



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/33909/2015

THE IMMIGRATION ACTS

Heard at Field House  
On November 9, 2018

Decision & Reasons Promulgated  
On November 19, 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR SULTHAN MOITHUDDIN SHAIK  
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bhullyan, Solicitor  
For the Respondent: Mr Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of India. The appellant entered the United Kingdom as a Tier 4 (General) student on September 6, 2012 with leave to remain in the United Kingdom until May 1, 2014. The appellant was served with notice of curtailment and on April 2, 2013 he made an application for leave to remain in the same category. In support of that application he submitted an English language certificate resulting from a test he had taken at Eden College International on February 20, 2013. He was granted leave until August 15, 2015.
2. On August 14, 2014 he submitted an application for further leave to remain. At the time he submitted the application he did not have his Confirmation of Admission for Studies (CAS). The respondent refused the application on October 20, 2015 on the

basis that no CAS had been assigned to him and consequently he was not entitled to the appropriate amount of points necessary. The application was also refused under paragraph 322(2) HC 395 on the basis that the English language certificate obtained on February 20, 2013 had been obtained fraudulently.

3. The appellant appealed that decision under section 82 of the Nationality, Immigration and Asylum Act 2002 on November 6, 2015. The grounds argued that steps had been taken to obtain the CAS that he had been unsuccessful in the request for an extension of time had been refused it was argued that he was a victim of circumstances and that the respondent had breached a decision which was unfair.
4. The appeal came before Judge of the First-tier Tribunal Aujla on June 5, 2018 and in a decision promulgated on June 20, 2018 the Judge concluded:
  - (a) The failure by the appellant to submit a mandatory document meant the application had to fail under the Immigration Rules.
  - (b) The Judge further concluded having considered the evidence that the respondent had discharged the evidential burden of proof to demonstrate that the appellant had obtained his English language certificate fraudulently and subsequently found that the appellant had not discharged the evidential burden placed on him if the legal burden was to shift to the respondent and therefore the appeal fell to be dismissed under paragraph 322(2) HC 395.
  - (c) No evidence of family life or private life, apart from his studies, had been submitted and the appeal was dismissed on human rights grounds.
5. The appellant submitted grounds of appeal against this decision on July 3, 2018 arguing the Judge had failed to take into account the fact that the respondent had refused all requests by the appellant to find a new sponsor and the conclusion reached in respect of the English language certificate was flawed.
6. Permission to appeal was granted by Judge of the First-tier Tribunal O'Brien on September 18, 2018 who found it arguable the Judge had failed to appreciate that the legal burden of proof lay with the respondent throughout and the Judge had not addressed whether the respondent discharged the burden in light of both sides evidence. Permission to appeal was granted on all grounds.

### **PRELIMINARY ISSUES**

7. Mr Bhullyan accepted that the Judge's decision in respect of the CAS was the only finding open to him and consequently he did not intend to pursue that issue further.

### **SUBMISSIONS**

8. Mr Bhullyan adopted the grounds of appeal and submitted that the Judge had failed to give reasons for accepting the respondent's evidence and rejecting the appellant's evidence. The Judge had also failed to take into account the effect this decision would have on him.

9. Mr Jarvis submitted the grounds argued today bore no resemblance to the grounds of appeal. He referred to paragraphs 4-9 of the grounds of appeal and submitted that those grounds challenged the finding that the Judge was wrong to find the evidential burden had been challenged and that the generic evidence was not enough but that was not the thrust of Mr Bhullyan's arguments today. He submitted there had been no application to amend the grounds and the Courts had made clear the generic evidence was sufficient to meet the evidential burden placed on the respondent. Regardless of this point the Judge had considered the evidence and made findings open to him.

### FINDINGS

10. The appellant had applied for leave to remain and it is clear, from Mr Bhullyan's concession, that when the appellant submitted that application in respect of his Tier 4 (General) Student application he could not meet the Rules and the respondent quite properly refused his application. That decision was challenged in the grounds of appeal but Mr Bhullyan quite properly conceded that this ground had no merit.
11. This appeal only concerns the decision under paragraph 322(2) HC 395. The respondent made a decision under this provision because he was satisfied the appellant had used a proxy taker. He presented to the First-tier Tribunal the generic evidence of witnesses Rebecca Collings and Peter Millington but also a witness statement from Mona Shah, the expert report of Peter French, the appellant's result, the "look up tool" and Project Façade report for the college concerned.
12. Paragraphs [57] and [58] of SM and Qadir v SSHD (ETS-Evidence-Burden of Proof) [2016] UKUT 000229 (IAC) set out the correct approach to take when considering cases of this nature. The approach was confirmed by the Court of Appeal in SM and Qadir and SSHD [2016] EWCA Civ 1167.
13. Contrary to the grounds of appeal and the permission, the Judge set out the correct procedure in paragraphs 31 and 34. The Judge clearly was aware which party had to prove what and set that out in clear and concise language.
14. Mr Bhullyan has today challenged the Judge's assessment of the evidence when reaching his decision to dismiss the claim.
15. Since the above decisions there has also been helpful guidance on the correct approach given by the Administrative court in R (on the application of Nawaz) v Secretary of State for the Home Department (ETS: review standard/evidential basis) [2017] UKUT 00288 (IAC). Upper Tribunal Judge Freeman made clear that when considering such a case the following should be borne in mind-
- (a) Dr Harrison sets what might be called the gold standard for the kind of independent expert analysis of voice comparison evidence which would ideally be required in a criminal case ... where one or a relatively small number of speakers will be under consideration.
  - (b) Professor French confirms, from the point of view of an at least equally recognized expert, that natural ability, training, even of a fairly basic kind, and

experience all play a valuable part. With the hindsight provided by his evidence, as well as Dr Harrison's, into the system of ASR, together with human verification, operated by ETS, I do not think the respondent can be regarded as having acted unfairly, in this and very many other cases of the same kind, in taking it as the basis for findings of deception. According to Prof French the rate of false positives would be very substantially less than 1%.

- (c) While the lack of visible note-taking means that direct independent checking of results obtained in an individual case is not possible ... applicant(s) ... were offered the chance to get copies of the recordings made, so (t)he(y) could have them analysed... The system as a whole is not unfair, in the context in which it had to be operated.
- (d) Deception in ETS cases is not a question of precedent fact, except in particular circumstances, for example those in Abbas [2017] EWHC 78 (Admin).
- (e) Oral or other evidence of an applicant's English-language skills or attainments is unlikely to have any decisive effect in judicial review proceedings on the fairness of the decision under challenge, for the reasons given in Habib (JR/1260/2016) [20], and those at [21].
- (f) Evidence obtained by use of the Look-up Tool, and subject to the human verification procedure, is an adequate basis for the Secretary of State's deception finding in these cases, in the light of Flynn & another [2008] EWCA Crim 970 [24 - 27], and the evidence of both Dr Harrison and Professor French.

- 16. Mr Bhullyan argues that the Judge failed to give reasons for preferring the evidence of the respondent but I am satisfied this is not the case.
- 17. The Judge summarised his evidence at paragraph 23 of the decision and from paragraph 32 the Judge examined the respondent's evidence. The Judge was aware of the appellant's claim and he had to consider that evidence against the respondent's evidence (see paragraph 11 above) which included a report that the appellant's exam test was found to be invalid as against questionable. The full report about the college was also before the Judge.
- 18. At paragraph [47] of Nawaz the Tribunal stated-

"While the state of the evidence in *Qadir* made it possible for the appellants to satisfy the Tribunal, on their own evidence and those of their expert, that the respondent had not satisfied the legal burden of proving deceit, the evidence which she has put forward since has invariably satisfied both courts and this Tribunal that evidence obtained through the ETS Look-up Tool entitled a reasonable decision-maker to refuse an application made in these circumstances. It is certainly a pity that this evidence was not assembled in the first place; but its effect is very clear."

- 19. The Judge concluded at paragraph 38 that the respondent had satisfied the burden placed on him and in doing so the Judge rejected the appellant's explanation. No detailed explanation was needed because the Judge noted there was nothing to support the appellant's claim apart from his oral evidence which he had considered

before reaching his decision. The Judge did apply the correct burden of proof and reached a decision open to him.

20. The final submission related to the effect this decision would have on the appellant. Again, this was not raised in the grounds of appeal and as I indicated at the hearing the consequences of a finding under paragraph 322(2) HC 395 do not breach article 8 ECHR.

**Notice of Decision**

21. There is no error of law. I uphold the original decision.

Signed

Date 09/11/2018



Deputy Upper Tribunal Judge Alis

**FEE AWARD  
TO THE RESPONDENT**

I do not make a fee award as I have dismissed the appeal.

Signed

Date 09/11/2018



Deputy Upper Tribunal Judge Alis