



(IMMIGRATION AND ASYLUM CHAMBER)

UPPER TRIBUNAL

APPEAL NUMBER: HU/05365/2017

**THE IMMIGRATION ACTS**

Heard at: Field House  
On: 30 January 2019

Decision and Reasons Promulgated  
On: 18 February 2019

Before  
Deputy Upper Tribunal Judge Mailer

Between  
SECRETARY OF STATE FOR THE HOME DEPARTMENT

**Appellant**

and

MR MUJTABA B SIDDIQI  
(ANONYMITY DIRECTION NOT MADE)

**Respondent**

**Representation**

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer  
For the Respondent: Mr G O'Cellaigh, counsel, instructed by M Y M Solicitors

**DECISION AND REASONS**

1. I shall refer to the appellant as the Secretary of State and to the respondent as the claimant.
2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge M Loughridge, who in a decision promulgated on 4 June 2018, allowed the appellant's appeal against the decision of the respondent, dated 17 March 2017, refusing his application made on 27 October 2016 for indefinite leave to remain in the UK on the basis of ten years' residence. The claimant contended that his Article 8 rights under the Human Rights Convention had been breached.
3. The claimant first entered the UK on 8 October 2006 as a student. That was followed by further extensions of leave, including a grant on 3 February 2012 following an application dated 30 December 2011 as a Tier 4 migrant.

4. The Secretary of State contended that the TOEIC certificate in support of his application made on 30 December 2011 application had been obtained fraudulently. He had obtained a TOEIC certificate from ETS by using a proxy test taker. The claimant's presence in the UK was accordingly not conducive to the public good.
5. First-tier Tribunal Judge Loughridge found that the generic evidence produced discharged the Secretary of State's evidential burden. He then proceeded to look at the second stage, namely what, if any, evidence exists to show an innocent explanation, described in SM and Qadir v SSHD (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 as an account which satisfies the minimal level of plausibility.
6. He set out the factors said to be relevant to the issue at [29]. He noted that relatively few questions were put to the claimant in cross examination regarding his evidence about taking the ETS test. He did not appear to have been interviewed at any stage by the Secretary of State, unlike the appellants in SM and Qadir. He had simply been asked how he booked the test; how he travelled to the test centre; whether he saw anyone cheating and whether there were any invigilators. He was not asked about the content of the test. He concluded that there was accordingly no evidence against him in terms of lack of knowledge about the test itself [31].
7. Further, he considered evidence relating to the claimant's character, including various witness statements concerning him. Whilst it was correct that some of those who provided supporting evidence for the claimant knew him through his work at MYM Solicitors, and given the fact that the firm is representing him at the appeal, that did somewhat reduce the weight which should properly be attached to that evidence. He accordingly concluded that there is very strong evidence of the claimant's good character [32].
8. He found that the claimant "comfortably" passed the burden of proof back to the Secretary of State. With regard to the "third step," whether the Secretary of State has established dishonesty on the balance of probabilities, he found that the Secretary of State failed to discharge the burden of proof that the appellant obtained his TOEIC certificate dishonestly. He accordingly did not fall foul of the suitability requirements under the relevant paragraphs of the Rules [36].
9. The fact that his application should not have been refused was a "weighty factor" in the proportionality exercise leading to the conclusion that the decision was in breach of Article 8 as "an unnecessary/disproportionate interference with private/family life" [37].
10. The renewed grounds seeking permission to appeal contended that the First-tier Tribunal Judge made detailed findings. However, he erred in failing to identify what about the claimant's evidence is in fact "an innocent explanation" as at no point is there any indication that he explained why the certificate was cancelled due to anomalies in the test identified by ETS. He in fact "simply describes a process", which whilst it may be plausible as he may have attended the test, it does not in fact

eliminate the possibility that a proxy was used, nor explain why ETS were so certain of this that the certificate was deemed invalid.

11. On 3 December 2018, Upper Tribunal Judge Chalkley granted the Secretary of State permission to appeal, stating "I believe that the grounds are properly arguable."
12. Mr Melvin on behalf of the Secretary of State adopted the grounds. He submitted that the First-tier Judge failed to give adequate reasons for the material findings. He accepted that the burden of proof was initially on the Secretary of State.
13. He referred to the decision in Ahsan v SSHD (Rev 1) [2017] EWCA Civ 1 at [33] where the Court of Appeal referred to the extent to which counsel emphasised the forensic landscape had changed since the Secretary of State 's initial, and frankly stumbling, steps in this litigation. The observations of the UT in SM should not be regarded as the last word.
14. Where the impugned test was taken at an established fraud factory such as Elizabeth College, and also where the voice file does not record the applicant's voice, or no attempt has been made to obtain it, the case that he or she cheated will be hard to resist. Lord Justice Underhill was willing to accept that even in such specially strong cases, the observations in the earlier case law to the effect that a decision whether the applicant or appellant has cheated is fact specific - are no longer applicable, or that there is no prospect of their oral evidence affecting the outcome. He did not understand counsel on behalf of the Secretary of State to have been contending otherwise.
15. The Secretary of State's grounds contend that the witness statements and the spreadsheet extract show that the claimant's English language test had been invalidated because of evidence of fraud in the test taken by him. In particular, it is asserted that given the certificate was invalidated as opposed to being declared "questionable," represents a clear indication of strong evidence of the use of a proxy rather than as described by the First-tier Tribunal Judge, as circumstantial evidence.
16. Mr Melvin noted that the Judge did not identify what there was about the claimant's evidence that was in fact "an innocent explanation". The Judge stated that given that the evidence of Ms Collings and Mr Millington was regarded as forming "the backbone" of the Secretary of State's case, it seemed to him that it was reasonable to conclude that it is the generic evidence on its own which discharges the evidential burden, "albeit only just" [25].
17. Mr Melvin submitted that since the decision in SM and Qadir, there have been further relevant decisions on the issue. He referred to the decision of Mr Justice Garnham in R (on the application of Gaogalalwe) v SSHD [2017] EWHC 1709 (Admin) and in particular to [34] and following. He noted that since the decision, the defendant in the judicial review proceedings had sought and obtained corroborative evidence in the form of a witness statement from Ms Rachel Green and an expert report from Professor French.

18. Ms Green explained how the “Revised Look Up Tool” was created as a means of demonstrating whether a specific set of tests showed invalid or questionable results. The information relating to the claimant in the judicial review was taken from the Revised Look Up Tool for the London School of Technology, the test centre used by that claimant, on 26 March 2012. The data showed that 31 scores (78% of the results) were deemed “invalid” because of the use of a proxy and nine scores (23%) were “questionable” and could not be relied on as a result of the general practice of fraud at the test centre. The claimant's test results were said to be “invalid” indicating the use of a proxy.
19. It was agreed by counsel representing the claimant before Mr Justice Garnham that the evidence provided to the Secretary of State by ETS together with the statement of Ms Green and the report of Professor French, are sufficient to shift the evidential burden described in Qadir from the Secretary of State to the claimant.
20. The claimant contended in that case that she discharged the evidential burden on her, pointing to various qualifications she obtained in the UK. However, the Judge noted that even the 2011 diploma is weak evidence that the claimant did not use someone else to take the spoken English test in 2012. The information about her educational qualifications came from her solicitors and not from her. He had no details about the nature of the diploma on which she relies or the level of English language needed to pass it. There was not even evidence that the course and exams were conducted in English, although it was a course offered by the Metropolitan University of Cardiff and he was prepared to assume that much.
21. It was contended that Ms Gaogalalwe, the claimant in the judicial review, would have had no motive for cheating in the test because she was capable of passing it at the time. However, there was no witness statement from her confirming that she who took the test, nor were any details provided about the circumstances in which the test was taken. Such a statement, supported by a statement of truth signed by her was necessary to make good a rebuttal of an allegation of cheating on facts such as these.
22. With some hesitation, Mr Justice Garnham was willing to accept that the reference by her solicitors to her success in the exams referred to, was sufficient to discharge the low evidential burden placed on the claimant. He then turned to consider whether the Secretary of State can then discharge the legal burden to prove on the balance of probabilities that the tests were fraudulent.
23. He found at [44] that balancing the powerful evidence provided by the Secretary of State pointing to a conclusion that the claimant's test result was obtained by fraud against the weak evidence provided by the claimant that her English language skills would have been sufficient to make cheating unnecessary, the Secretary of State 's argument “is irresistible” [44].
24. Mr Melvin submitted in respect of this appellant’s case, that it is difficult to see how there was sufficient evidence of the claimant attending and taking the test himself.

There was no evidence such as a financial receipt that was produced. Nor was there any evidence from the college supporting his assertion that he took the test himself. Nor has he obtained the voice recording relating to his test, nor has he complained to ETS. The only evidence before the Judge was the claimant's oral evidence that he attended and that he was of good character. There had therefore been a blanket acceptance of the claimant's evidence.

25. He referred to the decision of the Upper Tribunal in the judicial review of Nawaz, R (on the application of) v SSHD (ETS: Review standard/ evidential basis) [2017] UKUT 00288. Upper Tribunal Judge Freeman found that evidence obtained by the use of the Look Up Tool and subject to human verification procedure, is an adequate basis for the Secretary of State's deception finding in these cases and in the light of Flynn and Another [2008] EWCA Crim 970 and the evidence of both Dr Harrison and Professor French. Further, the lack of visible note taking by human verifiers does not provide any ground of challenge to the decision as insufficiently transparent, where there has been an offer, whether accepted or not, to provide a copy of a voice recording for analysis.
26. Mr Melvin submitted that the First-tier Tribunal Judge did not acknowledge the recent evidence that had been available before the Court of Appeal nor consider the failure by the claimant or his counsel to request the claimant's recording.
27. On behalf of the claimant, Mr O'Cellaigh, who did not represent the claimant before the First-tier Tribunal, submitted that Mr Melvin has sought to advance an entirely new basis for contending that there was a material error.
28. He submitted that in the grounds seeking permission, it was simply contended that the evidential burden fell upon the claimant to offer an innocent explanation. It was not clear why the evidence from the claimant which the Tribunal relied on would preclude the use of a proxy test taker during the test. All that the claimant did was provide a description of "a process and not an explanation" as to why ETS found such anomalies in his test as to have been compelled to invalidate his scores.
29. Further, it was also asserted in the grounds that the test is not whether the claimant speaks English but whether, on a balance of probabilities, he had deployed deception. There may be a reason why a person who is able to speak English to the required level would nonetheless cause or permit a proxy candidate to undertake an ETS test on their behalf, or otherwise to cheat.
30. The Tribunal in MA (ETS – TOEIC Testing) [2016] UKUT 00450 at [57] stated that are a range of reasons why persons proficient in English may engage in TOEIC fraud. These include a lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. The issue is whether the claimant engaged in deception.
31. Mr O'Cellaigh accepted that the claimant had the evidential burden of raising an innocent explanation – Majumder v SSHD [2016] EWCA Civ 1167 at [18]. Lord Justice Beatson noted that the Upper Tribunal decided that the Secretary of State

had discharged the evidential burden that lay on the Secretary of State, so there was a burden, again an evidential one, on the claimant raising an innocent explanation.

32. He stated that the UT accepted the submission of the Secretary of State that in considering an allegation of dishonesty, the relevant factors included the following: what the person accused had to gain from being dishonest; what he had to lose; what is known about his character; the cultural environment in which he operated; how the individual accused of dishonesty performed under cross examination; whether the Tribunal's assessment of that person's English language proficiency is commensurate with his or her TOEIC scores and whether his or her academic achievements are such that it was unnecessary or illogical for them to have cheated. There had been no criticism of that approach by counsel representing the Secretary of State.
33. In MA (ETS – TOEIC Testing) supra, it was noted that the experts, including the Secretary of State's own experts, cannot themselves explain the process by which an individual is connected to a particular voice file. It is thus not possible for any individual to explain how the error was made by ETS.
34. Mr O'Cellaigh submitted that what is required in order to establish an “innocent explanation” or one which meets the minimum level of plausibility, is set out in the binding decisions of SM and Qadir and Majumder. The Court of Appeal endorsed the decision in SM, finding that there was no requirement on an individual to explain where an error came from. Such a task would be impossible and would amount to a reversing of the burden of proof.
35. He submitted that those judgments were determinative of the issues before the Tribunal and that the Secretary of State's appeal on those grounds is without merit.
36. Mr O'Cellaigh submitted that the respondent's attempt to amend at this stage should be refused. No application has been formally made; there is no explanation as to why it was being made on the morning of the hearing; it is many months out of time and amounts to an attempt to re-argue the appeal on a basis not advanced before the First-tier Tribunal.
37. Further, the point is without merit: It had simply been contended on appeal that the First-tier Tribunal erred in relying on SM and not on the later decisions of Nawaz and Gaogalalwe. The contention in effect was that the First-tier Tribunal should have treated the evidence of Professor French as virtually determinative of the appeal. Further, it was in effect irrational for the Tribunal to have accepted the claimant's case, particularly in circumstances where he made no attempt to obtain the voice recording from ETS.
38. However, whereas the decisions in SM and Qadir and Majumder were binding on the First-tier Tribunal, the decisions in Gaogalalwe and Nawaz were not binding on the Tribunal as they were first instance judicial review decisions where the issue was directed to a different question, namely whether the Secretary of State's generic evidence in addition to the Look Up Tool could produce a rational conclusion that

deception had been employed. Although it clearly could, that is not equivalent to a finding that fraud was actually used.

39. In addition, he submitted that in Ahsan at [33] Underhill LJ recorded no more than that the Secretary of State's submission that it would be hard to resist an accusation of cheating where a person had not sought to obtain the available voice files, was broadly accepted, whilst stating in terms that it would depend on the claimant's oral evidence. Nor did the Court of Appeal examine any evidence in the Ahsan decision, nor purport to give any guidance on the evidence.
40. He submitted that the claimant had in any event sought to obtain his voice files, which attempts were frustrated by the Secretary of State. The current suggestion in the Secretary's grounds that the First-tier Tribunal erred by not holding the absence of those files against him was '... with respect, extraordinary'.
41. The claimant obtained numerous directions from the First-tier Tribunal that the Secretary of State, who was alleging fraud and claiming to have this evidence, provide the relevant files. Those directions were not complied with. Further, his representatives in fact wrote to ETS asking directly for the files which the Secretary of State had failed to provide despite repeated requests. Accordingly, no rational Tribunal could in these circumstances, have held against the claimant the absence of those voice files.
42. Nor, he submitted, was the evidence of Professor French in any way determinative. His report was prepared for SM and Qadir and related solely to the reliability of voice recognition. His report says nothing at all about the question of whether an individual voice file has been reliably matched to a person said to have cheated. It is clear from Upper Tribunal as to the proper approach to appeals, in MA, supra, at [14] that there is no reliable way of determining whether a person has been matched to the correct file.
43. In the circumstances, there was no error of law as the First-tier Tribunal followed the decisions and the approach in SM and Qadir and MA.

### **Assessment**

44. I have set out the reasons advanced before the Upper Tribunal for appealing. It is contended that the Judge failed to identify what there was in the claimant's evidence amounts to an innocent explanation. The claimant did not explain why the certificate was cancelled due to anomalies in the test results identified by ETS. He simply described "a process". Whilst it is plausible that he may have attended the test, this did not eliminate the possibility that a proxy was used, nor was it explained why ETS were so certain of this that the certificate was deemed invalid.
45. It is evident that the case advanced on behalf of the Secretary of State at the hearing was not a ground put forward in the application for permission to appeal. Nor has any application been made to amend the application to include it. In that respect, I have had regard to Ferrer (limited appeal grounds, Alvi) Philippines [2012] UKUT

304 where the Upper Tribunal held that in the immigration and asylum chamber, the overriding objective of the Tribunal Procedure (Upper Tribunal) Rules 2008 is unlikely to be advanced by adopting a procedure whereby new grounds of appeal can be advanced without permission of the Upper Tribunal under Rule 5 of those rules.

46. It is submitted that the contentions are without merit. The decisions in SM and Qadir, as confirmed by the Court of Appeal in Majumder were binding on the First-tier Tribunal. The issues raised in the judicial reviews, however, were concerned as to whether the Secretary of State's generic evidence, in addition to the Look up Tool, could produce a rational conclusion that deception had been employed. It was found that the conclusions were Wednesbury reasonable in the circumstances. That did not constitute a finding of fact that fraud was actually used.
47. It is evident that the claimant, through his solicitors, did indeed seek to obtain the relevant voice files. Directions were made by the First-tier Tribunal that the Secretary of State provide the relevant files, which despite repeated requests, were never complied with. Further, his representatives wrote to ETS directly seeking the files.
48. There is accordingly no basis for the contention that the absence of those voice files should have constituted an adverse finding against the claimant's assertions.
49. First-tier Tribunal Judge Loughridge directed himself appropriately at [29] in accordance with the test and approach set out in SM and Qadir. He proceeded to assess the relevant factors from [30-36]. There has been no contention that the underlying reasoning was in any way flawed, or that any errors were made.
50. The evidence before Judge Loughridge was that the claimant was studying a law degree, which required an exacting standard of English. He noted the extent of the claimant's academic career. He had recently passed the Pearson Speaking Test, which is more demanding than the ETS.
51. He did not regard the fact that he failed the Pearson test in November 2011 to be particularly relevant to his ability to pass the ETS test the following month. He failed the writing part of the Pearson test. The contention was that it was largely due to inadequate exam technique rather than any inherent shortcomings in his knowledge or comprehension.
52. Further, the claimant needed to obtain an extension to his visa, otherwise he would not have been allowed to sit his final law exams. He explained that he travelled to the test centre by taxi. The test was booked online using his college account. He received an email acknowledgement although he is no longer able to access that account as the college closed in 2015. He did not see anyone helping at the test centre. He does not recall whether there were invigilators.



53. Further, Judge Loughridge took into account that there was the risk that his entire future livelihood would be jeopardised by fraud. The character references, including the numerous character witnesses attested to his good character.
54. I agree with the initial decision made by First-tier Tribunal Judge Davis, who refused the Secretary of State's initial application for permission to appeal. He noted that there was not the slightest indication that the Judge's findings regarding the TOEIC certificate were in any way flawed. The Judge made extensive reference to the evidence before him. The grounds amount to a disagreement with the findings, made by the application of the correct burden and standard of proof.

**Notice of Decision**

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall accordingly stand.

Anonymity direction not made.

Signed

Date 14 February 2019

Deputy Upper Tribunal Judge Mailer