



Upper Tribunal
(Immigration And Asylum Chamber)

Appeal Number:

IA/30666/2015

THE IMMIGRATION ACTS

Heard at: Field House
On 24 July 2017

Decision and Reasons Promulgated
On 8 August 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS PATTRA PRAEPATH
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer

For the Respondent: Ms M Malhotra, counsel, instructed by Ash Norton Solicitors

DECISION AND REASONS

1. I shall refer to the appellant as “the secretary of state” and to the respondent as “the claimant.”
2. The secretary of state appeals against the decision of First-tier Tribunal Judge Coll promulgated on 25 November 2016 allowing the claimant’s appeal against the decision of the secretary of state to refuse to vary her leave to remain following an application for further leave to remain as a Tier 4 (General) Student migrant.
3. On 5 June 2017 First-tier Tribunal Judge Osborne granted the secretary of state permission to appeal on the basis that it is arguable that the Judge failed to consider the witness statement of Professor French who considered the defects in the secretary of state’s case that were found to exist in the Upper Tribunal’s decision in SM and Qadir v SSHD (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC). The Judge also failed to take into account the widespread cheating at Queensway College.

The decision of the First-tier Tribunal

4. In her decision, Judge Coll set out the evidence relating to the invalidation of the claimant's test results. She directed herself in accordance with R (on the application of Gazi v SSHD (ETS - judicial review IJR [2015] UKUT 00327 as well as setting out the headnote of the decision of the Upper Tribunal in SM and Qadir v SSHD (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC) at [34].
5. She noted that in the claimant's case, the secretary of state relied upon the same two witnesses from the Home Office as in Qadir. The additional report by an expert linguist "...is not particular to the (claimant's) situation and therefore adds nothing" [36]. The evidence from the claimant shows that she is a person of good character who had no incentive to cheat.
6. She found that when the secretary of state made the decision to refuse, "...the (claimant's) TOEIC results had been subjected to the same very flawed process criticised by the UT". She accordingly found that the legal burden of proof had not been discharged. The appeal was accordingly allowed under the Immigration Rules - [37] and [38].

The appeal

7. Mr Clarke relied on the reasons for appealing, noting that the Judge accepted that the claimant attended Queensway College and took the test herself. It is not clear how giving a detailed description of how the college was chosen and its location assisted in determining the deception issue. This did not preclude the use of a proxy test taker during the test. There was no analysis as to how the appellant took the test or what was involved.
8. He referred to the fact that the Judge noted that the secretary of state produced no language expert report to support the contention that in the claimant's case, her past and subsequent English language examination and test results were such as to show on the balance of probabilities that she did not have the ability and past experience to obtain the TOEIC scores honestly.
9. Mr Clarke submitted that no such expert report was necessary but that was not the contention being made. What was contended was that the claimant practised deception in her TOEIC test. Properly read, the witness statements and the spreadsheet extract showed that her English language test had been invalidated because of evidence of fraud in the test taken by the claimant.
10. He submitted that there may be reasons why a person who is able to speak English to the required level would nevertheless cause or permit a proxy candidate to undertake the ETS test on their behalf or otherwise to cheat. He referred to the judgment in MA (Nigeria) [2016] UKUT 540 at [57]. There is scope for other explanations for deceitful conduct.
11. MA (Nigeria) also featured Queensway College as one of the test centres, the very one selected by the claimant. The Tribunal in MA stated that at the general level, there is inter alia clear prima facie evidence of TOEIC corruption at the two test centres where the appellant (in that case) claimed to have been examined. Mr Clarke submitted that the

college is the subject of a Project Façade report because of the widespread cheating there which was not taken into account by the Judge.

12. Nor did the Judge properly consider the report of Professor French, simply stating that she did not find the additional report “particular to the appellant’s situation and therefore adds nothing.” In contrast, the report actually dealt with all the criticisms of ETS testing made by Dr Harrison, which were accepted in SM and Qadir.
13. Mr Clarke noted that the Project Façade report was faxed to the Tribunal on 3 November 2016. Dr French’s report was available as well. At paragraph [5] of the decision, the Judge was aware of the report of Dr French, which was identified as part of the secretary of state’s supplementary bundle.
14. He submitted that ETS case law involves a fact sensitive assessment which must be undertaken. The evidence as a whole must be weighed up in order to determine whether the secretary of state has discharged the legal burden. The Judge failed to address the need for innocent explanations from the claimant. At [36] she found that the additional report added nothing. He submitted that that characterisation of the report as “adding nothing” constituted an error. The report addresses various issues raised in Qadir which were not available at the time. Nor was there any mention of the criminal investigation undertaken in respect of the college regarding the extent of proxy cheating.
15. On behalf of the claimant, Ms Malhotra referred to the “French” report. She submitted that this was a tentative report. It was not conclusive. All he could do was to differ generally in his view. The Judge in the event had regard to the report, stating that it added nothing.
16. As to the report concerning the Queensway College, the Judge referred at [5] to all the evidence before her including the print out, the statement from Ms Shah and the report on Project Façade relating to the criminal investigation of Queensway College. It was therefore clearly in the Judge’s mind.
17. The Judge considered the “innocent explanation” of the claimant from [15-24]. She had regard to the claimant’s witness statement where she set out in full her denial that the certificate had been fraudulently obtained as well as why she wished to complete her studies before returning to Thailand. The claimant stated that whilst in Bangkok, she started her own bakery business; she wanted to expand it and improve her English. She therefore decided with her family’s encouragement to come to the UK to study further. She completed her general English programme in the UK and then returned to Thailand.
18. Subsequently she applied for leave to enter as a student. She sent a TOEIC certificate from ETS to the visa office prior to returning to Thailand. She wanted to further improve her English and studied English as a foreign language from 2013 until 2014 at Ealing Hammersmith and West London College.
19. Ms Malhotra noted that there was a Home Office Presenting Officer present. She could have asked the claimant a number of questions as anticipated in QM, supra, at [69].
20. The Judge found that the claimant was entirely credible in all respects as regards her circumstances. She answered questions in a straightforward manner with no hesitation – [27]

21. The Judge set out her evidence in some detail. As part of the evidence, the Judge has recorded in the proceedings that she was asked questions about the location of Queensway College. She identified it as near the Wandsworth tube station. She also explained that she chose Queensway College as the agency recommended this. She had only two weeks to do the exam.

Assessment

22. Judge Coll has given a careful decision. She has had regard to the proper approach identified in the authorities which she set out from [32-36].
23. She has also had regard to the secretary of state's evidence produced including witness statements and the report which she set out at [5]. She also had regard to the Project Façade report in respect of Queensway College.
24. The claimant gave evidence asserting her innocence. In finding her to be entirely credible in all aspects of her evidence the Judge set out the background facts relating to her academic achievements at [28-30]. She found that it would not be inconceivable for her to obtain the test scores set out in the TOEIC certificate - [29]. She noted that in October 2014 she achieved an average score of 5.5 in IELTS reading, writing, speaking and listening. IELTS scores, taken a year after the TOEIC, were sufficiently good that it would not have been surprising for her to have obtained the scores set out in the TOEIC certificate [29].
25. It is in that context that the Judge noted that the secretary of state produced no language expert report to support the claimant's contention that her past and subsequent English language examination and test results were such as to show that she did not have the ability and past experience to obtain the TOEIC scores honestly - [29]. That was little more than a makeweight.
26. In concluding that the secretary of state had not discharged the legal burden that the claimant had cheated, Judge Coll has properly considered the circumstances as a whole, including taking into account the flawed process which had been criticised by the Upper Tribunal.
27. Those findings were based upon the available evidence which were properly reasoned and are sustainable.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and shall accordingly stand.

No anonymity direction made

Signed

Date 3 August 2017

Deputy Upper Tribunal Judge C R Mailer