Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31071/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 September 2017	**On 13 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD KAMAL UDDIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Tarlow, Home Office Presenting Officer
For the Respondent: Mr Syed-Ali of Immigration Aid (Dunstable Road, Luton)

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Feeney promulgated on 17 January 2017.

2. Although before me the Secretary of State for the Home Department is the appellant and Mr Uddin is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to the Secretary of State as the Respondent and Mr Uddin as the Appellant.

3. The Appellant entered the United Kingdom on 22 September 2009 pursuant to entry clearance as a Tier 4 (General) Student Migrant, with

leave valid until 31 December 2010. On 24 January 2011 he was granted further leave to remain as a Tier 4 Migrant until 28 June 2014. On 29 March 2012 his leave was curtailed, to take effect on 28 May 2012. However, on 9 August 2012 he was granted further leave to remain until 30 March 2014, again as a Tier 4 Migrant. A second curtailment decision was taken on 25 January 2013 with effect from 26 March 2013. On 18 March 2013 the Appellant made an application for further leave to remain which in due course was granted on 23 May 2013 until 5 November 2014 - yet again as a Tier 4 Migrant. On 16 October 2014 the Appellant applied for further leave to remain as a Tier 4 Migrant. His application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 2 September 2015; in consequence the Appellant was refused leave to remain and a removal decision was made pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

4. The refusal of the Appellant's application was made with reference to paragraph 322(2) and 245ZX(a) of the Immigration Rules on the basis that the Respondent considered that the Appellant had used deception in the context of his application of 18 March 2013 by reason of submitting a TOEIC certificate issued by ETS dated 17 April 2012 which had been obtained through the use of a proxy tester. The application was also refused with reference to paragraph 245ZX(c) and (d) on the basis that the Appellant had failed to submit a Certificate of Approval of Study ('CAS') with his application, and in such circumstances failed to score the requisite points in respect of a CAS and thereby also in respect of maintenance.

5. The Appellant lodged an appeal to the IAC. In his Grounds of Appeal he acknowledged the two bases of the Respondent's refusal: see for example paragraph 2 of the Grounds. So far as the issue in respect of the CAS was concerned, the Appellant did not deny that he had submitted an application without a supporting CAS, but sought to offer an explanation for this shortcoming in his application. In respect of the allegation that he had used deception in an earlier application by relying upon an invalid TOEIC certificate obtained through proxy testing, he essentially denied that he had submitted such a document and asserted that he had obtained his TOEIC legitimately. Although Article 8 of the ECHR was referred to in passing in the Grounds by reference to public interest (see ground 5 at paragraphs 23 *et seq.*), nothing of substance was advanced in respect of private life either in the Grounds of Appeal or subsequently in the evidence before the First-tier Tribunal.

6. In support of his appeal the Appellant filed a bundle of documents including a witness statement signed by him on 1 December 2016. In his witness statement he again acknowledged the two bases of the Respondent's decision. In respect of the CAS he explains at paragraph 7 that he "*had to submit the application without a CAS*", and at paragraph 8

he states "*As I had expected, the Secretary of State refused my application*". At paragraph 12 of his witness statement the Appellant also says this about the CAS:

> "*I would like to plead the Honourable Immigration Judge that I have genuine intentions to study which I was unable to pursue simply as a result of not having CAS in time. It was highly frustrating when my application was refused due to the fact that the SSHD questioned the genuineness of the manner in which I had obtained my TOEIC certificate*".

(The Appellant also expresses his shock at the basis of the refusal with regard to proxy testing at paragraph 8 of his witness statement.)

7. On their face the Grounds of Appeal and the Appellant's witness statement appear to concede that the Appellant recognised that his application was going to be refused because he had failed to comply with the requirements of the Rules - which include the requirement to provide a CAS. However, his particular consternation and surprise was not in this regard, but in respect of the allegation of dishonesty in making use of the TOEIC certificate in the circumstances alleged by the Secretary of State.

8. Unfortunately - for reasons that are unclear - it is apparent that the First-tier Tribunal Judge completely failed to address the issue in respect of the CAS. It seems to me that had he done so, notwithstanding the conclusion he reached favourable to the Appellant in respect of the proxy testing issue, he would have been duty bound to conclude that the Appellant did not satisfy the requirements of the Immigration Rules, and would thereby have been duty bound to refuse the appeal under the Immigration Rules. The fact that the Judge seems to have missed this point entirely is in my judgement a manifest material error of law.

9. Notwithstanding the foregoing this matter was not actually pleaded by the Respondent in the grounds in support of the application for permission to appeal. Rather, the Respondent sought to challenge the First-tier Tribunal Judge's assessment in respect of the allegation of dishonesty in making use of an invalid TOEIC certificate. The First-tier Tribunal Judge addresses these matters from paragraph 17 of the Decision. Prior to paragraph 17 the Decision essentially rehearses the history, documents, substance of the refusal letter, substance of the Appellant's case, events at the hearing and sets out the relevant legal framework by citation from the case of **SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 229 (IAC)**. At paragraphs 17-19 the Judge makes reference to what is sometimes referred to as the 'generic evidence' from Mr Peter Millington and Ms Rebecca Collings, and passes some observations critical of the substance of that evidence, and

otherwise suggests that in some parts the evidence lacks clarity - for example, the Judge refers to Mr Millington referring to cases that are "*clearly distinguished by ETS in its spreadsheets*", but observes that it is not clear to him, that is to say to the Judge, how one can tell from the spreadsheets whether a case has been marked in such a way as to denote an 'administration irregularity'. (I pause to note that it might reasonably be thought that the comment that such cases are clearly distinguished in the spreadsheets is evidence enough that it is possible to tell from the spreadsheets which cases have been thus denoted. The Judge's comment appears to negate the meaning of the words 'clearly distinguished'.).

10. Be that as it may, the Judge then goes at paragraphs 20-23 to record aspects of the Appellant's narrative account and case; at paragraph 24 he refers to the Appellant's evidence as to how he chose his particular test centre and the travel arrangements made. The Judge says in this context "*The core aspects of his account are credible*", before adding "*The documentary evidence provided by the Appellant, in particular the certificates, are unchallenged*". (The reference to "*certificates*" is in respect of other educational certificates which the Appellant suggested indicated a competence in the English language.)

11. Paragraph 25 of the First-tier Tribunal's Decision is in these terms:-

> "*I remind myself of the burden and standard of proof and the guidance in* ***SM and Qadir****. Notwithstanding the concerns, I have identified in the evidence provided by the Respondent regarding the assessment of the tests themselves, in terms of* ***SM and Qadir*** *I find this is sufficient to the extent that the Respondent has discharged the evidential burden. However, in this particular case I find she has failed to discharge the legal burden. In reaching this decision I take into account that the Appellant would have had no need to use a proxy tester. Prior to his arrival in the United Kingdom he had been educated in Bangladesh to University level where he studied English Literature which was a course that was taught in English. The Appellant has lived in the United Kingdom since 2009 and during that time has undertaken various courses which have had English language components. I note he has successfully completed an MA at Anglia Ruskin University, a course which was conducted in English. I find that at the time the Appellant took his test there would have been no need for him to have engaged a proxy tester. The Appellant has a great deal [of] experience with the immigration process and understands well the risks associated with non-compliance. He has found himself in a difficult position on two separate occasions when he has had to deal with the curtailment of his leave and I find he well understands the implications of adhering to the Rules. I note the Appellant has provided a consistent account about the location of his test and his travel to the test centre, he was asked a limited number*

> *of questions by Ms Ayodele but the replies he did give were consistent with the evidence he provided in his witness statement and his certificates were unchallenged. Looking at the evidence overall, I find that the Secretary of State has not discharged the legal burden in this case and I find in the Appellant's favour.*"

12. The Judge then allowed the appeal without further reference to the issue in respect of the CAS.

13. In challenging the Decision of the First-tier Tribunal, the Respondent makes criticism of the Judge's analysis at paragraph 25 in particular.

14. It may be seen that the First-tier Tribunal Judge essentially identified three bases for concluding that the Secretary of State had failed to discharge the legal burden and for accepting that the Appellant was essentially honest in his presentation of his TOEIC certificate. In brief those three matters are: the Appellant did not need to use a proxy tester for the reasons set out; the Appellant was a person who understood well the risks of not complying with the Rules; the Appellant was able to give an account of how he had attended the testing centre.

15. In respect of the first of those matters the Respondent places particular reliance upon passages in the case of **MA (ETS – TOEIC testing) [2016] UKUT 00450(IAC)**, in particular at paragraph 57 where the following is said:-

> "*Second, we acknowledge the suggestion that the Appellant had no reason to engage in the deception which we have found proven. However, this has not deflected us in any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere. We are not required to make the further finding of why the Appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter.*"

16. The Respondent argues in effect that the apparent proficiency in English of any particular individual is not a reliable – far less determinative - indicator of whether or not he decided to make use of a proxy tester. Accordingly, it

is submitted, little or no weight should be placed on such a circumstance, and that the Judge fell into error in this regard. In light of **MA**, and for the reasons given therein, it seems to me that that is a point well made.

17. Moreover, on the facts of this particular case the TOEIC certificate relied upon by the Appellant that was said to be dishonestly obtained was dated from April 2012. The MA from Anglia Ruskin University to which the Judge accorded weight in evaluating language competence and the supposedly consequent propensity to cheat or not, was not obtained until 2015. To that extent the Judge's reliance upon the Appellant's proficiency by reference to the award of the MA was misconceived because it was not a helpful or reliable indicator of the Appellant's language abilities three years previously.

18. The Respondent also argues that the ability of the Appellant to give an account of how he got to and from his test centre and the circumstances at the test centre, is in no way a reliable indicator of whether or not a proxy tester was used. In this regard it is to be recalled - both from the evidence of the witnesses relied upon by the Secretary of State and from the Panorama programme that triggered the investigation into these matters - that at some testing centres it was the practice for the applicant to attend, but then to step aside, as it were, whilst the proxy tester took his or her place at the desk or terminal to complete the tests. It follows that the use of a proxy tester would not mean that an individual did not know where the testing centre was, or how to get there, or what it was like on arrival and during the testing process. Again I accept that the Judge was in error in according any favourable weight to the Appellant's account in this regard.

19. The general point that the Appellant knew that he needed to comply with the Immigration Rules appears to me to be essentially a 'make-weight' point. In and of itself - and perhaps even in combination with other factors – it does not seem to me to be in any way capable of being a reliable indicator of the likely innocence or otherwise of the Appellant in the alleged wrongdoing.

20. In all the circumstances, and for the reasons given above, I find that there is substance in Respondent's challenge to the adequacy of the reasoning of the First-tier Tribunal Judge, sufficient to persuade me that the Judge materially erred in law.

21. In my judgement there is a yet further substantial difficulty in the way in which this case has been considered.

22. Mr Tarlow has helpfully directed my attention to the relevant jurisprudence, and in particular the requirement that once the evidential burden has been discharged by the Secretary of State - as indeed was acknowledged to be the case by the Judge herein pursuant to **SM and Qadir** - the Appellant then has the burden of raising an 'innocent explanation'. What is required is an innocent explanation of the *prima facie* indication of deception. In substance that places the focus not on contesting the fact of the falsity of the document, but on any explanation of how an applicant came to rely upon an invalid document without knowing it was invalid – i.e. 'innocently', without the necessary intent required for dishonesty. The approach of the Judge in this case is not to focus upon that question, but rather to re-evaluate the question of whether or not the certificate was invalid.

23. Mr Syed-Ali told me that there is indeed a divergence of approach to this in the First-tier Tribunal, with some Judges adopting the approach that I have indicated - which is that the explanation must go to the circumstances in which an invalid document came to be submitted in support of an application - and other Judges in substance revisiting the question of whether or not the document is invalid, notwithstanding the Respondent's discharge of the evidential burden. I prefer the former approach as being a proper reflection of the legal guidance offered by the leading cases. Accordingly I conclude that the First-tier Tribunal Judge has approached this case in error. I acknowledge the divergence of approach, and necessarily therefore that this is a contentious issue. However, ultimately, irrespective of this approach, on the facts of this particular case for the reasons given above in respect of the Judge's reasoning, I am satisfied that in any event the First-tier Tribunal decision is vitiated for error of law.

24. In all of the circumstances I find that the decision of the First-tier Tribunal Judge must be set aside and requires to be remade.

25. In remaking the decision it seems to me, as discussed with the representatives, that it is not necessary to remit this appeal to the First-tier Tribunal. The Appellant cannot succeed under the Immigration Rules for the reasons I have already indicated in respect of the CAS. Indeed, this was to all intents and purposes substantially accepted and acknowledged in his witness statement. Whilst Mr Syed-Ali during the course of argument suggested that were the Appellant successful in establishing that the decision in respect of the proxy testing was in error, the Respondent might then accord him a 60 day period of grace in which to seek to regularise his status whereupon he might better be able to obtain a CAS without having to rely upon past TOEIC certification, I do not accept that that is a matter that founds a basis to allow the appeal under the

Rules, or by reference to any principles of procedural fairness or otherwise.

26. In such circumstances it becomes unnecessary to reach any conclusion in respect of the allegation of proxy testing. Were it necessary I would be minded to conclude that the Appellant has not offered an innocent explanation but has rather disputed the accuracy of the Respondent's evidence and findings as to his test being invalid - he has in effect denied the invalidity of his test, but has not sought to offer any explanation as to how it is that he might have come innocently to submit an invalid test certificate. To that extent I would have been minded to find that the Secretary of State had met both the evidential and the legal burden, and that accordingly the appeal should also fail on that basis.

27. Mr Syed-Ali has not sought to pursue an Article 8 ground of challenge, and indeed there is no evidential material before the Tribunal in respect of the Appellant's private life in the UK beyond those matters that relate to his studies.

Notice of Decision

28. The decision of the First-tier Tribunal contained material errors of law and is set aside.

29. I remake the decision in the appeal. The appeal is dismissed.

30. No anonymity direction is sought or made.

Signed: Date: **9 November 2017**

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed: Date: **9 November 2017**

Deputy Upper Tribunal Judge I A Lewis
(*qua* a Judge of the First-tier Tribunal)