



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

Appeal Number: IA/02305/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 19 July 2019**

**Decision & Reasons Promulgated
On 25 July 2019**

Before

**DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL**

Between

**MR IMRAN ALI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs, Counsel, instructed by Thamina Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant is a citizen of Pakistan. In a decision signed on 28 May 2019, I set aside the decision of Judge Paul of the First-tier Tribunal (FtT) sent on 5 March 2019 dismissing the appellant's appeal against the decision made by the respondent on 20 June 2016 refusing his application for leave to remain as a Tier 4 (General) Student. The appellant's appeal had earlier been allowed by Judge Sweet on 15 March 2018, but that decision was set aside for material error of law. The respondent had applied paragraph 322(1A) against the appellant on the basis of his belief that the appellant had used deception in taking an ETS test on 11 July 2012. The respondent

stated in the refusal decision that “ETS have declared your test [taken at the Seven Oaks College) to be “invalid” due to the aforementioned presence of a proxy tester who sat the test in your place, and the scores have therefore been cancelled by ETS”.

2. At para 7 of my decision I stated:

“Having found a material error of law, I turn to consider what procedure should be followed as regards re-making of the decision. Mr Singer submitted that the case should be remitted again to the FtT as on both occasions the central issue was one of credibility and so the appellant had still not had a proper assessment made of his credibility. Ms Everett voiced a more nuanced view. In the event, I have decided the case should be retained in the Upper Tribunal. It would not be in the interests of justice for it to be heard in the FtT for the third time. Given that I have rejected the appellant’s contention that the judge was wrong to consider that the respondent had discharged the initial evidential burden, the scope of the next hearing can be limited to assessment of whether the appellant has provided (or can provide) an innocent explanation for what transpired in 2012 as regards his ETS tests. It is likely that the parties’ submissions will cover some of the same ground as previously: they will not need to start from scratch.”

3. At the outset both parties confirmed that their presentations of the case would be confined to whether the appellant had provided or could provide an innocent explanation for the circumstances of the TOEIC/ETS tests he took in May, June and July 2012. I heard evidence from the appellant. Before summarising the appellant’s evidence, it is useful to note certain accepted aspects of the tests the appellant took in May, June and July 2012.

4. On 11th May 2012 the appellant had successfully taken the Listening and Reading test. When he took the taken the 19 June 2012 test on Speaking and Writing, the detail of his speaking result gave him a *score of 114 which put him in the level 6 score range. (The relevant explanatory note relating to level 6 states that ‘typically, test takers of level 6 are able to create a relevant response when asked to express and opinion or respond to a complicated request. However, at least part of the time, the reasons for, or explanations of, the opinion are unclear to a listener. This may be because of the following: unclear pronunciation or inappropriate intonation or stress when the speaker must create language; mistakes in grammar; a limited range of vocabulary. Most of the time, test takers of level 6 can answer questions and give basic information. However, sometimes their responses are difficult to understand or interpret. When reading aloud, test takers at level 6 are intelligible’).*

5. On 11 July the score for the same test was 190, which put him at level 8. (The relevant explanatory note for level 8 states that typically: *‘[t]est takers at level 8 can create connected, sustained discourse and appropriate to the level to the typical workplace. When they express opinions or respond to complicated requests, their speech is highly intelligible. Their use of basic and complex grammar is good, and their*

use of vocabulary is accurate and precise. Test takers of level 8 can also use spoken language to answer questions and give basic information. Their pronunciation and intonation and stress are at all times highly intelligible’.)

6. In his oral testimony before Judge Paul, the appellant was recorded as saying, inter alia, that in relation to the test on 19 June he was reaching the climax of his MBA course and had one final exam. His mind was distracted and he was under acute pressure at the time, so he considered this may have impacted upon his speaking score on 19 June 2012.
7. In an ‘appeal statement’ dated 2 July 2019, which was very similar in contents to his earlier witness statement of 23 October 2017, the appellant said that on 11 May 2012 he had undertaken a test in Listening and Reading test in which he was successful. Then on 19 June 2012 he had undertaken a subsequent test on Speaking and Writing. He had been informed that he had passed the Listening and Reading test within about three weeks after 11 May. He learnt that he had failed the Speaking and Writing test two weeks after 19 June. He then booked to do the Speaking test on 11 July 2012.
8. Having affirmed the truth of his witness statement and appeal statement, the appellant said in cross-examination that he wished to clarify that he had in fact taken his last exam for his MBA in April 2012. When he began preparing for his TOEIC/ETS tests he had to prepare for the Listening and Reading test and the Speaking and Writing and because of his MBA exams he had not been able to prepare fully. He had been confident he would pass all four components. However, after he learnt he had failed the Speaking and Writing test taken on 19 June he did a lot of practice online, doing sample papers and doing speaking and reading modules. It had been quite a shock to him that he had failed the Speaking and Writing test the first time.
9. I then heard submissions from Ms Everett and Mr Biggs. Ms Everett said the appellant’s explanations for his failure when he took the Speaking and Writing test on 19 June 2012 had differed, he saying to Judge Paul it was because he was under pressure because he was still doing his MBA exams, he now saying his last MBA exam was in April. That went against the credibility of his explanation. Mr Biggs submitted first of all that the appellant’s explanation had to be assessed against the backdrop of the refusal letter which was unclear regarding whether both the tests he had taken were classed as invalid or one. If it was both, that was very odd as he had failed it. Secondly Mr Biggs submitted that it was relevant in the appellant’s case that the voice recordings relating to the appellant’s case had not been produced. Principally, submitted Mr Biggs, the appellant’s oral testimony at the hearing before me had to be given considerable weight. The appellant was very nervous and it was only by dint of follow up questions that he was able to provide a proper explanation. His first test in Listening and Reading had come very shortly after his last MBA

exam. Then he had approximately 6 weeks until his first attempt at the Listening and Reading test. He had obviously been overconfident based on his ability to pass exams in English in Pakistan and then for his MBA degree in the UK. Also relevant was that he was of previous good character and had no adverse immigration history and had been a student who had made suitable academic progress.

10. In deciding this case I must apply the principles and findings set out in a number of leading cases, including **SM and Qadir** [2016] EWCA Cave 1167 and its subject, **SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof)** [2016] UKUT 229 (IAC). Although finding that the respondent had discharged the initial evidential burden, the Tribunal had serious reservations about the strength and quality of the respondent's evidence. At para 69 the Tribunal then addressed the legal burden:

"69. We turn thus to address the legal burden. We accept Mr Dunlop's submission that in considering an allegation of dishonesty in this context the relevant factors to be weighed include (inexhaustively, we would add) what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated. Mr Dunlop also highlighted the importance of three further considerations, namely how the Appellants performed under cross examination, whether the Tribunal's assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic achievements are such that it was unnecessary or illogical for them to have cheated."

Later, in **MA (ETS-TOEIC testing)** [2016] UKUT 00450 (IC), the Tribunal also noted that there may be many reasons why a person with some proficiency in English might resort to using a proxy to take an English language test (para 57).

11. In assessing the appellant's evidence I note that at both the hearing before Judge Sweet and before Judge Paul the appellant was able to give a detailed account of why he had chosen the test centre, his journey to the test centre and the constituent elements of the actual tests he took in May, June and July 2012. No aspects of his description have been challenged by Ms Everett. I also take into account that he had already obtained an access certificate in accounting and management awarded by London College of Accountancy in September 2010 and that he had obtained an MBA at Anglia Ruskin University in September 2012. He had also obtained an MSc from a college in Pakistan whose medium of instruction was English.
12. I have taken account of the ETS findings, which were that both the tests taken by the appellant in June and July 2012 were invalid. The appellant has not adduced any evidence from the test centre itself in terms of the voice recording, although it is not disputed by Ms Everett that the appellant did attempt to contact the test centre at college when he learnt of the respondent's decision. He had said that he had made numerous calls and then when he visited was astonished to find it no longer existed

and nobody at the building was able to provide any forwarding address. It counts against the appellant that he took no steps to obtain the voice recordings, but, like the Tribunal in **SM and Qadir** I must also take account of the shortcomings and frailties in the respondent's generic evidence.

13. Having considered the evidence as a whole, I agree with Mr Biggs that the appellant's evidence before me should be accorded considerable significance. I consider his evidence before me had two dimensions. First, it is clear that even now he is not fluent in English and not much has changed since Judge Paul assessed that his "language speaking skills [demonstrated that] he was a poor communicator having to repeatedly offer further explanations to my questions" (para 18). Second, at the same time, I found him ingenuous in his description of what had in fact happened. Whilst he found it hard to admit, he had plainly been overconfident about his abilities to pass the Listening and Reading test on 19 June. He clearly believed that because he had an exemption from English language requirements when he came to the UK and because he had been able to successfully pursue an MBA in this country, that he could pass these tests without difficulty. It was only when he learnt that he had failed that he undertook full and proper preparation. I am prepared to accept that he genuinely took the two tests and that in relation to the Listening and Reading test he was able to improve significantly between 19 June 2012 and 11 July. I note that in his account to Judge Sweet it was noted that his evidence was that "he had done a lot of practice between the two tests as he only obtained 140 points on the first speaking and writing test on 19th June 2012". That was not a new point raised for the first time before me.
14. In reaching my assessment I have considered the fact that the explanation he gave before me (and prefaced in his grounds for the error of law hearing) was different from that which he had been taken to provide before Judge Paul. However, having heard him give evidence before me, I consider that there is a strong possibility he failed to explain himself very well before Judge Paul. What he meant to convey by referring to the MBA exams was principally, I believe, that these three months in his life were a stressful time for him as he had to take his last MBA exam in April and then his TOEIC/ETS exams, starting in May 2012, and then in June and July.
15. In reaching my assessment I have also considered whether to count against the credibility of his explanation that even now his ability to communication in English is relatively weak, a factor which was taken by Judge Paul to indicate that he was not capable of scoring 190 points (a level 8) in Listening and Reading on the second occasion. In this regard I consider that the appellant strikes me as an example of a foreign student whose communication skills are limited but who has nevertheless been able to pass the requisite exams in the UK only when he has laboured hard and benefitted from the many revision aids now available, such as online example papers. I am satisfied that it is likely that he did manage by

preparing hard to achieve a level 8 at the second attempt. I considered he has provided an innocent explanation regarding the circumstances in which he took his TOEIC/ETS tests.

16. I also bear in mind, that although once the respondent discharged the initial evidential burden the appellant then has to provide an innocent explanation, the legal burden of proof rest ultimately on the respondent and at the end of the day I do not consider that the respondent has discharged that burden in this case. The fact that the appellant's test result for June 19 as well as for 11 July 2012 was classed as invalid means that reliance upon an implausible level of improvement between the test tests is questionable, since it requires considering why the unlikelihood that the appellant would have employed a proxy taker who was inept.
17. The appellant's is a human rights appeal. It is not in dispute that if he can be accepted to provide an innocent explanation in respect of the 2012 tests (and I have so accepted) then the decision of the respondent, heavily reliant as it was on the allegation of deception, cannot be considered a proportionate one.
18. To conclude:

I have already set aside the decision of FtT Judge Paul for material error of law.

The decision I re-make is to allow the appellant's appeal on human rights grounds.

No anonymity direction is made.



Signed

Date: 23 July 2019

Dr H H Storey
Judge of the Upper Tribunal