



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17767/2016

THE IMMIGRATION ACTS

Heard at Field House
On 25 July 2018

Decision & Reasons Promulgated
On 21 August 2018

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

THEOTONIUS BANTY GOMES

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Mr E Waheed, instructed by Commonwealth Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State, it will be convenient to refer to the parties as they appeared before the First-tier Tribunal.

Introduction

2. The appellant is a citizen of Bangladesh who was born on 16 January 1984. He first entered the United Kingdom on 3 February 2007 as a student with leave valid until 28 February 2010. Subsequently, his leave was extended as a Tier 4 Student until 15 July 2012. Prior to the expiry of his leave, the appellant returned to Bangladesh before

returning to the UK on 1 October 2012 with entry clearance as a student valid until 31 October 2013. That leave was subsequently extended to 26 September 2016. On 24 August 2015, the appellant's leave was curtailed to 12 February 2016.

3. On 11 February 2016, the appellant applied for indefinite leave to remain on the basis of ten years' lawful residence in the UK and on an exceptional basis outside the Immigration Rules.
4. On 13 July 2016, the Secretary of State refused the appellant's application for leave under the Rules and Art 8 of the ECHR. First, the respondent applied the general refusal ground in para 322(2) of the Immigration Rules on the basis that the appellant had submitted a TOEIC certificate from Educational Testing Service (ETS) with his earlier application made on 30 December 2011 which had been obtained by deception, namely that he had used a proxy test-taker for the oral part of the English language test. Secondly, the Secretary of State concluded that, in any event, the appellant could not establish the required ten years' continuous lawful residence as he had first entered the UK on 3 February 2007 and had therefore only been resident in the UK for nine years at the date of his application and for nine years and five months at the date of decision. Finally, the Secretary of State concluded that the appellant could not succeed on the basis of his private and family life either under the Immigration Rules or outside the Rules under Art 8.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. The appeal was heard by Judge L K Gibbs on 24 November 2017. The appellant gave oral evidence and, in that evidence together with his witness statement, he sought to explain a number of matters taken against him by the Secretary of State arising out of his "credibility" interview on 24 June 2016.
6. Judge Gibbs made three crucial findings. First, he accepted the appellant's evidence and concluded that the Secretary of State had not established on a balance of probabilities that the appellant had used deception. Consequently, para 322(2) of the Immigration Rules did not apply. Secondly, Judge Gibbs found that the appellant had, by the date of hearing before him, established the required ten years' continuous lawful residence in the UK and therefore that he met the requirements of para 276B of the Immigration Rules. Thirdly, given that the appellant met the requirements for ILR on the basis of his long residence under the Immigration Rules, the judge found that the appellant's removal would breach Art 8 of the ECHR and he allowed the appeal on that ground.

The Appeal to the Upper Tribunal

7. The Secretary of State sought permission to appeal to the Upper Tribunal on two grounds.
8. First, having found that the Secretary of State had discharged the evidential burden by demonstrating that the appellant's test result had been cancelled on the basis that the

result was “questionable”, the judge had erred in law in accepting the appellant’s innocent explanation, given that he had been unable to answer a number of questions concerning his language interview at the “credibility” interview on 24 June 2016.

9. Secondly, the judge had erred in law in allowing the appellant’s appeal under Art 8 as there were “no compelling circumstances” to justify a conclusion that the appellant succeeded outside the Rules under Art 8.
10. On 22 February 2018, the First-tier Tribunal (Judge P J M Hollingworth) granted the Secretary of State permission to appeal.
11. On 23 April 2018, the appellant filed a rule 24 response seeking to uphold the judge’s decision.

Discussion

12. Before me, Mr Tufan indicated that the Secretary of State no longer relied upon the second ground. He also accepted that the Secretary of State had not challenged the judge’s finding under para 276B that the appellant had established, by the date of the hearing, ten years’ continuous lawful residence. Mr Tufan, instead, relied only upon the first ground.
13. That ground seeks to challenge the judge’s acceptance of the appellant’s innocent explanation and finding that the Secretary of State had failed to establish on a balance of probabilities that the appellant had used deception, namely a proxy to undertake the oral part of his language test.
14. At the outset of the hearing, I drew to the representatives’ attention an earlier decision of my own in a Judicial Review case which had considered the relevance, as in this case, of a language test result which was cancelled not because it was “invalid” (it having been established by the use of voice recognition software that it was not the appellant who took the test) but rather that it had been cancelled because the result was “questionable” due to test administrative irregularities, including at a test centre when a number of other results had been cancelled on the basis that they were “invalid” because a proxy, rather than the appellant, had taken the test. In R (Zhihao Li) (JR/11450/2016) (heard 15 June 2017), I considered the issue in the light of the Court of Appeal decision in the ETS cases of SSHD v Shehzad and Chowdhury [2016] EWCA Civ 615 and R (Giri) v SSHD [2015] EWCA Civ 784. At [44]-[49] I said this:

“44. Mr Mold submitted that the burden of proving that the applicant had used deception or fraud was on the respondent and the standard of proof was the balance of probabilities. In relation to the respondent’s first decision of 18 March 2016, Mr Mold submitted that there was no proper basis in law upon which it could be concluded that the evidential burden upon the respondent had been discharged – such that it was then for the applicant to demonstrate some ‘innocent’ explanation – by relying upon the applicant’s test result being cancelled because it was ‘questionable’ rather than ‘invalid’ and the generic evidence in Rebecca Collings and Peter Millington’s witness statements. Mr Mold submitted that it was only on the basis that the result was ‘invalid’ that in Shehzad and Chowdhury the Court of

Appeal held there was sufficient evidence to discharge the ‘evidential burden’ on the Secretary of State.

45. In *R (Giri) v SSHD* [2015] EWCA Civ 784 the Court of Appeal confirmed that the legal burden of proving deception or fraud in a case such as the present was placed upon the Secretary of State and that the standard of proof was that of a balance of probabilities (see [34]-[38]). The court also confirmed that, in a judicial review application, the challenge was on *Wednesbury* principles rather than on the basis that deception or fraud was a precedent fact (see [19]).

46. In *Shehzad and Chowdhury*, the Court of Appeal accepted that where the look up tool showed that an individual’s test score had been cancelled because it was ‘invalid’ taken together with the generic evidence, then the Secretary of State’s evidential burden of proving deception or fraud was discharged (see [30]). The evidential burden then shifted to the individual to provide an ‘innocent’ explanation. However, the court recognised (at [30]) that:

‘... in circumstances where the generic evidence is not accompanied by evidence showing that the individual under considerations test was categorised as ‘invalid’, I consider that the Secretary of State faces a difficulty in respect of the evidential burden at the initial stage’.

47. I respectfully agree with that view expressed by Beatson LJ with whom Black and King LJ agreed. That was said in the context of statutory appeals on the merits before UTIAC. It is no less relevant in judicial review cases, such as the present, where irrationality must be established.

48. As the evidence of Rebecca Collings and Peter Millington which I set out above makes plain, the categorisation and cancellation of a test score on the basis that it was ‘questionable’ is based upon an inference that because of the proven level of fraud or deception at the particular centre (perhaps on the particular day) the remaining test results are ‘questionable’ and are cancelled. In this case, the inference, as we now know from the supplementary decision letter of 27 March 2017, was based upon the fact that 28% of those who took the test had their test results categorised as ‘invalid’ because they had used a proxy. That led to the cancellation of the remaining 72% of individuals’ test results. It is, in my judgment, impermissible to infer that a ‘questionable’ result based upon these statistics established a prima facie case of fraud or deception. That is not a defensibly logical conclusion from the premise that 28% of candidates at the relevant time did use fraud or deception. While it may be reasonable to make such an inference where the statistics are overwhelming, here, of course, they are far from overwhelming: only 28% were shown to be ‘invalid’ because of the use of a proxy test taker. It must never be overlooked that for the remaining 72% (including the applicant) the voice recognition exercise did not establish that a proxy had taken the test.

49. Consequently, I accept Mr Mold’s submission that in the circumstances of this case the cancellation of the applicant’s test result on the basis that it was ‘questionable’ could not, in itself, rationally lead to a discharge of the evidential burden of proving fraud or deception placed upon the Secretary of State”.

15. My conclusion was, therefore, that in itself the cancellation of a test result on the basis that it was “questionable” (based essentially on an inference from the statistical level of “invalid” tests) did not discharge the evidential burden of proving fraud or deception placed upon the Secretary of State.

16. In Li, however, I went on to note at [57] that:

“... answers given by an individual at an interview when a test result has been cancelled on the basis that it was ‘questionable’ could add to the weight of evidence so as to discharge the evidential burden of proof upon the Secretary of State to establish fraud or deception by that individual”.

17. On the facts of Li, I concluded that the matters relied upon by the Secretary of State in that case could not rationally lead to a conclusion that the evidential burden of proof had been discharged. At [57], I said this:

“The difficulty in this case is, however, that the applicant was taken completely by surprise at his interview without any knowledge of why he was being asked these questions. He, of course, says he was not asked some of the questions but that was rejected in the AR after considering the interviewer’s notes. The questions were, however, asked in the context of an unfair interview. They were questions being asked about events that had occurred three and a half years earlier on 29 August 2012. The weight to be given to these answers must, therefore, be considered in that context. It is difficult to conclude that answers such as ‘I can’t remember’, given in the context of an unfair interview when the individual does not know why he is being interviewed and what the allegations is against him and which relate to events that he is being asked to recall from three and a half years earlier, can readily be considered to bear any significant evidential weight. There was, in truth, little or no positive evidence against the applicant following his interview. He had not failed the voice recognition software test. Not perhaps unreasonably, he was unable to recall events of three and a half years previously when, without knowing why he was being interviewed by the Home Office, he responded that he could not remember”.

18. Mr Tufan did not seek to counter my conclusion in Li at [48]-[49] that the cancellation of a test on the basis that it was “questionable” could not in itself discharge the evidential burden of proof upon the Secretary of State. However, he relied upon the appellant’s evidence at his “credibility” interview both, as I understood him, to discharge the evidential burden of proof on the Secretary of State and also discharging the legal burden of proof on a balance of probabilities.

19. Mr Waheed, on behalf of the appellant, submitted that the judge was entitled to accept the appellant’s explanation. Relying on [57] in Li, Mr Waheed submitted that the appellant’s “credibility” interview had been conducted two and a half years after the test and the appellant (as in Li) had been taken by surprise. As his evidence given orally and at para 19 of his witness statement demonstrated, the appellant had not appreciated, because he had not been told, the purpose of that interview. Mr Waheed submitted that the judge took those matters into account and was entitled to accept the appellant’s innocent explanation.

20. I begin with the judge’s reasoning in this case. It is found at para 9–13 as follows:

“9. The respondent has provided her ETS Bundle which includes a report from Professor French and witness statements from Rebecca Collings and Peter Millington. In addition I have the witness statement of Chandrika Mindelsohn and The Test Centre Lookup data specific to the appellant. In accordance with *Secretary of State for the Home Department v Shehzad and Chowdhury* [2016] EWCA Civ 615 I am satisfied that the respondent has discharged the evidential burden that falls on her in raising the allegation of dishonesty. It is therefore for the appellant to provide

an innocent explanation and if that burden is discharged, the Secretary of State must establish on a balance of probabilities that this innocent explanation is to be rejected.

10. In considering the appellant's explanation I place weight on the fact that his test has not been deemed invalid, only questionable, as were the minority of tests taken on 13 December 2011 at the test centre (27%). I remind myself that Ms Collings' witness statement highlights that:

'ETS explained, at the time, that those categorised as questionable (as opposed to cancelled/invalid) were inconclusive in terms of being certain of impersonation/proxy test taking. Following further communication with ETS they confirmed the definition of 'questionable' and this is set out in Peter Millington's witness statement; it is where an individual's test results were still cancelled on the basis of test administration irregularity including the fact that their test was taken at a UK testing centre where numerous other results have been invalidated on the basis of a 'match'. ETS had analysed over 10,000 test scores at that point, of which the majority were cancelled as invalid, the remainder were cancelled as questionable'.

11. I have considered the appellant's 'credibility' interview conducted by the Home Office on 24 June 2016. Firstly I have taken into account the fact that it was conducted two and half years after the test but despite this I find that the appellant was able to provide basic information regarding what had occurred, why he had chosen the test provider and where the test had taken place. I also find credible his oral evidence that he had asked the Home Office for a copy of the test recording but they had told him that he had to obtain this from the test provider directly. I find that the appellant then contacted ETS on 29 August 2016 requesting further information which I am satisfied is further evidence that he did not use a proxy to take his test. In addition, although not conclusive, I am satisfied that the appellant has studied, and achieved qualifications taught in English, has passed other English exams and gave evidence in fluent English before me.
12. Taking into account all of the facts I am satisfied that the appellant has provided an innocent explanation and that the respondent has not persuaded me, on the balance of probabilities, that there is reason to reject this.
13. I therefore allow the appeal in so far as the appellant's application should not have been refused in accordance with paragraph 322(2) of the Immigration Rules".

21. At para 9, the judge concluded that the Secretary of State had discharged the evidential burden of proving dishonesty following Shehzad and Chowdhury. However, the Court of Appeal was only concerned in that case with a test result which had been cancelled because it was "invalid", namely the voice recognition software test had established that a proxy had taken the test. As the quotation from the judgment of Beatson LJ at [30] of Shehzad and Chowdhury makes plain (set out in [46]) of Li, where the test has not been cancelled because it was "invalid", the Secretary of State "faces a difficulty in respect of the evidential burden at the initial stage".
22. The judge was, therefore, wrong to conclude that the Secretary of State had discharged the evidential burden in this appeal, relying upon Shehzad and Chowdhury, simply on the basis that the appellant's test score had been cancelled because it was "questionable". Although that was an error, it was not, in my judgment, material to

the judge's ultimate finding that the Secretary of State had not discharged the legal burden of establishing deception or dishonesty on a balance of probabilities.

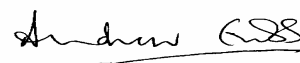
23. Before dealing with the judge's reasoning in respect of the appellant's "credibility" interview, it should be noted that the statistics in this appeal are not the same as those in Li. In Li, 72% of the test results had been cancelled on the basis that they were "invalid" and only 28% of test results had been cancelled because they were "questionable". In this case, by contrast, 73% of the test results on the day the appellant took his test were cancelled because they were "invalid"; only 27% were cancelled because they were "questionable". That distinction does not, in my judgment, affect whether it is reasonable or rational to conclude that the fraud by 73% should lead to a reasonable inference that there is sufficient evidence to discharge the burden of proving fraud by the remaining 27%. It must always be remembered that the 27%, whose results are only "questionable", did not fail the software voice recognition test. If they had, their test results would have been cancelled because they were "invalid". Whilst in principle, an overwhelming incidence of fraud, perhaps taken with other evidence, may justify an inference that the pervasiveness of fraud engulfs even an individual who passed the software recognition test, extreme caution must be exercised before reaching such a conclusion. The statistics in this appeal 73%: 27%: are not, in themselves, sufficiently overwhelming to fall into that category.
24. That then leads to the judge's reasoning in para 11 in which he concluded that he accepted the appellant's evidence and his innocent explanation. The judge was clearly aware of the discrepancies relied upon by the Secretary of State. The Secretary of State's case was that, by the time of the hearing, the appellant had been able to "set about learning all the details he did not know". In my judgment, the judge was entitled to take into account, as Mr Waheed submitted, that the "credibility" interview was conducted two and a half years after the test and, in addition, the appellant attended for that interview without knowing its purpose. He was, in a very real sense, 'taken by surprise'. The judge was entitled to take that into account, together with the appellant's subsequent conduct in seeking a copy of the test recording from the Home Office and further information from ETS itself. Certainly, in addition, the appellant's facility in English was not an irrelevant matter although of course, subsequent demonstration of an ability to speak English does not, in itself, negate an earlier inability to do so or there being some motivation for using a proxy test-taker. The judge was, in my judgment, well aware of the need to adopt a cautionary approach to such evidence which he did not consider to be "conclusive".
25. Consequently, for these reasons, the judge's finding that the Secretary of State had not established the appellant's deception or dishonesty by using a proxy test-taker did not involve the making of a material error of law which would justify the setting aside of the judge's decision.

Decision

26. Accordingly, the decision of the First-tier Tribunal to allow the appellant's appeal stands.

27. The Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

A handwritten signature in black ink, appearing to read "Andrew Grubb", written over a horizontal line.

A Grubb
Judge of the Upper Tribunal

13 August 2018