



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/09710/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 25 January 2019**

**Decision & Reasons Promulgated
On 06 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

**MR AMIT KUMAR BASNET
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ahmed of Counsel

For the Respondent: Mr Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nepal. He was born on 24 June 1987.
2. He appealed against the respondent's decision refusing him leave to remain dated 22 March 2016.
3. The appeal was allowed by Judge O'Garro (the Judge) in a decision promulgated on 15 June 2018. She found the respondent had failed to prove the allegation of fraud and that the case had not been made out against the appellant. Having found that the appellant did not engage in

fraud, and that he therefore met the suitability requirements, the Judge found the respondent's decision was not proportionate.

4. The grounds claim the Judge failed to give adequate reasons for findings on a material matter. The grounds cite the case of **Shehzad [2016] EWCA Civ 615** and claim that properly read, the witness statements the respondent relied upon and the spreadsheet extract showed the appellant's English language test had been invalidated because of evidence of fraud in the test he took.
5. Given the Judge accepted that the evidential burden fell upon the appellant to first offer an innocent explanation that had not been adequately addressed, it is not clear why the evidence from the appellant which the Judge relied upon would preclude the use of a proxy test taker during the test. The appellant had simply described a process which the respondent claimed was not the same as an "innocent explanation" for why ETS found such anomalies as to warrant the invalidation of his test scores. The grounds claim that the Judge erred because the appellant had failed to displace the evidence of the Secretary of State which had been accepted as satisfying the first burden and as such, the Judge's conclusion that the appellant did not use a proxy was in error.
6. In reaching the material finding the Judge relied upon the appellant's English language ability and other English qualifications but the test was not whether the appellant spoke English but whether on the balance of probabilities he had employed deception. The witness statements and the spreadsheet provided the necessary evidence to demonstrate that he did apply deception (see **MA (Nigeria) [2016] UKUT 450** at [57]).
7. Judge Page refused permission to appeal in a decision dated 3 October 2018. He said inter alia:
 - “2. *The grounds of appeal complain that the judge did not accept the respondent's case that the appellant had used a proxy test taker to obtain his TOEIC certificate and failed to give adequate reasons for accepting the appellant's evidence that he had not used deception in obtaining his certificate. Neither ground is arguable in my view. The judge was not bound to accept the respondent's evidence as conclusive that the appellant had used deception. It is apparent that the judge applied all the case law on the point. After weighing the appellant's evidence and the respondent's evidence the judge gave adequate reasons for believing the appellant's evidence.*”
8. The grounds were resubmitted to the Upper Tribunal arguing that Judge Page had failed to fully engage with the grounds.
9. Upper Tribunal Judge Martin granted permission on 11 December 2018. She said:

“It is arguable that the judge erred in finding that the appellant had not used a proxy in an ETS TOEIC test purely on the basis of his ability in the English language.”

10. There was no Rule 24 response.

Submissions on Error of Law

11. Mr Lindsay relied upon the grounds of appeal. He said that the Judge’s finding at [28] was insufficient and drew my attention to **MA (ETS - TOEIC testing) [2016] UKUT 450 (IAC)**. Mr Lindsay submitted that the Judge had paid merely lip service to the relevant case law she set out, **Gazi (ETS - judicial review) [2015] UKUT, SM and Qadir (ETS - evidence - burden of proof) [2016] UKUT 00229, Sheehan and Chowdhury [2016] EWCA Civ and MA**. There was prima facie evidence of fraud, so the Judge was obliged to give proper reasons.
12. Mr Ahmed submitted that the Judge was not bound to accept the respondent’s evidence as conclusive that the appellant had used deception. She had applied all of the case law, properly weighed the evidence and gave adequate reasons for believing the appellant.
13. At the hearing before the Judge, the respondent was satisfied that the appellant met all of the eligibility requirements of Appendix FM. The only issue was the claimed deception on the part of the appellant who submitted a TOEIC certificate from Educational Testing Service (ETS) and there was significant evidence to conclude the appellant’s certificate was fraudulently obtained by the use of a proxy taker. As a result, ETS cancelled his scores from the test that was taken on 19 March 2013. That being the case, the respondent said that on the basis of the information provided by ETS, the certificate was fraudulently obtained and that the appellant used deception in his application made on 12 April 2013.
14. Save for what I have said above, ETS failed to provide evidence as to the reason the certificate was invalidated. There was no audio recording of the appellant or the alleged proxy and the score results for 19 March 2013 were incomplete as those for the English speaking tests were absent. All that were available were the listening and reading tests. The respondent produced an English language speaking certificate dated 16 April 2013 but that was a later test taken by the appellant such that the wrong certificate had been submitted for the Judge’s consideration.
15. The Judge nevertheless considered the generic evidence in the statement of Rebecca Collings which said that ETS was “certain” that there was evidence of proxy taking. Accordingly, the Judge found at [24] that the Secretary of State had discharged the evidential burden to raise an issue that the appellant was guilty of deception. The Judge then went on to consider the appellant’s evidence in terms of any possible innocent explanation. The Judge set out the factors to take into account at [26]. Mr Lindsay said that the Judge merely paid lip service to those factors,

however, at [27]-[31] the Judge gave all of the reasons why she found that the respondent had not made out the case of deception against the appellant. The Judge considered the following:

- (a) The appellant's academic record. He came here in 2009 and studied until 2013. He produced provisional notification results of ACCA examinations he took in 2010. He achieved a pass in business accounting, financial accounting and management accounting. He produced his certificates for the award he received in January 2013 for a level 7 BTEC diploma as well as the certificate for the Master of Business administration course which he completed in April 2014. The appellant's course of studies included level 7 courses which the Judge found would have required a high level of English language skills.
- (b) Considering the issues in (a) above, the Judge found that there appeared to be no reason for the appellant to have needed to have used deception or to employ a proxy test taker.
- (c) The Judge said she had concentrated on the appellant's level of English prior to 2013 because she said she found it necessary to consider the appellant's proficiency in English prior to 19 March 2013 which was the relevant date.
- (d) The Judge commented that she could not overlook the fact that he gave evidence before her in English and had no difficulty in understanding the questions asked and responding appropriately in English. Nevertheless, the Judge took into account that it was five years since the ETS test and she would expect that he would speak better English today than in 2013. Nevertheless, in taking that into account, she reflected back upon the appellant having started successfully a level 7 course of study in 2010 which would have required a high level of English language skills.
- (e) The Judge took into account the appellant's oral evidence. She said that she had seen the appellant, heard what he had to say and that she believed him. That was a matter for the Judge to consider and to decide. Based upon the evidence overall, the appellant found the respondent had not discharged the burden of proof in order to satisfy the Judge that the appellant had used deception in a previous application. That was a decision which the Judge was entitled to come to on the evidence before her.

16. The Judge's decision contains no error of law and shall stand.

No anonymity direction is made.

Signed

Date: 4 March 2019

Deputy Upper Tribunal Judge Peart