



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/26975/2015

THE IMMIGRATION ACTS

Heard at Birmingham
On 16 May 2018

Decision and Reasons promulgated
On 07 June 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ARSLAN ABDULLAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge Broe promulgated on 20 September 2017 in which the Judge dismissed the appellant's appeal.

Background

2. The appellant is a citizen of Pakistan born on 23 September 1988. The appellant entered the United Kingdom lawfully on 15 May 2011 with leave subsequently extended until 20 June 2014. On 5 June 2014 the appellant made a further application which was refused on 14 July 2015 pursuant to paragraph 322(2) of the Immigration Rules as it was said that an English language test certificate submitted in 2012 was invalid as the relevant test had been taken by a proxy. This is an ETS case. The current application was refused as a result, against which the appellant appealed.
3. The appeal was initially allowed on 1 December 2015 against which the respondent appealed to the Upper Tribunal, successfully. On 2 February 2016 the matter was remitted for a fresh hearing before the First-tier Tribunal and listed for hearing by Judge Broe.

4. Having considered the evidence and submissions the Judge sets out findings of fact from [17] of the decision under challenge. The Judge notes that the key question is whether the respondent was right to refuse the application under paragraph 322(1A) as the findings regarding the appellant's conduct, such that he did not satisfy the requirement of paragraph 276B(ii), flows from that decision.
5. The Judge refers to relevant decided authorities concerning ETS and the evidence available in the case which includes not only the generic material but also a report on Project Facade together with the reports of Professor Peter French and records from ETS. The core findings of the Judge are set out at [22 - 26] in the following terms:

22. In this case the Appellant accepts, rightly, that the initial burden on the Respondent has been discharged and that it is for him to provide a plausible innocent explanation.
23. I note that the Appellant made no effort to challenge the finding made by ETS. His explanation is that by the time he became aware of the issue he already had an IELTS certificate. He told his solicitor but took no further action. Whether or not he had another certificate the ETS finding would continue to affect any applications he might make in the future. I find that his failure to take any action undermines his ability to provide a plausible innocent explanation.
24. The Appellant relies on his ability to speak English which he argues shows that he had no need to use a proxy to take the test at ETS. I accept that he has since then demonstrated an ability to speak English to the required standard and that he gave evidence without the assistance of an interpreter. It does not necessarily follow that his English was of that standard in 2012 and I note that he failed an IELTS test not long before the ETS test took place. In any event whilst an ability to speak English to the required standard may make it less likely that someone would use a proxy to take a test it does not necessarily follow that he would not do so. I note that the Appellant was facing a deadline and the prospect of what would amount to a guaranteed pass would have had some attraction. I have taken into account the Appellant's oral evidence of the circumstances of the test and find this to be general in nature and short on specific detail.
25. On what is before me I find that the Appellant has not provided a plausible innocent explanation to rebut the evidence adduced by the Respondent.
26. Therefore on the totality of the evidence before me, I find that the Appellant has not discharged the burden of proof and the reasons given by the Respondent to justify the refusal. Therefore the Respondent's decision is in accordance with the law and the applicable immigration rules. I see no reason to make an anonymity direction.

6. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal on the 30 October 2017. The operative part of the grant of permission is in the following terms:

The 1st and 2nd grounds are arguable. The May 2012 IELTS shows listening and speaking at 5.5, two months before the contested ETS test, and it is arguable that the finding at [24] about his standard of English in 2012 was based on a mistake of fact, or was not open on the evidence. This was one of a number of reasons, but it is arguable that this was an important aspect that could have altered the outcome, and that it was central to the relevant factors set out at para 18 of *Majumder & Qadir*. It is notable that this Court of Appeal judgment was not included in the Judges self-direction at [18 - 21].

The 3rd ground is obscure without clarification of the nature of cross examination and evidence in chief. The 4th ground refers to a matter likely to be seen as fitting within the factual arena (in these cases are fact sensitive).

7. The respondent opposes the appeal in her Rule 24 response dated 15 November 2017, replying to the operative part of the grant in the following terms:

3. In respect of the contentions in grounds 1&2, it is not the case that the Court of Appeal have said in *Majumder v SSHD* [2016] EWCA Civ 1167 that it is illogical for someone to have cheated on an ETS case when they already speak English. Paragraph 18 of the Court of Appeal judgment merely says that this is an argument that will need to be considered. The Judge in the instant case does consider this point and finds against the appellant, giving adequate and rational reasons, at paragraph 24.

4. Furthermore, in *MA (ETS - TOEIC testing)* [2016] UK UT00450 (IAC) the former President of the UT(IAC), McCloskey J, stated at paragraph 57:

"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, in exhaustively, 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 findings of why the Appellant engaged in deception and to this we add that the issue was not explored during the hearing. We resist any temptation to speculate about this discreet matter."

5. As regards ground 3, the Presenting Officer's hearing minute suggests that questions were indeed asked about the ETS test that he claimed to have taken. No doubt the Judge's record of proceedings will confirm the same.

6. Ground 4 is no more than disagreement, and is in any case an assertion made without reference to any background evidence.

Error of law

8. In *R(on the application of Gazi) v SSHD (ETS-JR)* [2015] UKUT 00327 (Mr Justice McCloskey) the tribunal considered the Respondent's generic evidence in ETS cases. At paragraph 35 the tribunal found that the evidence had the hallmarks of care, thoroughness, underlying expertise and sufficient reliability such as to warrant an assessment that an applicant's TOEIC had been procured by deception. However, the tribunal did not state that the generic evidence was infallible and, indeed, at paragraph 14 the tribunal suggested that all cases involving ETS certificates would be "unavoidably fact sensitive". The tribunal said that "Each litigant will put forward his or her individual disputed assertions, agreed facts, considerations and circumstances", which must be assessed alongside the generic evidence submitted on the respondent's behalf. It follows that the tribunal in *Gazi* did not suggest that the generic evidence would be determinative in all cases. The implication is that where a judge simply rejects the generic evidence in ETS cases that is arguably an error of law, but where, a judge

makes a rounded assessment of all the evidence, as required by Gazi, and concludes that overall the evidence is insufficient to show that deception has been practised then there is no arguable error of law. The Tribunal is entitled to take the appellant's ability to speak English as a factor. The tribunal in Gazi specifically acknowledged at paragraph 40 that this might be relevant.

9. In *SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC)* (McCloskey J) it was held that (i) The Secretary of State's generic evidence, combined with her evidence particular to these two appellants, sufficed to discharge the evidential burden of proving that their TOEIC certificates had been procured by dishonesty; (ii) However, given the multiple frailties from which this generic evidence was considered to suffer and, in the light of the actual evidence adduced by the appellants, the Secretary of State failed (in this case) to discharge the legal burden of proving dishonesty on their part. During the course of the determination Tribunal added that "every case belonging to the ETS/TOEIC stable will invariably be fact sensitive. To this we add that every appeal will be determined on the basis of the evidence adduced by the parties". In *Qadir [2016] EWCA Civ 1167* the Court upheld the Upper Tribunal's consideration of the expert evidence and said that the Upper tribunal was entitled to reach its conclusions on the English language abilities of the Claimants based on the evidence before them.
10. In *Shehzad and Chowdhury [2016] EWCA Civ 615* it was held that a decision under paragraph 322(1A) of the Rules required material justifying a conclusion that the individual under consideration had lied or submitted false documents. The initial evidential burden of furnishing proof of deception was on the Secretary of State. Where the Secretary of State provided prima facie evidence of deception, the burden shifted onto the individual to provide a plausible innocent explanation, and if the individual did so the burden shifted back to the Secretary of State. In effect it was held that a screenshot of the results which stated that that was the position and included the "ETS Lookup Tool" which showed the tests that were categorised as "invalid" sufficed to discharge the initial burden.
11. In *MA (ETS - TOEIC testing) [2016] UKUT 00450* it was held that the question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact sensitive. Per curiam: where the voice data generated by TOEIC testing are those of a person other than the person claiming to have undergone the tests, there is no breach of EU or UK data protection laws.
12. In *R (on the application of Mohibullah) v Secretary of State for the Home Department (TOEIC - ETS - judicial review principles) [2016] UKUT 561 (IAC)* it was held that (i) Where there is a multiplicity of decision making mechanisms, some generating a right of appeal and others not, there is a public law duty on the decision maker to be aware of the options and to take the same into account when opting for a particular mechanism. (ii) the student's knowledge of an allegation by ETS that he has procured his TOEIC certificate by deception will normally suffice to convey the gist of the case against him, thereby rendering the Secretary of State's decision making process (in this respect) procedurally fair.
13. I find no error of law material to the decision to dismiss the appeal made out. The appellant was clearly asked about the tests he claimed to have undertaken during the hearing and had ample opportunity to advance the case before the Judge that

he sought to rely upon as providing a reasonable explanation for the conclusions relating to the use of a proxy.

14. The issue was not whether the appellant had as certain level of ability in the English language, written or spoken, but whether a proxy had been used to take the specific test declared invalid by ETS. The Judge was clearly aware of the appellant's arguments but did not find that they provided a satisfactory explanation for the finding that a proxy had been used to take the test.
15. Disagreement with the outcome or desire for a more favourable finding does not establish arguable legal error per se. The Judge clearly understood the case and has given adequate reasons in support of the findings made. As such the weight to be given to the evidence was a matter for the Judge.
16. The decision to dismiss the appeal for the reasons stated in the determination under challenge is clearly within the range of reasonable findings open to the Judge on the evidence. The appellant fails to establish any arguable basis for the Upper Tribunal interfering in this decision.

Decision

17. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

18. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 6 June 2018