



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

Appeal Number: HU/12307/2019 (P)

THE IMMIGRATION ACTS

**Decision under Rule 34
Without a hearing
26th August 2020**

**Decision & Reasons Promulgated
On 01st September 2020**

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

HIREN RAKESHKUMAR DARJI

Respondent

DETERMINATION AND REASONS (P)

1. FtT Judge Samimi allowed, under the Immigration Rules, Mr Darji's appeal against the refusal of his human rights claim which was based upon his family and private life in the UK. Her decision was promulgated on 29th November 2019. Permission to appeal was granted to the SSHD by FtT judge Foudy on 13th April 2020. Directions for the further conduct of the appeal were sent on 12th May 2020 and, in the circumstances surrounding COVID 19, provision was made for the question of whether there was an error of law and if so whether the decision of the FtT Judge should be set aside to be determined on the papers.
2. The Secretary of State informed the Upper Tribunal that she was content to rely on the grounds of appeal upon which permission to appeal had been granted and agreed that the appeal was suitable to be heard on the

papers with no requirement for an oral hearing. Mr Darji, who is unrepresented, emailed the Tribunal requesting a copy of any rule 24 notice that had been submitted by the Secretary of State. No rule 24 response was submitted because the appellant in this case is the Secretary of State and not Mr Darji. Mr Darji has not made any submissions in response to directions served. No request for an extension of time was made and no comment was made on whether or not he agreed to a decision being taken on the papers.

3. I am satisfied that the submissions made on behalf of the SSHD together with the papers before me¹ are sufficient to enable me to be able to take a decision on whether there is an error of law in the decision of the FtT and if so whether the decision should be set aside, on the papers and without hearing oral submissions.

FtT Decision

4. For reasons set out in a decision dated the 8 July 2019, the Secretary of State refused Mr Darji's human rights claim on grounds of suitability. The basis of the Secretary of States conclusion that Mr Darji did not meet the suitability test was that he had submitted a fraudulently obtained a certificate and had willingly participated in an organised and serious attempt to defraud the Secretary of State and others. Mr Darji appealed on the grounds that he had not obtained a fraudulent certificate and had been resident in the UK since the 7th of July 2009. The FTT judge stated that she had had full regard to the totality of the documentary evidence before her which she said included the documentary evidence submitted by Mr Darji and that the Secretary of State had provided an appeal bundle which included the notice of refusal letter; the notice of appeal was also before her. The judge recorded Mr. Darji's answers in cross-examination of what had occurred on the day of the TOEIC test. The judge referred to *SM and Qadir v SSHD (ETS –burden of proof)* [2016] UKUT (IAC) and stated she had also had regard to the case of *SSHD v Shazad and another* [2016] EWCH 615.
5. The judge's findings are recorded as follows:

“14. In the particular circumstances of the appellant's case, his solicitors have not made any endeavours to obtain the recording evidence relied upon by the respondent to show that the appellant had allegedly used a proxy to undertake the TOEIC test. Nevertheless, I do not find that the respondent has satisfied the burden of proof on balance of probabilities to show that the appellants specific test results were obtained through deception in the manner that has been suggested by the respondent. There is no voice recording evidence.

15. The respondent has also found that on the date of the appellant's test namely 29.1.2009 taken at New London College, 37% of the test results were found to be questionable.

¹ (a)the SSHD's bundle; (b) the SSHD's ETS bundle; (c) the bundle filed on behalf of HR and the Report of the APPG on TOEIC; (d)decision of FtT judge Samimi; (e) The application for permission to appeal; and (f) the grant of permission to appeal.

I do not find that this is sufficient to satisfy the legal burden to establish to the balance of probabilities that the appellant has used deception in relation to a previous application for leave to remain. It has been submitted on the appellant's behalf that he has spent substantial sums on legal proceedings in order to clear his name. The appellant gave evidence in English which he spoke fluently. Both representatives have agreed that the sole issue before me relates to the issue of the respondent's refusal on grounds of the appellant's alleged use of deception in obtaining his TOIEC results. I do not find that there is before me any explanation or specific and cogent evidence relating to the appellant's TOEIC individual test results that would satisfy the burden of proof on balance of probabilities that the appellant has used a proxy in order to achieve the results set out in the test results that the respondent has submitted. The documents submitted by the ETS do not provide evidence to show that the appellant's results were obtained through fraudulent participation and misrepresentation of the English Test certificate by the use of a proxy, which is said to have been made on the appellants behalf."

Error of law

6. The Secretary of State submitted that:

"... the Tribunal erred in law because he/she has disregarded our comprehensive ETS bundle which was served on 17 October 2019 on the Court and Reps and easily discharged the evidential burden of proof as per SM and Qadir. The judge ought to have gone on to consider A's innocent explanation – as the judge has not done that the determination of the ETS deception point and remainder issues is unsafe."

7. Although the FtT judge does not refer in terms to the ETS bundle submitted on behalf of the Secretary of State on the 17th of October 2019 it is apparent from the first tier Tribunal judge's decision that she had regard to that because she quotes in her judgement the ETS source data for Mr Darji at the New London College. In particular she refers to the number of questionable results. She does not however refer to the number of invalid results namely 63%. The Secretary of State refused the application not on the basis that his result was questionable but that he had obtained his certificate fraudulently and that there was significant evidence to conclude that his certificate was fraudulently obtained by the use of a proxy test taker. Although the judge reproduces extracts from *SM and Qadir* she has not set out sufficient, adequate or indeed any reasoning to explain on what basis she considered that the respondent had failed to discharge the evidential burden given the very large number of questionable and invalid test results. The Tribunal was required to consider the explanation provided by Mr Darji as to taking the test. The first tier Tribunal judge has erred in law in failing to apply the relevant caselaw, restricting her analysis to whether the appellant's result was questionable rather than invalid and has failed to proceed to the further step of considering the explanation provided.

Findings

8. The first tier Tribunal judge erred in law and I set aside the decision to be remade, no findings preserved. Given the extent of the findings that are required to be made, the oral evidence to be heard and the underlying credibility findings to be made, this case is to be remitted to the first-tier tribunal in accordance with the relevant guidance.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision and remit the appeal for hearing afresh before the first-tier tribunal.

Consequential Directions

This appeal is remitted to the first-tier tribunal to be heard afresh with no findings preserved; not before Judge Samimi.

Anonymity

The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

No reason has been given why the anonymity order was imposed by the first-tier judge or why it should continue. There does not appear to be anything in the papers which indicates there should be an anonymity order and I discharge the order.

Jane Coker
Upper Tribunal Judge Coker