



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/34084/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 26 September 2017**

**Decision & Reasons
Promulgated
On 26 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**OLEKSANDER DIYAK
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Ms P Solanki of Counsel instructed by LS Legal
Immigration Solicitors

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Carroll promulgated on 13 January 2017 following a hearing at Taylor House hearing centre on 12 December 2016. I mention the date of hearing only because the decision of Judge Carroll appears wrongly to date the hearing as having taken place on 12 December 2015.
2. Although before me the Secretary of State for the Home Department is the Appellant and Mr Diyak 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 Diyak as the Appellant.

3. The Appellant's immigration history is helpfully set out at paragraphs 2 and 3 of the decision of Judge Carroll. He entered the United Kingdom in 2002; since his arrival in the United Kingdom he met and married Ms Bodhana Bihun - the couple have had two children, born in October 2008 and November 2010. The Appellant's wife and their children are British citizens. The Appellant was granted discretionary leave to remain in April 2012 until 17 April 2015. On 17 March 2015 the Appellant made an application for further leave to remain on the grounds of his family and private life.
4. The application was refused with reference to paragraphs 322(1) and (5) of the Immigration Rules on the basis that the Respondent decided that the Appellant had submitted a TOEIC certificate from Educational Testing Services in support of the application that he had made for discretionary leave to remain on 22 December 2011. The certificate was issued in respect of a test taken by the Appellant on 18 October 2011 at OPAL College. The Respondent considered that the Appellant had made use of a proxy tester to acquire this certificate, and in such circumstances determined that the Appellant had employed deception in the context of his earlier application that justified the invocation of the paragraphs under the Rules to which I have referred above.
5. The Respondent also gave consideration to other aspects of the Immigration Rules, in particular the so-called 'partner route' and the so-called 'parent route' under Appendix FM, and also paragraph 276ADE. In respect of the partner route the Appellant was refused on the basis that the finding in respect of deception meant that he did not meet the suitability requirements. It was otherwise acknowledged in the Respondent's 'reasons for refusal' letter ('RFRL') that he met the eligibility requirements and also that he met the requirements of paragraph EX.1.
6. The Appellant appealed to the IAC.
7. The Appellant's appeal was allowed by Judge Carroll.
8. The Respondent, dissatisfied with the outcome in the appeal, sought permission to appeal, which was granted by Acting Resident Judge Appleyard on 19 July 2017. The Respondent's grounds of appeal are essentially that the Judge failed to assess correctly the burden of proof in line with the authority of **SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC)**. It was also pleaded that the Judge had failed to give

adequate reasons why the Respondent had not met the legal burden in the case. Judge Appleyard considered these matters to be arguable.

9. The Appellant has filed a Rule 24 response in these proceedings dated 4 September 2017 which essentially argues that the Judge's reasons and findings were adequately set out in the decision notwithstanding that it is acknowledged "*the IJ could have written more in her decision*".
10. Mr Tarlow has reminded the Tribunal this morning of the important passages in the case of **SM and Qadir**, and in particular the concluding guidance set out at paragraph 68 to the effect that the 'generic' material relied upon by the Respondent in cases of this kind is sufficient - albeit by a narrow margin - to discharge the legal burden on the Respondent in respect of the alleged deception, and that thereafter an evidential burden rests upon an Appellant to raise "*an innocent explanation*".
11. The First-tier Tribunal Judge's decision covers approximately a page and a half. The first page essentially rehearses the immigration history and quotes from the RFRL. It notes that the Appellant and his wife adopted the contents of their witness statements and that evidence is contained in the record of proceedings.
12. Thereafter the Judge says the following at paragraphs 6 to 9:
 6. *The burden of proof lies upon the respondent to show that deception or dishonesty has been used by the applicant, or someone acting on his behalf, and the standard of proof is the balance of probabilities.*
 7. *The issue of fraudulently obtained TOEIC certificate has been considered by the Upper Tribunal in **R (on the application of Ghazi) v Secretary of State for the Home Department (ETS - judicial review) [2015] UKUT 00327** and by the Court of Appeal in **Qadir v Secretary of State for the Home Department [2016] EWCA Civ 1167**.*
 8. *In this appeal the respondent relies upon the generic evidence submitted in similar appeals together with a witness statement of Hillary Rackstraw. The representatives for the parties confirmed at the hearing of this appeal that there was no possibility of now of obtaining the audio record of the test undertaken by the Appellant in 2011.*
 9. *I have heard evidence from the appellant as to the circumstances in which he took the test in 2011 and in which he*

was asked to return two weeks later to collect the test certificate. In the light of the authorities to which I have referred above, and in the light of the appellant's evidence, I find that the respondent has not discharged the burden of proof upon her in respect of the decision made by reference to paragraph 322 of HC 395."

13. In my judgment those passages do not display anything by way of reasoning such that the reader can understand the basis upon which the Judge allowed this appeal. Although the Judge has made reference to relevant authority and has stated that the burden of proof lies upon the Respondent to show that deception or dishonesty has been used, there is nowhere any express reference to the concept of the legal burden being upon the Respondent but being satisfied by the generic evidence, and the evidential burden shifting to the Appellant to raise 'an innocent explanation'.
14. There is no finding specified as to the Judge's conclusion as to whether the Respondent had, or had not, discharged the legal burden; indeed there is no finding on the Respondent's generic evidence. There is no consideration of whether the evidential burden had, or had not, shifted to the Appellant. If it was considered by the Judge that the evidential burden had shifted to the Appellant, there is nothing by way of explanation as to why the Appellant's evidence as to the circumstances in which he had taken the test and had returned to the test centre to collect his test certificate offered anything by way of an innocent explanation in answer to the allegation of deception.
15. It is to be recalled from the evidence that the Secretary of State relies upon - and indeed from the Panorama programme which is expressly referred to in that evidence - that in many cases the person making use of a proxy nonetheless attended the test centre and, as it were, stood to one side whilst the proxy tester took up position at the testing desk or terminal. The ability to recall how one went to a test centre, and indeed the ability to recall how one went back to pick up a certificate, does not seem to me remotely to address the concerns that are raised in cases of this type. Even if it were otherwise, the Judge in this particular quite simply fails to offer any explanation as to why the Appellant's evidence was adequate. The Judge has stated a conclusion but has provided no supporting reasons.
16. In all of those circumstances it seems to me that there is a manifest error of law and the decision of the First-tier Tribunal must be set aside.

17. It follows that the decision requires to be remade. Bearing in mind the complete lack of findings, in my judgment this must be done back before the First-tier Tribunal.

18. This is an Article 8 appeal and not an appeal under the Rules. The Judge may not have recognised - certainly in allowing the appeal no reference is made to Article 8. That said, as I have indicated in rehearsing the facts above, the Respondent only refused the Appellant's case with reference to Appendix FM under the so-called partner route by reason of the suitability requirements and that was premised upon the allegation of deception. It is likely in those circumstances that if the Appellant is able to meet the concerns in respect of the allegation of deception that his appeal should succeed under Article 8, particularly bearing in mind that he is in a subsisting relationship with a British citizen wife and two British citizen children. It does not follow, however, that if the deception is made out by the Secretary of State that the Appellant does not have a residual Article 8 case to pursue: it will be for the decision-maker then to balance that deception against the potential disruption to family and private life in the event of the Appellant's removal.

19. In the circumstances, and further to the observations above, this case is to be remitted to the First-tier Tribunal with all issues at large.

Notice of Decision

20. The decision of the First-tier Tribunal contained an error of law and is set aside.

21. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Carroll.

22. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed:

Date: **25 October 2017**

Deputy Upper Tribunal Judge I A Lewis