Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA101302015

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 10 May 2017 **On 26 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR THIRUPATHI BABU MAMINDLA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Armstrong, Senior Home Office Presenting Officer
For the Respondent: Mr S Bellara, Counsel instructed by Legend Solicitors

DECISION AND REASONS

Details of Appeal

1. The appellant in this case is the Secretary of State and the respondent is Mr Mamindla. However for the purposes of this decision I shall refer to the parties as they were before the First-tier Tribunal where Mr Mamindla was the appellant.

Background

2. Mr Mamindla first entered the UK with a valid Tier 4 Student visa valid until 30 April 2009. The appellant was subsequently granted further leave to remain as a student until 30 August 2014. His leave was curtailed on 23 March 2012 to expire on 22 May 2012 as his then college licence was

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revoked. It was not disputed that Mr Mamindla then applied for further leave and was granted further Tier 4 (General) Student leave until 6 September 2015. However again, his college licence was revoked and the appellant submitted a further application for a variation on 16 August 2014. The evidence indicates that the appellant was encountered during an enforcement visit on 4 December 2014 and served with an IS151A and IS151A Part 2, notice to a person liable to removal.

3. The Secretary of State in the IS151A asserted under the "Specific Statement of Reasons" that the appellant was considered as a person who had sought leave to remain in the United Kingdom by deception and specifically that he had submitted a TOEIC certificate from the Educational Testing Service (ETS) to the Home Office for the purposes of his application dated 26 November 2013. It was asserted that the appellant's scores from the test taken on 18th April 2012 at Sevenoaks College had been cancelled by ETS.

4. The appellant appealed. The appellant (after an unsuccessful judicial review) made an out of country appeal against a decision to remove. In a decision promulgated on 6 September 2016 following an oral hearing on 19 August 2016, Judge of the First-tier Tribunal S D Rodger allowed the appellant's appeal.

Error of Law Hearing

5. The Secretary of State appeals with permission, granted by the Upper Tribunal, on the grounds that it was submitted that the judge gave undue weight to the appellant's evidence, given that the appellant did not give oral evidence. It was further argued that the judge provided inadequate reasons for finding that the appellant was credible and perverse or irrational reasons or had regard to immaterial matters specifically in the judge's findings at paragraph [27] of the decision and reasons. Upper Tribunal Judge Frances found that it was arguable that the judge had taken into account irrelevant considerations and that his findings were against the weight of the evidence and that all grounds were arguable.

6. Mr Armstrong for the Secretary of State relied on the grounds for permission to appeal. Mr Armstrong relied on:

   (1) Court of Appeal decision in **Secretary of State v Muhammad Shehzad and Md Chowdhury [2016] EWCA Civ 615**;

   (2) **MA (ETS – TOEIC Testing) [2016] UKUT 00450 (IAC)**;

   (3) **SM and Qadir v Secretary of State for the Home Department (ETS – evidence - burden of proof) [2016] UKUT 00229 (IAC)**;

7. In particular Mr Armstrong reiterated that the appellant could have given evidence by video link or requested permission to enter the UK and that the judge had given an appropriate weight to the written evidence. Mr

Armstrong further submitted that the judge's findings in the various sub-paragraphs of [27] fell into error of law.

8. Mr Bellara in reply submitted that there was no material error. The judge had addressed the relevant burden of proof and had properly directed herself in line with **SM and Qadir**. He submitted that the judge took into account a number of factors which were similar to the types of factors considered by the Upper Tribunal in **Qadir** in finding that the appellant in that case had been credible, including that this appellant had been studying in the UK for a long time and that to have cheated would have entailed engaging in a game of risk with very high stakes and that the Tribunal had no reason to question the appellant's good character.

9. The Secretary of State submitted that the judge gave inappropriate weight to the appellant's evidence and had not properly directed herself as Mr Mamindla was not giving oral evidence nor could he be cross-examined on that evidence. However, the judge noted that the burden was on the appellant to prove that his appeal should succeed whereas the burden was on the respondent to prove the allegation that the certificate was obtained by fraudulent means. The judge carefully considered all the evidence and indicated that there was no oral evidence from the appellant. The fact that the judge did not specifically record that less weight attached to the appellant's evidence does not mean that the Tribunal did not attach the appropriate weight to the respondent's evidence. The judge also had no oral evidence from the witnesses relied on by the respondent and equally made no specific reference to attaching less weight to this evidence. It is also not the case that the Tribunal relied alone on the appellant's untested witness statement evidence, but rather considered all the evidence available including of the appellant's circumstances and the evidence from the respondent in relation to the test. Considering the decision in its entirety I am satisfied that there is no material error in this ground.

10. The Secretary of State's main challenge was in relation to the Tribunal's findings at paragraph 27 which is subdivided into (a) to (g) subparagraphs. The judge took into account the evidence from the respondent and correctly directing herself in line with **SM and Qadir** was satisfied that the respondent had discharged the initial evidential burden of proving deception so as to shift the burden onto the appellant.

11. The head note of **SM and Qadir** provides:

    (i) The Secretary of State's generic evidence, combined with her evidence particular to these two appellants, suffice to discharge the evidential burden of proving that their TOEIC certificates had been procured by dishonesty.

    (ii) However, given the multiple frailties from which this generic evidence was considered to suffer and, in the light of the evidence adduced by the appellants, the Secretary of State failed to discharge the legal burden of proving dishonesty on their part.

12. The judge set out at [23] that she had considered **SSHD v Shehzad & Chowdhury** as well as setting out extracts from **SM and Qadir** separately in relation to the strength, or lack thereof of the evidence on behalf of the Secretary of State.

13. The Court of Appeal in **Shehzad and Chowdhury** echoed the approach taken by the Tribunal in **SM and Qadir**. This was summarised in **MA (ETS – TOEIC Testing) [2016] UKUT 00450**. In **MA** the Presidential Tribunal confirmed "that the question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact sensitive".

14. It was open therefore to the Tribunal in this case to take into consideration that although in addition to the witness statement evidence of Peter Millington and Rebecca Collings, the Tribunal had the additional evidence of Mona Shah and the expert report of Professor French dated 20 April 2016 (prepared for a different appeal), the respondent did not provide a digital recording of the speaking test (the only test initially) and had not relied upon any expert evidence relating to the actual voice recording of this appellant's test.

15. The Tribunal was also entitled to take into consideration that there was no witness evidence from anyone who had listened to the appellant's actual recording and no details as to the training or expertise of the person that listened to the recording and assessed the certificate as invalid. The judge confirmed that all she had available to her specific to the appellant was a spreadsheet from ETS with the appellant's name and that the certificate was invalid and the ETS look up tool showing all results for Sevenoaks College on 18 April 2012 as well as a witness statement from Hilary Rackstraw the Senior Caseworker dealing with the appellant's appeal, relying on the witness statement of Rebecca Collings and Peter Millington.

16. The judge at [27(a)] took into consideration that the appellant had been studying in the UK for a number of years and went on to find that it was unlikely that the appellant's level of English in 2012 would have been such that he needed a proxy test taker "given that he would have had to undergo earlier English speaking tests and no issues are being raised with his earlier English language speaking or other tests". Although the respondent raised the fact that two of the appellant's colleges had had their licence revoked which the respondent states suggests that they were not a bona fide college, there was no evidence to support this assertion. Although it was not disputed that the colleges had had their licences revoked equally it was not disputed that the appellant subsequently, on a number of occasions, obtained further leave to remain in the UK. It was open to the judge to find that in these circumstances he would have had to undergo additional earlier English language speaking tests about which no issues had been raised either with the speaking tests or any other tests.

17. At [27(b)] the judge took into consideration that the appellant "described with some detail the conditions of the test centre on that day". There is no adequate information as to whether this is an accurate reflection or not. I have taken into consideration that the appellant in his witness statement stated that the test centre was overcrowded and that he did not have any space but that he managed to take the test. What the judge was saying was that the appellant provided some details which, when considered in the round in the context of all the evidence, led the judge to not be satisfied that the appellant had obtained a certificate by deception. It is not the case that the judge was relying solely on these details. It was a matter for the judge what weight he attached to the evidence and there was nothing perverse in his reliance on this information in the round.

18. The judge at [27(c)] relied on the fact that no issue had been taken with the appellant's written test which was taken on the same day and the judge went on to find that it seemed unlikely that if someone was going to cheat by arranging for someone to take a test for them that they would arrange for only one test to be taken. The respondent asserted that this ignored the fact that ETS never reviewed the writing scores but only reviewed the speaking tests and that the judge made no allowance for the fact that many non-English native speakers can write English very well but not speak it very well. Again the judge carefully considered this in the context of an appellant who had been in the UK for a number of years and about whom no other issues had been raised in respect of alleged difficulties with any such tests. The judge was of the view therefore that it was less likely in all these circumstances, when they were considered in their entirety, that such an appellant would have used a proxy.

19. The judge went on at [27(e)] to fully explore the report of Professor French. The respondent submitted that the judge ignored the fact that Professor French's report was submitted to "reduce the probability of false positives and therefore the appellant was more likely than not to have cheated on balance". I do not agree that the judge ignored the contents of Professor French's report. In addition to taking into consideration that Professor French did not specifically consider the appellant's test the judge also set out that it was Professor French's view that the rate of false positives is likely to be "very substantially less than 1% after the process of assessment by trained listeners have been applied". However there is no challenge by the Secretary of State to the judge's subsequent findings that Professor French's opinion was very much based on the subsequent assessment of the two trained listeners but that there was a lack of proper information from ETS as to how much training these listeners underwent, or as to the details of the training, or the background of the listeners and the judge took into consideration that Professor French referred to it being far from ideal that the person responsible for training the staff may have had no university education or training in phonetics/speech science. The judge went on to consider Professor French's report in some detail and gave adequate reasons which were open to her for not being satisfied that it was sufficient to discharge the legal burden of proving that this appellant cheated.

20. At [27(f)] the judge was satisfied that there was an absence of detail in relation to the background or training of the listeners who assessed the appellant's speaking test invalid and that there had been no disclosure of the actual speaking test. The respondent submitted that the judge took into account immaterial matters and that there was no need for the respondent to obtain the voice recording and checked for itself, whilst it was open for the appellant to do so to rebut the respondent's case but had chosen not to. However I am not satisfied that any error in that approach was material given the overall fact-sensitive approach by the judge in relation to this appellant's case. As set out by the Tribunal in **SM and Qadir** the final question for the Tribunal is whether the Secretary of State had discharged the legal burden of establishing on the balance of probabilities that an appellant procured a TOEIC certificate by deception and that the answer to such a question required a balancing of all the findings and evaluative assessments. That must include an evaluation of the respondent's evidence even though it was bound to discharge the initial burden.

21. The findings of the First-tier Tribunal were findings properly open to the judge on the evidence and the respondent's grounds disclose no more than disagreement with those findings. Whilst another Tribunal may not have reached the same conclusion it has not been shown that the findings were either inadequately reasoned or that they reached the high threshold of perversity.

22. The decision of the First-tier Tribunal does not disclose an error of law and shall stand. The appeal by the Secretary of State is dismissed.

No anonymity direction was sought or is made.

Signed Date: 24 May 2017

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT

FEE AWARD

As the appellant's appeal before the First-tier Tribunal ultimately succeeds, I make a full fee award.

Signed Date: 24 May 2017

Deputy Upper Tribunal Judge Hutchinson