Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14253/2019_P

THE IMMIGRATION ACTS

Decided under Rule 34 without a hearing
On 9 September 2020

Decision and Reasons Promulgated
On 14 September 2020

Before:

UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department

Appellant

And

Mr Prem Prashanth Rao Gudivada
(ANONYMITY ORDER NOT MADE)

Respondent

This is a decision on the papers without a hearing. There were no submissions from the Secretary of State whether a decision could appropriately be made on the papers. The respondent requested an oral hearing. The documents described at para 4 below were submitted. A face-to-face hearing or a remote hearing was not held for the reasons given at paras 6-21 below. The order made is set out at para 53 below. *(Administrative Instruction No. 2 from the Senior President of Tribunals).*

Representation (by written submissions):
For the appellant: Ms H Aboni, Senior Presenting Officer.
For the respondent: Ms A Jones, of Counsel, instructed by Farani Taylor Solicitors.

DECISION AND DIRECTIONS

1. The Secretary of State appeals against a decision of Judge of the First-tier Tribunal Herlihy who, in a decision promulgated on 15 November 2019 following a hearing on 29 October 2019, allowed the appeal of Mr Gudivada, a national of India born on 28 December 1982 (hereafter the "claimant") on human rights grounds (Article 8) against a decision of the Secretary of State of 7 August 2019 to refuse his application of 13 November 2017 for leave to remain on human right grounds (Article 8).

2. Permission to appeal was granted by the First-tier Tribunal ("FtT") in a decision signed on 20 April 2020 and sent to the parties on 26 May 2020.

3. On 24 June 2020, the Upper Tribunal sent to the parties a "*Note and Directions*" issued by Upper Tribunal Judge Lindsley dated 22 June 2020. Para 1 of the "*Note and Directions*" stated that, in light of the need to take precautions against the spread of Covid-19, Judge Lindsley had reached the provisional view, having reviewed the file in this case, that it would be appropriate to determine questions (a) and (b) set out at para 1 of her "*Note & Directions*", reproduced at my para 5(i)(a) and (b) below, without a hearing. Judge Lindsley gave the following directions:

   (i) Para 2 of the "*Note and Directions*" issued directions which provided for the party who had sought permission to make submissions in support of the assertion of an error of law and on the question whether the decision of the FtT should be set aside if error of law is found, no later than 14 days after the "*Note and Directions*" was sent to the parties; for any other party to file and serve submissions in response, no later than 21 days after the "*Note and Directions*" was sent to the parties; and, if such submissions in response were made, for the party who sought permission to file a reply no later than 28 days after the "*Note and Directions*" was sent to the parties.

   (ii) Para 3 of the "*Note and Directions*" stated that any party who considered that despite the foregoing directions a hearing was necessary to consider questions (a) and (b) may submit reasons for that view no later than 21 days after the "*Note and Directions*" was sent to the parties.

4. In response to the "*Note and Directions*", the Upper Tribunal has received the following:

   (i) on the Secretary of State's behalf, a letter dated 29 June 2020 from Ms Aboni and the decision of the Upper Tribunal in MA (ETS - TOEIC testing) [2016] UKUT 000450 (IAC), submitted to the Upper Tribunal under cover of an email dated 29 June 2020 timed at 12:46 hours; and

   (ii) on the claimant's behalf, a document entitled: "*Appellant's Submissions July 2020* " dated 15 July 2020 by Ms Jones, submitted under cover of an email dated 16 July 2020 timed at 05:52 hours.

The issues

5. I have to decide the following issues (hereafter the "*Issues"*),

   (i) whether it is appropriate to decide the following questions without a hearing:

(a) whether the decision of the Judge involved the making of an error on a point of law; and

(b) if yes, whether the Judge's decision should be set aside.

(ii) If yes, whether the decision on the claimant's appeal against the Secretary of State's decision should be re-made in the Upper Tribunal or whether the appeal should be remitted to the FtT.

Whether it is appropriate to proceed without a hearing

6. In her letter dated 29 June 2020, Ms Aboni did not make any submissions as to whether or not it is appropriate to decide questions (a) and (b) set out above without a hearing.

7. At para 3 of her written submissions, Ms Jones submits that an oral hearing by telephone or video is the appropriate way of "*considering permission to appeal*". This does not make sense because the claimant and his representatives must already be aware that permission has been granted. Furthermore, no reasons have been given in support of the submission of Ms Jones that the Upper Tribunal should not make a decision on questions (a) and (b) without a hearing.

8. I do not rely upon the mere fact that the Secretary of State has not made any submissions or the mere fact that Ms Jones has not provided reasons in support of her submission that the Upper Tribunal should not make a decision on questions (a) and (b) without a hearing as factors that justify proceeding without a hearing. I have considered the circumstances for myself.

9. The appeal in the instant case is straightforward.

10. I am aware of, and take into account, the force of the points made in the dicta of the late Laws LJ at para 38 of Sengupta v Holmes [2002] EWCA Civ 1104 to the effect, inter alia, that "*oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by a judge*"; Keene LJ at para 47 of Sengupta v Holmes concerning the impact that oral submissions may have on the decision-making process; paras 35 and 48 respectively of the judgments of Lord Bingham and of Lord Slynn in Smith v Parole Board [2005] UKHL 1; the dicta at para 17(3) of Wasif v SSHD [2016] EWCA Civ 82 concerning the power of oral argument; the dicta in the decision in R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256 to the effect that justice must be done *and* be seen to be done; and the dicta at para 8 of R (Siddiqui) v Lord Chancellor and others [2019] EWCA Civ 1040 to the effect that it is an "*undeniable fact that the oral hearing procedure lies at the heart of English civil procedure*", to mention just a few of the cases in which we have received guidance from judges in the higher courts on the issue that I have to decide.

11. I am aware of and have applied the guidance of the Supreme Court at para 2 of its judgment in Osborn and others v Parole Board [2013] UKSC 61.

12. Given that my decision is limited to the Issues, there is no question of my making findings of fact or hearing oral evidence or considering any evidence at this stage.

13. In addition, I take into account the seriousness of the issues in the instant appeal for the claimant. He has been accused of having obtained a test certificate by the use of a proxy test taker. The instant case therefore relates to an important matter, as it goes to his character. It is a matter of some seriousness.

14. I have considered all the circumstances very carefully and taken everything into account, including the overriding objective.

15. Taking a preliminary view at the initial stage of deciding whether it is appropriate and just to decide the Issues without a hearing, I considered the Judge's decision, the grounds and the submissions before me. I was of the view, taken provisionally at this stage, that there was nothing complicated at all in the assessment of the Issues in the instant case, given that the grounds are simple and straightforward and the Judge's decision straightforward. I kept the matter under review throughout my deliberations. However, at the conclusion of my deliberations, I was affirmed in the view I had taken on a preliminary basis.

16. At para 38 of my assessment below, I have said that there were two possible constructions of ground 2. If there had been a hearing, whether face-to-face or remotely, I would have asked the Secretary of State's representative to clarify which of the two constructions was relied upon. Whichever construction is relied upon by the Secretary of State, my reasoning at paras 40 and 41 below is a complete and determinative answer.

17. No other issues arose during the course of my deliberations that I would have asked the parties to address if there had been a hearing, whether a face-to-face hearing or a remote hearing.

18. Whilst I acknowledge that the Tribunal is now listing some cases for face-to-face hearings and using technology to hold hearings remotely in other cases where it is appropriate to do so, the fact is that it is not possible to accommodate all cases in one of these ways without undue delay to all cases.

19. Of course, it is impermissible, in my view, to proceed to decide a case without a hearing if that course of action would be unfair in the particular case. If it would be unfair to proceed to decide an appeal without a hearing, it would be unfair to do so whatever the delay in convening a hearing or the consequent delay on other cases being heard. The need to be fair cannot be sacrificed.

20. There are cases that can fairly be decided without a hearing notwithstanding that the outcome of the decision may not be in favour of the party who is the appellant. In the present unprecedented circumstances brought about by the coronavirus pandemic, it is my duty to identify those cases that can fairly be decided without a hearing.

21. Having considered the matter with anxious scrutiny, taken into account the overriding objective and the guidance in the relevant cases including in particular Osborn and others v Parole Board, I concluded that it is appropriate, fair and just for me to exercise my discretion and proceed to decide the Issues without a hearing, for the reasons given in this decision.

Questions (a) and (b) - whether the Judge erred in law and whether her decision should be set aside

The Secretary of State's decision

22. The Secretary of State refused the claimant's application for leave to remain because she considered that he did not meet the suitability requirements of the Immigration Rules. This was because she considered that, in connection with a previous application for leave to remain, he had submitted a TOEIC certificate from Educational Testing Service ("ETS") which was subsequently found to have been fraudulently obtained by the use of a proxy test taker at a test on 12 March 2012 at South Quay College ("SQC").

23. The Secretary of State considered that the claimant had displayed a flagrant disregard for the public interest. She found that his presence in the United Kingdom was not conducive to the public good and refused the application under paragraph S-LTR 1.6 of the Immigration Rules.

24. In addition, the Secretary of State considered that the claimant would not experience very significant obstacles to his reintegration in India and therefore that he did not satisfy the requirements of para 276ADE(1)(vi) of the Immigration Rules. Finally, the Secretary of State concluded that there were no exceptional circumstances to warrant the grant of leave on the basis of Article 8. In reaching this conclusion, the Secretary of State took into account her conclusion that the claimant did not meet the suitability requirements of the Immigration Rules.

The Judge's decision

25. As can be seen, a key issue before the Judge was whether the claimant had used a proxy test taker at the test on 12 March 2012 at SQC.

26. At para 20, the Judge stated that it was conceded on the claimant's behalf that the evidence produced by the Secretary of State satisfied the initial evidential burden.

27. The Judge then turned to consider whether the claimant had provided a plausible innocent explanation, at paras 21-22 and concluded, at para 22, that the claimant had provided a credible innocent explanation to rebut the claim made by the Secretary of State and that the Secretary of State had failed to show that the claimant's application should be refused on suitability requirements. She found that he met the suitability requirements.

28. At paras 25-26, the Judge considered the judgments of the Court of Appeal in Ahsan [2017] EWCA Civ 2009 and Khan and others [2018] EWCA Civ 1684 and concluded (at para 26) that the clear ratio of both Khan and Ahsan is that a person who has been the subject of an erroneous decision in relation to an ETS decision must not be put in a worse position than if the adverse decision - in the instant case, a curtailment decision - had not been made. She considered that if the Secretary of State followed this binding authority, it would mean in the instant case that the claimant would have to be given a period of leave during which it would be open to him to make a further application for extension of leave as a student or some other basis. At para 27, the Judge said that she found that the decision was not in

accordance with the law as it fell foul of principle (3) of the five-step approach in R (Razgar) v SSHD (No.2) [2004] UKHL 27 and, further, that the decision was not proportionate given the binding decisions of the Court of Appeal. She therefore allowed his appeal on human rights grounds.

The grounds

29. The grounds challenge the Judge's assessment of the key issue that was before her, i.e. whether the claimant had used a proxy test taker at the test on 12 March 2012 at SQC. They do not challenge her assessment at paras 25-27, summarised at my para 28 above.

30. Although the Secretary of State's application refers to "*ground one*" only in the heading, the grounds pleaded at paras 1-5 beneath the single heading raise more than one ground. Paras 1-5 of the grounds raise the following separate grounds which I have numbered grounds 1 to 4 for ease of reference:

(i) Ground 1 (para 2 of the grounds): The Judge failed to consider video evidence, provided in the form of a DVD to all hearing centres, of a BBC Panorama programme which showed students at Eden College standing next to terminals while a proxy test taker took the test for them. Given this evidence, the grounds contend that, even if the claimant had attended SQC, this does not mean that he had personally taken the test.

(ii) Ground 2 (para 3 of the grounds): The Judge misinterpreted the Secretary of State's generic evidence and evidence relating to the claimant which was sufficient, pursuant to SM and Qadir, to discharge the evidential burden of establishing that the ETS certificate had been fraudulently obtained.

(iii) Ground 3 (para 4 of the grounds): In taking into account the claimant's English language ability, the Judge applied the wrong test, in that, the test is not whether the claimant speaks English but whether he had employed deception; and the Judge failed to apply MA in which the Upper Tribunal said, at para 57:

> "Second, we acknowledge the suggestion that the Appellant had no reason to engage in deception which we have found proven. However, this has not deflected us in any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, in-exhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere. We are not required to make the further finding of why the Appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter."

(iv) Ground 4 (para 5 of the grounds): The Judge failed to give adequate reasons for holding that a person who speaks English would therefore have no reason to secure a test certificate by deception.

Submissions

31. In her letter dated 29 June 2020, Ms Aboni states the Secretary of State continues to rely upon her grounds of appeal and MA. She does not advance any further submissions.

32. In her written submissions, Ms Jones advances her submissions in response to the Secretary of State's grounds at paras 6-44 and then states, at para 45: "*Permission to appeal should be refused*".

33. Para 45 of Ms Jones's written submissions does not make sense because (as I have said above) the claimant and his representatives must be aware that permission has already been granted.

34. I will refer to or incorporate the remainder of the submissions of Ms Jones in my assessment below, to the extent that I consider it necessary or appropriate to do so.

Assessment

35. Ground 1 can be dealt with briefly. If the Secretary of State intended to rely upon the video evidence mentioned in ground 1, it was incumbent upon her representative to draw the Judge's attention to it at the hearing notwithstanding that the video evidence may have been available at the hearing centre. If the Judge's attention had been drawn to the video evidence, not only would she (the Judge) have been alerted to the evidence, the claimant and his representative would have had an opportunity to consider the evidence and address the Judge on it. There is nothing before me that confirms that the Judge's attention was drawn to the video evidence. There is nothing in the Judge's decision which suggests that her attention was drawn to the video evidence. The grounds do not suggest that the Judge's attention was drawn to the video evidence. I agree with Ms Jones that the fact that the DVD was available at the hearing centre is irrelevant, if the Judge's attention was not drawn to it.

36. For the reasons given above, I am not satisfied that the Judge erred in law by failing to consider the video evidence. On the material before me, I am satisfied that her attention was simply not drawn to the video evidence. I therefore reject ground 1.

37. Ground 2 is that the Judge misinterpreted the Secretary of State's generic evidence and evidence relating to the claimant which (the grounds contend) was sufficient, pursuant to SM and Qadir, to discharge the evidential burden of establishing that the ETS certificate had been fraudulently obtained.

38. It is not clear whether ground 2 relates to:

(i) the Judge's consideration of whether the initial evidential burden had been discharged by the Secretary of State;

or

(ii) the Judge's overall conclusion that the Secretary of State had failed to establish that the claimant obtained his test certificate by the use of a proxy test taker.

39. I shall consider each construction in turn.

40. If ground 2 relates to the Judge's consideration of whether the Secretary of State's evidence was sufficient to discharge the initial evidential burden and if it contends that the Judge misapprehended the evidence in concluding that it was not sufficient, then ground 2 is wholly misconceived and simply ignores the following paragraphs of the Judge's decision:

(i) para 9 where the Judge directed herself concerning the applicable burden and standard of proof;

(ii) para 15 where she referred to the Secretary of State's evidence at Annex A of the Secretary of State's bundle;

(iii) paras 16-17 where she summarised the witness statements submitted by the Secretary of State, i.e. the witness statements of Rebecca Collins and Peter Millington;

(iv) para 19 where she noted that the result of the claimant's test was categorised as invalid according to the document at Annex A;

(v) para 19 where she referred to the Secretary of State's evidence at Annex B of the Secretary of State's bundle; and

(vi) para 20 where the Judge then said:

> "… The [claimant's] representative conceded that the [Secretary of State] had met the evidential burden based on the evidence of the look up tool and the statements in the [Secretary of State's] bundle …"

41. On the other hand, if ground 2 relates to the Judge's overall conclusion that the Secretary of State had failed to establish that the claimant obtained his test certificate by the use of a proxy test taker and if it contends, in this regard and in reliance upon the conclusion in SM and Qadir, that the Secretary of State's evidence was sufficient to discharge not only the initial evidential burden but also the overall legal burden upon the Secretary of State, then ground 2 is also misconceived. This is because it conflates two steps, the first step being consideration of whether the Secretary of State's generic evidence in the form of the witness statements from Rebecca Collins and Peter Millington taken together with the evidence of the "*look up*" tool in relation to the specific individual is sufficient to discharge the Secretary of State's initial evidential burden. If it is sufficient, which the case-law establishes is the case and which was conceded by the claimant's representative before the Judge, the second step is consideration of whether the individual has provided an innocent explanation. SM and Qadir does not state that the Secretary of State's evidence in the form of the witness statements of Rebecca Collins and Peter Millington taken together with the "*look-up tool*" relating to the specific individual satisfies *both* stages *and* that there is no need to consider whether the individual in question has provided an innocent explanation.

42. I therefore reject ground 2.

43. Ground 3 is that the Judge applied the wrong test, in that, the test is not whether the claimant speaks English but whether he had employed deception; and that the Judge failed to apply para 57 of MA.

44. Ground 3 relates to paras 21-22 of the Judge's decision. These read:

"21. I have carefully considered all the evidence before *[sic]* and I found that [the claimant] demonstrated a very good level of spoken English, he clearly had no difficulty in understanding any of the questions that were put to him and he gave his evidence in a clear and fluid manner without any hesitancy. [The Secretary of State's] representative conceded that [the claimant's] English was good. In considering the evidence I note that [the claimant] has submitted documentary evidence that he conducted his education in India in the English language and from an examination of results from his exams in India it is clear that his highest scores were achieved in English. The evidence before me is that [the claimant] then enrolled for an ESOL course in the United Kingdom at the Royal College of London in 2011 but the college was closed in 2012 and [the claimant] then applied for *[sic]* was granted leave to undertake a business management course at Barking & Dagenham College being a local authority funded college to undertake a BTEC Level 3 in business. [The claimant] obtained a pass in his BTEC course which was conducted in English in August 2013. [The claimant] undertook a secure English language test with Pearson in March 2014 and achieved a level CEFR Level B2 which is confirmed by the document at page 88 and the further documents at pages 90 and 108. This test was taken in order to secure admission onto a university place which was granted to [the claimant] as evidenced by the document at page 88. There is evidence of [the claimant] having completed his first-year degree course at Sunderland University in his BA business and management course and the evidence is that he was clearly able to follow and complete a university course which was taught in English. [The Secretary of State] has never challenged the result of the Pearson test, and the integrity of the Pearson tests has not been impugned.

22. **I found [the claimant] to be a credible witness and I am satisfied from my examination of the totality of the evidence that he has given a credible and consistent account of his chronology and history.** There is evidence that [the claimant] was educated entirely in the English language when undertaking his education in India and he has demonstrated that two years after the impugned TOEIC test he was able to pass the Pearson English language test in all four components and that he achieved a level sufficient for him to gain admission to the University of Sunderland (scoring 83 out of 90 in speaking and 90 out of 90 in pronunciation) and completed and passed his first year undergraduate study. It is not disputed that [the claimant] was unable to continue his university course as his leave as a student was curtailed in 2015 due to the alleged deception. **[The claimant] has provided a credible explanation as to why he took the TOEIC test at South Quay College and the circumstances which led him to having to take the test. [The claimant] says that the voice recording supplied to him is not of his voice.** I find [the claimant] has provided a credible explanation and has produced evidence to support his claim that he did not need to utilise a proxy to take the TOEIC test for him in March 2012 as he had already demonstrated at that time he was entirely capable of and taking and passing an English language test having undertaken all his studies in India in English and having studied in the UK *[sic]* r initially on an ESOL course. I see no reason to doubt [the claimant's] explanation that the scores that he achieved on the TOEIC test were genuinely achieved by him that he did not deploy a proxy. **I note that other data which [the claimant] requested from ETS has not been supplied such as the sheet that he signed when he registered at the college to take the test and the photographs that were taken on**

> **the day.** I find that [the claimant] has provided a credible innocent explanation to rebut the claim made by [the Secretary of State]. I find that [the Secretary of State] has failed to show that the application should have been refused under the suitability requirements. Accordingly I find that [the claimant] met the suitability requirements of the immigration rules."
>
> (My emphasis)

45. Para 22 and a large part of para 23 of the Judge's decision plainly show not only that the Judge did, as ground 3 contends, take into account the claimant's ability in the English language but also that she placed considerable weight on that fact. However, MA does not decide that it is never possible to take into account an individual's ability in the English language. In MA, the Upper Tribunal found that the evidence of the appellant was incredible for several reasons. In contrast, the Judge found the claimant a credible witness. Furthermore, in addition to the claimant's ability in the English language, she gave other reasons for reaching her finding that the Secretary of State had not discharged her overall burden, as the text that I have emboldened and underlined above shows. It is plain from her reasoning that she found no reason not to accept his evidence that he had attended the test centre and taken the test himself. Indeed, it is plain from her decision as a whole that nothing at all emerged from the claimant's evidence, whether written or oral, that was in way adverse to his evidence that he had not used a proxy test taker and that he had taken the tests himself.

46. In these circumstances, it is difficult to see how the Judge could have justified making an adverse finding and rejecting the claimant's evidence that he had taken the tests himself.

47. Although I accept that the Judge did place considerable weight upon her assessment of the claimant's ability in the English language, matters going to weight are rarely sufficient to establish a material error of law, a hurdle that is not reached in the instant case. This is, of course, subject to the important proviso, that the factor upon which considerable weight has been placed is not shown to have been an irrelevant consideration. However, MA does not decide that an individual's ability in the English language is totally irrelevant.

48. For the reasons given above, I have concluded that ground 3 does not establish that the Judge had materially erred in law.

49. Ground 4 is that the Judge failed to give adequate reasons for holding that a person who speaks English would therefore have no reason to secure a test certificate by deception.

50. In my view, ground 4 invites speculation of the sort that the Upper Tribunal in MA refused to undertake. The question for the Judge was not whether the claimant, who she found speaks English, had no reason to secure a test certificate by deception but whether the Secretary of State had established that he had done so.

51. For the reasons given at para 45-47 above, the Judge gave adequate reasons for her finding that the Secretary of State had failed to establish that the claimant had obtained his test certificate by the use of a proxy test taker.

52. For all of the reasons give above, I am satisfied that the Judge did not materially err in law. The Secretary of State's appeal is therefore dismissed.

Notice of Decision

53. The decision of the First-tier Tribunal did not involve the making of any error on a point of law such that it fell to be set aside. The Secretary of State's appeal to the Upper Tribunal is therefore dismissed.

Upper Tribunal Judge Gill

Date: 9 September 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email**