



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

Appeal Number: IA/44945/2014

**THE IMMIGRATION ACTS**

**Heard at the Field House  
On 11 June 2019**

**Decision & Reasons Promulgated  
On 8 July 2019**

**Before**

**UPPER TRIBUNAL JUDGE BLUM**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**SHEIKH FARAZ UMER  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr D Clarke, Home Office Presenting Officer

For the Respondent: Mr G O'Ceallaigh, Counsel, instructed by AWS Solicitors

**DECISION AND REASONS**

1. The Secretary of State for the Home Department (hereafter SSHD) appeals against the decision of Judge of the First-tier Tribunal Flynn (the judge) who, in a decision promulgated on 22 September 2015, allowed the appeal of Mr Sheikh Faraz Umer (hereafter claimant) against the SSHD's decision of 22 October 2014 to remove him pursuant to s.10 of the Immigration and Asylum Act 1999 as a person who used deception in seeking leave to remain.

**Background**

2. The claimant is a national of Pakistan, born on 28 April 1991. He entered the UK on 10 March 2011 as a Tier 4 (General) Student. He was granted further leave to remain in the same capacity until 27 January 2014. On that date he made an application for further leave to remain, again as a Tier 4 (General) Student. In support of this application the claimant submitted a TOEIC English language certificate from Education Testing Services (ETS). In a solicitor's letter dated 22 July 2014 the claimant then sought leave to remain under Article 8, although it does not appear that the judge was aware of this application, or that any attempt was made to bring this application to her attention. There is no evidence before me that the SSHD engaged with this application or considered it as a variation of the previous application.
3. On 22 October 2014 the SSHD decided to cancel the claimant's leave and to remove him as a person who used deception in his application for further leave to remain. The SSHD claimed that ETS had a record of his speaking test and, using voice verification software, found there was "significant evidence" that his certificate was fraudulently obtained using a proxy test-taker. His score from the test undertaken on 1 August 2012 at the Premier Language Training Centre was cancelled.
4. Under the statutory appeals regime in place at the date of the SSHD's decision the claimant had a right of appeal against that decision (s.82(1)(g) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act)). The claimant could however only appeal while in the UK if he had made a human rights claim in the UK (s.92(4)(a) of the 2002 Act).

### **The decision of the First-tier Tribunal**

5. The appeal came before the judge at a hearing on 10 August 2015. The judge determined a preliminary issue as to whether the claimant had an in-country right of appeal in his favour (at [12]). The judge then heard oral evidence from the claimant, which included the reasons why chose to do his test at the Premier Language Training College and his description of taking the test, and considered the claimant's written statement contained in a 27-page bundle of documents. The bundle of documents included a further TOEIC Speaking and Writing Official Score Report dated 2 August 2014, an IELTS English language test dated 1 July 2010, a Statement of Marks relating to the claimant and issued by the Board of Intermediate Education Karachi on 17 March 2011, a South Thames College 'Good Student Award' dated 25 November 2011, a letter dated 27 September 2013 from the College of Advanced Studies, and further documentation of the claimant's academic achievements. The judge

heard additional oral evidence from Adnan Nazir, a friend of the claimant.

6. Having summarised evidence and the parties' submissions the judge then set out her conclusions. The judge referred to the evidence of deception upon which the SSHD relied and set out extracts from the 'generic' statements of Rebecca Collings, Peter Millington and Michael Sartorius. The judge found that the claimant's reasons for taking the test at the particular centre were plausible and considered it significant that the claimant had attained good marks in other English language tests, including an IELTS test dated 19 June 2010, which was taken over 2 years before the ETS test. The judge relied on other English language tests taken by the claimant and noted that he gave his evidence in English and was able to understand and answer some complicated questions. The judge expressed concern that the generic statements lacked any specific details of the voice analysis method employed by ETS, or details of the training of the ETS assessors, or details of the number of false positives that had been identified. The judge acknowledged the number of invalid test results from the College but found there was a strong risk of confirmation bias. The judge found, in light of the claimant's evidence that about 10 people took the test at the same time in relatively small room, that it was more likely than not that the examination conditions were the reason his test result was invalidated. The judge concluded, indicating that she had looked at the evidence in the round, that the SSHD failed to provide sufficient evidence to demonstrate on the balance of probabilities that the claimant used deception. The appeal was consequently allowed under the "immigration rules".

### **The challenge to the judge's decision**

7. The initial grounds were twofold. It was first contended that the judge erred in law in concluding that she had jurisdiction to entertain the appeal. The second ground contended that the judge failed to give adequate reasons for concluding that the SSHD had not discharged the burden of proving deception and that she failed to give due consideration to the SSHD's evidence. It was submitted that the witness statements, when cumulatively considered, extensively detailed investigations undertaken by ETS, and that there may have been reasons why a person who was able to speak English to the required level would nevertheless use a proxy tester. Permission was initially granted only on the first ground, but the Upper Tribunal decided, "in the interests of consistency", that the SSHD may also challenge the second ground dealing with the judge's approach to the evidence.
8. A previous Upper Tribunal decision promulgated on 6 May 2016 found that the First-tier Tribunal had no jurisdiction to entertain the appeal and concluded that there had been no valid appeal. Understandably,

there was no engagement with the 2<sup>nd</sup> ground. In a decision dated 27 April 2018 but sealed on 9 May 2018 the Court of Appeal granted permission to appeal and invited the parties to agree that the appeal should be allowed and remitted to the Upper Tribunal on the basis that the claimant had made an Article 8 claim in his solicitor's letter of 22 July 2014 and that the First-tier Tribunal therefore had jurisdiction. In an order sealed on 26 April 2019 it was agreed by consent that the appeal be allowed as the Upper Tribunal (and the First-tier Tribunal) had jurisdiction to consider the appeals and that the case was remitted back to the Upper Tribunal to consider the second ground.

9. At the 'error of law' hearing on 11 June 2019 Mr Clarke relied on the only remaining ground and submitted, in reliance on **SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof)** [2016] UKUT 00229 (IAC), that the generic evidence and the ETS spreadsheet constituted sufficient evidence to discharge the evidential burden on the SSHD, and that in concluding otherwise at [12], the judge misdirected herself in law. If, as her starting point in her assessment of whether a proxy tester was used, the judge did not accept that the evidence upon which the SSHD relied was capable of demonstrating deception, then her subsequent analysis was wrong in law because she failed to attach adequate weight to the SSHD's evidence. Mr Clarke additionally submitted that the judge attached inappropriate weight to the claimant's English proficiency.
10. Mr O'Ceallaigh submitted that the judge's approach to the issue of jurisdiction was different to her subsequent approach in determining whether a proxy tester was used and that it was unclear what standard the judge applied when determining jurisdiction. He submitted that the judge undertook a separate assessment of deception in her conclusions and placed appropriate reliance on the SSHD's evidence but was entitled to conclude, having looked at the evidence before her 'in the round' and for the reasons given, that the claimant was a credible witness who did not use a proxy tester.

## Discussion

11. In making her preliminary decision regarding jurisdiction the judge referred to the 'generic' statements from Rebecca Collings, Peter Millington and Michael Sartorius and an ETS spreadsheet relating to the claimant. The judge's reasoning on the jurisdictional issue is confused. She considered the ETS spreadsheet and found this was "not sufficient evidence" of deception and decided that the claimant enjoyed an in-country right of appeal. The issue whether the claimant was entitled to an in-country right of appeal was however dependent on whether he made a human rights claim to the respondent. It was not dependent on the quality of the evidence going to the issue of deception. This was a point accepted by both representatives at the

error of law hearing before me. I agree with Mr O’Ceallaigh that it is unclear what standard of proof was applied by the judge when determining the issue of jurisdiction with reference to the allegation of deception. The structure of the decision, in which the judge first considered the issue of jurisdiction with reference to the SSHD’s evidence on deception before engaging in a much fuller assessment of the SSHD’s evidence against the claimant’s evidence, suggests that she adopted a different standard when assessing the issue of jurisdiction. If this was not the case, and she was not initially persuaded that the SSHD’s evidence was capable of demonstrating deception, there would have been no reason for her to have undertaken any subsequent assessment.

12. The decision in **SM and Qadir**, which held that the SSHD’s evidence discharged the initial evidential burden thereby requiring an individual to advance a reasonable explanation which, if accepted, would cause the burden of proof to boomerang back to the SSHD, had not been promulgated at the date of the First-tier Tribunal’s decision. It is not therefore surprising that the judge did not adopt this approach. Failure to adopt this approach would not however constitute an error of law if the judge, in practice, approached the appeal on the basis that the SSHD’s evidence required a reasonable explanation from the claimant and the judge properly considered this explanation and its supporting evidence.
13. Having carefully examined the decision I am satisfied that the judge did adopt this approach. The judge correctly identified that the SSHD bore the burden of proving deception and then fully engaged with the evidence upon which the SSHD relied, setting out relevant extracts from the statements of Ms Collings, Mr Millington and Mr Sartorius in some detail while accurately highlighting certain deficiencies in that evidence. The judge took full account of the SSHD’s evidence, including the ETS spreadsheet [31], and accorded that evidence appropriate weight. The judge was entitled to find that the claimant’s explanation for taking his test at the Premier Language Training College was plausible (he took the test there because it was near to him and because the College could offer him the earliest date), and properly took into account the claimant’s description of the circumstances in which he took his test.
14. The judge was rationally entitled to accord weight to previous English language tests taken by the claimant. The judge did not approach this evidence as being determinative of the issue of deception. The fact that the claimant had previously attained good marks in English language tests before his alleged use of a proxy tester was clearly a relevant factor in determining an allegation of deception. The judge was also entitled to rely on a letter dated 27 September 2013 from the College of Advanced Studies stating that the claimant’s English language and communication skills were very high and competent,

and her own assessment of the claimant's proficiency in English. Whilst I appreciate that in **MA (ETS - TOEIC testing)** [2016] UKUT 450 (IAC) the Tribunal indicated that there may be a variety of reasons why someone proficient in English may wish to use a proxy tester, no such reasons were advanced in respect of this particular claimant, either at the First-tier Tribunal hearing or at the 'error of law' hearing. In **MA** the Tribunal had already concluded that the Appellant in that case had engaged in deception. The Tribunal found there were "*significant gaps*" and "*notable discrepancies*" in the Appellant's evidence, and that his account was "*vague and hesitant*". No such finding was made in the present case. **MA** is not authority for the proposition that a judge, having found that an individual was, at all material times, sufficiently proficient in English, is then obliged to speculate as to why that person may nevertheless have had a reason to use a proxy test-taker.

15. I am satisfied, for the reasons given, that the judge carefully considered the evidence relied on by both parties and that she was entitled to conclude, having found the claimant to be a credible witness, that he did not use a proxy tester. The judge's conclusion that the SSHD failed to discharge the burden of proving that deception was used was rationally open to her and was not infected by an error of law.
16. I am however concerned that the judge allowed the appeal under the immigration rules. The decision under challenge was not made under the immigration rules. It was made under s.10 of the Immigration and Asylum Act 1999 on the basis that the appellant used deception in an application for Leave To Remain. The judge's sustainable findings in reality rendered the s.10 decision "not in accordance with the law", another ground of appeal available to the First-tier Tribunal under the previous appeals regime (s.84(1)(e) of the 2002 Act).
17. This was not an issue ventilated by the parties at the error of law hearing. I considered whether it was necessary to invite further submissions from the parties on this point but, in light of my findings above, I did not consider it necessary. The point is narrow and straightforward. The judge was not entitled to have allowed the appeal under the immigration rules and, to this limited extent, she erred on a point of law. In these circumstances I set the judge's decision aside and proceed to remake the appeal allowing it on the basis that the SSHD's decision is otherwise not in accordance with the law. The consequence of my decision is that the claimant's application, whether it be a Tier 4 (General) Student application or an Article 8 human rights claim, remains pending.

## **Notice of Decision**

**The decision of the First-tier Tribunal contained an error on a point of law and is set aside. The decision is re-made allowing the appeal of Mr Umer.**



Signed  
Upper Tribunal Judge Blum

Date: 4 July 2019