken into account, show that the judge was entitled to decide as he had that the appellant had discharged the burden of proof.
12. Ms Akinbolu asserted that the grounds were factually incorrect. She stated that the judge had properly set out the relevant law and had properly found that the Secretary of State had discharged the initial burden of proof and had then considered whether or not there was an innocent explanation by the appellant with regard to his having sat a test and passed the test as he had claimed. She referred to the evidence on which the appellant relied. She took me through the relevant documentary evidence and the various qualifications of the appellant.

Discussion

13. It is accepted that the sole issue in this case is whether or not the judge had given sufficient and adequate reasons for concluding that the appellant had discharged the burden of proof upon him to show that notwithstanding the evidence from ETS and that relating to the test centre. I can only conclude that the judge properly considered all relevant factors and was therefore entitled to reach the conclusion which he did that the appellant had sat the test. The reality is that the judge did consider all the evidence which included evidence, in effect, from an officer of the Secretary of State that he was relaxed and fluent when interviewed, as well as his various academic qualifications, the English

language tests he had taken over a period of time and the references from his employers regarding his fluency in English at work. While it is correct that the judge did not then state in terms that he was considering the alternate explanation as to why the appellant would have used a proxy test taker I consider that there was no requirement on the judge to do that. I consider that the judge was entitled to find that, on the evidence before her, the appellant had discharged the burden of proof and that this decision was not in any way perverse or not open to the judge. I therefore dismiss the appeal of the Secretary of State.

Notice of Decision

The appeal of the Secretary of State is dismissed and the decision of the judge in the First-tier Tribunal allowing the appeal shall stand.

No anonymity direction is made.

Signed: 
2018

Date: 6 November

Deputy Upper Tribunal Judge McGeachy