Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10768/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 February 2018	**On 22 March 2018**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ATIKUL ISLAM SHAIHAM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Secretary of State: Mr S. Kotas, Senior Home Office Presenting Officer
For Mr Shaiham: Mr G. Davison, Counsel instructed by Thamina Solicitors

DECISION AND REASONS

1. The Secretary of State appeals against the determination of First-tier Tribunal Judge J. H. H. Cooper promulgated on 26 October 2017 following a hearing at Taylor House on 2 October 2017 in which he allowed the appeal of Mr Shaiham in what we now know to be an ETS appeal. I shall refer to Mr Shaiham as the appellant as he was in the First-tier Tribunal.

2. The appellant is a citizen of Bangladesh who was born on 3 November 1987. He was refused leave to remain by a decision made by the respondent, the Secretary of State,

on 12 April 2016 and that followed an initial grant of leave that was made on 15 November 2009 which was subsequently extended in the same category. Finally, leave to remain as a spouse was granted on 17 October 2013 which was valid until 17 April 2016. That of course postdates the decision under challenge. Consequently it appears to me that the appellant is one of those who has had continuous valid leave since 2009.

3. The issue arises in relation to an earlier grant of leave when it was said that in his application of 17 October 2013 the appellant submitted a TOEIC certificate produced by ETS (Educational Testing Service) which was, on review by ETS, found to be an invalid test result as a result of the use of a proxy test taker. The scores that were considered were those produced at a test that was taken on 27 February 2012 at Westlink College. Those results were analysed by two individuals and it was found that a test taker was likely to have been used.

4. The appellant was interviewed on 4 April 2016 by an official from the Home Office and the results of that interview (according to the decision letter) were that the appellant could not explain details about the tests taken. Unfortunately, the interview notes are not amongst the papers in the appeal before me nor were they apparently in amongst the papers before the First-tier Tribunal Judge. Consequently whatever the appellant said in interview which might adversely have affected the Secretary of State's decision, those matters are not available to us. Indeed, the answers that are recorded, are answers that are generally helpful to the appellant.

5. Consequently there was then before the First-tier Tribunal Judge the basic generic evidence with which we are all familiar in these cases provided by Mr Millington and Ms Collings. In addition to that there was also the evidence of Professor Peter French. He was the individual who looked at the report of Dr Harrison which had rather indicated that the tests were subject to a considerable amount of frailty whereas Professor French took the view that the false positives were considerably less than had been proposed by Dr Harrison. So that was the generic evidence as it stood at that stage but there was also the evidence which came directly from an examination of Westlink College. That was part of a document called Project Façade, *Criminal Inquiry into the abuse of the TOEIC* and Westlink College was a college that was identified in the report dated 15 May 2015 by Andrew Carter, a Detective Inspector. He was able to say that between 18 October 2011 and 18 April 2012 Westlink College undertook 915 TOEIC speaking and writing tests and that of those 661 were said to be invalid. That is some 72%. That obviously leaves a further 28% which were not classified as invalid but I suspect that where such a high percentage of invalid tests were taken, it inevitably sheds light on the other tests that were taken rendering 254 of them questionable for that reason alone. Of course that does not establish that any individual test taken was valid or invalid. What it says is that there are mistakes that can be made and that the invalidity test, although it is pretty accurate, cannot be completely accurate.

6. The other material that was before the Home Office was a printout from the day in question, that is 22 February 2012. Of the 32 tests that were taken some 75% were invalid. That is a slightly higher figure than the figure for the college as a whole and

that may well have fed into the conclusion of the college that some 25% were questionable. The evidence in relation to the appellant himself is that his test was declared to be invalid, not questionable, and that was from a test taken on 22 February 2012 where he was adjudged to have a speaking score of 200 and a writing score of 170.

7. The evidence which I have referred to postdating the generic evidence which was before the Tribunal in *QM and Qadir* was dealt with in a witness statement by Rema Bassi.

8. All of these documents were referred to by the judge in paragraph 29 and in particular I note that the judge must have looked at the Project Façade investigation because the relevant passages to which I have referred were highlighted in the document by a highlighting pen.

9. The judge then went on to look at the decision of the Upper Tribunal in *SM and Qadir* [2016] UKUT 00229 (IAC). That decision, as we well know, stated that the Secretary of State's generic evidence was sufficient to discharge the initial evidential burden of proving that the certificates were procured by dishonesty. However, things did not end there and the frailties in the generic evidence were such that the appellants might be placed in the position by adducing evidence and making submissions that the Secretary of State had, on balance, failed to establish the legal burden. That was a burden upon them to comment upon the Secretary of State's evidence and to establish that the reasons advanced by the Secretary of State were insufficient to make out the use of fraud in the circumstances of the appellant's case. The way that this is worked through is seen very clearly in the decision of the Court of Appeal in *Majumder v Secretary of State for the Home* [2016] EWCA Civ 1167. It is the case of *SM and Qadir* on appeal to the Court of Appeal. In that case Beatson LJ spoke of the evidential burden which was correctly identified by the Secretary of State and by the Upper Tribunal and which had been established by the generic evidence.

10. The Court of Appeal then went on to consider what the Upper Tribunal said in relation to the evidence which had been provided both by Mr Majumder and by Mr Qadir. In the review of the evidence it was recorded that Mr Majumder gave evidence before the First-tier Tribunal. That evidence was accepted by the First-tier Tribunal. There was no indication of invention, exaggeration or evasiveness and he consistently presented himself as a witness of truth. It was a similar but slightly different assessment that was made in relation to Mr Qadir. It was therefore accepted by the Secretary of State that the two appellants Mr Majumder and Mr Qadir had given credible evidence and that was conceded by Mr Kotas on behalf of the Secretary of State. He conceded that the Secretary of State had discharged the evidential burden but that she had not discharged the legal burden that she bore to show dishonesty. He made it clear that he abandoned any submission that the Tribunal in the present case did not treat the evidence of Dr Harrison in a legitimate way. It followed therefore that one of the principal planks advanced by the Secretary of State was effectively withdrawn.

11. In short, what occurred was that the generic evidence was balanced against the individual's evidence that was provided by the appellants. The First-tier Tribunal

Judge came to the conclusion that the Secretary of State had failed to establish the legal burden. In other words, having looked at the evidence in the round, having looked at the generic evidence, the specific evidence in relation to Professor French and Dr Harrison the Upper Tribunal was entitled to conclude that the First-tier Tribunal made no error in its conclusions about the totality of the evidence.

12. In this case, in paragraph 29, the judge refers to the Westlink College material including the speaking and writing tests taken by the appellant on 22 February 2012, the scores and the analysis of those tests on 22 February 2012. He took into account Project Façade and the generic, as it were, overall impression that Westlink College was a factory of fraud. He then applied *SM and Qadir* and did so by looking at the evidence of the appellant. He said in paragraph 33 that the appellant had provided a detailed account of how he came to chose Westlink College, how he travelled there initially to book the test and subsequently to take the tests on two different days and what took place during each of the tests. He was cross-examined by the Home Office Presenting Officer, Miss McKenzie and explained in his answers the anxieties that she raised and his evidence was clearly found by the judge to be a truthful account.

13. The judge then went on to make an assessment of the appellant's ability to speak English. The test that was taken on 22 February 2012 predated another spoken English examination which the appellant took in February 2016, that is exactly, or almost exactly, four years later. He took into account the fact that if he had been proficient in English in March 2016 that might shed light on his proficiency in 2012, albeit with the passage of time. He took into account the answers that were provided in interview and the record of the interviewing went as follows:

> "Q: Was the applicant able to answer the questions in basic English?
>
> A: Yes.
>
> Q: Did the applicant answer in a fluent manner suggestive of the fact that they had not been coached in providing specific answers by rote?
>
> A: Yes.

It was said that the appellant did have very good English during the interview and stated that he completed the A1 English language test in March 2016. The judge, unsurprisingly, found that the appellant's English was quite competent and that was a factor that he was entitled to take into account. However, he also exercised a certain amount of caution. That caution is effectively the subject of the grounds of appeal where the Secretary of State relies on *MA (Nigeria)* [2016] UKUT 450, at paragraph 57, where the Tribunal said:

> "... We acknowledge the suggestion that the Appellant had no reason to engage in the deception which we have found proven. However, this has not deflected us in any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere. We are not required

> to make the further finding of why the Appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter."

14. This passage obviously offers us the simple truth that there may be a number of reasons why an individual who is proficient in English might want to, as it were, hedge his bets by making sure that a professional proxy taker makes sure of the result and so proficiency can never be conclusive evidence of an absence of fraud but the decision maker in this case was not saying that it *was* conclusive. It is true that he spends paragraphs 37 and 38 considering this matter but that is largely because there was a certain amount that he had to cover including the answers that were given in interview and the test that had been taken on another occasion. Consequently, I do not think one can infer from the fact that rather more words were used in paragraph 37 than were used in paragraphs 33 or 34 means that the evidence was the subject of undue consideration. The difficulty that the Upper Tribunal faces in such cases is that this is an evaluative process where all of the factors had to be taken into account. That included the Westlink College material. It included the witness statement evidence. It included the reports of both Professor French and Dr Harrison and it included the approach that was required to be adopted by the case-law. Those matters are material which the Upper Tribunal itself can form a judgment about in relation to their strengths and weaknesses because that evidence is exactly the same for me as it is for the decision maker and for the First-tier Tribunal Judge.

15. What however the Upper Tribunal cannot do is make an assessment as to the weight that the First-tier Tribunal Judge was properly able to attach to the appellant's own evidence. It is quite plain that he was cross-examined on aspects of his evidence and gave an account which the First-tier Tribunal Judge accepted as being truthful and accurate. It is also fair to say that he took into account the answers that were provided by the appellant in interview which were not answers that in any way undermined the truthfulness of the appellant. In those circumstances it has to remain the legal principle that the Upper Tribunal applies that, absent an ability to assess the impact of the appellant's own evidence given to the First-tier Tribunal Judge, it is impossible for the Upper Tribunal to say that the ultimate decision of the First-tier Tribunal was not properly open to the judge. In those circumstances I conclude that the First-tier Tribunal did not make a material error on a point of law and the determination of the First-tier Tribunal shall stand.

DECISION

(i) I dismiss the appeal of the Secretary of State's against the decision of the First-tier Tribunal.

(ii) The First-tier Tribunal's determination of the appeal shall stand.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL

Dated 20 March 2018