



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/02776/2015

THE IMMIGRATION ACTS

Heard at Field House
On 25 May 2016

Decision & Reasons Promulgated
On 3 June 2016

Before

UPPER TRIBUNAL JUDGE STOREY

Between

MR MD YEASIR ARAFAT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Malik of Counsel instructed by Hafiz & Haque Solicitors
For the Respondent: Ms N Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. The subject of this appeal is a determination sent by First-tier Tribunal (FtT) Judge Metzger on 19 October 2015 dismissing the appellant's appeal against a decision made by the respondent on 17 December 2014 to remove him from the UK under s.10 of the

1999 Act. Such a decision carries a right of appeal out of country which the appellant exercised upon his return to Bangladesh.

2. The basis of the respondent's decision was that in his last Tier 1 application made on 16 November 2012 (shortly before expiry of his leave to remain) he had exercised deception by submitting an invalid TOEIC score report with his Tier 1 application. In concluding that the respondent had discharged the burden on her to prove deception, the FtT judge noted the evidence relied upon by the respondent which included (i) the ETS finding that his test results had been obtained by use of a proxy tester; (ii) Home Office generic evidence regarding the reliability of the ETS analyses; and (iii) evidence specific to the appellant's case. This was identified at para 6 as follows:

"The Respondent also relied upon security marking which gives a context as to the level of cheating. The secure public test centre as overseen by ETS global employees show that only three were valid out of 1,039 TOEIC speaking and written tests whereas Synergy Business College where the Appellant took the test, ETS identified that 2,410 out of 4,894 TOEIC speaking and written tests were invalid comprising 49%, whereas the percentage invalid of secure public test centres was 0.28%."

The judge then concluded at para 8:

"Although the Appellant has submitted an IELTS certificate in February 2015 suggesting he passed the test which the parties agreed only went to the Appellant's credibility, I have received no further evidence as to how he took the test and have no other evidence from the Appellant to counter the points advanced on behalf of the Respondent. The failure rate is 49% and the Appellant's case was based upon an analysis by ETS. It was alleged that the Appellant's result was obtained by the use of a proxy tester and the Appellant has not sought to address that concern. Even taking into account that the Appellant appears to have passed a recent test, I do not find the Appellant has adequately addressed the concerns of the Respondent as contained within the witness evidenced and reflected [in] the inordinately high failure rate in respect of Synergy Business College."

3. The appellant's grounds as advanced are in summary:
 - (1) that the judge had erred by deciding the case "in line with the respondent's generalised allegation" and "without considering the evidence of the appellant" which was that he had not used a proxy;
 - (2) that the judge failed to consider the appellant's subsequent achievement in securing the "English Certificate";

- (3) that the judge failed to take into account the fact that the appellant was not given an in-country right of appeal due to which he had to leave the UK and was unable to give evidence to the FtT to explain any allegation raised against him;
- (4) (This ground was added by way of a skeleton argument submitted at the outset of the hearing before me) the “generic evidence” relied on by the respondent has been “firmly rejected” by the Upper Tribunal in SM and Qadir v SSHD (ETS – evidence – Burden of Proof) [2016] UKUT 229 (IAC) (hereafter “Qadir”).

4. I am not persuaded that the judge erred in law. Taking the grounds in reverse order, whilst I am prepared to accept ground (4) as an amended ground, it relies on evidence that was not in existence at the time the judge made his decision and does not fulfil the criteria necessary for a mistake of fact to constitute an error of law. Further, in Qadir the conclusion of the Presidential panel did not amount to a blanket rejection of the generic evidence. Whilst finding it weak it considered it was sufficient to discharge the evidential burden and could be sufficient to discharge the legal burden in the absence of credible and satisfactory evidence from individual appellants. Thus, at para 67-68 the Tribunal concluded that the Secretary of State had discharged the evidential burden:

“67. We begin by asking ourselves whether the Secretary of State has discharged the evidential burden of proving that the Appellants were, or either of them was, guilty of dishonesty in the respects alleged. Bearing in mind that, as noted above, all of the Secretary of State's evidence was adduced first, reflecting the burden of proof, it is appropriate to record that at the stage when the Secretary of State's case closed there was no submission on behalf of either Appellant that the aforementioned evidential burden had not been discharged. We draw attention, *en passant*, to a procedural issue which may be worthy of fuller consideration in an appropriate future appeal, namely the question of whether in a case where the Secretary of State bears the evidential burden of establishing sufficient evidence of deception and, at the hearing, goes first in the order of batting, the Tribunal should invite submissions from the parties' representatives at the stage when the Secretary of State's evidence is completed.

68. As our analysis and conclusions in the immediately preceding section make clear, we have substantial reservations about the strength and quality of the Secretary of State's evidence. Its shortcomings are manifest. On the other hand, while bearing in mind that the context is one of alleged deception, we must be mindful of the comparatively modest threshold which an evidential burden entails. The calls for an evaluative assessment on the part of the tribunal. By an admittedly narrow margin we are satisfied that the Secretary of State has discharged this burden. The effect

of this is that there is a burden, again an evidential one, on the Appellants of raising an innocent explanation.”

5. It then turned to the issue of the legal burden together with the state of the evidence advanced by the appellants in the case before it.

“69. We turn thus to address the legal burden. We accept Mr Dunlop's submission that in considering an allegation of dishonesty in this context the relevant factors to be weighed include (inexhaustively, we would add) what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated. Mr Dunlop also highlighted the importance of three further considerations, namely how the Appellants performed under cross examination, whether the Tribunal's assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic achievements are such that it was unnecessary or illogical for them to have cheated.”

6. Having made clear that the relevant factors to be weighed included those pertaining the individual appellant, the Tribunal then proceeded to treat the assessment it had to make as a two-stage one, first assessing the evidence of Dr Harrison produced on behalf of the appellants; and second assessing the evidence particular to the appellant. As regards the first stage it said:

“70. We begin with the expert evidence of Dr Harrison upon which both Appellants rely. We have already made our assessment of Dr Harrison's evidence in the context of our evaluation of the evidence on behalf of the Secretary of State: see [58] - [61] above. There is nothing of substance to add to this. In short, the evidence adduced on behalf of the Secretary of State emerged paled and heavily weakened by the examination to which it was subjected. By the stage when Dr Harrison's evidence was completed, the Secretary of State's evidence had paled and wilted. In the sporting world a verdict of no contest would have been appropriate at this juncture. The Appellants' cases are enhanced and fortified by Dr Harrison's evidence, which we accept in its entirety”.

7. The Tribunal then turned to the evidence particular to the appellants and in this context it is notable that it attached significant weight to the detailed accounts of both as regards how they took the tests and the surrounding circumstances. It concluded that the first appellant had given credible evidence and then proceeded to the following conclusion:

“89. The final question is whether the Secretary of State has discharged the legal burden of establishing on the balance of probabilities that this Appellant procured his TOEIC certificate by deceit. The answer to this question requires a balancing of all of the findings and evaluative

assessments rehearsed above. We are satisfied, objectively, that at the stage when this Appellant took the tests in question there was no need for him to engage in any form of cheating. He would have been sufficiently proficient in English to secure the necessary qualification legitimately. Furthermore, given his extensive familiarity with the immigration system, he would have been aware of the grave consequences of any form of deception. To have cheated would have entailed engaging in a game of risk with very high stakes indeed. Furthermore, having considered all the evidence, we have no reason to question the Appellant's good character generally.

90. In addition, as already highlighted, this Appellant's case is fortified by the unchallenged evidence of the steps which he took in his own defence from the moment when the illegitimacy of his TOEIC certificate was first questioned. We find no reason to doubt this evidence. Moreover, there was very little exploration in cross-examination of the Appellant's account of the tests undertaken and the surrounding circumstances. Finally, we must weigh our findings concerning the marked shortcomings in the Secretary of State's evidence, coupled with our acceptance of the Appellants' expert evidence."

8. A similar process of assessment was conducted in respect of the second appellant.

9. The Tribunal ended by setting out what is called "Omnibus Conclusions" as follows:

"100. The evidence adduced on behalf of the Secretary of State suffers from the multiple frailties and shortcomings identified above. The oral evidence of the first Appellant, SM, was a classic curate's egg. We have exposed its mix of strengths and imperfections above. Having done so, we have concluded that the core elements of his case are plausible. The oral evidence of the second Appellant, Mr Qadir, was, in contrast, impressive in its entirety. We have accepted the central thrust of his case also. The documentary evidence adduced by both Appellants contains no significant flaws. While certain questions deserving of consideration and reflection have been raised (reflected in our conclusion that the Secretary of State's evidential burden has been satisfied), these are insufficient to displace our omnibus conclusion that, viewing all the evidence in the round and having subjected the Appellants' testimony to the Tribunal to critical scrutiny, the core of their respective cases is truthful and plausible. Finally, the expert evidence of Dr Harrison significantly undermines the Secretary of State's case, fortifies and reinforces the case of both Appellants and, ultimately, has emerged not merely unshaken but enhanced .

101. We have already held that the evidential burden of proof resting on the Secretary of State has been narrowly discharged. For the reasons which we

have given, we are satisfied that both Appellants have discharged their burden of raising an innocent explanation of the *prima facie* indications of deception on their part in the Secretary of State's evidence. For the reasons elaborated, we conclude, without hesitation, that the Secretary of State has failed to establish, on the balance of probabilities, that the Appellants' *prima facie* innocent explanations are to be rejected. The legal burden of proof falling on the Secretary of State has not been discharged. The Appellants are clear winners.

102. We take this opportunity to re-emphasise that every case belonging to the ETS/TOEIC stable will invariably be fact sensitive. To this we add that every appeal will be determined on the basis of the evidence adduced by the parties. Furthermore, the hearing of these appeals has demonstrated beyond peradventure that judicial review is an entirely unsatisfactory litigation vehicle for the determination of disputes of this kind: see Gazi at [36] - [37].
103. We take note of the indications in the conduct of these appeals that, in some future case, the Secretary of State may seek to adduce further evidence, likely to be expert in nature. Should this eventuate the evidential framework of future appeals will not merely be fact sensitive but may include an entirely new ingredient. As we have emphasised, all appeals will be decided on the basis of the evidence actually adduced.
104. The factors which were of particular significance in the exercise of making our findings and conclusions in these appeals are evident from what we have written in this judgment. We are conscious that some future appeals may be of the "out of country" species. It is our understanding that neither the FtT nor this tribunal has experience of an out of country appeal of this kind, whether through the medium of video link or Skype or otherwise. The question of whether mechanisms of this kind are satisfactory and, in particular, the legal question of whether they provide an appellant with a fair hearing will depend upon the particular context and circumstances of the individual case. This, predictably, is an issue which may require future judicial determination."

Particular note should be taken of what the Tribunal said in para 102, namely that "...every case belonging to the ETS/TOEIC stable will invariably be fact sensitive. To this we add that every appeal will be determined on the basis of the evidence adduced by the parties."

10. As regards ground (3), the fact that the appellant had only an out-of-country appeal was a consequence of the statutory framework. The judge had no discretion to change that. Insofar as the argument seeks to identify lack of equality of arms, the appellant in this case took no steps to enhance his ability to give evidence. He did not, for example, request that he be allowed to give evidence by video-link.

Moreover, although he had submitted a written statement dated 2 October 2015, in relation to the allegation against him of deception it did not seek to provide any detail as to how, where and when he took his ETS test, and what he recalled about it. As the judge noted at para 8, "I received no further evidence as to how he took the test and have no other evidence to counter the points advanced on behalf of the Respondent". The appellant's statement simply repeated his denial that he had not used a proxy or otherwise practised deception.

11. In addition, the evidence relied upon by the respondent in support of her allegation that the appellant in this appeal had used deception went beyond the generic evidence. As observed and relied upon by the judge at para 6:

"The Respondent also relied upon security marking which gives a context as to the level of cheating. The secure public test centre as overseen by ETS global employees show that only three were invalid out of 1,039 TOEIC speaking and written tests whereas [at] Synergy Business College where the Appellant took the test, ETS identified that 2,410 out of 4,894 TOEIC speaking and written tests were invalid comprising 49%, whereas the percentage invalid of secure public test centres was 0.28%."

12. Ground (2) complains that the judge should not have ignored the appellant's achievement in obtaining an IELTS certificate dated 18 February 2015 taken with the Cambridge English language assessment in which he passed all the tests with an overall band score of 7.0. However, in order to succeed under the relevant immigration rule the applicant had to show he had obtained the relevant English language qualification prior to the date of application. At that date (November 2012) the qualification he relied on was based on the invalid TOEIC score report. Nor had the appellant even obtained the IELTS certificate by the date of decision in December 2014. In Qadir, the Tribunal pointed out at para 80 that one factor that might limit the value of evidence of a recent certificate was "the passage of time" since an impugned ETS test was taken. In this case it was over two years. In any event, the judge appears to have been prepared to accept the fact that the appellant had obtained this qualification in February 2015 as being relevant to his credibility (see 8) but even so was not satisfied it cast a different light on the earlier test or on overall assessment of his account. The judge stated at 8:

"Even taking into account that the Appellant appears to have passed a recent test, I do not find [he] has adequately addressed the concerns of the Respondent as contained within the witness evidence and reflected [in] the inordinately high failure rate in respect of Synergy Business College."

13. In light of what I have already set out in rejecting grounds (2)-(4), it is unnecessary to say anything about ground (1) save that, contrary to what it asserts, the judge did not decide the case "in line with the respondent's generalised allegation without considering the evidence of the appellant". The judge properly noted that the respondent's allegation was based both on generic and specific evidence and that the

appellant's own evidence seeking to rebut the allegation of deception was both not credible and unsatisfactory.

Notice of Decision

14. For the above reasons I conclude that the judge did not materially err in law and accordingly the judge's decision to dismiss the appeal must stand.
15. No anonymity direction is made.

Signed

Date: 2 June 2016

A handwritten signature in black ink that reads "H H Storey". The signature is written in a cursive style with a large, sweeping flourish at the end of the name.

Dr H H Storey
Judge of the Upper Tribunal