



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

Appeal Number: HU/09890/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 21 November 2018**

**Decision &  
Promulgated  
On 08 January 2019**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**and**

**MR JAHANGIR ALAM  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**Representation:**

For the Appellant: Mr S Karim, Counsel.

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

**DECISION AND REASONS**

1. The appellant is a citizen of Bangladesh who appealed against a decision of the Respondent refusing him leave to remain in the United Kingdom. The principle issue in the appeal was the Respondent's conclusion that the Appellant participated in a fraudulent English language test in 2012.
2. The appeal came before Judge of the First-Tier Tribunal Goodman, who, in a decision promulgated on 9 July 2018, dismissed it.

3. The Appellant sought permission to appeal. This was granted by Judge of the First-tier Tribunal Birrell on 1 October 2018. Her reasons for so granting were: -
  - “1. The Appellant seeks permission to appeal, (in time), against a Decision of the First-tier Tribunal (Judge Goodman) who, in a Decision and Reasons promulgated on 4 September 2018 dismissed an appeal against the Secretary of State’s decision to refuse his human rights claim.
  2. The grounds assert that the Judge erred in that she erred in her assessment of the evidence by reference to SM and Qadir v Secretary of State for the Home Department [2016] EWCA Civ 1167 in that there was a three-stage test; failed to give adequate reasons for rejecting the Appellant’s explanation and failed to take into account all matters relevant to that decision; failed to engage with the significance of the test scores being inconclusive as opposed to invalid.
  3. In what is otherwise a detailed decision the Judge makes no reference to the three stages of the decision-making process in respect of the allegation of dishonesty or the significance of the test results being inconclusive. The grounds disclose arguable error of law.”
4. Thus, the appeal came before me today.
5. Mr Karim submitted that the Judge materially erred in failing to apply the 3-stage test as outlined in **SM and Qadir v SSHD (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC)**. He argued that the Judge had failed to have regard to the fact that the evidential threshold on the Appellant was a low one and not the usual balance of probabilities. Albeit the Judge has set out the burden and standard of proof at paragraph 27 of her decision she had not set out the correct one. Further the Judge had failed to give properly reasoned findings with regards to the Appellant’s evidence in relation to the test and his innocent explanation which can be gleaned from his first witness statement. The fact that the Appellant has not displaced the allegation “on balance” demonstrates that the Judge has erred in applying the correct standard. Thirdly the Judge’s decision refers to test and scores from both test centres being “inconclusive” as opposed to clearly “invalid” accordingly the Judge has failed to have regard to the fact that in those circumstances the Respondent could not discharge the evidential burden and would in any event have significant difficulties in discharging the legal burden. Beyond that the Judge has failed to make findings as to the factors identified in **SM and Qadir** and having adopted an erroneous approach to the ETS issue has allowed it to infect the article 8 assessment which is inadequate.
6. Mr Lindsay contended that the Judge had not erred as asserted. The 3-stage test is not always applicable where dishonesty prevails and the Judge has rejected the innocent explanation, as here, put forward by the Appellant. At paragraph 27 of the decision the Judge correctly reminds herself of the burden and standard of proof and goes on at paragraph 28 to set out the guidance provided by **SM and Qadir**. None of the grounds disclose an error of law. Finally, he relied upon the rule 24 response dated 6 November 2018.

7. The nub of Mr Karim's submissions is the suggestion that the Judge has failed to apply the 3-stage test drawn from **SM and Qadir**. What the Upper Tribunal said was that the correct approach was to consider first whether the Secretary of State's evidence – at that stage consisting essentially of the evidence of Ms Collings and Mr Millington together with the look-up tool, established a *prima facie* case that the Appellant had cheated; and then, if it did, to decide whether that case was sufficiently answered by his or her evidence. Albeit criticised the evidence of Ms Collings and Mr Millington was found to be sufficient to transfer the evidential burden to the Appellants to show that they had not cheated. It goes without saying that every TOEIC case is fact-sensitive and that each case turns on its own facts and that success or failure depends on what evidence the Respondent produces.
8. At paragraph 4 of her decision the Judge sets out the Respondent's evidence which was contained within her supplementary bundle including witness statements from his officials including Reema Bassi, Rebecca Collings and Peter Millington and an expert report of April 2016 from Professor French together with two statements of facts about criminal investigations of Elizabeth College and Colwell College. The Judge has then gone on from paragraph 6 onward in her decision to make findings of fact before setting out relevant law at paragraph 22 onward of her decision. There she sets out the burden of proof, the standard of proof and the relevant guidance from **SM and Qadir**. It is plain that she had this in mind when dealing with this appeal. The Judge finds that dishonesty has been practiced by the Appellant and, contrary to the grounds, has not failed to have regard to the fact that the evidential threshold on the Appellant was a low one. She has recognised the relevant shifting burden and standard of proof. She has done so taking into account the totality of the evidence including the Appellant's own witness statement. She was entitled, knowing that the Appellant's test result was deemed "questionable" as opposed to "invalid" to set this into the context of the totality of the evidence that was before her. The evidential burden having then shifted, the Appellant failed to provide an "innocent explanation". It was open to the Judge to make that finding. She was entitled on the evidence to find that the Respondent had then established on the balance of probabilities that the Appellant's *prima facie* innocent explanation should be rejected.
9. Contrary to the grounds there is no erroneous approach by the Judge to the ETS issue and this has not 'infected' her article 8 assessment. Whilst that assessment at paragraphs 37- 39 of the Judge's decision may be brief it is none the less a sufficient balancing exercise and any complaint made by the Appellant in relation to it is no more than a disagreement.

### **Notice of Decision**

The decision of the First-tier Tribunal discloses no material error of law and the appeal of the Appellant is dismissed and the decision of the First-tier Tribunal Judge is maintained.

No anonymity direction is made.

Signed  
2018

Date 17 December

Deputy Upper Tribunal Judge Appleyard