



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/31571/2015

THE IMMIGRATION ACTS

Heard at Field House
On 22 August 2018

Decision & Reasons Promulgated
On 05 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD AZAHAR KHAN
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr S Walker (Senior Home Office Presenting Officer)

For the Respondent: Mr A Maqsood (counsel for Reza Solicitors)

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal of 21 February 2018 to allow the appeal of Md Azahar Khan, a citizen of Pakistan born 5 December 1978, itself brought against the decision of 9 September 2015 to refuse him leave to remain.
2. The immigration history supplied by the Secretary of State shows that Mr Khan was granted leave to enter as a student on 17 November 2007, which

was extended until 30 April 2014, though his last tranche of leave was curtailed, on 3 April 2012, to end on 2 June 2012. On 16 August 2012 he was granted further leave as a student until 30 September 2014, and on 25 September 2014 he made an application for further leave as a student.

3. The September 2014 student application was refused because a TOEIC certificate previously relied on to secure leave to remain following an application of 1 June 2012 had now been invalidated following checks by the issuing authority, Educational Testing Service (“ETS”), who had confirmed to the Secretary of State that significant evidence was available justifying a conclusion that Mr Khan had fraudulently obtained his English language test results by using a proxy tester in his stead.
4. The Secretary of State provided a document entitled *ETS Invalid Test Analysis* recording that Mr Khan’s English language test taken on 18 April 2012 at Synergy Business College was under suspicion, now ETS had treated it as invalid. The results provided by ETS were tied to two English language test certificate numbers, themselves linked to Mr Khan’s full name and date of birth.
5. Mr Khan appealed against that decision, and in a decision of 29 November 2016 Judge Harris for the First-tier Tribunal allowed his appeal on the basis that the Secretary of State had not established that he had been dishonest. The Secretary of State appealed on the basis that inadequate reasoning had been given, and the Upper Tribunal remitted the appeal for re-hearing.
6. The appeal then came before Judge Blake who recorded Mr Khan’s evidence that he arrived at the test centre in April 2012 at round 9:30am, and waited for the test to begin for some 15 to 20 minutes, giving the administrators his birth date and nationality details whilst they took a copy of his passport. The speaking test took some 15 to 20 minutes, and began with listening to a telephone conversation; he could not recall the questions. He recalled being asked questions about pictures including a building shown on a computer screen and about his future study plans. He had previously passed an English language test run by City and Guilds but had been unable to rely on this for his June 2012 application because the results had been delayed.
7. The Judge directed himself to the staged process for considering the general refusal reasons, noting that the burden of proof was initially on the Secretary of State to point to evidence raising some legitimate suspicion of dishonesty. If he did so, an applicant would then have to put forward a sufficiently cogent innocent explanation in order for the Home Office to have to discharge the ultimate legal burden to demonstrate dishonesty, on balance of probabilities. The Judge considered that the initial evidential burden needed to invoke a general refusal reason had been satisfied, and that Mr Khan had then put forward a cogent explanation that meant the ultimate burden reverted to the Secretary of State.

8. The Judge looked at the evidence of Professor French and from Project Façade, observing that the latter source acknowledged that a fraud could have taken place without the knowledge of a test participant such as Mr Khan and that on one occasion a separate room had been made available for the purposes of fraud, and that it was the test centres who had been entrusted with entering candidate details onto a register.
9. The Judge concluded that Mr Khan was an honest and credible witness who had given evidence in a forthright and unhesitant style without any sign of embellishment. He had previously passed City and Guilds tests and his academic achievements indicated he had no need to engage in fraud.
10. Accordingly the Secretary of State had not discharged the burden of proof on him to establish dishonesty. In these circumstances, the decision letter could be seen to be flawed for failing to have recognise the general policy position for students whose Sponsor's licence had been revoked, and thus the immigration decision against which the appeal was brought was not in accordance with the law. The appeal was allowed.
11. The Secretary of State appealed on the grounds that Mr Khan's "innocent explanation ... has not been adequately addressed. It is not clear why the evidence of the [sic] from the appellant which the Tribunal relies upon would preclude the use of a proxy test-taker during the test." There had been undue focus on whether Mr Khan spoke adequate English rather than upon the evidence of fraud.
12. On 5 June 2018 the First-tier Tribunal granted permission to appeal on the basis that the Judge's findings were so brief as to render the grounds of appeal arguable. An ability to speak English did not itself raise an innocent explanation that rebutted an allegation of deception: see *MA Nigeria*.
13. Before me Mr Walker relied on the grounds of appeal, arguing that excessive weight had been placed on the evidence of the Appellant's English language proficiency. Mr Maqsood replied that there had clearly been a rounded and lawful consideration of all relevant issues, including the Appellant's Project Façade evidence, the Appellant's educational history, and his oral evidence generally.

Findings and reasons

Relevant case law

14. The President explains in *Muhandiramge* [2015] UKUT 675 (IAC), that decisions in General Refusal reasons cases involve a "moderately complex exercise" in which "the evidential pendulum swings three times and in three different directions". To quote further from that decision:
 - “(a) First, where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-

existence of a fact in issue: for example, by producing the completed application which is prima facie deceitful in some material fashion.

(b) The spotlight thereby switches to the applicant. If he discharges the burden - again, an evidential one - of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.

(c) Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's prima facie innocent explanation is to be rejected.

A veritable burden of proof boomerang!"

15. The Upper Tribunal cites expert evidence deployed by a litigant seeking to cast doubt upon the validity testing process used by ETS in *Gazi* (IJR) [2015] UKUT 327 (IAC):

"Dr Harrison also examines, with accompanying critique and commentary, the discrete issues of factors affecting performance; the typical performance of human verification; the definition of thresholds; the explicit acknowledgement of human errors; the lack of testing of the performance of analysts; the dubious touchstone of "confidence" (see Mr Millington's witness statement); the dearth of information about the actual analysis methodology; the lack of detail about the experience and knowledge of both the recruited analysts and their supervisors; the indication that any training of the newly recruited analysts was hurried; the shortcomings in Mr Millington's speech recognition averments; and the clear acknowledgement on the part of ETS that false identifications (viz false positive results) have occurred. One passage relating to the human verification process is especially noteworthy:

"... although the analysts only verified matches where they had no doubt about their validity - ie where they were certain about their judgments - this should not be taken as a reliable indicator of the accuracy of those judgments. This approach does not remove the risk of false positive results."

Dr Harrison also highlights that both the automatic system and the human analysts are capable of false positive errors. The Secretary of State's evidence does not disclose either the percentage or the volume of such errors."

16. No findings were made on that evidence in *Gazi*. However in the subsequent appeal of *Qadir* [2016] UKUT 229 (IAC) the Upper Tribunal concluded that the Home Office evidence had significant shortcomings, in particular at [63], a lack of qualifications or expertise of the officials who visited ETS and produced witness statements based on their visit to ETS, during which ETS was the sole arbiter of the information disclosed and assertions made, undue Home Office dependency on the information from ETS when ETS had put forward no witness or indeed any other evidence whatsoever of their own, the lack of any expert evidence backing up the opinion of the staff who visited ETS, and the fact that voice recording files had never been put forward

pertaining to the appellants themselves. Accordingly the Tribunal accepted that the methods used by ETS were not necessarily guaranteed to avoid the occasional false positive whereby an innocent student is wrongly identified as having cheated in their test.

17. In *MA Nigeria* [2016] UKUT 450 (IAC) the Upper Tribunal stated that

“... 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.”
18. As noted by the Tribunal in *Nawaz* [2017] UKUT 288 (IAC), the training by ETS for its staff called to assist in the programme reviewing potentially suspect tests fell well short of what could be expected of an expert language analyst; however they were trained in relevant areas, and this was not an exclusively technical subject area in which only true experts could perform to a reasonably reliable standard. Their lack of note-taking, at least in any form available for subsequent analysis, was one deficiency that would need to be factored into judicial decisions. Professor French’s evidence recognised that false positives could occur in the review process, albeit that in his opinion at a significantly lesser level than might have been inferred from the earlier criticisms of ETS’s processes in *Gazi* and *Qadir*.

Consideration of the issues in this appeal

19. As I indicated at the hearing, I did not accept that the decision of the First-tier Tribunal was flawed by any material error of law.
20. Taking the second ground first, it is correct that *MA Nigeria* warns against excess attention being paid to a migrant’s English language proficiency, given that the Secretary of State has put forward a *prima facie* case of improprieties in the testing process.
21. However, here it seems to me that all relevant considerations were examined. The Tribunal below focussed on other evidence of language proficiency around the date of the test in question, recorded the Appellant’s detailed recollection of events at the testing centre, was aware of his general good character as evinced by his successful studies, and was impressed by his presentation as a witness. It was clearly aware, from its references to the Project Façade report, that Synergy was one of the testing sites where there was a need for particular concern because of the evidence of large-scale

malpractice there. It was also aware of Professor French's evidence, which it specifically referenced.

22. The first of the Secretary of State's two pleaded grounds is barely coherent, though it can be discerned that it amounts to a rationality challenge. The question for the Upper Tribunal is not to assess whether it would have come to the same conclusion itself, but to determine whether the approach below is within the range of reasonable responses to the material before the decision maker. Lord Sumption stated in *Hayes v Willoughby* [2013] UKSC 17 at [14]:

"A test of rationality ... applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."

23. Given that the First-tier Tribunal had regard to the full span of the evidence before it, and was clearly impressed by the Appellant's oral evidence, it is very difficult to uphold a challenge based on rationality. It seemed to me that there was a clear logical connection between the evidence relied upon by the First-tier Tribunal and its reasons for its decision.
24. The First-tier Tribunal's decision is wholly consistent with the *Muhandiramge* approach; it clearly appreciated that both the initial evidential and the ultimate legal burden of proof was on the Secretary of State, and that cogent explanations from Mr Khan might rebut Home Office allegations of malpractice.
25. I accordingly find that the Secretary of State's grounds of appeal are not made out. In the light of that finding, the First-tier tribunal was correct, given its rejection of the allegation of dishonesty, to find that the refusal of further leave was not in accordance with the law because the appropriate policy had not been put into place for a person who was innocent in any involvement of their Sponsor's loss of licence.

Decision:

The Secretary of State's appeal is dismissed.

The Secretary of State's decision of 9 September 2015 was not in accordance with the law and Mr Khan's application remains outstanding for lawful decision.

Signed:

Date: 27 August 2018

Deputy Upper Tribunal Judge Symes