



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

Appeal Number: IA391842014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 11<sup>th</sup> May 2016**

**Decision & Reasons Promulgated  
On 8<sup>th</sup> June 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SAINI**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**and**

**MR MD RIAZUL MAHMUD**

Appellant

**Representation**

For the Appellant: Mr M Hasan, Solicitor; Kalam Solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is the Secretary of State's appeal however I will refer to the parties according to their status before the First-tier Tribunal for ease of comprehension.
2. The Respondent appeals with permission against the decision of First-tier Tribunal Judge Row (promulgated on 27 August 2015) allowing the Appellant's appeal against the Respondent's decision to cancel his leave and issue directions for his removal.

3. Permission to appeal was granted by Upper Tribunal Judge Goldstein on the Respondent's two grounds.
4. Submissions were made by both parties which I have taken into account and are set out in full in my record of proceedings.

### **Error of Law**

5. Having heard from both parties I pronounce my decision as follows. I do not find that there is an error of law such that the determination should be set aside.
6. At the outset of the hearing, I made clear my preliminary view to Mr Walker which was that the analysis of the First-tier Tribunal's assessment seems to fit in my view with the self-described "boomerang" of proof that appeared in the decision of *Muhandiramge (section S-LTR.1.7)* [2015] UKUT 675 (IAC), itself referred to and approved most recently in *SM and Qadir (ETS - Evidence - Burden of Proof)* [2016] UKUT 229 (IAC). Neither party objected to my consideration of *SM and Qadir* (nor *Muhandiramge*). In terms of the burden of proof, as stated in those decisions, it was made clear that the burden of proof does lie with the Respondent in appeals concerning the allegation of deception in relation to some individuals whom have obtained an "ETS/TOEIC" English language certificate. The reported headnote in *SM and Qadir* states as follows in harmony with that view:
  - (i) *The Secretary of State's generic evidence, combined with her evidence particular to these two appellants, sufficed to discharge the evidential burden of proving that their TOEIC certificates had been procured by dishonesty.*
  - (ii) *However, given the multiple frailties from which this generic evidence was considered to suffer and, in the light of the evidence adduced by the appellants, the Secretary of State failed to discharge the legal burden of proving dishonesty on their part.*
7. Turning to the determination itself, the First-tier Tribunal considered the burden of proof and the evidence put forward by the Respondent at paragraphs 7 to 15 of the First-tier Tribunal's determination. It does not appear that a conclusion was ultimately reached on whether the initial burden was discharged by the Respondent. This is something incidentally that the Appellant may have had cause to criticise but at any rate the First-tier Tribunal, despite not finding that the burden was discharged by the Respondent, went on to consider the second stage of the boomerang of proof, namely, the Appellant's rebuttal evidence.
8. In that respect the Appellant's rebuttal evidence at paragraphs 16 to 21 is scrutinised in some great detail. The rebuttal evidence included a letter from ETS Global, an assessment of the Appellant's English but also consideration of his qualifications in having achieved a BSc honours degree in Finance and Accounting. The First-tier Judge quite rightly

acknowledged that there was a passage of time and it would be expected that the Appellant would speak English better today than 2012 but that the achievement of the BSc degree must have involved a high level of English language skill. In my view it is right that the First-tier Judge made this qualification of his assessment of the English language and also observed that the English language will have improved in the interim, particularly given the findings in *SM and Qadir* on this concept. This did not give me cause for concern however, as in light of the judge's findings on other matters and the documentary evidence produced by the Appellant, nothing turns on that point. Ultimately the judge did find that the analysis of the evidence did not show that the Appellant's English language test was not taken by him and importantly the judge accepted that the Appellant was telling the truth and that he did take the exam. Those findings, as Mr Walker said in reply, were such that the judge was open to reach and entitled to make. I am grateful to Mr Walker for his observations on the First-tier Tribunal's determination. Mr Walker did not pursue the appeal beyond reliance beyond the grounds as pled.

9. In my view the First-tier Tribunal's determination is sound and entirely in keeping with the decision in *SM and Qadir* which stands as the latest and most authoritative stance on these ETS/TOIEC appeals.
10. In respect of the second issue raised saliently in the Grounds of Appeal, there was complaint at paragraph 10 by the Presenting Officer that the Appellant and his representatives had failed in their "duty of honesty" to the Tribunal as they failed to disclose the fact that there is objective evidence available which reveals that Synergy Business College of London is the subject of a criminal enquiry because of cheating on the TOEIC test that took place there. A copy is said to be attached of that objective evidence however nothing appears in the bundles before me and nothing has reached the Upper Tribunal's files. Mr Walker rightly acknowledged that there was no evidence to support this serious assertion and Mr Hasan, who also appeared before the First-tier Tribunal, confirmed that there was no evidence or mention of Synergy Business College of London being subject of a criminal enquiry due to cheating on the TOEIC test such that he was in a position to disclose and he was equally unaware of any investigation.
11. In that light I find that there is no material error that is revealed by paragraph 10 of the grounds in respect of any allegation of a failure to disclose objective evidence available. It is questionable whether the evidence in fact was available. From my previous sittings I have seen evidence of Synergy Business College but this has been habitually produced by the Respondent, not the Appellant, and that material was not produced in the bundles that I have seen. At any rate it does not appear to be something which the Appellant's representatives were aware of anyhow.
12. I should also say, in my view, this is a fairly serious accusation that the Secretary of State has levelled at the Appellant's representatives. I would

normally expect there to be a witness statement from the individual that drafted the grounds of complaint along with a statement of truth and supporting evidence going towards the allegation made that the representatives were in fact aware of the objective evidence available and that they had failed in their duty to disclose facts to the Upper Tribunal. There is no evidence whatsoever that supports this allegation and I consider it inappropriate that such an accusation was made in the absence of any evidence and before an assessment was made as to whether such an assertion could reasonably be made against the Appellant's representatives. There is indeed a recent reported decision on the duty of candour from the Upper Tribunal (see *R (on the application of Bilal Mahmood) v Secretary of State for the Home Department (candour/reassessment duties; ETS :alternative remedy) IJR* [2014] UKUT 439 (IAC)) in which it is confirmed that there exists a duty of candour from an Appellant's representative however this statement was made in the context of judicial review proceedings (and particularly in the context of *ex parte* applications for injunctions). I have no doubt that any solicitor or counsel, as officers of the court owe a duty towards the court to ensure it is not misled. I should add that, by custom and practice of this Tribunal, I view the same duty as falling equally upon all presenting officers although not strictly or traditionally officers of court. However, there are professional implications for any officer that misleads a court and cogent evidence would be required to support such a serious allegation. At any rate, in my view, in light of recent authority, custom and practice and Mr Walker's sensible submissions, the Appellant's representatives have not failed in their "duty of honesty" to the Tribunal and consequently there is no error of law such that the determination stands to be set aside.

13. I should also add as an addendum that it appears from the letter from ETS Global that there was an acknowledgement that the test taken by other sitters at the Synergy Business College test centre were all cancelled due to invalidity which may or may not have been due to the investigation or potential fraud by a 'majority' of other applicants; but at any rate there is no subjective evidence that *this* applicant had committed fraud, as I have already stated.
14. Consequently I do not find that there is an error of law in the determination such that it should be set aside.
15. The appeal of the First-tier Tribunal is affirmed.

Signed

Date 01/06/2016

Deputy Upper Tribunal Judge Saini