



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/00064/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 20<sup>th</sup> December 2018

Decision & Reasons Promulgated  
On 11<sup>th</sup> February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR NASIR AHMED  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Z Khan (Solicitor)

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

**DECISION AND REASONS**

**Introduction**

1. The Appellant born on 1<sup>st</sup> September 1988 is a citizen of Bangladesh. The Appellant was represented by Mr Khan. The Respondent was represented by Mr Wilding a Senior Presenting Officer.

## **Substantive Issues under Appeal**

2. The Appellant had arrived in the United Kingdom on a student visa from 3<sup>rd</sup> May 2011. He had applied for an extension which was dismissed by the Respondent in 2013 but remitted to the Respondent for reconsideration. The Respondent then refused that application on a different basis on 25<sup>th</sup> October 2016. The basis of that decision was that an English language certificate submitted by the Appellant in his application in 2012 had been obtained by deception and his appeal had been refused under paragraph 322 of the Immigration Rules. The Appellant had appealed that decision and his appeal was heard by First-tier Tribunal Judge Oliver on 23<sup>rd</sup> November 2017. The judge had allowed the Appellant's appeal under the Immigration Rules.
3. The Respondent had applied to appeal that decision on 15<sup>th</sup> December 2017. Permission to appeal was granted by First-tier Tribunal Judge Pickup on 27<sup>th</sup> April 2018 on the basis it was arguable the judge had misapplied the burden and standard of proof and failed to provide cogent reasons to accept the Appellant's innocent explanation said. It is also arguable that relying upon the Appellant's language ability was questionable in the light of **MA (Nigeria) [2016] UKUT 450**. Directions were issued for the matter to be decided firstly as to whether an error of law had been made by the First-tier Tribunal in the case. The matter came before me in accordance with those directions on 10<sup>th</sup> July 2018 at Field House.
4. The following submissions were made on behalf of both the Respondent and the Appellant. I found that a material error of law had been made by the judge in this case for the reasons given in the decision made following that hearing. It was decided that the decision of the First-tier Tribunal needed to be set aside and made afresh in the Upper Tribunal. The matter came before me in accordance with that history.

## **The Proceedings - Introduction**

5. I had before me the original bundle on behalf of the Respondent together with a supplementary bundle containing those documents listed at Items 1 to 7 on the index sheet to the bundle. I further had before me the Appellant's bundle containing those documents listed at pages 1 to 33 on the bundle
  - **Qadir [2016] EWCA Civ 1167**;
  - **Kaur [2013] UKUT 00344**;
  - **MA [2016] UKUT 00450**;
  - those documents contained within the appeal bundle.

## **The Proceedings - Evidence**

6. The Appellant was called to give evidence. He identified his name on file. He confirmed his date of birth as being 1<sup>st</sup> September 1988 and his address as that being on file. He referred to his witness statement dated 21<sup>st</sup> November 2017 contained

within the Appellant's bundle and confirmed that as being true and correct and adopted that as his examination-in-chief. He said that he did not know why an allegation had been made that he had taken the test by proxy as he had taken the test himself. He confirmed that he had booked the test himself and spoke to the administration office for booking of that test and following that booking had a receipt from the centre. He then attended the centre. He said that he could speak good English and had taken an English test in his own country in 2010 and had taken a test prior to coming to the UK. When he arrived in the UK he had completed a course at level 5 in respect of a diploma in business management and that had been completed in 2012 prior to taking the ETS test in question. He said that was done at the London Guild Hall.

7. In cross-examination he said that he had paid fees for the college but did not have the receipt nor did he have any evidence of enrolling on the test. Following the Home Office refusal he had not contacted Westlink College to get evidence that he had attended for the test. In respect of taking the test he said that he had spoken to a lady on the phone and she had asked if he would pay £188 cash for the course. Since refusal in 2016 he had not contacted Westlink College and he now believed the college was closed. He contacted ETS and they had told him they did not keep details for more than two years. They had told him they did not have any records.
8. I heard submissions on behalf of the Respondent who relied upon the refusal letter. In respect of the ETS test it was said that the evidential burden had been met. It was submitted there were three significant documents namely Operation Façade Report showing the high percentage of invalid testing namely 75% test work found to be invalid. Secondly I was referred to the ETS printout that demonstrated his tests were found to be invalid. Finally the evidence of tests taken on the day that the Appellant did his tests were contained in Annex AA showing that 63% of tests taken were invalid and the rest were questionable. In respect of any innocent explanation from the Appellant it was submitted there was nothing in his evidence that assisted him in that respect. It was further said it was not surprising that he might have known his way to the college as that would not be inconsistent with a test taken by proxy. It was submitted there was no documentary evidence in support of those matters asserted by the Appellant.
9. It was further submitted that the Appellant clearly had made a change of college such matter being referred to earlier.

### **Submissions on Behalf of the Appellant**

10. It was accepted by Mr Khan that the Respondent had passed the evidential burden of proof but it was submitted had not passed the legal burden. It was noted that all colleges involved in the testing were private colleges and Operation Façade had not made a comparison with a public college. It was submitted that not all invalid tests were necessarily done by proxy takers. It was said that there could have been a number of reasons for the invalidation of a result. It was submitted the Appellant had been granted entry clearance in 2010 as a result of English test taken and gained

as to the same standard as the test taken in 2012. It was further said that the Appellant had then studied in the English medium for a year before taking the ETS test. It was said that the Appellant was of good character and never used an interpreter in hearings before the IAC.

11. In respect of the change of colleges Judge Elek had found that the Appellant had continued to study at Bedford College and therefore the Appellant had not breached his condition of leave. It was submitted that that had been accepted by the Presenting Officer at the hearing. It was further said that Home Office policy allowed him to take a supplementary course at a different college and it was said that the Appellant had not used college A as a vehicle. The letter from Bedford College within the Appellant's bundle showed that the Appellant had not abandoned that course. It was further noted at page 30 that the letter from Guildhall College noted that his course of study had started seven months after the start of the course at Bedford College and therefore the Appellant was not in breach of the conditions of his visa.
12. At the conclusion of the hearing I reserved my decision to consider the documents and evidence submitted. I now provide that decision with my reasons.

### **Decision and Reasons**

13. In the case such as this where the Respondent essentially is alleging dishonesty or deception on the part of the Appellant the initial burden of proof lies on the Respondent to demonstrate that they have evidential proof to support their assertions. If they are able to pass that evidential burden it is then a matter for the Appellant to provide an innocent explanation if he can as to the circumstances and finally therefore an examination of totality of the evidence to consider whether the Respondent fulfils the legal burden of proving their assertion that the Appellant has acted dishonestly.
14. The Appellant had arrived in the United Kingdom on 3<sup>rd</sup> May 2011 on a Tier 4 (General) Student visa valid until 30<sup>th</sup> April 2012 to study a diploma in administrative management at Bedfordshire College. Prior to the expiry of his leave he made a further application for leave to remain as a Tier 4 (General) Student to study a graduate diploma in business management and marketing at Swarthmore College. The Appellant as he accepts at paragraph 14 of his witness statement was aware that prior to making his application for further leave to remain and prior to the expiry of his current leave to remain in April 2012 he would have to provide proof of knowledge of English by undertaking an English language test approved by the Home Office as being part of his application for further leave to remain. It is in those circumstances that the Appellant took a language test at Westlink College knowing that passing an English language test at the appropriate level was an essential part of the application he intended to make for further leave to remain in the United Kingdom. It is accepted evidence that the Appellant took one test on 20<sup>th</sup> March 2012 which consisted of the speaking and writing test. A second test which

comprised the listening and reading components at the TOEIC test were taken at the same centre on 26<sup>th</sup> March 2012.

15. These cases have routinely come before the Tribunal over some years. In the earlier years the Respondent's generic evidence was invariably inadequate to allow the Respondent to pass the legal burden of proof and dubious as to whether it allowed them to pass the evidential burden of proof. Over time the evidence provided by the Respondent strengthened and in Shehzad and Choudhury [2016] EWCA Civ 615 the court held that the general evidence relied upon by the Respondent did pass the evidential burden of proof.
16. Mr Khan on behalf of the Appellant fairly conceded that the Respondent's evidence as contained essentially within the supplementary bundle did allow the Respondent to pass the evidential burden of proof although he added the caveat that colleges tested were private colleges and Operation Façade tested comparison with public colleges. I do not find that caveat of any real assistance to the Appellant. The fact that public colleges may well have emerged far better than private colleges in a comparison of potential dubious test results does not assist in the validation of tests taken either at private colleges or more specifically an individual college relevant to the case before me namely Westlink College.
17. The evidence provided by the Respondent demonstrates that between 18<sup>th</sup> October 2011 and 18<sup>th</sup> October 2012. Westlink College undertook 915 TOEIC tests. ETS identified 72% of those tests as being invalid and 0% were not withdrawn. The balance of 28% tests were found to be questionable. Further on 15<sup>th</sup> May 2012 an ETS audit was undertaken at Westlink College when a test was taking place. There are the dramatic findings of that visit as recorded in the Operation Façade statement. The findings of the spot check on 15<sup>th</sup> May 2012 do not allow or suggest an inference that circumstances on that day were necessarily different to the circumstances on any day at least within the period that produced a high level of invalid and questionable tests. The Appellant took his tests within that period of time.
18. It is accepted and I find the Respondent has discharged the evidential burden in this case. I have therefore looked at the explanation provided by the Appellant and his circumstances generally.
19. The Appellant had arrived in the UK on 3<sup>rd</sup> May 2011 with a twelve month visa only, to study as a student. He was fully aware that to remain as a student in the UK he needed, as part of his application as such, to prove he could pass English to the required standard. A letter from Bedfordshire College dated 20<sup>th</sup> May 2011 indicated the Appellant was enrolled on a full-time diploma in business management that commenced on 11<sup>th</sup> March 2011 and continued until 23<sup>rd</sup> February 2012. A further letter dated 8<sup>th</sup> June 2011 confirmed the Appellant commenced the course in March 2011 and was due to complete it in February 2012. On the face of it, if the Appellant only arrived in the UK in May 2011 which appears to be agreed evidence (Appellant's witness statement paragraph 4) the Appellant could not have commenced the course in March 2011 having only arrived in the UK two months

later on what was already a short course. A letter from Bedfordshire College dated 25<sup>th</sup> March 2012 stated that although the Appellant's attendance was satisfactory he did not "pass any exam attempt at college". That is not fully clear but certainly it is clear he did not gain any qualifications and questionable whether he actually attended to take any exam. Contemporaneous with his studies at Bedfordshire College the Appellant enrolled at London Guildhall College on 5<sup>th</sup> September 2011 to study a level 5 diploma in business management and in February 2012 was accredited with all requirements leading to an award at that level. It is said his attendance record is 82%. It does not give an indication as to whether this was a full-time or part-time course but perhaps the inference would be that for such a short course it was likely to be a full-time one. The letters from Bedfordshire College do not provide any clue as to the attendance rate of the Appellant on that course. I have already noted what appears to be an anomaly in that college claiming the Appellant commenced in March 2011 when in reality he only arrived in the UK in May 2011. However the letter was specific in stating that the Appellant was enrolled on a full-time basis.

20. I find it unlikely that as a full-time student on an administrative management programme lasting only eleven months the Appellant would practically have been able to undertake another course of study of any magnitude. That is perhaps exacerbated by the fact that the Appellant on the face of it missed the first six weeks of the Bedfordshire College course, did not pass exams and potentially did not even sit those exams. In like manner if a level 5 diploma in business management awarded by Guildhall College has any worth then for a course lasting only six months (as far as the Appellant was concerned) it is unlikely to be so part-time as to allow the Appellant to have studied that course as well as the full-time course at Bedfordshire College. His attendance at Bedfordshire College was described as satisfactory which does not particularly assist in terms of deciding upon his attendance rates. I find it highly unlikely the Appellant operated between two full-time courses. I find that on available evidence the fact that he attended Guildhall for 82% of the time required and passed exams whilst contrasted with his Bedfordshire result indicates that however onerous or not the Guildhall course may have been that was his focal point to the exclusion of any studies at Bedfordshire College and accordingly his studies at Guildhall could not be described simply as either secondary or supplementary.
21. I have considered that aspect of the Appellant's academic history not only in respect of the Respondent's assertion of a breach of visa conditions but also in terms of the Appellant's behaviour and evidence generally when examining any innocent explanation he provides following the Respondent's discharge of the evidential burden of proof in respect of the ETS matter.
22. I have also carefully considered the Appellant's written and oral evidence in respect of his attendance at the test centre. It follows that his attendance at a test centre would not preclude any proxy taker nor would it necessarily lead to a conclusion of a lack of dishonesty.

23. The Appellant can produce no documentary evidence or other evidence in support of his assertions to have attended and genuinely taken the test or his alleged attempts to obtain information from ETS. I accept that time has passed and gathering some evidence may not be easy, however the Appellant has been aware of the Respondent's assertions now for some time. I have carefully considered the Appellant's written evidence regarding the manner in which tests were taken. I accept he has provided detail as to the nature of those tests. However that does not preclude the use of a proxy test taker at the centre nor does it exclude the fact that the Appellant may merely be providing evidence generally known or available in terms of the methodology of test taking.
24. I have taken into account the fact that the Appellant had taken an English language test in 2010 that has not been challenged and accordingly he may at an earlier stage have demonstrated a proficiency in the language. However case law is clear that the fact that someone may demonstrate a proficiency in the English language does not itself preclude the fact that the person may have cheated in a test for any number of reasons. This was a matter that was raised in the case of Qadir. It is also something referred to at paragraph 57 of the case of MA where a number of reasons were provided as to why an individual may resort to deception.
25. I have looked at the Appellant's evidence and that which he did contemporaneously in that period of time namely the latter half of 2011 and the first half of 2012. I am satisfied that for one reason or another the Appellant struggled with or was unable to cope with the course of study at Bedfordshire College and decided to switch to a different course at a different college which, by inference I presume to have been easier for the Appellant to deal with than the one at Bedfordshire College. I do not find the switch to London Guildhall to have simply been a supplementary course but was clearly the main focus of the Appellant's attention. He did not have permission to attend at that college nor did he make any effort to notify the Home Office of that change and accordingly was operating within breach of his student visa. I also find in terms of his evidence and behaviour generally that remaining in the UK on a student visa was potentially of greater importance to the Appellant than any specific course of study being undertaken. It is clear that he wanted to move to a different college for a different course and required as part of his application an English language test and required such test at relatively short notice. His evidence indicates that when he attended at Westlink College he was anxious to be able to take a test and obtain a result within a short timeframe in order to complete his application prior to the expiry of his current visa. Whilst the Appellant had a test certificate dating to 2010, which has not been challenged, if that certificate alone had been sufficient for the Appellant's purposes then there would have been no need for him to attend a further test at a language centre and therefore whatever ability in language the Appellant may have had it was the necessity to take and pass a test in a reasonably short timeframe that was, in my view uppermost in the Appellant's mind. The statistics surrounding the college that he attended, at that period, are stark and dramatic. As I have indicated the spot check done on 15<sup>th</sup> May 2012 did not preclude people being in attendance at the college and therefore the fact that the Appellant has and is able to describe the tests that were undertaken does not in my view on its own

provide an innocent explanation. I have already commented on the lack of documentary evidence to support that which is being claimed by the Appellant. I also refer to his general behaviour at this time with regard to colleges. I do not find in all of those circumstances that the Appellant has provided an innocent explanation. I find when examining all of the evidence that the Respondent has discharged the legal burden in demonstrating the Appellant acted with deception in respect of the ETS test. I further find for the reasons provided above that the evidence points on balance the Appellant essentially studying at a college and on a course which he had not gained entry clearance and without having notified the Home Office and therefore was in breach of his visa conditions.

**Notice of Decision**

26. I dismiss this appeal.

No anonymity direction is made.

Signed 

Date 3/2/19

Deputy Upper Tribunal Judge Lever

**TO THE RESPONDENT**  
**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed 

Date 3/2/19

Deputy Upper Tribunal Judge Lever