



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/27168/2016

THE IMMIGRATION ACTS

Heard at Field House
On 28th August 2018

Decision & Reasons Promulgated
On 13th September 2018

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS MAHSA SADERYOUN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow (Senior Home Office Presenting Officer)

For the Respondent: Mr K Behbahani (Behbahani & Co Solicitors)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal by the Secretary of State in relation to a judgment of the First-tier Tribunal, Judge Zahed, promulgated on 9th April 2018 in which he allowed the appeal. This is what has become known as a TOEIC case where the applicant had made an application for leave to remain on the basis of her family and private life. However, the application was refused by the Secretary of State primarily because the Appellant had submitted, what the Secretary of State said was, a false certificate, in other words, that she had not taken an ETS test herself but rather had used a proxy for that purpose.

2. At the hearing before the First-tier Tribunal the Secretary of State produced the usual evidence, which included witness statements of Rebecca Collings and Peter Millington, an expert report of Professor French and what has become known as the Lookup Tool. Those documents showed that the relevant test centre on the day in question tested fifteen applicants, all fifteen of which were found to be invalid; not questionable, invalid.
3. The Judge heard oral evidence from the Appellant and he found that she was credible, honest, spoke very good English, had a good immigration history and had been studying in English in the UK and therefore had no reason to cheat in the test. At paragraph 14 he found her to have provided a plausible explanation that she had taken the test and,

“given her history as a student and having seen and heard her give evidence and taking into account her academic qualifications and her progression as a student as well as her interaction with medical staff regarding her younger brother, I find that the Respondent has not discharged the legal burden of showing that she used a proxy test taker”.
4. The Secretary of State’s grounds argue that the Judge did not follow the guidance of SM and Qadir [2006] EWCA Civ 1167 as to the process to be followed in assessing these types of cases. It was acknowledged by Mr Behbahani that what a Judge is tasked to do is to look at the evidence produced by the Secretary of State to see if that satisfies an initial burden of proof that it may have been a false test, in which case the evidential burden switches to the Appellant to offer an innocent explanation for what the results appear to show and if she does then the Secretary of State has not established the legal burden that she did in fact cheat. It is argued in the grounds that the Judge did not follow that process and it is also argued that in taking into account the Appellant’s ability to speak English and qualifications he has not taken into account what we have been told by case law, namely that people will have many reasons for choosing a proxy to take the test which does not necessarily have anything to do with their ability to speak English. There is also criticism of the way the Judge dealt with the fact that according to ETS 100% of the results on that day were invalid.
5. Mr Behbahani made powerful submissions in defence of this Decision and Reasons and argued that although the Judge does not mention the relevant case law, it is clear when reading the Decision and Reasons as a whole that he followed it and while on the face of it the Secretary of State’s grounds have some force, when one drills down and reads the Decision as a whole they do not.
6. What the Judge says about the fact that 100% of test takers were using proxy test takers on the day gives cause for concern as he also notes that there is a possible explanation for that. I am told that there was no voice recording available to the Judge and there is some indication that efforts were made to obtain it although no evidence of that has been provided. The Judge, Mr Behbahani argued, gave more than adequate reasons for finding that the Appellant had offered an innocent explanation. He was entitled to take into account the matters he did, namely her abilities in English, her studying in

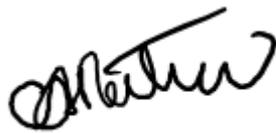
English, her general credibility and honest demeanour and good immigration history, and he concluded by saying that essentially the Secretary of State was disagreeing with the Decision rather than pointing to actual errors of law in it.

7. I disagree with Mr Behbahani and find that the Judge has made an error of law. The Judge has made confused findings in terms of where the burden lay and where it shifted and has not helped by not referring to case law in that regard. That in itself would not make a material error of law if he had then made appropriate findings. However, I find that the Judge has not done that and the most powerful reason for my saying that is the fact that it is quite clear that on the day in question all fifteen tests were found to be invalid and to say an explanation may be voices of other test takers being heard is speculation with no evidential basis at all. It is known that the fact that an Appellant is able to describe going to the test centre and how many people were there and what the layout is like is completely irrelevant, given that they are there with the proxy. The Appellant may well speak good English but she may have had entirely other reasons for choosing to use someone else to take the test rather than take it herself.
8. I therefore find that the Decision is tainted by a material error of law. There has not been an adequate consideration of the explanation and no adequate consideration of the powerful evidence coming from the Secretary of State. For those reasons I set aside the Decision. Having set it aside, as all of the findings need to be remade I will remit it to the First-tier Tribunal for a full rehearing.

Notice of Decision

The appeal is allowed to the extent that the Decision and Reasons of the First-tier Tribunal is set aside and the matter remitted to the First-tier Tribunal for a full rehearing.

No anonymity direction is made.



Signed

Date 12th September 2018

Upper Tribunal Judge Martin