Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03703/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 December 2017	**On 18 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SIKANDER ALI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Mills
For the Respondent: Mr Z Raza

DECISION AND REASONS

1. I shall refer to the Secretary of State throughout as such and to Mr Ali as the claimant to avoid confusion. The claimant is a citizen of Pakistan who was born on 20 April 1987. The claimant initially entered the United Kingdom in 2006 with a student visa valid until 30 September 2007. He made various applications for further leave to

remain as a student and as a Tier 1 (Post-Study) Migrant and a Tier 4 (General) Migrant with leave valid until 28 July 2014. On 21 March 2012 the claimant's leave to remain was curtailed with no right of appeal to end on 20 May 2012. On 6 December 2012 he applied for leave to remain as a Tier 4 (General) Migrant which was refused on 18 April 2013. This decision was maintained on reconsideration on 18 September 2013 on the basis of deception in obtaining a TOEIC certificate. On 11 November 2013 the claimant's leave was curtailed with no right of appeal because his college had ended its sponsorship of him.

2. On 20 July 2015 he applied for indefinite leave to remain on the basis of long residence (ten years). The Secretary of State rejected his application on 4 January 2016. The claimant's application was considered under paragraph 276D of the Immigration Rules and also outside the Rules. The application within the Rules on the basis of his ten year residence was refused because the appellant had submitted a TOEIC certificate from the Educational Testing Service (ETS) to his sponsor as part of his application to remain as a Tier 4 (General) Migrant dated 6 December 2012 that the Secretary of State asserted was obtained fraudulently.

The appeal to the First-tier Tribunal

3. The claimant appealed against the Secretary of State's decision to the First-tier Tribunal. In a decision promulgated on 25 August 2017 First-tier Tribunal Judge Shore allowed the claimant's appeal. The First-tier Tribunal found that the Secretary of State did not meet the evidential burden of proof that the law requires to show that the claimant cheated in his TOEIC tests. The appeal was allowed under the ten year route under the Rules on the basis that the Secretary of State accepted that the appellant is eligible other than failing to meet the eligibility requirements because of the fraud.

4. The Secretary of State applied for permission to appeal against the First-tier Tribunal's decision and on 28 September 2017 First-tier Tribunal Judge Page granted the Secretary of State's permission to appeal.

The hearing before the Upper Tribunal

5. The grounds of appeal assert that the judge materially erred in law by finding that the Secretary of State had failed to satisfy the evidential burden of proof despite citing the case of **SM and Qadir** which is authority for the proposition that the Secretary of State does satisfy that burden where the invalid test result and generic witness statements have been produced. The judge places no weight or significance on the report of Professor French and relies on an unreported determination of the Upper Tribunal in the case of **SSHD v Kadivar IA/42545/2014**. There is authority on the point of the probative value of Professor French's report from the High Court in the judgment of **Gaogalalwe, R (On the application of) v Secretary of State for the Home Department [2017] EWHC 1709 (Admin) (6 July 2017)** where it was described as powerful evidence. The judge was wrong to rely on an unreported determination of the Upper Tribunal when there is in fact higher court precedent on the very point and misdirected himself in law as to whether the evidential burden had been

discharged. It cannot be said that the credibility findings render the above immaterial because had he directed himself properly in respect of the French report he may have come to a different conclusion.

6. In oral submissions Mr Mills submitted that the judge found that no weight can be placed on Professor French's evidence. At paragraph 27 the judge instead relied on the decision in **Kadivar**. He referred to paragraph 26 of the decision where the judge found that the evidence of the Secretary of State was woefully inadequate. There was no reference to Professor French's report. In **Gaogalalwe** at paragraph 37 the court held that Professor French's report was powerful evidence. Professor French is Professor Harrison's superior. Professor Harrison's evidence was not at odds with Professor French's evidence. He referred to gaps in the Secretary of State's evidence. In the main, both experts agree. Professor French obtained the necessary evidence to fill in the gaps and found that false positives were less than 2%. This evidence went well beyond the evidence that was available in the **Qadir** case. At paragraph 44 the court referred to the Secretary of State's evidence as powerful evidence. This is far from the woefully inadequate evidence described in **Qadir**. The judge has failed to take any of this into consideration. He referred to paragraph 16 of the decision where he submitted the judge appears to indicate that the position was settled however it is clear that Professor French's report was not considered in the case of **Qadir**. He handed up two other decisions, both judicial review decisions. He referred to the case of **Abbas v SSHD [2017] EWHC 78 (Admin)**. At paragraph 8 the court held that Professor French was a preeminent expert in the UK, was worthy of consideration and that he was senior to Professor Harrison. He referred to the case of **Nawaz v SSHD (ETS: review standard/evidential basis) [2017] UKUT 00288 (IAC)** paragraphs 39 to 46 where the points made by Professor French's evidence carries weight. He submitted that these cases show that Professor French's report needs to be taken into account. The judge expressly finds at paragraph 28 that the respondent does not meet the evidential burden. However, even in the cases of **Qadir** and **Shehzad and Chowdhury** on less powerful evidence it was held that the Secretary of State did meet the evidential burden.

7. Mr Raza accepted that the judge erred in paragraph 28 by concluding that the respondent did not meet the evidential burden. However, he submitted that this is not material to the outcome of the case. He referred to paragraph 34 of the case of **Gaogalalwe** which set out the approach that should be taken. What remains material is an assessment of the appellant's evidence and the appellant's credibility. He submitted that there was no dispute with regard to the findings that the appellant speaks fluent English and had passed a number of tests as set out at paragraphs 19 to 21 of the decision. He submitted that the report of Professor French goes to the initial burden of proof but is not relevant to the burden on the appellant. The judge has considered all the material evidence and made appropriate findings. There is a distinction between a finding and an assessment of the appellant's evidence. He referred to paragraph 41 of **Gaogalalwe** and the criticisms there made of the evidence, there was no witness statement etc. That is not the case here. He referred to paragraph 21 and submitted that it was reasonable to assume that this is evidence of the judge considering the credibility of the appellant. Whilst not expressly stated

the fact that there is an absence of any negative findings or adverse findings must infer and support that the judge when considering all the evidence did make a finding that the appellant had not used fraud.

8. Mr Mills in reply said that there is a problem with relying on the findings of the judge, even if there are any, because the judge's approach to the Secretary of State's evidence was incorrect and started from the wrong position in assessing the appellant's evidence. He submitted that as described in **Qadir** the burden once satisfied by the Secretary of State boomerangs over to the appellant. If the evidence is woefully inadequate as described in **Qadir** then the appellant does not have to do much to bat the burden back to the Secretary of State. However, if the evidence is now much more powerful then the appellant has to do more to bat that burden back. He submitted **MA (ETS TOEIC testing) [2016] UKUT 450** made it clear that the judge should be cautious when placing weight on English speaking as there are many reasons why a person might cheat, see paragraph 57. If the judge properly recognised the powerful evidence the judge might have found the ability to speak English etc. is not sufficient.

Discussion

9. The judge in this case set out at paragraph 20 that the appellant asserts vehemently that he took the TOEIC test himself and where he took the tests and that he was used to speaking English. The judge set out:

> "21. The appellant was cross-examined carefully by Mr Graham at some length. He was asked about the location of the tests and how he had got there. He was asked about the methodology of the tests and the physical characteristics of the test room. I found his answers to be cogent, consistent and truthful.
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> 22. I read the appellant's bundle, which contained a number of academic certificates that evidenced educational attainment to a post-graduate standard.
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> 24. I find that the appellant has shown on the balance of probabilities that the documents produced can be relied upon.
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> 26. I find that the respondent does not meet the burden of proof that the law requires to show that the appellant cheated at his TOEIC tests. I echo the findings in **Qadir** and **SM** that the respondent's evidence was woefully inadequate. The additional evidence of Matthew Lister added nothing to the respondent's case and did not address the reservations expressed in the appellate courts in the aforementioned cases. I distinguish **MA** from this case as I found the appellant to be a credible witness unlike the finding of the Upper Tribunal in respect of the appellant in **MA**.

> 27. I find the conclusions made in **Kadivar** in respect of Professor French's evidence to be relevant and damaging to the respondent's ability to meet the burden of proof.
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> 28. If the respondent does not meet the evidential burden then the appellant's appeal must succeed, as he is accepted as being eligible. The appeal is therefore allowed under the ten year route under the Rules."

10. The burden and standard of proof, where it is alleged that an ETS test is invalid, was discussed in **SM and Qadir v SSHD (ETS-Evidence-Burden of Proof) [2016] UKUT 229).** The legal burden of proving that the test taker used deception lies on the Secretary of State albeit that there is a three stage process. Firstly, the Secretary of State must adduce sufficient evidence to raise the issue of fraud. Secondly, the test taker then has a burden of raising an innocent explanation which satisfies the minimum level of plausibility. Thirdly, if that burden is discharged, the Secretary of State must establish on a balance of probabilities that the claimant has used deception to obtain the TOEIC (the legal burden).

11. It is not clear that at paragraph 26 the judge was referring to the **evidential** burden (the first stage) that lies with the Secretary of State. The Secretary of State, even if the evidential burden is discharged, also has to meet the legal burden of proving dishonesty. However it is clear from paragraph 28 that the judge is referring to the Secretary of State failing to meet the evidential burden. On the evidence before the First-tier Tribunal the evidential burden was clearly satisfied as per **SM and Qadir**.

12. The judge rejected the evidence of Professor French adopting the conclusions of the Tribunal in the unreported **Kadivar** case. In **Gaogalalwe** the court when considering the evidence of Professor French concluded:

> 37. Professor French provided his report for use in the Qadir case. Nonetheless, it is relied upon in the present proceedings because it provides opinion evidence on the methodology of ETS. The expertise of Professor French to provide opinion evidence of this sort is not disputed; it is clear from his CV that he is a singularly well-qualified expert.
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> …
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> 44. In my judgment, balancing the powerful evidence provided by the Secretary of State pointing to a conclusion that the claimant's test result was obtained by fraud against the weak evidence provided by the claimant that her English language skills would have been sufficient to make cheating unnecessary, the Secretary of State's argument is irresistible. In my judgment the Secretary of State has made out her case that the claimant used fraud to obtain leave to remain.

13. In this case the judge dismissed the evidence of Professor French finding that it not only did not assist but following the conclusions made in **Kadivar** found them damaging to the Secretary of State's ability to meet the burden of proof. There have been several cases in the Administrative court (as referred to above) subsequent to

the unreported decision of **Kadivar** that have considered the evidence of Professor French and in which the evidence has been considered to be 'powerful' evidence.

14. The judge has not made specific findings on the claimant's evidence regarding attending the test centre. Mr Raza invited me to assume that at paragraph 21 this is evidence of the judge considering the credibility of the claimant and whilst not expressly stated it could be inferred from the absence of any negative findings that the judge did make a finding that the appellant had not used fraud. I do not consider that such an inference can be drawn.

15. I find that there are material errors of law in the First-tier Tribunal decision. I set that decision aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA').

16. I considered whether or not I could re-make the decision myself. I considered the Practice Statement concerning transfer of proceedings. I am satisfied that the nature and extent of judicial fact finding that is necessary in order for the decision in the appeal to be re-made is such, having regard to the overriding objective, that it is appropriate to remit the matter to the First-tier Tribunal.

17. I remit the case to the First-tier Tribunal for the case to be heard at the First-tier Tribunal at Taylor House before any judge other than Judge Shore pursuant to section 12(2)(b) and 12(3)(a) of the TCEA. A new hearing will be fixed at the next available date.

18. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Notice of Decision

The appeal of the Secretary of State is allowed. The case is remitted to the First-tier Tribunal for a de-novo hearing before any Judge other than Judge Shore.

Signed P M Ramshaw Date 16/1/18

Deputy Upper Tribunal Judge Ramshaw