Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30572/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 November 2017	**On 11 December 2017**

Before

UPPER TRIBUNAL JUDGE WARR

Between

MR MD SAYFUL ISLAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss A Christie, Counsel, instructed by J S Solicitors
For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh born on 10 August 1988. He entered the UK as a Tier 4 (General) Student on 21 January 2010 with leave to enter until 30 April 2013. On 14 June 2013 he was granted further leave to remain until 30 August 2014. On 24 September 2013 he applied for an extension of leave as a Tier 4 (General) Student which was refused on 26 August 2015 on the basis that the appellant had used a proxy test taker to undertake the speaking part of the TOEIC Certificate for Speaking and Reading to obtain his Confirmation of Acceptance for Studies (CAS). It

was also alleged that the appellant had submitted forged certificates to obtain the CAS.

2. The appellant appealed and his appeal came before a First-tier Judge on 19 January 2017. It was in issue as to whether the appellant had taken the disputed test at Eden College International on 6 March 2013 which the appellant denied. The appellant relied upon a letter from Colwell College showing the appellant had achieved Level B2 but not confirming whether this was a speaking and writing exam as opposed to a listening and reading exam.

3. The determination continues:

> "4. The Respondent produces a schedule which essentially asserts that the Appellant on 15 January 2013 had undertaken speaking and writing tests, also had undertaken the same exam at the London College of Media and Technology on 6 February 2013. Somewhat curiously, the Colwell College letter does not provide the certificate number for the test which he did and similarly the scores provided for Colwell College by the Respondent show that the Appellant had failed the speaking test and had passed the written test. In contrast, in the test carried out at the London College of Media and Technology, said to be on 6 February 2013, the Appellant passed the speaking test and failed the written test. In any event, the scores listed for Eden College International on 6 March 2013 show the Appellant passed both tests."

4. In paragraph 6 of the decision the judge notes the same test certificate number appeared on the Eden College International certificate as well as the Colwell College certificate which he found difficult to understand and raised serious doubts about the reliability of the certificate.

5. The determination continues:

> "7. It is clear that the Appellant presented the certificate for the speaking and writing test which shows scores in respect of each category of 200 out of 200 and the same is recorded in the CAS material.
>
> 8. The Appellant gave a general description of attendance at a testing centre in London at Alie Street, London E1 and that is the same as in the Colwell College confirmatory letter. Such a description could be correct whether or not a test was taken.
>
> 9. The Appellant's recollection of the test itself is generally fairly vague although he recalls the travelling details to and from the college.
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> 10. I am left in the position that the Respondent's evidence is challenged as to the test centre attended by the Appellant as indeed the use of a proxy test taker.
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> 11. The Appellant also says that he did not pay the fee himself to take the test but used another's credit card, as he did not have sufficient funds. In the result, he does not have any result or indeed any evidence of the payment at all.
>
> 12. The Appellant also asserted that he must have passed this test because within a few months after March 2013 he had passed other examinations, in particular one in relation to speaking English 'with merit'. It followed from that that it was

reasonable to conclude that he had taken the test and had not used a proxy test taker. In considering this matter I have taken into account the case law demonstrated by SM and Qadir [2012] UKUT 229, I Qadir [2016] EWCA Civ 1167, Shehzad [2016] EWCA Civ 615, MA [2016] UKUT 450 and Shen [2014] UKUT 236. It seemed to me that there is no direct evidence of a separate forged document as adverted to in the reasons for refusal but rather, the underlying criticism is that the CAS letter was obtained on the strength of a certificate which itself was not valid because a proxy test taker had been used.

13. I therefore do not find that any separate document was a forgery, so much as the Appellant had relied upon the false certificate because a proxy test taker had been used.

14. Having weighed up the Appellant's explanation of these events, I have done so in the context of what is sometimes called the 'generic evidence' demonstrated and provided by the Respondent in the statements of Mona Shah, Peter Milligton, Rebecca Collings and Professor French.

15. It seems to me that the Respondent has established that there is a case to answer in relation to first, the college where the certificates are said to have been provided by and secondly, in relation to the use of a proxy test taker.

16. I concluded that the likelihood was that the Appellant had not shown there was an honest explanation for the position he found himself in. The Appellant may well have had in 2013 good English language skills but that is not the same thing as the confidence to pass a test, not least with its attendant consequences, when he had previously had some difficulties in that respect.

17. It also seemed to me that the evidence, even if it is generic, was particularly addressing the certificates relied upon by the Appellant from Eden College International whose reputation had been seriously damaged by the T.V. exposé and the police investigation. Similarly, Colwell College has also been the subject of investigation and adverse criticisms of their testing performance.

18. In the circumstances, I find that the Appellant has not discharged the burden of proof upon a balance of probabilities that he took the speaking test himself. He may have taken other tests but I do not find he took the speaking test himself. No separate representations were made in relation to private life rights under the immigration rules or Article 8 and, in the circumstances, it appeared that there was no evidence particularly advanced in that matter. Accordingly, I do not find they are engaged."

6. The judge dismissed the appeal and grounds of appeal were settled by Counsel (not Miss Christie) and permission to appeal was granted on 14 September 2017. A response was filed on 28 September 2017.

7. Miss Christie settled amended grounds on 27 October 2017 which were lodged with the Tribunal on that date. Permission was sought to rely on these grounds. Ms Ahmad had not seen the grounds and I put the case back to enable her to have sight of them. She submitted it was unfair to raise amended grounds at this stage and the grounds should have been lodged in the proper timescale. Counsel submitted that the respondent had suffered no prejudice as the grounds had been sent some weeks previously. She referred to a guidance note in 2011 from Mr Justice Blake. The issues raised had featured in the original grounds. One point had been withdrawn.

8. It appeared to me appropriate to permit the reliance upon the amended grounds. I noted that some of the points had already featured in the original grounds and one of the points had been withdrawn and the grounds and the application had been made several weeks before the hearing date. However I offered Ms Ahmad the opportunity to take additional time should she require it.

9. Counsel submitted that the Secretary of State had an initial evidential burden to show that the test certificate had been procured by dishonesty and if satisfied the burden shifted to raise "a plausible innocent explanation" (**Shehzad and Chowdhury [2016] EWCA Civ 615**. The evidential burden entailed a "comparatively modest threshold" (see **SM and Qadir v Secretary of State (ETS – Evidence – Burden of proof) [2016] UKUT 00229 (IAC)** at paragraph 67. If the appellant satisfied the evidential burden the respondent was then required to discharge the legal burden of proving dishonesty on the balance of probabilities. The standard of proof belonged to the higher end of the balance of the probabilities spectrum – Counsel referred to **Muhandiramge [2015] UKUT 00675 (IAC)** at paragraph 89. Reference was also made to **Shen (Paper appeals: proving dishonesty) [2014] UKUT 00236 (IAC)** and **Mohibullah v Secretary of State [2016] UKUT 00561 (IAC)** at paragraph 79. The fact that the judge had not applied the correct burden and standard of proof was a clear material error of law – Counsel referred to **MZ (Pakistan) v Secretary of State [2009] EWCA Civ 919** – the court rejected the submission that the misdirection was immaterial because the judge had simply disbelieved the appellant. She referred to paragraph 18 of the determination. In addition to the amended grounds she had prepared a helpful note on the evidential burden and a chronology.

10. Ms Ahmad submitted that it was clear from paragraph 8 that the First-tier Judge had considered the appellant's evidence and found his recollection to be vague. He had referred to the absence of a receipt in paragraph 11 and had considered the generic evidence in paragraph 14. The judge had not found there was an honest explanation in paragraph 16.

11. Ms Ahmad accepted that paragraph 18 was not best worded but should not be looked at in isolation. It would be wrong to subject a determination to a very careful analysis which would overburden a First-tier Judge. The Court of Appeal had encouraged brevity in determination writing. The judge had applied the correct approach concerning the initial burden and the conclusion that the appellant's explanation was not satisfactory was open to the judge. Reference was made to paragraph 57 of the decision in **MA** to which the judge had referred in paragraph 12 of his determination. There were many reasons why an appellant might use a proxy although he was proficient in English. Paragraph 18 was not very well worded but paragraph 16 needed to be looked at and the judge could not have come to a different conclusion.

12. Miss Christie submitted that the judge should have been clear on applying the correct burden and standard of proof and she was surprised by Ms Ahmad's submission. The determination was not clear at all. The evidential burden on the

appellant was only a modest one. It may be that the judge thought that the appellant had a legal burden on him. Counsel referred to the evidential burden and the remaining grounds of appeal and her note on the evidential burden. The appellant had advanced a positive account denying fraud and unless –

> "the appellant is found to be so uncredible that no reasonable judge could find his explanation to be truthful, the appellant will have discharged the evidential burden and it will be for the respondent to prove fraud, on the balance of probabilities."

13. Counsel also referred to what the judge had said in paragraph 60 about the appellant previously having difficulties in passing a spoken English Language test without taking into account the discrepancy in the spreadsheet put forward by the respondent about the speaking test taken on 15 January 2013 which recorded a different date of birth for the candidate which did not correspond to the appellant's date of birth. While the judge had referred to discrepancies in the dates of birth in paragraph 5 of his determination this was not taken into account when relying on the test result as evidence of the appellant's alleged difficulties.

14. The judge had failed to consider points referred to in the relevant case law to which he had made reference in paragraph 12 of his decision which highlighted questions as to the accuracy of the ETS testing, scoring and test checking processes. Given the clear discrepancy in the date of birth the judge should have considered the reliability of the ETS spreadsheet as evidence that the appellant had previously had difficulty in passing an English test. No proper findings had been made that the appellant was the person identified in the ETS spreadsheet or that he had taken and failed a test on 15 January 2013. It was a question about the uncertainty and lack of evidence as to how ETS had linked candidates' names with test results. No reasons had been given for preferring the mis-matching ETS spreadsheet extract over the appellant's multiple educational certificates demonstrating his academic achievements in the English Language. There was an issue whether the judge could properly rely on the spreadsheet as evidence that the appellant had failed a test when the respondent's position that it was "questionable" whether that test had in fact been taken by the named person, or by a proxy test taker. The appellant had also given academic evidence of his ability after the date of the allegedly fraudulent test certificate and the matter had not been given proper attention by the judge. In ground 4 it was submitted that the judge had not properly noted the "multiple frailities" identified in **SM & Qadir** in the respondent's generic evidence. This evidence had been found to be insufficient to discharge the legal burden. There was an issue of data being mis-matched and the possibility of covert, remote control mechanisms being used thereby a person using another computer could secure access to the computer being used by the candidate. There had been no evidence specifically connecting the appellant with the invalid test result such photographs, for example. The actual results of the speaking tests had not been given, preventing any statistical analysis of the scoring patterns, the judge had not properly assessed the paucity of the respondent's evidence in the light of the findings of the Tribunal in **SM & Qadir** and

subsequent evidence identified in **MA** and **Saha**. The judge appeared simply to have given weight to the respondent's generic evidence.

15. At the conclusion of the submissions I reserved my determination. I have carefully considered the material before me and the submissions that have been made and I remind myself that I can only interfere with the decision if there an error of law in it. The question of the shifting burden of proof in ETS cases is of course a complicated one.

16. The respondent has an initial evidential burden and then the burden shifts to the appellant to show a plausible innocent explanation. It does not appear to me that the determination clearly explains why the appellant had not put forward a plausible innocent explanation. Counsel points out that while the appellant had put forward evidence of his English Language ability, besides referring to the case law in paragraph 12 the judge had not appeared to have taken that into account. Counsel points out to a discrepancy in the ETS spreadsheet concerning the appellant's date of birth. The judge had noted the issue of the date of birth but found it difficult to tell its relevance in paragraph 5 of his determination. Counsel makes the point that the evidential burden is a light one – the threshold is comparatively modest.

17. Although the appellant's evidence is described as fairly vague it is not clear how the judge reached the conclusion in paragraph 16 that the likelihood was that the appellant had not shown that there was an honest explanation. As Counsel makes clear all the appellant had to advance was a plausible innocent explanation.

18 Ms Ahmad accepts that paragraph 18 is not ideally worded but submits that it would be wrong, in effect, to apply too critical an analysis of it. I also take into account that in both counsel's amended grounds of appeal at paragraph 18 and in the skeleton argument at paragraph 10 she misquotes what the judge wrote in the first sentence of paragraph 18 – adding the word "legal" so that it reads: "In the circumstances, I find that the Appellant has not discharged the *legal* burden of proof upon a balance of probabilities that he took the speaking test himself." The judge did not write this – I have set out the correct version above. On the other hand it is by no means clear that the judge was not dealing with the legal burden at this stage and if he was then of course the burden was not on the appellant. Ms Ahmad does acknowledge a weakness in paragraph 18 as I have said.

19. I accept the submissions made by Miss Christie that on issues of burden and standard of proof where fraud is alleged it is particularly important that it can be clearly demonstrated that the judge had gone through the proper steps when reaching his conclusions. I do not find that it is clear that the judge properly directed himself in this matter and accordingly in light of the fact finding required it is necessary that his case should be remitted for a fresh hearing before a different First-tier Judge.

Notice of Decision

The appeal is allowed to the extent indicated.

Anonymity Order

The First-tier Judge made no anonymity order and I make none.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date 8 December 2017

G Warr, Judge of the Upper Tribunal