



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/33663/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 12<sup>th</sup> October 2017

Decision & Reasons Promulgated  
On 30<sup>th</sup> October 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MD MAHMUD HUSAIN  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer  
For the Respondent: Mr R Claire instructed by Waterstone Solicitors

DECISION AND REASONS

1. Although the Secretary of State is the Appellant in this appeal, I refer to the parties as they were in the First-tier Tribunal.
2. The Appellant, a national of Bangladesh, appealed to the First-tier Tribunal against a decision of the Secretary of State of 16<sup>th</sup> October 2015 refusing his application for indefinite leave to remain in the UK as the spouse of a British citizen. First-tier Tribunal Judge Trevaskis allowed the appeal and the Secretary of State now appeals

to this Tribunal with permission granted by Deputy Upper Tribunal Judge Roberts on 15<sup>th</sup> August 2015.

3. The background to this appeal is that the Appellant entered the UK on 28<sup>th</sup> July 2007 with leave as a student. His leave was extended on a number of occasions up until August 2013 and on 27<sup>th</sup> February 2013 he was granted leave to remain as the partner of a person present and settled in the UK until 27<sup>th</sup> February 2015. His application for indefinite leave to remain was refused under paragraph 287(a) of the Immigration Rules with reference to 322(1A) because he submitted a TOEIC certificate from Educational Testing Service (ETS) with his application of 24<sup>th</sup> October 2011 issued on the basis of a test that he took at Synergy Business College, London on 18<sup>th</sup> October 2011. In the Reasons for Refusal letter the Secretary of State said that ETS had undertaken a check of the Appellant's test and had concluded that it was undertaken by a proxy test taker and was invalid. On the basis of that information the Secretary of State considered that the certificate was fraudulently obtained and refused the application for indefinite leave to remain under the general ground in paragraph 322(1A) of the Immigration Rules and under Appendix FM on suitability grounds. The application was also refused under paragraph 276ADE and the Secretary of State considered there were no exceptional circumstances.
4. At the hearing before the First-tier Tribunal the Secretary of State's representative initially applied for an adjournment to seek further evidence. The judge refused the adjournment but gave the Presenting Officer an opportunity to obtain some of the missing evidence. The judge heard oral evidence from the Appellant and his wife. The judge set out the Respondent's submissions and the Appellant's submissions and found that the Appellant was credible and that the test scores had not been obtained by means of fraud or by the use of a proxy. The judge concluded that the test certificates were valid and, since the Appellant satisfies the other requirements of the Immigration Rules, he had demonstrated that he was entitled to indefinite leave to remain in the UK.
5. The Secretary of State's application for permission to appeal is based on two grounds of appeal. It is contended in the first ground that as the First-tier Tribunal Judge failed to refer to the evidence before him it is not clear that it has been properly considered and that the judge failed to explain why he found the Appellant credible. The second ground contends that the judge made a procedural error in refusing to grant an adjournment so that the Presenting Officer could obtain further evidence in relation to the ETS test.
6. Permission to appeal was initially refused in the First-tier Tribunal but was granted on renewal to the Upper Tribunal on the basis that it was arguable that, in refusing the Respondent's request for an adjournment, the First-tier Tribunal had not given proper consideration to material evidence which may affect the outcome of the matter. The Deputy Upper Tribunal Judge further considered that it was unclear what evidence the First-tier Tribunal Judge considered in coming to his decision.
7. At the hearing before me Ms Isherwood accepted on the basis of paragraphs 9 and 10 of the decision and the copy of the fax that was in the bundle that she could not take

the second ground any further. It is clear to me from the note at paragraphs 9 and 10 of the decision that the Presenting Officer was given an opportunity to obtain missing evidence before the hearing commenced. The fax from the Home Office which was submitted to the judge is on file and it indicates that it was received by the First-tier Tribunal at 10:32am on 10<sup>th</sup> January, the day of the hearing. It contains the following documents:

- ETS printout in respect of the Appellant.
- Statement of 10<sup>th</sup> January 2017 from Timothy Lloyd.
- Statement dated 23<sup>rd</sup> June 2014 from Rebecca Collings.
- Statement dated 23<sup>rd</sup> June 2014 from Peter Millington.
- Report of 20<sup>th</sup> April 2016 by Professor French.
- A Project Façade Report by Synergy Business College.

8. It is clear from the decision and the fax that this evidence was before the judge at the hearing. The Home Office has not asserted that there was any further evidence to be submitted had an adjournment been granted. Accordingly the Secretary of State has not established that the judge committed a procedural error capable of making a material difference to the outcome of the fairness of the proceedings.
9. The first ground in the renewal application to the Upper Tribunal contends that the First-tier Tribunal Judge failed to refer to the evidence and it is not clear that it has been properly considered. It is contended that the First-tier Tribunal Judge failed to take proper account of this evidence in accepting that the Appellant is credible and failed to properly adequately explain why this had been done. It is contended that had the judge properly considered the Respondent's evidence it would have been established on the balance of probabilities that the Appellant had practised deception.
10. In her submissions Ms Isherwood contended that the First-tier Tribunal Judge had erred at paragraph 23 in taking account of the Appellant's proficiency in English at the hearing. She relied on paragraph 57 of the decision in **MA (ETS - TOEIC testing) Nigeria [2016] UKUT 450 (IAC)** where the Tribunal says that there are a range of reasons why people proficient in English may engage in TOEIC fraud. She further submitted that the judge failed to properly consider the evidence submitted by the Secretary of State. Although the judge set out the Respondent's case at paragraphs 3 to 6 of the decision, in her submission he did not show that he had engaged with the Secretary of State's evidence. She submitted that the judge failed to explain how the evidence had crossed the first hurdle set out in the case of **SM and Qadir v Secretary of State for the Home Department [2016] UKUT 229 (IAC)**. The guidance of the Upper Tribunal was clarified by the Court of Appeal in **SM and Qadir (ETS - Evidence - Burden of Proof) [2016] EWCA Civ 1167**.
11. Mr Claire submitted that the judge had relied on the credibility of the Appellant in reaching his conclusions and noted that the Appellant had given evidence of English and that he was not asked any additional questions over and above his witness statement and was not cross-examined. He noted also at paragraph 15 that the Appellant's wife was not asked any questions and was not cross-examined.

Therefore, in his submission, it is clear that the Appellant's credibility was not challenged at the hearing. Further, Mr Claire referred to paragraph 16 of the decision where it is noted:

"The Respondent's representative conceded that the evidence which was before me was insufficient to shift the burden of proof to the Appellant regarding the allocation of deception in order to pass the test. He invited me to decide the appeal on the available evidence".

12. He submitted that the judge found in the Appellant's favour because of his general credibility and not only because of the finding in relation to the Appellant's proficiency in English. In his submission the judge attached weight to the substantial evidence from the Appellant detailing the circumstances of his attendance at the test centre and the conduct of the test and the judge concluded that he did attend these tests. This showed that the proficiency of English was a factor but not the only factor. He highlighted the decision in the case of **R (on the application of Gazi) v SSHD [2015] UKUT 00327** as set out in paragraph 19 of the decision which said that the Tribunal is entitled to take the Appellant's ability to speak English as a factor.
13. Mr Claire referred to paragraphs 54, 56 and 57 of the decision in **MA** where the Tribunal said:

"(54) At this juncture we switch our focus to the Appellant's evidence to the Tribunal. We heard and observed the Appellant studiously during some 2½ hours. We scrutinised in particular response times, hesitation, spontaneity and engagement with the Tribunal generally. We found the Appellant surprisingly hesitant. If he had truly undertaken the tests we would have expected him to have been much more assured and assertive in his evidence. These qualities were, however, strikingly lacking. We would also have expected greater spontaneity in his evidence. In particular, we consider that, if genuine, he would have been anxious to disclose, spontaneously or otherwise, matters of detail relating to the two days and occasions under scrutiny with a view to demonstrating his innocence of the charge of deception. This too was strikingly absent from his evidence. Furthermore, on occasions, the simplest of questions had to be repeated, sometimes more than once, a paradigm illustration being the quintessentially simple, but crucial, question: to where did he travel from Cauldon College on the first occasion, 28 February 2013? The Appellant dealt with this repeated question in a wholly unsatisfactory way.

- (55) These features of the Appellant's demeanour, presentation and the delivery of his evidence generally must be considered within their contextual framework and, in particular, the background that the Appellant, prior to giving evidence to the Tribunal, had enjoyed ample time for reflection, recollection and preparation. We recognise that a party or witness whose evidence partakes of these characteristics is not, *ipso facto* and inexorably, unworthy of belief. However, context is everything and we consider that in this particular appeal these factors, coupled with the findings and considerations highlighted above, impel ineluctably to the conclusion that the Appellant's case is a fabrication in all material respects. Finally, we have already highlighted above, and do not repeat,

his unconvincing and implausible explanations of material discrepancies and inconsistencies canvassed with him in questioning.

### **Omnibus Finding and Conclusions**

- (56) We make two concluding observations. First, we are conscious that our assessment of the Appellant's credibility differs radically from that of the FtT. While we take this into account, we are not of course bound by another judicial assessment. Furthermore, it is clear that the content and contours of the appeal which we have considered differ markedly from those of the first instance appeal.
- (57) 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."

14. Mr Claire referred to paragraph 54 highlighting that in this appeal the judge had the benefit of hearing evidence from the Appellant and his wife who he said did their best to assist the Tribunal and this went into his credibility assessment. He submitted that there is no requirement for the judge to refer to all of the evidence. He reiterated that the Secretary of State chose not to dispute the Appellant's evidence by deciding not to cross-examine the Appellant and it was unfair to raise a challenge to the Appellant's evidence now.
15. Ms Isherwood in response submitted that she could not comment on paragraph 16 in light of the fact that the guidance in **SM and Qadir** says that the generic evidence is sufficient to discharge the evidential burden. She argued that the judge erred in that he failed to consider the Secretary of State's evidence, considered the Appellant's proficiency in English and failed to address paragraph 53 of **SM and Qadir** which sets out the proper approach to be taken.

### **Discussion and Conclusions**

16. The guidance given by the Upper Tribunal in **SM and Qadir** was further clarified by the Court of Appeal where it was held that the generic evidence is sufficient to meet the evidential burden on the Secretary of State to raise a doubt such that the evidential burden shifts to the Appellant to proffer an innocent explanation. If he can then the Secretary of State may be unable to meet the legal burden of proof.

17. In considering the reasons given by the First-tier Tribunal Judge for his conclusions it is worth remembering the guidance given by the Court of Appeal for example in **AS (Iran) v SSHD [2017] EWCA Civ 1539** where Irwin LJ said at paragraph 26:

“In approaching criticism of reasons given by a First-tier Tribunal, the Respondent correctly reminds us to avoid a requirement of perfection. As Brooke LJ observed in the course of his decision in *R (Iran) v The Secretary of State for the Home Department* [2005] EWCA Civ 982, “unjustified complaints” as to an alleged failure to give adequate reasons are all too frequent. The obligation on a Tribunal is to give reasons in sufficient detail to show the principles on which the Tribunal has acted and the reasons that have led to the decision. Such reasons need not be elaborate, and do not need to address every argument or every factor which weighed in the decision. If a Tribunal has not expressly addressed an argument, but if there are grounds on which the argument could properly have been rejected, it should be assumed that the Tribunal acted on such grounds. It is sufficient that the critical reasons to the decision are recorded. ...”

18. The judge was clearly aware of the approach to be taken in these cases as set out at paragraph 17 in the submissions from the Appellant’s representative and in the section setting out the case law [19 – 21].
19. Whilst it is noted at paragraph 16 that the Presenting Officer conceded that Secretary of State had failed to discharge the evidential burden upon her to enable the burden to shift onto the Appellant, it is clear that the judge must have considered that the burden had shifted in moving to his assessment of the Appellant's evidence as set out in his findings at paragraphs 22 to 26.
20. The judge took into account the Appellant’s evidence and attached particular weight to the Appellant’s credibility and that of his wife. The judge considered the evidence about the Appellant’s attendance at the test centre and the conduct of the test and concluded that the Appellant did attend the test centre and take the test. Whilst the judge referred to the Appellant’s proficiency in English as a factor at paragraph 23 it is clear from his assessment of all of the evidence that this was not a determinative factor. Whilst the Tribunal highlighted the dangers of relying on a proficiency in English as a reason why an Appellant might not have engaged in deception at paragraph 57 of **MA**, the judge was entitled to take this into account along with all of the other evidence.
21. In my view it is clear that the judge reached findings open to him on the evidence and the judge was entitled to reach that finding on the basis of the evidence before him.

### **Notice of Decision**

There is no material error of law in the judge’s decision.

The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed

Date: 27<sup>th</sup> October 2017

Deputy Upper Tribunal Judge Grimes

**TO THE RESPONDENT**  
**FEE AWARD**

I maintain the fee award made by the First-tier Tribunal.

Signed

Date: 27<sup>th</sup> October 2017

Deputy Upper Tribunal Judge Grimes