



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

Appeal Numbers: IA/31653/2015
IA/31661/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 5 February 2018**

**Oral Decision & Reasons
Promulgated
On 21 March 2018**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

**BINJALBAHEN DHARMESHKUMAR PATEL
DHARMESHKUMAR RAVINDRABHAI PATEL
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr L Lourdes, Counsel, Direct Access

For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of Mrs Patel against the determination of First-tier Tribunal Judge Beg whose determination was promulgated on 5 October 2017 dismissing her appeal against the decision of the Secretary of State dated 15 September 2015 refusing to vary their leave and setting in train their removal by a decision made under s. 47 of the 2006 Act.

2. There are in fact two appellants to the appeal but it is the appeal of Mrs Patel which is the significant one. It arises because of a test that was taken at a centre at the London College of Social Studies in Bermondsey. The test was taken on 20 March 2012. The Secretary of State reached her decision on the basis that ETS had considered the test taken at this college and concluded that a proxy test-taker had been used. The process of examination had included the use of voice recognition but it had also been listened to by two independent listeners who had, in each case, determined that a proxy had been used.
3. The evidence which we now know to be the generic evidence was the generic evidence that was given by Mr Milligan and Ms Collings. That evidence had been looked at on a number of occasions and in particular had been looked at by the Tribunal in the case of *SM & Qadir (ETS - evidence - burden of proof)* [2016] UKUT 00229. This was the same generic evidence that had been provided in the case before us and the Upper Tribunal decided that the evidence was sufficient to discharge the evidential burden of proving that the certificates had been procured by dishonesty. There were however frailties within the generic evidence so that it could not be a guarantee of accuracy and accordingly it was open to an individual to put forward evidence to establish that an innocent explanation could be provided as a response to the generic evidence.
4. Each of these cases is of course fact-sensitive. In this particular case the Secretary of State did not however simply rely upon the generic evidence as I have already described but also relied upon specific evidence in relation to this test centre. That was supported by a statement by Reema Bassi made on 27 September 2017 in which she set out the specific documents as they relate to the applicant. The test was recorded as being 'invalid'. This was a record that was made on the test taken on 22 March 2012.
5. In addition to this, the results taken on that day from the London College of Social Studies were examined generally; in the tests that were done, there were some 35 tests taken which equalled 69% of the total and of those 35, 69% were said to be invalid. That did not mean that the remaining sixteen, or 31%, were valid; merely that the evidence in relation to them could only properly be said to be questionable. It is not a question of an incorrect result being attributed to this appellant because we have a list of all of those takers. The appellant's test is 009010 and that was a result which was declared to be invalid on the test taken in the afternoon.
6. This however was not the only evidence that was relied upon by the judge in coming to the conclusion that she did because in her determination she remarks in paragraph 25 that the generic evidence was augmented by the specific test results and it unequivocally shows that the appellant took the test in the *afternoon*. However, that contradicted the evidence given by the appellant herself because she said she took the first test, that is the speaking and writing test, at 11:30 in the *morning*. Consequently, the First-tier Tribunal Judge was satisfied that the respondent had discharged

the initial evidential burden of proof by providing evidence which it was susceptible to be outweighed by an innocent explanation.

7. The judge then went on to consider whether there was an innocent explanation and concluded in paragraphs 26 to 29 that this had not been done. I can deal with those paragraphs.
8. In paragraph 26 the judge records that she went to the London College of Social Studies which was located in Bermondsey and she did so by going on the District Line and the Jubilee Line. One of the matters that was relied upon by the judge was her decision to choose the London School of Social Studies. Her explanation was that someone at Richmond College had told her to take the test at London College of Social Studies because it was a good centre. However, there was no evidence that the appellant made any attempts to find out whether there were any other centres closer to where she lived where she could more easily take the test. It was therefore a sustainable finding on the judge's part that anybody choosing a particular college would make some attempt to justify from her own knowledge why she might go to a particular college rather than the one that was located closer to her. There is no evidence that she ever made those enquiries, merely relying on what Richmond College had told her.
9. The test was taken on 20 March 2012 and the Home Office letter was written on 15 September 2015 which accused her of using deception but, when that accusation was made, the judge relied upon the fact that the appellant accepted the contents of the letter without taking any steps to contradict it. It was said on behalf of the appellant, 'Well, it was three years after the test had been taken and consequently she could not be expected to make any enquiries.' The judge did not accept that as an adequate explanation. It seems to me that it was open to the judge to find that, if the college had so badly let her down when she genuinely attended the college and she genuinely took a test and genuinely got the scores, it was reasonable for her to seek verification from the college to say that she had properly applied for, and sat the test. At least, if they were not able to do that, they might have been able to say that they had no further records of her test taking or that they could not comment on what she was saying. The judge took the view that anybody who was accused of deception in this way would have made attempts to seek to get to the bottom of it were she to have been innocent. It may not be that it is the strongest point but it was open to the judge to comment on the fact that, when somebody is accused of deception, it would be a normal reaction to try and take whatever steps available to her to give the lie to that accusation.
10. The judge also considered the way she gave her evidence. The judge said:

"I find that throughout the cross-examination there were long pauses and silences from the appellant when she had no real answers to give to the questions that were being asked of her. She stated that she understood what was being asked of her. I find that questions had to be repeatedly asked of her before she gave answers."

Accordingly, insofar as there was an evidential burden placed upon her to give an innocent explanation, the evidence that she provided was not satisfactory.

11. In paragraph 29 there is an additional source of material. The judge recorded that she appeared to be unaware that a college was required to be on a Tier 4 sponsor list nor did the appellant know what the CAS meant. She said that she believed it was to do with registration. The appellant was asked what she did when she found out that the original college, Khalsa College, had lost its licence. She said that she did nothing and took no action after 15 September 2015 when she received the Home Office letter saying that she had used deception. All in all, the judge was not impressed by the evidence that was provided by the appellant and, in a fact-sensitive case where the initial evidential burden had been discharged by the Secretary of State, it was open to the judge to consider that the evidence that had been provided by the Secretary of State was, on balance, better than the evidence that was provided by the appellant herself. Accordingly, it was open to the judge to find that, on balance of probabilities, deception had been used.
12. That is the simple way in which decisions on fact are made; weighing the evidence in one direction, weighing the evidence in the other direction and forming a conclusion, on balance, as to whether deception had been used.
13. There were in my judgment many reasons why this case should be considered different from those cases which have gone before the Upper Tribunal and the Court of Appeal where decisions have been made in favour of the claimants. In those cases the evidence of the claimants had been found to be satisfactory, there had been reasons provided by the Upper Tribunal or reasons which were relied upon by the Court of Appeal which indicated that satisfactory explanations had been provided. Accordingly these matters of fact were resolved in favour of an applicant on the basis that the applicant had provided the innocent explanation such that the legal burden that formally rested upon the Secretary of State had not been discharged. In this case I am quite satisfied that the evidential burden which was initially placed upon the shoulders of the Secretary of State had been discharged and that the attempts made by the appellant were inadequate to counter the matters which were raised by the Secretary of State. Consequently the legal burden had been discharged. That was what the First-tier Tribunal Judge found. In the circumstances of this case, that was a matter which it was open to her. For those reasons she concluded that the certificate was properly declared invalid by ETS and consequently that the appellant was not entitled to the leave that she had originally sought.

DECISION

The First-tier Tribunal Judge made no error of law and her determination of the appeal shall stand.

Date: 20th March 2018

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL