



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/01509/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 2<sup>nd</sup> July 2018

Decision & Reasons Promulgated  
On 10<sup>th</sup> August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE RENTON

Between

MD ASADUZZAMAN MAZUMDER  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms A Christie, Counsel instructed by JS Solicitors

For the Respondent: Ms K Pal, Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. The Appellant is a male citizen of Bangladesh born on 1<sup>st</sup> January 1991. He first arrived in the UK on 26<sup>th</sup> July 2009 when he was given leave to enter as a Tier 4 (General Student) Migrant until 31<sup>st</sup> October 2012. On that date the Appellant applied for leave to remain in the same capacity in order to study at Guildhall College. That application was finally refused on 12<sup>th</sup> January 2016 under the provisions of paragraph 322(1A) of the Statement of Changes in Immigration Rules

HC 395 on the basis that the Appellant had fraudulently obtained a TOEIC certificate by using a proxy test taker. The Appellant appealed and that appeal was heard by Judge of the First-tier Tribunal Burns (the Judge) sitting at Taylor House on 28<sup>th</sup> July 2017. He decided to dismiss the appeal for the reasons given in his Decision dated 30<sup>th</sup> July 2017. The Appellant sought leave to appeal that decision and on 13<sup>th</sup> April 2018 such permission was granted.

### **Error of Law**

2. I must first decide if the decision of the Judge contained a material error of law so that it should be set aside.
3. The Judge dismissed the appeal because he found that he was satisfied that the Appellant had used a proxy text taker. At the hearing before me, Ms Christie argued all the grounds of application. I need only concern myself with the first ground which argue that the Judge had materially erred in law by applying the wrong burden and standard of proof to the evidence. She argued that it was established by the jurisprudence that a three stage test was to be applied. In the first stage the Respondent had an initial evidential burden of providing prima facie evidence that the TOEIC certificate was obtained by dishonesty. If established, in the second stage the evidential burden of proof shifts to the Appellant to provide a plausible innocent explanation. Finally in the third stage the evidential burden of proof shifts again onto the Respondent to prove dishonesty on the balance of probabilities at the higher end of the probability spectrum. Ms Christie acknowledged that the Judge had carried out the first stage test correctly. However, Ms Christie argued that the Judge had then erred in law by conflating the second and third stage tests. The Judge dealt with these tests simultaneously at paragraphs 23 to 25 of the Decision.
4. In response, Ms Pal argued that there was no such error of law. The Judge had correctly set out the legal tests at paragraphs 19 and 20 of the Decision. The Judge ultimately analysed the relevant evidence and made a finding in respect of the explanation given by the Appellant which was a finding open to the Judge on the evidence before him.
5. I find a material error of law in the decision of the Judge which I therefore set aside. Ms Christie accurately explained to me the three stage evidential burden test in cases of this nature. Ms Pal did not argue to the contrary. I find that the Judge erred in law in his application of second and third stages of the test. He has conflated the two stages and made no distinction between them when explaining his decision. He makes no specific findings in respect of each of the second and third stages of the test. This amounts to a material error of law particularly as the Judge's analysis of the relevant evidence at paragraphs 23 and 24 of the Decision is no more than cursory. The Judge failed to come to a conclusion in accordance with the decisions in **SSHD v Shehzad and Chowdhury** [2016] EWCA Civ 615 and **SM and Qadir v SSHD** (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC). I did not proceed to remake the decision in the appeal. That decision will be remade by the First-tier Tribunal in accordance with the provisions of paragraph 7.2(b) of the

Practice Statements. There is a considerable body of judicial fact-finding still to be done.

**Decision**

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside that decision.

The decision in the appeal will be remade by the First-tier Tribunal.

**Anonymity**

The First-tier Tribunal did not make an order for anonymity. I was not asked to do so and indeed find no reason to do so.

Signed

Date 30<sup>th</sup> July 2018

Deputy Upper Tribunal Judge Renton