



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/30556/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 26th January 2018

**Decision & Reasons
Promulgated
On 14th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MR NADIMAHMED HASAN ARAB
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Ms Everett (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge E B Grant, promulgated on 25th May 2017, following a hearing at Hatton Cross on 21st March 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of India, and was born on 29th May 1970. He clearly gives a decision of the Respondent Secretary of State dated 28th August 2015 refusing his application to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the points-based system. The basis of the rejection is that he submitted a TOEIC certificate from Educational Testing Service (ETS) to a Sponsor in order for them to provide him with a Confirmation of Acceptance for Studies (CAS). However, ETS has a record of the Appellant's speaking test. Using voice verification software, ETS was able to detect that the Appellant had used a proxy and was not satisfied that his certificate was not fraudulently obtained. Accordingly, the tendering of a false document meant that his application stood to be refused under paragraph 322(2) of the Immigration Rules.

The Judge's Findings

3. At the hearing before Judge Grant on 21st March 2017, the Appellant attended in person to give evidence. He claimed that he obtained his TOEIC certificate by genuinely taking the test himself and he did not use a proxy test taker. He gave his evidence in English throughout the hearing. Indeed, the Appellant has subsequently set an IELTS exam and secured a level B2 grade (see paragraph 9 of the determination). Accordingly, the Appellant maintained that he was a genuine student and that the TOEIC certificate provided was a result of a genuine test. He went on to say that the Home Office could have informed him of this before refusing his application and given him a fair opportunity to submit an alternative English language test certificate (see paragraph 10 of the determination).
4. The judge went on to consider the Appellant's personal circumstances, observing that he was a 46 year old man, who had been studying in the UK since 14th September 2009. He had a wife and two teenage daughters living in India. Despite the refusal of his application in August 2015 he has been living in the UK and claims he was not working. The judge did not believe that he was not working because he had obtained a certificate of fitness for work from his GP "despite his protestations to the contrary" (paragraph 17).
5. The judge then went on to consider the main allegation and the application of paragraph 322(2) of the Immigration Rules and held that the Respondent Secretary of State had discharged her burden of proof, showing that the Appellant did not submit the TOEIC test in 2012 as claimed. This was because the Respondent had adduced evidence in support of the appeal confirmation of the invalidation supplied by the testing company, which could be filed at pages E1 and E2 of the Respondent's bundle. This couple with the affidavit evidence lodged in support of the Respondent's position had led the judge to conclude that the Respondent had discharged the burden of proof required of her (paragraph 18). The fact remained that the Appellant had no valid CAS certificate and could not succeed in any event.
6. With respect to his Article 8 rights, and the issue as to whether he should be granted 60 days in order to find another licenced institute and to

continue with his studies, the Appellant had relied upon the well-known case of **CDS (Brazil)** but the judge found that this reliance was misconceived. This is because the requirement to issue a student for the period of 60 days in order to find another college only applies where a college licence has been revoked during the currency of an existing student visa. This was not the case here (paragraph 21).

7. The appeal was dismissed.

Grounds of Application

8. The grounds of application state that the Secretary of State had materially erred in law in failing to apply the correct burden of proof because the Respondent was simply relying upon the exclusion of his grounds under paragraph 322(1A). He submitted that he had taken the test at an approved English language test centre which was specified under Appendix O of the Immigration Rules.
9. He stated that the certificate actually indicated that he had been present for the test that he undertook. He had taken his passport size photograph which was visible from the test score that was submitted to the Home Office. Therefore the evidence of his giving him the test himself should be taken at face value. The allegation that he had used a proxy test taker was simply an allegation. It was not backed up by any proof.
10. On 7th November 2017, permission to appeal was granted on the basis that the judge arguably did not consider the fact that the Appellant provided evidence that he had in fact taken the test. If the Appellant had provided an innocent explanation then his explanation must be considered before it can be said that the Respondent has discharged the legal burden of proof.
11. In this case it appeared that the judge had only considered the first stage of the test, namely, the evidential stage, as referred to in **SM & Qadir [2016] UKUT 00229**, and not the second stage of the Appellant providing an innocent explanation. Moreover, the Respondent had not raised the issue of whether or not the Appellant had been working in the reasons for refusal letter.

Submissions

12. At the hearing before me on 26th February 2018, the Appellant was not in attendance, and nor was any explanation given for his absence. Nor, indeed, was there a legal representation present on his behalf.
13. In her submissions before me, Ms Everett, in her usual helpful manner, stated that she did not think that she could argue around the basis upon which grant of permission to appeal had been made. If the ETS has confirmed that the test certificate was invalid (by way of the details provided on the look-up tool), coupled with generic statements provided by Rebecca Collings and Peter Millington, they had discharged the evidential burden of proof. It was, however, thereafter for the Appellant to provide an innocent explanation. It appeared that he had done so. The

judge, however, had only looked at the situation at the initial first evidential stage.

14. She submitted that “the issue is whether he had offered a rebuttal, but he was not present here today at the hearing”.
15. In fairness to the Appellant, however, Ms Everett submitted that the consequences of ascribing dishonesty to the Appellant was serious for him. That being so, regardless of whether the Appellant had attended today or not, the judge should have made a finding on this matter. The consequences for the Appellant were serious. However, the Appellant could not have succeeded today (as is clear from his witness statement).

Error of Law

16. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. This is a case where, as the Appellant states in his grounds of application, he had actually gone to the officially approved test centre in person, presented his passport sized photograph, together with his passport, taken a test which confirms his identity on the certificate provided to him, and the only basis for the Respondent challenging that assertion is the ETS records and the generic statements provided by Rebecca Collings and Peter Millington.
17. Such a scenario was considered by the Upper Tribunal in **SM & Qadir [2016] UKUT 00229**. It was determined that whether the Secretary of State satisfies the evidential stage, it is necessary then to consider the Appellant’s innocent explanation. This is an Appellant who gave evidence at the hearing in English himself. He had subsequently sat an IELTS exam and secured a level B2 (see the judge’s determination at paragraph 9).
18. In the circumstances for paragraph 322(2) to apply, there had to be a finding as to whether he had been dishonest in this respect. He may have been working in the UK, but this was not a matter highlighted in the refusal letter. He may not have succeeded in any event because he had no valid CAS certificate (see paragraph 19 of the determination). Even so, the consequences of a finding that he had been dishonest were extremely serious for him. The failure of the judge to consider the appeal on the basis of the guidance given in **SM & Qadir [2016] UKUT 00229** led the Tribunal into making an error of law.

Remaking the Decision

19. I have remade the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal to the extent that it is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge E B Grant, on the basis that the nature or extent of any fact-finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective in Rule 2, it was appropriate to

remit the case to the First-tier Tribunal pursuant to paragraph 7.2(b) of the Practice Statement.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal, under Practice Statement 7.2(b).

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

13th March 2018