Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05242/2017

THE IMMIGRATION ACTS

Heard at Field House	**Oral Decision & Reasons Promulgated**
On 14 November 2018	**On 10 December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

DUPLAY BISWAS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Malik of Counsel, instructed by Chancery Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Bangladesh who was born on 20 May 1988. He appeals against the determination of First-tier Tribunal Judge Fox promulgated on 23 May 2018 in which he considered the appeal of the appellant against the decision of the respondent made on 15 March 2017 to refuse the appellant leave to remain on the basis of ten years' continuous lawful residence.

2. The decision was made and communicated to the appellant by a letter dated 15 March 2017. It records that the appellant had entered the United

Kingdom sometime on 1 March 2007 following an earlier grant of permission and on 23 April 2010 he was granted further leave to remain in the United Kingdom as a student until 30 November 2012. Then, on 12 February 2013, he was granted yet further leave to remain as a student until 28 January 2014. There were then subsequent grants of leave.

3. The point made by the Secretary of State in the refusal letter is that on 16 October 2012 the appellant purported to take a TOEIC speaking test with Educational Testing Services, universally referred to as ETS. It then went on to say that ETS had a record of his speaking test and, using verification software as well as other means, it took the view that the certificate had been fraudulently obtained by the use of a proxy test taker. In particular, it noted that the scores from the test taken on 16 October 2012 indicated that he had established his ability to pass the necessary grade. However, as a result of what ETS considered to be the use of a proxy test taker, the test result had been cancelled by ETS. The letter goes on to make a further reference to a test taken on 21 November 2012. It is not explained why he should have taken that second test. No evidence was supplied in relation to it. It is therefore the test of 16 October 2012 which is the relevant factor as far as this appeal is concerned.

4. The letter goes on to say, in what are fairly conventional terms, that the use of fraudulent test certificates undermines the maintenance of effective immigration control and is a matter of grave public concern.

5. That was the basis upon which the decision maker made his or her decision. It was in due course supported by a bundle served on 25 April 2018 in support of the appeal. It consists of a witness statement of Hilary Rackstraw in which she says in paragraph 4 that the appellant had been identified as a person who had sought to obtain leave by deception through the use of a fraudulently obtained English language test certificate provided by ETS. That was, as a matter of fact, wrong. The appellant had not used that certificate at all. Instead he had gone to another test provider and he had used that other certificate. Consequently, the case advanced by the Secretary of State at the hearing was never, as far as I am aware, that the appellant had used this certificate; rather, that he had gone through a process of obtaining a certificate, presumably on the basis that it might be necessary to use it or that it might be convenient to use it at some future date if the situation arose.

6. The further evidence consists of the material in Annex A. That records that the certificate which had been issued, bearing the number 25015 was invalid as a result of the test taken on 16 October 2012. On the date in question some 45% of the tests taken at the centre were said to be invalid. That totalled 72 applications in all and I suspect this rendered the further 87 applications questionable. There is a further spreadsheet which deals with the results in rather greater detail than we need go into. The additional evidence provided by the Secretary of State was in the conventional form of the statements made by its two witnesses, that is the

evidence of Mr Peter Millington as well as the evidence of Miss Rebecca Collings.

7. This was the material that was before the Secretary of State and was also the material that was before the First-tier Tribunal Judge when he came to consider the appeal. His approach to the appeal is clearly revealed in the determination. He considered the burden and standard of proof and went on to consider the requirements of the relevant case law in appeals of this nature. He then went on to deal with the evidence that was provided. The appellant's case was that, although he had applied for and obtained an appointment to sit the relevant test, he did not in fact do so. He accepted that the appointment had been made by him but he then decided to abandon the ETS examination in favour of another test provider and that he therefore neither used nor had any reason to use the test which had been provided and which was the subject of the challenge by the Secretary of State.

8. The judge recorded the evidence that was provided as well as the appellant's assertion that he had nothing to do with the use of a proxy test taker. However, when he received the respondent's decision the appellant made no effort to contact ETS to tell them that a mistake had occurred in his particular case.

9. It was therefore the task of the judge to consider, on the one hand, the claim that was advanced by the Secretary of State imposing upon the Secretary of State an evidential, but not at this stage a legal burden, and then to consider the explanation that was provided by the appellant as to whether or not there was another reason explaining why the Secretary of State may have been mistaken about his assessment of the evidence. Then, as a result of balancing those two sources of material, to decide whether the legal burden had been discharged by the Secretary of State; that legal burden being upon the Secretary of State throughout the process. The judge accepted that the appellant was not required to prove his innocence. The judge recorded that the respondent had the burden upon her. In paragraph 29 he said

> The respondent had satisfied the burden upon her. The appellant has failed to satisfy the shifting burden upon him.

In my judgment that was clearly the operation of the process which the judge had clearly identified from such cases as *SSHD v Shehzad and anor* [2016] EWCA Civ 615. What it demonstrates is that the judge had in mind whether or not the explanation provided by the appellant was a plausible, satisfactory or credible one so that the evidential burden established primarily by the respondent had not been outweighed by the appellant's explanation, such that the respondent was entitled to say that the evidential and legal burden had been established.

10. The reasoning of the judge is found principally in paragraphs 34 onwards. He recorded that the appellant accepted that he had registered for the

ETS examination and then considered the claim made by the appellant that he had abandoned the test in favour of another test provider. He therefore considered his explanation that he did not attend the examination. However, the judge looked at the evidence and considered that there was a proxy test taker used. That meant that somebody, a proxy test taker, had attended at the examination centre, had sat the examination and had produced a result as recorded in the paperwork. The judge therefore found that the respondent had demonstrated what he described as a nexus between the ETS examination and the appellant. Indeed, it must be a matter of simple common sense. But what the judge had to consider was whether there could have been a third party who attended at the centre using the name of the appellant and the appellant's reference number, who then sat the test, obtained a test certificate and had done all of this without the appellant knowing it. That would require the proxy text taker to have a considerable amount of information. It would need information about the date of the test, information about the time of the test, information about the venue of the test, information about the appellant, information about his name and his identification number. All of those pieces of information would be required in order for this charade to have taken place and it is, (it appears to me, at any rate, to be) incredible that this could have been arranged without the appellant's complicity in some way or another. Nor of course, would it answer the question of why the proxy test taker would be involved in this charade if he was not being paid for his services; if he was simply doing it, as a joyride of his own, without any reference to the appellant. The judge considered these matters in paragraphs 35 and 36 and said:

> 35. Therefore I turn to consider the appellant's explanation. Simply stated he claims that he abandoned the ETS examination in favour of another test provider. He claims that he had no need to engage in deception or dishonesty as he had a good command of English and relied upon another test certificate to continue his studies.
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> 36. This does not address the active involvement of an individual who assigned their examination contribution to the appellant's candidate number. Nor [does, *sic*] is this explanation supported by the available evidence.

In my assessment of the judge's approach, he was exactly applying the correct analysis of the material before him. He first considered, whether or not on its face, the evidence adduced by the Secretary of State was sufficient to establish the evidential burden placed upon the Secretary of State. He then went on to consider the evidential burden placed upon the appellant to provide an innocent explanation which would undermine the weight that is to be attached to the Secretary of State's material, often in generic form, such that having looked at both sides of the argument together, the judge might then conclude that the Secretary of State had failed to establish the legal burden. He was clear, and properly so, as to the evidential burden having been discharged by the respondent. He was also clear, and properly so, that the appellant had failed to discharge the evidential burden placed on him to provide a plausible explanation as to

how the situation arose that a proxy test taker had been engaged. Accordingly, he was fully entitled to reach the conclusion that the legal burden, placed upon the Secretary of State, had been discharged by him.

11. The submissions made this morning by Mr Malik on behalf of the appellant with the degree of lucidity with which I am very familiar were several in number. The first matter that he drew to my attention was the position dealt with by Beatson LJ in *Shehzad* [2016] EWCA Civ 615, a decision that was made on 29 June 2016. In his judgment, which was the subject of an agreement by Lady Justice King and Lady Justice Black, he stated in paragraph 3

> … if the Secretary of State provides prima facie evidence of deception, the burden 'shifts' onto the individual to provide a plausible innocent explanation and that if the individual does so, the burden 'shifts back' to the Secretary of State".

12. Mr Malik submits that the Secretary of State failed to provide evidence as to the primary evidential burden and that the judge did not fully engage with the question of whether the appellant had provided a plausible explanation. In particular, he relies upon the evidence that was provided in the respondent's bundle, to which I have referred. He did so by reference to the decision of the President and Upper Tribunal Judge Rintoul in the case of *MA (ETS – TOEIC testing)* [2016] UKUT 00450 (IAC). He referred in particular to the evidence that was summarised in paragraph 15 of its decision and, specifically, in subparagraph (xiv):

> A study of the spreadsheets attached to the witness statements of the Home Office employee, Mr Sewell reveals a lack of any nexus between the data supplied to him by ETS and the unique ID of individual candidates. As a result, the experts say '*We do not know the process by which the candidate's name is linked to each test*'.

13. That is a reference to the spreadsheet that we see in Annex A and more fully in the spreadsheets that follow. Annex A states that a certificate 0044202171025015 was invalid. Mr Malik submits that there is no evidence of the process by which the candidate's name is linked to that test. The candidate's name is given as that of this appellant, Duplay Biswas, and it also makes reference to his date of birth being given as 20 May 1988, the same date of birth as is attributed to this appellant by the appellant himself. It mentions his nationality. It mentions the relevant test centre. It also mentions the date of the relevant test which was 16 October 2012. On that material, it was open to the judge (and indeed to the decision maker and ETS) to link the relevant certificate number to this appellant. Of course, we do not know the precise process by which the candidate's name is linked to each test but the matter that was before the judge was to consider whether, on the basis of the material which was advanced by the Secretary of State, this was as a matter of fact a test certificate which had been issued to the appellant as a result of a test.

14. It was also submitted by Mr Malik that there was no evidence that there was a proxy test taker. In my judgment that is unsustainable because what is marked in Annex A is the word '*invalid*' and we know that this is a term of art attributed to a situation where there is an electronic consideration of the voice records followed by a double assessment by human ears as to the invalidity of the test result. It is inconceivable in my judgment that there was no proxy test taker, that no test took place, that no certificate was issued as a result of that test, that there was no speaking score of 180 nor a writing score of 150, that therefore was no adequate evidence to suggest that these events took place. The word 'invalid' meant that there had to be a process by which a voice record was considered and that can only mean that a voice record was created and assessed by those in the position of doing so. For these reasons, I am entirely satisfied that it was open to the judge to find that the appellant was linked to this test certificate, was linked to a proxy test taker and was linked to the provision of a certificate which was subsequently rendered invalid. It does not matter that this certificate was not used because it was obtained with a potential use in mind albeit a use which was not, in the end, taken up.

15. The third point that is made by Mr Malik is upon a consideration of the decision in the Court of Appeal in *Majumder and Qadir* [2016] EWCA Civ 1167 in which Beatson LJ once again gave the judgment of the court (to which Lord Justice Sales and Lady Justice Black agreed). In that case the Secretary of State herself had submitted that when considering an allegation of dishonesty some seven factors at least had to be considered. I do not suppose for one moment that that is an exhaustive list but it is a helpful list of factors which should be taken into account. I shall recount them now:

    (1) what the person accused had to gain from being dishonest;

    (2) what he had to lose;

    (3) what is known about his character;

    (4) the cultural environment in which he operated;

    (5) how the individual accused of dishonesty performed under cross-examination;

    (6) whether the Tribunal's assessment of that person's English language proficiency is commensurate with his or her TOEIC scores;

    (7) whether his or her academic achievements are such that it was unnecessary or illogical for them to have cheated.

    It is said on behalf of the appellant by Mr Malik that that process of going through each of the seven requirements to consider dishonesty was not the approach that was adopted by the First-tier Tribunal Judge in his determination. However, a consideration of the determination makes it

plain and clear that the test certificate was not used. It was not therefore necessary, as a matter of fact, for this test certificate to have been obtained. Secondly, the judge considers the cross-examination of the appellant, (who refers to this in paragraph 17 of the determination). It was for the judge to determine whether the cross-examination provided evidence that was material.

16. In fact, the point in the cross-examination noted by the judge is that the appellant stated that he did not contact the ETS when he received the respondent's decision. It is therefore necessary to consider the respondent's decision made on 15 March 2017 in which it explicitly stated that on 16 October 2012 the appellant had used a proxy test taker and had done so in a way which was fraudulent. If this grave allegation had been made, and the appellant had not sat the test and knew nothing about the sitting of the test and was at a complete loss to understand how it came about that a certificate had been issued, it was open to the judge to consider whether the appellant would not at an early stage have made written protestations of innocence either to ETS or to the Secretary of State. What the judge records is that, although the appellant was not *required* to pursue ETS for an explanation, it was submitted on the appellant's behalf that he had no awareness of the allegation before 23 April 2018 when the respondent's bundle was filed. That surely is not correct. He knew of the allegation on 15 March 2017 when the refusal letter was made. It was therefore a point that the judge was entitled to take into account that no action had been taken earlier.

17. The other factors, which it is said the judge should have taken into account, were that the certificate was of no use to the appellant, there was no need for him to engage in deception or dishonesty as he had a good command of English and was able to rely upon another uncontroversial test certificate. It cannot properly be said that the judge was not looking at the fact that there was no need for the appellant to use dishonesty, but it was part of the explanation which in the event the judge found wanting. He did so by reason of what he subsequently said, namely that the appellant did not address the active involvement of an individual who assigned their examination contribution to the appellant's candidate number.

18. Consequently, I do not accept that the judge failed in his duty to consider the position of the appellant in the round, which is effectively what was being said by the Court of Appeal in setting out its list of material factors in the consideration of a case such as this.

19. Finally, it is said that the judge did not properly engage with the discretionary nature of paragraph 322(5) of the Immigration Rules. It clearly contains a discretionary element. So much is clear from the decision of the Court of Appeal in *R (on the application of Charly Ngouh)* [2010] EWHC 2218. This case was heard in the Administrative Court and came before Mr Justice Foskett, who said in paragraph 120 that there was a large range of context which might or might not, depending on the

circumstances of the case, render it desirable to permit the applicant for indefinite leave to remain in the United Kingdom. He said:

> "In some instances the offence may be so serious that little by way of explanatory justification for relying on this paragraph may be required: the answer may be obvious. Where, however, the offence is in a different part of the criminal spectrum, certainly if very much at the lower end, then far greater justification would be required, particularly if it is the only occasion where the person concerned has broken the law."

That passage graphically describes the range of circumstance where the decision may or may not be justified on the basis of a discretion.

20. Mr Malik submits that the judge did not go on to deal with the positive factors in favour of the appellant: his long presence in the United Kingdom; the fact that he was able to obtain a legitimate test result not using deception; the fact that he did not use deception; the fact that he is a man of good character and has studied hard. All of these factors should have been taken into account and, had they been taken into account, then it may well, or would indeed, have resulted in a decision that, although deception had been used, it was not deception of a degree that merited the refusal of his grant of further leave to remain.

21. It is true that the judge did not go through the discretionary elements in a separate part of his judgment but what the determination reveals is that he knew very well what the factors were in the appellant's immigration history and those had to be balanced against the fact that an act of dishonesty had been committed and that the appellant himself was complicit in that act of dishonesty; otherwise, it would have required the judge to find that it was possible and plausible that there had been this unidentified proxy test taker who had gone through the necessary machinations in order to sit a fraudulent test without the appellant's knowledge.

22. Consequently, having found that the appellant had used dishonesty and that his involvement in the obtaining of a fraudulent test certificate justified in principle the refusal of indefinite leave to remain, there was no room for a further exercise of discretion to say that the conduct of the appellant was not such as to render the refusal of indefinite leave to remain unlawful.

23. It seems to me that, once the appellant had been found to have acted with dishonesty and had not conceded that he had acted with dishonesty and advanced a case which was implausible and indeed incredible, those were factors which gravitated heavily in favour of the refusal of a grant of ILR. That was in fact the point that was made in the refusal letter expressly where the Secretary of State says,

> Although you did not rely on your TOEIC certificate for the purposes of your application for leave to remain, your complicity in the fraud nevertheless

> contributed to an extremely serious attack on the maintenance of effective immigration control and the public interest generally.

It seems to me that this thinking permeates the determination and consequently there was no need for the judge to make explicit reference to the fact that there was a discretionary element but that he was not going to give the benefit of the exercise of that discretionary element to the appellant.

DECISION

The First-tier Tribunal Judge made no error of law and accordingly his decision should stand.

ANDREW JORDAN
DEPUTY JUDGE OF THE UPPER TRIBUNAL