



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/01752/2016  
IA/01753/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 4 September 2018

Decision & Reasons Promulgated  
On 27 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS RITU BALA NAGPAL  
MR BHGWAN DASS NAGPAL  
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr I Jarvis, Home Office Presenting Officer

For the Respondents: Miss F Shaw, Counsel

DECISION ON ERROR OF LAW

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Herlihy in which he allowed the respondent's appeal against the decision of the respondent made on 18<sup>th</sup> March 2016 to refuse to grant her further leave to remain in the UK as a Tier 4 (General) Student under the Immigration Rules. The respondent's husband Mr Bhgwan Dass Nagpal is dependent on her appeal.
2. The respondent will from now on be referred to as the applicant for ease of reference.
3. The Secretary of State claims that the applicant had employed deception by submitting a false document in order to obtain a CAS as a Tier 4 (General) Student. The applicant had submitted a TOEIC certificate from ETS test as a result of a test that she took at

South Quay College on 19 February 2013 and which she subsequently submitted to the Home Office with her application for leave as a Tier 4 (General) Student on 15 March 2014.

4. Permission was granted to the Secretary of State on grounds that assert that the judge erred in her assessment of whether the initial burden had been met in an ETS case failing to take account of the guidance given by the Court of Appeal in **SM and Qadir v SSHD [2016] EWCA Civ 1167**.
5. Mr Jarvis raised one issue and this was in respect of the judge's finding at paragraph 6.9. The judge held as follows:

*"6.9 The Reasons for Refusal Letter stated that the anomaly with the speaking test 'indicated the presence of a proxy test taker'. The Reasons for Refusal Letter appears to be clear that the reason the appellant's test result was invalidated was because the speaking test was conducted by a proxy test taker. However, even if I attach weight to the document at D it does not corroborate the claim in the Reasons for Refusal Letter. It merely indicates that the test result has been declared invalid. It is clear from Peter Millington's witness statement that 'an individual's test result may still be invalidated on the basis of test administration irregularity including the fact that their test was taken at a UK test centre where numerous other results have been invalidated on the basis of a 'match'. There is no evidence before me as to what happened on 19 February 2013 at South Quay College and whether numerous other results from this centre for that date were invalidated. I have no specific evidence relating to the appellant's test beyond the unidentified document which indicates that the appellant's test result is invalid. The reason that it was declared invalid is not clear from this document alone. I find that this document in and of itself is not evidence that the appellant has practised deception. Neither is it evidence of deception when read in conjunction with the generic witness statements.*

*"6.10 In the absence of any reliable evidence specific to the appellant, or to the tests conducted at South Quay College on 19<sup>th</sup> February 2013, I find that the respondent has failed to show that the application should have been refused under the suitability requirements. Accordingly, I find that the appellant met the suitability requirements of the Immigration Rules."*

6. Mr Jarvis submitted that the judge misunderstood what "invalid" means. It does not mean as the judge suggested at paragraph 6.9 that the ETS says that the test was taken by a proxy taker and therefore the applicant was being tarnished with the same brush.
7. Mr Jarvis relied on paragraph 47 of Peter Millington's statement which says

*"Where a match has not been identified and verified, an individual's test result may still be invalidated on the basis of test administration irregularity including the fact that their test was taken at a UK testing centre where numerous other results had been invalidated on the basis of a 'match'. These cases are clearly*

distinguished by ETS in its spreadsheets provided into the Home Office from tests where there is substantial evidence of invalidity.”

8. Mr Jarvis submitted that the reason for the distinction was in the use of the term questionable or invalid. He said the ETS decided a test was invalid by the analysis of the evidence. He said albeit the Secretary of State tends to produce other evidence such as results from numerous colleges where the results have been invalidated. The absence of such evidence does not change the evidence that was given to the Secretary of State that the applicant’s result was declared to be invalid.
9. Miss Shaw relied on her skeleton argument. She said the spreadsheet printout showing that the respondent’s results marked as “questionable” or “invalid” did not take matters any further because an unknown number of those invalid results will have been false positives. She relied on **SM and Qadir**. She said the spreadsheet printout does not provide evidence that the applicant used deception.
10. Miss Shaw submitted that the judge was required to look at the evidence in the round. The term “invalid” does not mean that the respondent’s test was taken by a proxy test taker. The judge noted that there was the possibility of an irregularity. The judge considered the evidence in the round, placed weight on the respondent’s evidence. At paragraph 6.1 he applied **SM and Qadir**, at paragraph 4 he properly directed herself as to the burden and standard of proof and at paragraphs 6.1 to 6.10 considered all the evidence that was before her.
11. In reply Mr Jarvis relied on paragraph 29 of Rebecca Collings’ statement which provided the ETS’s explanation of the use of the term “questionable” as opposed to cancelled/invalid.
12. I accept Mr Jarvis’ submission that the judge materially misunderstood the evidence that was before her. She misunderstood what “invalid” means. I note that the judge at paragraph 6.9 was relying on paragraph 47 Peter Millington’s statement. However, the judge’s finding that there was no evidence before her as to what happened on 19<sup>th</sup> February 2013 and whether numerous other results from the centre for that date were invalidated, does not detract from ETS’s evidence that the appellant’s test was declared invalid for the reasons given by Peter Millington. Indeed, this was confirmed by Rebecca Collings who at paragraph 29 of her statement said  
  
*“ETS explained, at the time, that there was categorised as questionable (as opposed to cancelled/invalid, where inconclusive in terms of being certain of impersonation/proxy test taking. Following further communication with ETS they confirmed the definition of ‘questionable’ ... it is where an individual’s test result was still cancelled on the basis of test administration irregularity including the fact that their test was taken at a UK test centre when numerous other results have been invalidated on the basis of a ‘match’.”*
13. I find that had the judge ought to have followed the view taken by the UT and upheld by the Court of Appeal in **SM** that the Secretary of State had discharged the evidential burden that lay on her with the production of the generic evidence, so that there is a

burden, again an evidential one, on the applicant of raising an innocent explanation. I find that the judge failed to engage with the caselaw and recognise that the generic evidence that the appellant's results were invalid met the evidential burden.

14. Consequently, I find that the judge materially erred in law in her decision at paragraph 6.9. The judge's decision cannot stand.
15. The applicant's case is remitted to Taylor House to be reheard by a judge other than First-tier Tribunal Judge Herlihy.

No anonymity direction is made.

Signed  
Deputy Upper Tribunal Judge Eshun

Date: 20 September 2018