



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

Appeal Number: OA123092014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 3<sup>rd</sup> May 2017**

**Decision & Reasons Promulgated  
On 17<sup>th</sup> May 2017**

**Before**

**UPPER TRIBUNAL JUDGE FRANCES**

**Between**

**ENTRY CLEARANCE OFFICER**

Appellant

**and**

**MR MINGHUI JIA  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms J Isherwood, Home Office Presenting Officer  
For the Respondent: Mr D Lemer, instructed by Charles Russell Speechlys LLP

**DECISION AND REASONS**

1. Although this is an appeal by the Secretary of State I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of China born on 17<sup>th</sup> November 1990. His appeal against the refusal of leave to enter under paragraph 321A of the Immigration Rules was allowed by First-tier Tribunal Judge R G Walters in a decision dated 10<sup>th</sup> July 2016.
2. Permission to appeal was sought on the grounds that the judge failed to consider the documents in the Respondent's bundle, in particular the

witness statements of Rebecca Collings and Peter Millington, the ETS record of invalidity specific to the Appellant and the Appellant's interview record. Had the judge considered these documents he would have found, in line with SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC), that the Secretary of State had discharged the initial evidential burden. The judge would then have to consider whether the Appellant had rebutted the allegation. However, the judge heard no evidence from the Appellant as to how he took the test or any details relating to the test. The Appellant struggled to remember where he took the test in his port interview. All the judge did was to pick up on a passing reference from the Home Office file that the Appellant spoke perfect English at port some two years after the test in question. This point, following SM and Qadir, was immaterial.

3. Permission to appeal was initially refused by Designated First-tier Tribunal Judge McCarthy for the reasons given in his decision dated 2<sup>nd</sup> February 2016. The application made to the Upper Tribunal was on the ground that Judge McCarthy refused permission on a misunderstanding of the Court of Appeal's judgment in SM and Qadir which reinforced the conclusions of the Upper Tribunal. The judge failed to appreciate that the Secretary of State had satisfied the evidential burden and it was then for the Tribunal to consider the credibility of the Appellant.
4. Permission to appeal was granted by Upper Tribunal Judge Kekić on 8<sup>th</sup> March 2017 on the grounds that it was arguable that the First-tier Tribunal judge failed to give adequate reasons for why he found that the Respondent had failed to discharge the evidential burden of proving that the Appellant had used deception. The very brief findings of fact appeared to rely on the Appellant's knowledge of English but arguably that in itself did not establish that the Appellant did not use a proxy test taker and the judge failed entirely to engage with the fact that the test was found to be invalid.

## **Submissions**

5. Ms Isherwood relied on the grounds and submitted that the judge had failed to properly consider the evidence presented by the Secretary of State including the Appellant's interviews at port. The judge did not assess this evidence in his findings and conclusions. The fact that the Appellant spoke perfect English did not mean he had not used deception in obtaining his English language certificate in 2012. Each case had to be assessed on its facts and the judge had failed to demonstrate that he had assessed the Respondent's position.
6. The judge failed to identify the actual evidence upon which he relied. The judge had erred in law because the Respondent's generic evidence met the evidential burden (SM and Qadir). It was therefore for the Appellant to

provide an explanation. The decision failed to follow that approach. There was no proper assessment of the Secretary of State's evidence and no proper assessment of the approach set out in SM and Qadir.

7. Ms Isherwood submitted that it was not clear from the decision whether the Respondent had discharged the evidential burden and why the Appellant had given a credible explanation. The judge had failed to apply SM and Qadir and this amounted to an error of law. The Appellant's current English language ability was not relevant.
8. Mr Lemer relied on his skeleton argument and submitted that the judge's conclusion at paragraph 25, that he did not find that the Respondent had satisfactorily proved that the Appellant's TOEIC certificate was fraudulently obtained, was one which was open to the judge on the evidence before him. It was not material that the judge failed to properly demonstrate the shift in the evidential burden because there was evidence before him to show that the Appellant had satisfied the evidential burden.
9. Further, looking at the evidence as a whole, the Respondent had failed to discharge the legal burden of showing that the Appellant had used deception. The Respondent argued that even though the Appellant spoke perfect English he may have bribed staff at the centre where he took his English language test. The judge specifically dealt with that submission and rejected it at paragraph 23.
10. The Respondent accepted that the Appellant spoke perfect English in 2012 and in 2014. Therefore, it was open to the judge to reject the Respondent's case that notwithstanding his English language ability the Appellant had used deception in his English language test. The legal burden remained with the Respondent throughout and the judge's conclusion that the Respondent had not discharged the burden was one which was open to the judge on the evidence before him.

## **Discussion and Conclusions**

11. The judge's findings and reasons are brief. However, there is just enough in the decision to demonstrate that the judge adopted the correct approach set out in SM and Qadir. He initially refers to SM and Qadir and it appears that he accepts that the evidential burden has been satisfied because he then goes on to consider the Appellant's position and the explanation provided. It is unfortunate that the judge only referred to the Appellant's English language ability in his reasoning. However, it is clear that the judge rejected the Respondent's submission that, notwithstanding his English language ability, the Appellant had used deception.
12. The judge was unable to hear oral evidence from the Appellant because he had returned to China, his leave having been cancelled. However, the judge relied on the submissions made by both representatives and took

into account the Appellant's first and second bundle and the Respondent's first and second bundle. In the Appellant's bundle, there was a statement from the Appellant in which he denied cheating and described the ETS TOEIC test, which he took in Barking on 22<sup>nd</sup> August 2012. There was evidence before the judge which supported his conclusion that the Respondent had failed to satisfy the legal burden, even though he did not specifically refer to the explanation in the Appellant's statement.

13. The description given by the Appellant in taking the test coupled with his English language ability not only at his port interview in 2014, but which was accepted by the Respondent to have been evident in 2012 when he took the English language test, was sufficient evidence to support the judge's finding that the Respondent had failed to prove that the Appellant had fraudulently obtained his English language test certificate.
14. The judge could have set out the shifting burden and demonstrated the approach in SM and Qadir more clearly, but it was apparent from his brief findings that he did adopt that approach and was well aware of the burden of proof.
15. Any lack of reasoning did not amount to an error of law in this case because the evidence before the judge supported his conclusion that the Respondent had failed to prove deception. Accordingly, I find that there was no material error of law in the judge's decision dated 10<sup>th</sup> July 2016 and I dismiss the Respondent's appeal.

### **Notice of Decision**

The Respondent's appeal is dismissed

No anonymity direction is made.

**J Frances**

Signed

Date: 15<sup>th</sup> May 2017

Upper Tribunal Judge Frances