



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

Appeal Number: HU/22390/2016

THE IMMIGRATION ACTS

Heard at Field House

On 9 November 2018

Decision & Reasons

Promulgated

On 27 November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

**BHARPOOR SINGH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Sharkey

For the Respondent: Mr Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India. He was born on 26 July 1983.

2. He appealed against the respondent's decision to refuse him indefinite leave to remain dated 12 September 2016.
3. Judge H Graves (the judge) allowed the appeal under Article 8 because she found the decision was disproportionate.
4. The respondent's grounds claim lack of adequate reasoning on the part of the judge who failed to correctly assess the burden of proof in line with **SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC)**. The grounds claim that properly read, the witness statement, spreadsheet extract and interview record showed the appellant's English language test had been found questionable and then invalidated because of evidence of fraud in the test centre. Further, the appellant was not found credible at interview. The evidential burden fell upon the appellant to offer an innocent explanation and that had not been adequately addressed. It was not clear why the evidence from the appellant which the judge relied upon would preclude the use of a proxy test taker during the test.
5. The judge relied upon the appellant's English ability and other English qualifications (see [27] of the decision) but the grounds submitted that the test was not whether the appellant spoke English but whether on the balance of probabilities, he had employed deception. See **MA (Nigeria) [2016] UKUT 450** at [57]:

“Second, 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”.

6. The grounds claim the judge materially erred by failing to give adequate reasons for holding that a person who clearly speaks English would therefore have no reason to secure a test certificate by deception. Further, the judge placed weight on the fact that the appellant was able to recall details of the examination process but that did not mean that he personally took the test. The BBC Panorama programme showed students (at Eden College) standing next to terminals while proxy test takers took the test for them. The judge did not refer to having seen that documentary which was provided on DVD to every hearing centre such that he might not have been aware of the methods used which would not preclude the candidates from having travelled to the test centre and

having knowledge of the procedures and contents of the test itself, even though they had not taken it personally.

7. There were no exceptional circumstances such that the judge materially erred.

8. Judge Andrew granted permission on 5 June 2018. She said inter alia:

“2. I do not find there is an arguable error of law in this decision. The respondent appears to have missed the finding at paragraph 26 of the decision that respondent [sic] had not met the standard required to discharge the initial evidential burden of proof. In view of this there was no necessity for the judge to go on to make further findings, of which the respondent complains”.

9. The grounds were renewed to the Upper Tribunal. Judge Kebede granted permission to appeal on 26 September 2018 as follows:

“1. The appellant, a citizen of India, appealed against the respondent’s decision to refuse his application for indefinite leave to remain on long residence grounds. His application was refused on the basis that he had not demonstrated ten years of continuous lawful residence and under the general grounds of refusal in paragraph 322(2) of the Immigration Rules on the basis that he had submitted a fraudulently obtained English language TOEIC certificate in support of his application. First-tier Tribunal Judge Graves allowed the appeal. The respondent seeks to challenge that decision.

*2. Arguably the judge erred in her findings that the respondent had failed to discharge the initial evidential burden of proof on the evidence produced and, in considering the matter in the alternative, in according the weight that she did to the appellant’s ability in the English language, contrary to the guidance in **MA (ETS - TOEIC testing) [2016] UKUT 450**. Given that the judge’s findings on deception were intrinsic to her proportionality assessment under Article 8, all the grounds are arguable”.*

Submissions on Error of Law

10. Mr Clarke relied upon the grounds. He corrected an error in that the test had not been “invalidated” but merely made questionable because of evidence of fraud.

11. Ms Sharkey submitted that the grounds were in error when they referred to the appellant not being found credible at interview. The only reference to credibility on the interview record sheet was as follows:

“Was the customer credible at interview? No

Recommendation Summary

Applicant could communicate in English answered all questions at ease. However applicant confirmed he sat the ETS TOIEC test one the date and at the place on our list therefore not credible."

12. The judge had identified to the Presenting Officer, her concerns regarding the quality and nature of evidence relied upon by the respondent. See decision at [12].

Conclusion on Error of Law

13. The Secretary of State produced no specific evidence of abuse. The respondent relied upon an interview with the appellant which in terms of adverse credibility referred only to generic abuse at a specific test centre as a result of which he was found not to be credible. All this despite the fact that the appellant answered all questions at interview in fluent English.
14. The judge gave her reasons at [22]-[29]. She found that the Secretary of State's evidence did not support a finding that the appellant had used a proxy test taker, only that there was evidence of general abuse of the system. The judge found that the evidence before her did not reach the standard required to discharge the initial evidential burden upon the respondent of deception but that even if that had been the case, the respondent's documentation as to generic abuse should not be taken in isolation. The judge found that the appellant was able to give detailed evidence in English about the test he took. His evidence was given without hesitation, using complex sentence structure and vocabulary with a minimal accent.

Notice of Decision

The judge was entitled to come to the decision she did on the evidence before her. The decision of the First-tier Tribunal shows no material error of law and shall stand.

No anonymity direction is made.

Signed

Date

9 November 2018

Deputy Upper Tribunal Judge Peart

