Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27722/2015

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 5th July 2019	**On 19th August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR MD JOYNUL ABEDIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N. Ahmed
For the Respondent: Mr D. Mills

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge J. L. Bristow, promulgated on 9th April 2018, following a hearing at Birmingham on 21st March 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Bangladesh, and was born on 20th March 1990. He appealed against the decision of the Respondent dated 20th July 2015 refusing the Appellant's application for a variation of leave to remain in the UK, on the basis of paragraph 322(2) of HC 395, the basis of the decision being that the Appellant had made false representations, or had failed to disclose material facts, when undertaking a TOEIC English language test, where it was alleged that the Appellant had used a proxy.

The Judge's Findings

3. The judge adopted the well-established practice in a case of this kind, and determined at first that the Secretary of State had put forward a *prima facie* case for the allegation that the Appellant had engaged in fraudulent behaviour. The next question was whether the Appellant had discharged the "evidential burden" upon him. The Appellant had asserted that he did sit the tests for the TOEIC examinations on 27th and 28th February 2013. He had attended the test centre. He had passed the test. He had no difficulty doing so because he had studied English before coming to the UK and had been awarded "excellent" grades. He was sufficiently proficient in English, such that he had been granted entry clearance when he came to the UK. He had completed two courses in the UK which were both taught in English. He had no reason to use a proxy or to cheat (paragraph 21).

4. The judge concluded that

> "I am satisfied that the Appellant has discharged his evidential burden. He has asserted a plausible reason why the Respondent's evidence that his tests result had been obtained by deception is incorrect. He had a sufficient grasp of English to sit and pass the test without the assistance of a proxy" (paragraph 23).

5. However, the judge then went on to consider whether the Respondent Secretary of State, upon whom the burden had by now shifted, was able to discharge that burden at the requisite civil standard of proof. To this extent, the Respondent had produced the ETS spreadsheet document for the Appellant, with his date of birth given. This recorded that the Appellant had sat the tests of 27th February 2013 and that it was "invalid". The judge went on to observe that "the term invalid is used to describe a test which has been sat by a proxy or where there has been impersonation. In short, the attribution of 'invalid' means that the result has been obtained by deception" (paragraph 25).

6. Significantly, the judge did also then add that "other than the ETS spreadsheet the Respondent does not produce evidence which is specific to this Appellant" (paragraph 26). That, however, was not the end of the matter. The judge had in that event, to consider "how reliable the invalid categorisation is" (paragraph 26).

7. The judge went on to consider the report of Professor Peter French, dated 20th April 2016, which was not before the court in **Qadir [2016] UKUT 00229**. Of course Professor French's report did not deal with the Appellant specifically. He had been asked only to give an opinion on whether on a balance of probabilities, the

methodology employed in determining whether a test was invalid, was likely to result in false positives. His view was that "the methodology would have resulted in substantially more false rejections than false positives. He estimated that the rate of false positives to be 'very small' after processed by trained listeners had been applied" (paragraph 28).

8. In the instant case, the Appellant had also admitted that he had knowledge of the invalid test certificate. As the judge observed "the Appellant's credibility is also damaged by the account he gave to me that he knew the TOEIC certificate was invalid before he made the September 2014 application" (paragraph 32). The judge went on to repeat this at the end of the determination, observing that the Appellant could not succeed in the appeal because "the Appellant was clear in evidence to me that he knew the certificate was not valid when he submitted the September 2014 application" (paragraph 36).

9. The appeal was dismissed.

Grounds of Application

10. The grounds of application state that the judge erred with regard to the application of the burden of proof with regard to deception because he failed to have regard to the applicable law, and in particular to the case of **SM and Qadir** and failed to give reasons why the report of Professor French should be given greater weight than the report of Dr Harrison, which had actually been considered by the Tribunal, and where Dr Harrison had in fact been subjected to cross-examination in live evidence.

11. Second, the judge fell into error in stating (at paragraph 32) that the Appellant's credibility was damaged by the fact that he had knowledge of an invalid TOEIC certificate before he submitted that in his September 2014 application.

12. On 14th August 2018, permission to appeal was granted.

Submissions

13. At the hearing before me on 5th July 2019, the Appellant was represented by Mr Ahmed. He relied upon the grounds of application. He made two basic submissions. First, once it was accepted by the judge that the Appellant had discharged the burden of proof (see the judge's comment at paragraph 23) that was the end of the matter and the appeal should have been allowed. The judge had made it quite clear by that stage that the Appellant "has asserted a plausible reason" and that "he had a sufficient grasp of English" and that he could pass the tests "without the assistance of a proxy".

14. Second, the judge was factually wrong in stating (at paragraphs 27 to 30) that "the Appellant did not adduce any expert evidence in rebuttal" because the expert evidence of Dr Harrison was tendered in rebuttal of the report of Professor French. Given that the legal burden of proof remained on the Secretary of State that the Appellant had obtained his TOEIC test certificate by deception, it was difficult to see why the Appellant had not succeeded in his appeal, and this was especially so

because the judge had made it quite clear that the Appellant had provided a "plausible reason" (paragraph 23).

15. Third, the report by Professor French was not specific to the Appellant. It could give no rational basis on which an innocent explanation could be rejected. This was important because the legal burden remained throughout on the Respondent Secretary of State. Given that Professor French had accepted the existence of false positives (even at a lower rate than previously thought) it was clear that there will be cases where an individual's test results would have been invalidated wrongly. This could be the case here. Indeed, once it was accepted that the Appellant had provided a "plausible reason" and had "discharged his evidential burden" his appeal stood to be allowed, given that the legal burden upon the Secretary of State had still not been discharged.

16. Finally, the judge referred to the fact that the Appellant had not given details of his journey to Essex where he took the test, did not describe the test centre or the examination process, and failed to corroborate his assertions about travelling and how an associate paid the fee on his bank card (paragraph 31). However, Mr Ahmed submitted that the Appellant had not been cross-examined on these issues. It was open to the Secretary of State to ask the Appellant about these issues at the hearing.

17. For his part, Mr Mills submitted that the judge's decision was sustainable. When Dr Harrison had given evidence before the Tribunal, what he had said was that the process that had been gone through was one which, without knowing more about it, could not be said to be an entirely reliable process. Given this, the Secretary of State had instructed Professor French for the Tribunal hearing in **Qadir**. However, the evidence of Professor French arrived late, and the Tribunal was unable to take it into account and rejected it. The subsequent attempts by the Secretary of State to have this evidence adduced in the Court of Appeal was also rejected. However, Dr Harrison actually worked under Professor French, who was his senior.

18. Following the case of **Qadir**, there was the decision of Mr Justice Garnham in the case of **Veronica Gaogalalwe [2017] EWHC 1709**, where the High Court had recognised the expert knowledge of Professor French. It had been said that "the expertise of Professor French to provide opinion evidence of this sort is not disputed; it is clear from his CV that he is a singly well-qualified expert" (paragraph 57). What this meant was, submitted Mr Mills that the reference to the "frailites" in **Qadir** in 2016 had now been explained away by Professor French's subsequent report, and with his standing being openly acknowledged by the judicial Tribunals after that, there was no reason why his evidence could not be taken into account.

19. That being so, the judge was entirely correct in this case to say that Professor French had "concluded that the methodology would have resulted in substantially more false rejections than false positives" (paragraph 28) and that the Respondent "has discharged the burden and proved to the civil standard that the invalid categorisation applies to this Appellant" (paragraph 30).

Error of Law

20. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007). My reasons are as follows.

21. First, it is important to bear in mind that in an appeal arising under paragraph 322(2) of HC 395, where the allegation is that the Appellant's application for leave to remain is to be refused on account of his or her "making of false representations", that such an allegation of dishonesty means that the legal burden of proof rests upon the Respondent Secretary of State. The Appellant only has an evidential burden of proof. The Appellant does not ever have the legal burden to discharge.

22. In this case, the judge proceeded in an entirely appropriate manner by noting that the burden to begin with did lie with the Respondent. That burden was discharged by the Respondent Secretary of State providing initial evidence of the TOEIC certificates being falsely produced. After that, the burden shifted to the Appellant. This burden, however, was only an evidential burden. The judge considered that evidence on behalf of the Appellant. It is well-known that the Appellant only has the task of "raising an innocent explanation" (see **Qadir [2016] UKUT 00229** at paragraph 68). There is then the "legal burden" (see paragraph 69) on the Secretary of State.

23. This includes an analysis of such matters as "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". Other factors which are included are "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 necessary or illogical for them to have cheated" (paragraph 69). These matters are in fact fundamentally in favour of the Appellant. As the Appellant himself said he had nothing to gain from being dishonest given that he spoke English well, had studied it in Bangladesh, and had undertaken two courses in the UK upon arrival here.

24. Second, the evidence would also indicate that it was illogical and unnecessary for the Appellant to have cheated. This is clear from the judge's own acceptance that "I have borne in mind the Appellant's assertion that he did sit the tests personally and, perhaps more importantly, that he did not need to cheat as his grasp of English was sufficient" (paragraph 31). Insofar as then said, however, that the Appellant's assertions about sitting the test "lacked detail" because he did not give details of the journey or of the building, he was not cross-examined about these matters (at paragraph 31) and any lack of detail in this respect can hardly therefore be laid at his door.

25. Third, the judge considered the expert evidence of Professor Peter French, dated 20th April 2016, whilst noting that this was not in fact before the court in **Qadir [2016] UKUT 00229**. Nevertheless, credence was given to this expert's report. Whilst the judge is entitled to do that, it was factually not correct to state that "the Appellant did not adduce any expert evidence in rebuttal" (paragraph 29), given that the expert

evidence of Dr Harrison had been expressly put before the Tribunal. This was not assessed by the judge.

26. Finally, insofar as it is the case that the judge has at two separate occasions stated (see paragraph 32 and paragraph 36) that the Appellant "knew the certificate was not valid when he submitted the September 2014 application", this matter was disputed by Mr Ahmed. He stated that he had represented the Appellant at the Tribunal below. The Appellant had made no such admission. What he had said was that he was aware that the college was no longer accepting the ETS certificates. This was confirmed by Mr Mills, who observed that his notes also made it clear that what the Appellant was doing was that "he was aware it had been invalidated because the ETS had said so".

27. In these circumstances, the submission by Mr Ahmed that something more was required before the Secretary of State could be seen to have discharged the legal burden of proof upon him has merit. The Respondent Secretary of State had not produced evidence specific to the Appellant. Professor French's report also was not specific to the Appellant. As the judge below very correctly stated, "the term invalid is used to describe a test which has been sat by a proxy or where there has been impersonation" (paragraph 25). The issue nevertheless remains whether such a "invalid" test relates to the particular Appellant in question. In that respect, the legal burden remains on the Secretary of State.

28. On the facts of this case, it had not been discharged. Indeed, the judge had half way through the determination made it quite clear that "I am satisfied that the Appellant had discharged his evidential burden" (paragraph 23) noting how he had provided a "plausible reason" that the allegation against him that the test certificate had been attained by deception was incorrect. This was especially so given his "sufficient grasp of English".

Remaking the Decision

29. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am remaking the decision by allowing this appeal.

Decision

30. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision shall be set aside. I remake the decision. This appeal is allowed.

31. No anonymity direction is made.

32. This appeal is allowed.

Signed Dated

Deputy Upper Tribunal Judge Juss 17th August 2019