



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

Appeal Numbers: IA/02224/2016
IA/02225/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 29th June 2018**

**Decision & Reasons Promulgated
On 18 July 2018**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**JITENDER KAUR
AMIT KUMAR
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Ms R Ahmad, Home Office Presenting Officer

For the Respondents: Miss D Revill, instructed by A H Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, I shall refer to the parties as in the First-tier Tribunal. The first Appellant is an Indian national born on 5 March 1982. The second Appellant is her dependent spouse and therefore I shall refer only to the first Appellant as the Appellant in this decision. Their appeals against the refusal of leave to remain as a Tier 4 Student and dependant were allowed by First-tier Tribunal Judge Manyarara on 8 December 2017.

2. The Secretary of State appealed on the ground that the judge failed to give adequate reasons for his finding on a material matter. The Respondent submitted that the witness statements and the spreadsheet extracts showed the Appellant's English language test had been invalidated because of evidence of fraud.
3. It was submitted that the First-tier Tribunal accepted that the evidential burden fell upon the Appellant to offer an innocent explanation but it was not clear why the evidence from the Appellant would preclude the use of a proxy test taker during the test. The judge's reliance on the Appellant's English language ability was contrary to MA (Nigeria) [2016] UKUT 450 at paragraph 57.
4. It was also submitted that the Tribunal 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 and the judge failed to refer to the documentary which had been provided on DVD to every hearing centre.
5. Permission to appeal was granted by First-tier Tribunal Judge J M Holmes on the following grounds.

"The decision arguably fails to properly engage with the relevant current jurisprudence or the evidence that was before the Tribunal. The judge's decision is arguably inconsistent with the guidance to be found in Shehzad [2016] EWCA Civ 615 and Qadir [2016] EWCA Civ 1167 and Nawaz [2017] UKUT 288. The judge had to engage with the evidence of Professor French indeed it was arguably perverse for him not to do so. His evidence, which his colleague Dr Harrison has not rebutted, is that the number of false positives on checking for proxy test sitters is less than 1%. Given the applicable standard of proof the conclusion that the Respondent had discharged the legal burden of proof was arguably one that ought to have followed, and a decision does not suggest that the judge engaged with this evidence.

Arguably the decisions display a failure to understand either the evidence or the relevant jurisprudence and a failure to apply one to the other. All grounds may be argued."

Submissions

6. Ms Ahmad submitted that it was incumbent on the judge to identify in the decision why the losing party had not been successful. The judge's reasoning started at paragraph 20, but the only consideration of the legal burden was at paragraphs 55 and 56. She submitted that this consideration was inadequate in ETS cases. There were three stages: the evidential burden; any innocent explanation; and then an assessment of the legal burden.

7. At paragraph 55 the judge failed to scrutinise the evidence and failed to appreciate the main reasons for why someone might well engage in deception. There was no consideration of the 'look up tool' in relation to the legal burden. It was not enough to refer to the 'look up tool' at paragraph 50 and then state at paragraph 56: "I have considered all the evidence." The judge had to specifically state why the 'look up tool' was not sufficient. The judge should have balanced the Appellant's explanation in light of the evidence from the Respondent. The judge should have referred to why he accepted the Appellant's evidence and what was said at paragraph 56 was not enough. The judge did not clarify why the evidence of the Appellant was preferred over the 'look up tool'. The judge needed to resolve the conflict between the Appellant's evidence and the Respondent's evidence. In the skeleton argument, which was before the judge, the Respondent specifically relied on Professor French's evidence of false positives at paragraph 9 and the judge failed to engage with it.
8. Miss Revill relied on the Rule 24 response which in summary submits that the Respondent did not rely on the judge's failure to engage with the expert report of Professor French in the grounds of appeal and there was no application to amend. Therefore, notwithstanding the observations of First-tier Tribunal Judge Holmes, the Respondent should be precluded from relying on that as a ground of appeal. Any failure on the part of the judge to take into account Professor French's evidence was not challenged. The grounds failed to rely on the judge's treatment of the 'look up tool' and therefore I should reject the submission that was made today that the judge should have said why he preferred the Appellant's evidence over and above the 'look up tool'.
9. Ms Revill submitted that the judge adequately addressed the Appellant's innocent explanation. It was not in dispute that the evidential burden was satisfied and this was accepted by the Appellant's representative at paragraph 53. The judge's reasons for finding that the Appellant had offered an innocent explanation were sufficient. The judge was entitled to find that the Appellant's account reached the minimum level of plausibility so that the Respondent then bore the legal burden of proving fraud. The Appellant had given a vivid description; there was no need to prompt her; she had given quite a lot of detail and her ability to speak English meant that the minimum level of plausibility was satisfied. The Appellant did not have to show that her explanation was true. The fact that she was proficient in English was relevant to whether her explanation was a plausible one.
10. The judge gave adequate reasons and did not conclude that a person who clearly speaks English would therefore have no reason to secure a test by deception. The judge was aware of the 'look up tool' and generic evidence which was not particularly weighty and only satisfied the evidential burden narrowly following Qadir. It was not incumbent on the judge to explain why he preferred the Appellant's evidence to the 'look up tool' because the 'look up tool' was not determinative in the appeal.

11. The Appellant did not have to show that she did not cheat. The judge found that the Respondent had not proved that she had. The judge dealt with the evidence of Professor French at paragraph 4 but, since it was not pleaded in the grounds and there was no application to amend, the Respondent should be prevented from relying on this point. In any event, it could not be said that the judge's findings were perverse if indeed he did fail to take into account the evidence of Professor French. Any reliance on the DVD at the hearing centre was misplaced. It was not served on the Appellant and was not relied on at the hearing. Accordingly, there was no error of law.
12. In response, Ms Ahmad submitted that the 'look up tool' was raised in the grounds as the Respondent relied on the spreadsheet that contained it. Following MA the Respondent had satisfied the evidential burden and it was incumbent on the judge to say why he accepted or rejected the evidence which was before him.

Discussion and Conclusions

13. I agree with Ms Ahmad that there is a three stage process to assessing deception in ETS cases. First the judge should assess whether the evidential burden was satisfied. That matter seems to be beyond dispute given the decision in SM and Qadir and it was conceded by the Appellant's representative at the appeal hearing at paragraph 53. There was no error in the first stage of the three part process.
14. The judge then went on to consider the Appellant's innocent explanation. He made the following relevant findings:
 - "54. One of the landmark features in Qadir was that the Appellants gave evidence and were cross-examined on the contents of their witness statements.
 55. I have derived considerable benefit from hearing the first appellant giving oral evidence in support of her appeal. The first appellant has given her evidence in English central to which is the claim that she personally took the TOEIC test and has been proficient in the English language for some considerable time. The first Appellant was able to give a vivid description of the procedure both before and after she took her test. She did not need to be prompted to provide further information and described the events of the day right down to the timing of the various components of the test she took. The first Appellant has gained further English language qualifications both before and since taking the TOEIC test which is the subject of the decision under appeal. I find that the first Appellant has provided a plausible explanation and so the burden shifts back to the Respondent. It is trite law that the legal burden of proof does not shift.
 56. I am fortified in my view that the first Appellant personally took the English language test having further had the benefit of hearing the second Appellant giving evidence. I find both Appellants to be truthful witnesses who have given their evidence in a clear and straightforward manner. The

evidence has been consistent and includes sufficient detail to enable me to gain a full understanding of the manner in which she took her test. The first Appellant has further attempted to contact ETS to clarify the situation. I find that she would not have done so if she had anything to hide. In any event, having considered all the evidence cumulatively, I find that the Respondent has not discharged the burden of proof to the requisite standard in relation to the issue concerning the TOEIC certificate. I find that the first Appellant in this case has produced evidence to support her claimed proficiency in English and the fact that she personally took the English language test. I am satisfied that the first Appellant did not submit a false document in relation to her previous application.”

15. The Respondent relied on paragraph 9 of the skeleton argument which states:

“The additional information supplied by Prof French has enabled him to reach clearer conclusions on the reliability of ETS’ systems. Whilst there was further evidence which Dr Harrison would have expected, Prof French stated he was not convinced that the provision of such information could be used to establish a closely specified percentage of false positives. His conclusions were:

- the use of trained listeners and conservative thresholds the ASR matters would have resulted in more false rejections than false positives (in other words the system would have rejected more instances of cheating than incorrectly identifying cheats)
- if the 2% error rate established for the ASR system in the TOEFL pilot tests were to apply for the TOEIC test the rate of false positives would be substantially less than 1% after the process of assessment by trained listeners had been applied
- even if the TOEIC recordings were on average somewhat shorter and poorer in quality than the TOEIC pilot test recordings, on the basis of the information provided, the number of false positives from the overall process of automated voice recognition system and assessment by two trained listeners to be very small.”

16. I find that the judge assessed the Appellant’s explanation, the second stage, and found that her evidence was cogent and persuasive. The judge’s reasons given at paragraphs 55 and 56 were sufficient to sustain the finding that the Appellant was a credible witness, her evidence was supported by her husband and she personally took the English language test.
17. The judge then put this into the balance in assessing all the evidence cumulatively, the third stage. The judge concluded that, on the evidence as a whole, the Respondent had failed to satisfy the legal burden. It is apparent from paragraph 50 that the judge took into account the ‘look up tool’ to which he specifically referred. The ‘look up tool’ was not determinative of the appeal, because taken with the generic evidence, it only just satisfied the evidential burden (SM and Qadir). There was no error of law in the judge’s

failure to give reasons for why he preferred the evidence of the Appellant to that of the Respondent.

18. The judge's finding that the Appellant had provided a plausible explanation was open to him on the evidence before him. Therefore, assessing all the evidence in the round, it was open to the judge to conclude that the Respondent had failed to discharge the legal burden and prove deception. Whilst it was argued that the judge failed to take into account the evidence of Professor French, that there was substantially less than 1% of false positives, it was still open to the judge to find that this Appellant was within that 1%. The judge's failure to refer to the evidence at paragraph 9 of the Respondent's skeleton argument was not material because the judge was satisfied, on the totality of the evidence, that this Appellant took the English language test herself. Any failure to specifically refer in detail of Professor French's evidence was not material.
19. In summary, the judge's conclusions at paragraphs 55 and 56 were sufficient to support the judge's finding that the Respondent had failed to discharge the legal burden of proof. The judge's findings were open to him on the evidence before him and he gave adequate reasons for his conclusions. It was perfectly clear to the Respondent why the Appellants' appeals had succeeded.
20. I find that there was no error of law in the judge's decision to allow the Appellants' appeals and I dismiss the Respondent's appeal to the Upper Tribunal.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

J Frances

Signed

Date: 16 July 2018

Upper Tribunal Judge Frances