



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

Appeal Number: IA000122015

THE IMMIGRATION ACTS

**Heard at Field House
On 5 May 2016**

**Decision & Reasons
Promulgated
On 26 May 2016**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Appellant

**MD YOUSUF ALI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr M Biggs, SEB Solicitors

For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Rothwell allowing the appeal of the appellant against a decision made by the respondent on 21 December 2014 to cancel his leave to remain as a Tier 4 (General) Student Migrant.

2. The respondent's reasons for her decision are that the appellant had made false representations when he was granted leave on 15 October 2013 and there had been a change of circumstances since he was granted leave and his leave has been cancelled. The appellant had submitted a TOEIC certificate from the Educational Testing Service (the "ETS"). ETS has a record of his speaking test and used voice verification software, which is able to detect if a single person is taking multiple tests. ETS had undertaken a check of his test and there was significant evidence to conclude that his certificate was fraudulently obtained. ETS had cancelled his test.
3. The judge had before her the respondent's interview with the appellant and the generic witness statements of Rebecca Collings and Peter Millington. There was an additional statement from Michael Sartorius.
4. The judge advised both parties that she was aware of the case of **R (On the application of Gazi) v Secretary of State for the Home Department (ETS - judicial review) IJR [2015] UKUT 00327 (IAC)** which is a judicial review decision based on the issue of a right of appeal in an ETS case.
5. The appellant gave evidence before the judge. When it was put to him that the Home Office says he used deception to get the ETS, he said he took the exams on 30 April 2013 and 1 May 2013 and passed it. He completed his MBA in marketing on 21 February 2015 and got merit and wants to do a PhD, but because of this decision he cannot do it.
6. In cross-examination it was put to him that the marks he scored for the MBA were low or below average. The appellant replied that he got good in the dissertation. He confirmed the dissertation was written. In Bangladesh he got good grades in his Bachelor degree in Physics. He said his pronunciation was poor because he spoke too fast.
7. The judge found that the appellant's standard of spoken English was not perfect and at times he had difficulties understanding the questions and his answers were not clearly understood. He spoke with quite a heavy accent. However she accepted that it was likely that he was nervous. She also found that it appears from his Association of Chartered Certified Accounts (ACCA) results in June 2013 that he had failed some papers, but did not find that this was unusual as it was common knowledge that these exams were particularly difficult. So she did not find that this was indicative of the fact that the appellant used deception to pass the ETS tests in April/May 2015.
8. The judge found however that in November 2014 the appellant passed and was awarded an MBA in marketing with merit from the University of Sunderland. Therefore his level of English must have been sufficient and proficient enough to study and pass the course for which he was granted leave to remain. She accepted that he was awarded his certificate in

November 2014, which was about eighteen months after the ETS tests, but still gave some indication of his level of English.

9. The judge considered the series of witness statements from Home Office officers who have generally assessed the process at ETS and their testing facilities regarding voice recognition.

10. The judge held as follows:

“21. However I find force in the submissions of Mr Azadi that it is for the respondent to prove her case that THIS appellant has used deception. Mr Azadi’s submissions partly focused upon the duty of the respondent to ensure that her licences are granted to organisations which can provide reliable results. The evidence produced by the respondent in the form of the three witness statement are all generic which she states prove to a high standard of proof that THIS appellant used deception. These witness statements show that the testing is not 100% accurate and are relying upon the standard of probabilities. The respondent allowed ETS to check the test and personnel carrying out the test are not experienced as they are lay people. Further no-one from ETS has provided a witness statement for this appellant. In this case the respondent has stated that ETS have cancelled the appellant’s test.

22. I am also guided by the decision of the Upper Tier Tribunal which was a Judicial Review case, but the President made a valuable observation R (on the application of Gazi) v Secretary of State for the Home Department (ETS - judicial review) IJR [2015] UKUT 00327 (IAC) who carefully examined the generic witness statements provided by the respondent in that case and each and every other case. He was of the view that each case needed to be examined in the light of all the evidence.

23. I have examined the appellant’s case in the light of the three witness statements provided by the respondent and the evidence provided by the appellant. I do not find that the respondent has proved to the required standard that THIS appellant used deception.”

11. Mr Biggs sought permission to rely on the unreported decision of the President of the Upper Tribunal in **SM and Qadir** promulgated on 5 April 2016. He relied on the Practice Directions for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal, paragraph 11 - “Citation of unreported determinations”. He submitted that **SM and Qadir** considered at length the oral evidence of the two Home Office witnesses, whose statements were considered by the judge. Furthermore this appellant’s case was adjourned on 23 March 2016 to await the decision in **SM and Qadir**.

12. Mr Jarvis objected to the reliance on **SM and Qadir** citing **R (Iran)** and arguing that the judge could not be criticised for not taking into account evidence that was not before her.
13. Whilst I accepted Mr Jarvis's argument, I granted Mr. Biggs permission to rely on **SM and Qadir** for the reasons given by him.
14. Mr Jarvis submitted in respect of the judge's findings at paragraph 23 that there was specific evidence in respect of this appellant following which his past test was declared invalid. The basis for that is that after the software analysis and the additional human analysis there was evidence to indicate that a proxy was used in the context of that test. He submitted that the judge acted unlawfully by misunderstanding the nature of the Secretary of State's evidence.
15. He submitted that in **SM and Qadir** the Secretary of State made out the original claim that there had been deception. Once the Secretary of State made out her case that deception had taken place, the appellant could put in evidence surrounding the test, his education in the UK or in any other country to rebut the allegation of deception. Mr Jarvis submitted that **SM and Qadir** is of no immediate relevance. The judge erred at 23(d) in that she should have, with the benefit of **Gazi**, found that the first part had been made out by the Secretary of State. The second part is whether the appellant's circumstances during, before and after indicated that deception had not been deployed. The appellant says he has passed the MBA. The judge does not analyse whether this is enough to rebut the Secretary of State's decision.
16. Mr. Jarvis added that there was a further challenge in respect of the Immigration Rules 245ZX which was referred to in the refusal letter and which was not dealt with by the judge.
17. Mr Biggs submitted that the only issue before the First-tier Tribunal was whether deception was used by the appellant. He referred to page 11 of the appellant's bundle below. The respondent said that the deception amounted to a change of circumstances. The Secretary of State has to demonstrate on the evidence that the appellant used deception by cheating.
18. Referring to paragraph 57 of **SM**, Mr. Biggs submitted that the President found that the evidential burden is first on the respondent. The evidential burden then shifts to the appellant if the Secretary of State provides some evidence to raise deception. The president accepted that the legal burden on the Secretary of State does not shift (paragraph 58). The legal burden always remains on the Secretary of State. When the evidential burden shifts to the appellant, the appellant would have to give oral evidence which he did, supported by his MBA certificate, which in this case was

evidence of academic study taught in English. This provided evidence that there was no obvious motive to cheat.

19. Mr Biggs submitted that the judge acted in accordance with settled principle. The judge gave a detailed analysis of the appellant's evidence. She was entitled to conclude that he had an MBA and on the facts before her, the Secretary of State had not proved her case. He submitted that the respondent's arguments were mere disagreements. Furthermore there was no clear evidence by ETS as to why the appellant's test was invalidated. He submitted that the judge's analysis was right and that analysis was supported by the decision in **SM and Qadir**.
20. I was not persuaded that the First-tier Tribunal Judge erred in law in her decision. I accept that the judge did not, as in **SM and Qadir**, find that the Secretary of State had satisfied the first hurdle by establishing the allegation of deception. This error is not material. The evidential burden shifted to the appellant to rebut the respondent's allegation of deception. I find that this is what the judge's decision was all about. The judge examined the evidence provided by the appellant and made positive findings in his favour. She found force in the submissions made by the appellant's representative. She was satisfied that the MBA, although taken about eighteen months after the ETS test, might give some indication of his level of English. I find that it can be ascertained from the judge's findings that the appellant had satisfied the evidential burden on him to the required standard of proof.
21. **SM** held that the legal burden remains on the respondent, it does not shift. Hence the judge's finding that the respondent has not proved to the required standard that this appellant had used deception was sustainable in the light of her findings.
22. Consequently I find that the judge's decision does not disclose an error of law. The judge's decision shall stand.

Signed

Date: 25 May 2016

Upper Tribunal Judge Eshun