Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01723/2016
IA/01724/2016

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Decision & Reasons Promulgated**
On 10 December 2018	**On 11 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOSNA MOLE
THOMAS GEORGE KUTTY
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr Howells, Home Office Presenting Officer
For the Respondents: Mr Panikkar, Zenith Solicitors

DECISION AND REASONS

1. I refer to the Appellant in this appeal as the Secretary of State and the Respondents as the Claimants. The Claimants are nationals of India born on 8 March 1985 and 1 April 1983. The First Claimant made an application on 24 September 2014 for further leave to remain in the United Kingdom as a Tier 2 (General) Migrant. The Second Claimant is her dependent. I refer to the First Claimant as the Claimant in this decision. The Secretary of State refused the application on the grounds that the

Claimant's TOIEC certificate from Educational Testing Service (ETS) was fraudulently obtained by the use of a proxy taker. Her scores from the test taken on 21 August 2012 were cancelled by ETS. The Secretary of State concluded that her presence in the UK was not conducive to the public good and that her conduct made it undesirable to allow her to remain in the UK. Her application was refused under paragraph 322 (2) and 322 (5) of the Immigration Rules because she had used deception in her application.

2. The Claimants appealed against this decision to the First-tier Tribunal under section 82 of the Nationality, Immigration and Asylum Act 2002 (NIAA). In a decision promulgated on 4 July 2017 First-tier Tribunal Judge Frazer allowed the appeal finding that the Secretary of State had not discharged the legal burden of proving the Claimant to be dishonest. The Secretary of State sought permission to appeal against this decision on the grounds that the First-tier Tribunal Judge had failed to give adequate reasons for her findings.

3. Permission to appeal was granted by Upper Tribunal Judge Kebede on renewal to the Upper Tribunal on the grounds that there was arguable merit in the assertion that the Judge failed to give full and proper reasons for concluding that deception did not occur and accorded inappropriate weight to the first Claimant's ability to speak English, contrary to the observations made in **MA (ETS – TOEIC testing) Nigeria** [2016] UKUT 450.

The Grounds

4. The grounds assert that in reaching the material finding the Judge relied on the Claimant's English language ability and other qualifications. As such, she was satisfied that she was entitled to take this into account in determining whether the Claimant had met the evidential burden in the case. The Judge placed weight on the fact that the Claimant was able to recall details of the examination process, however this did not mean the Claimant personally took the test. The BBC panorama programme showed students (at Eden College) standing next to terminals whilst proxy test takers took the test for them. The Judge did not refer to having seen this documentary which was provided on DVD to every hearing centre and may therefore not have been aware of the methods used which would not preclude the candidates from having travelled to the test centre and having knowledge of the procedures and contents of the test itself even though they had not taken it personally.

5. The Secretary of State averred that there may be reasons why a person who was able to speak English to the required level would nevertheless cause or permit a proxy candidate to undertake an ETS test on their behalf or otherwise to cheat. The First-tier Tribunal had materially erred by failing to give adequate reasons for holding that a person who clearly spoke English would therefore have no reason to secure a test certificate by deception. It is submitted that the Judge's findings are inadequately reasoned.

The Hearing

6. The appeal therefore came before the Upper Tribunal in order to determine whether there was an error of law in the decision of Judge Frazer and if so whether to set that decision aside.

7. Mr Howells, in answer to my question, confirmed that the First-tier Tribunal Judge had not been provided with a copy of the DVD referred to in the grounds. She could not therefore be criticized for failing to take it into account. He submitted that the Judge's findings and conclusions were very brief. She found that the Secretary of State had discharged the evidential burden but not the legal burden. The legal burden was on the Secretary of State but case law had established a shift in the evidential burden. The innocent explanation provided by a Claimant had to meet a minimum level of plausibility. In this case the Judge found that the Secretary of State met the original burden but appeared to have been satisfied that the Claimant provided an innocent explanation. Considerable weight was given to the fact that she gave evidence in English and had a BSC from University of Sunderland and had nothing to gain to from using a proxy. The Secretary of State submitted that the Judge's finding were contrary to **MA** in which the Upper Tribunal noted that there were a range of reasons why a person proficient in English might engage in TOEIC fraud. The Upper Tribunal noted that there was no requirement to make a finding of why a person engaged in deception. Her findings were inadequate and ran contrary to the reported case of **MA** which was the leading authority on ETS cases.

8. Mr Pannikar submitted that TOIEC cases were fact specific. In this Claimant's case the fact finding had been adequate. There was a big difference between this case and the case of **MA**. In **MA** there were many discrepancies in the evidence. That was not the case here. The Claimant gave reasonable explanations which were accepted by the Judge. The fact finding was final and the case law supported the fact that the Claimant had discharged burden.

Discussion

9. The grounds assert that the Judge's findings do not accord with the Judgment of the Upper Tribunal in **MA.** The grounds refer to paragraph 57 of **MA**, which was part of the Omnibus Findings and Conclusions. The Upper Tribunal commented there:

> "Second, we acknowledge the suggestion that the Claimant had no reason to engage in the deception which we have found proven. However, this has not deflected us in any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for <u>other</u> explanations for deceitful conduct in this sphere. We are not required to make the further finding of <u>why</u> the Claimant engaged in deception

> and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter."

10. There is no requirement in law that a Judge specifically direct him/herself that there are a range of reasons why a person proficient in English may engage in TOIEC fraud. As the Upper Tribunal made clear in the headnote in **MA** the question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact sensitive.

11. The Judge in this case correctly directed herself as to the burden and standard of proof, finding that the Secretary of State had discharged the evidential burden having had regard to the ETS evidence and the generic evidence. The Judge then considered at paragraph 10 whether the Claimant had provided an innocent explanation. The reasons for her finding that she had and that the Secretary of State had not discharge the legal burden of proving that she was dishonest were that she gave reasonable explanation for why she chose to attend a college 2 ½ hours away from where she lived; her evidence was given in English and it sounded fluent; she had BSC in nursing from the University of Sunderland and was therefore capable of acquiring a degree qualification in English and that she would have had nothing to gain by using a proxy tester to sit her examination on her behalf. In coming to these conclusions the Judge took account of the evidence that she had heard from the Claimant and of the Secretary of State's submissions set out at paragraph 5 of the decision. There is no suggestion that she did not consider all of the reasons the Secretary of State advanced as to why it was said that the innocent explanation was not plausible. In summary therefore, she employed a fact sensitive approach to the evidence and gave reasons for finding in the Claimant's favour and accepting her account.

12. The Secretary of State says that these reasons are not adequate. However, the Judge addressed all the Secretary of States points. She found that there were no discrepancies or inconsistencies in the Claimant's account. It has not been said that her findings were perverse. The Secretary of State criticises the Judge by saying that she 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. However, the First-tier tribunal provided a number of reasons why she accepted the Claimant's account and the Upper Tribunal should be slow to interfere with findings on credibility when the Judge has seen and heard a Claimant give evidence. Thus, I find that the first-tier Tribunal gave adequate reasons which must be assessed in the light of the Secretary of State's case as it was put to her at the hearing. I find that her reasoning was adequate as it dealt with the matters in issue between the parties in respect of which clear reasons were given.

Notice of Decision

The decision of the First-tier Tribunal did not contain a material error of law and I do not set it aside.

I dismiss the Secretary of State's appeal.

No application for anonymity was made and no direction is appropriate in this case.

Signed Date 20 December 2018

Deputy Upper Tribunal Judge L J Murray