IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15184/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams	**Decision & Reasons Promulgated**
On 16th September 2021	**On 5th November 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KHURRAM SHAHZAD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Home Office Presenting Officer
For the Respondent: Mr S Ahmed, Counsel instructed by no.12 Chambers

DECISION AND REASONS

1. The Secretary of State filed the application for permission to appeal but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal.

2. The Secretary of State challenges the decision of First-tier Tribunal Judge Ian Howard, who allowed the appeal of Mr Shahzad against the Secretary of State' s

refusal on 2nd July 2018 of the appellant's human rights claim. That decision recorded that the appellant entered the UK on 28th March 2010 with entry clearance as a Tier 4 Student valid from 24th March 2010 to 9th April 2012. That leave was subsequently extended (following a consideration not to curtail his extended leave) and on 20th June 2012 the appellant submitted an application for leave to remain as a Tier 4 Student which was granted on 11th October 2012. The appellant sat the TOEIC test on 16th May 2012 at the Thames Education Centre.

3. The Secretary of State recorded in her letter that ETS had cancelled the scores from the test taken on 16th May 2012. It was specifically considered that the appellant was a person who had sought leave to remain in the United Kingdom by deception following information provided by Education Testing Services. The Secretary of State was satisfied there was substantial evidence to conclude that the certificate was fraudulently obtained to support the application on 20th June 2012, and it was considered he did not meet the suitability requirements for consideration of limited leave to remain in the United Kingdom under paragraph 276ADE.

4. The immigration litigation spans a considerable period. The appellant's human rights application was made on 15th December 2014 and, as stated above, it was that application that was refused on 2nd July 2018. That decision was appealed and on 10th October 2018 First-tier Tribunal Judges O'Keefe and Hughes dismissed the appellant's appeal. An error of law in that decision was found by Deputy Upper Tribunal Judge Norton-Taylor on the basis that the panel had not raised particular issues of concern with the appellant when no Home Office Presenting Officer had been attendant at the hearing. In effect, there was a procedural unfairness and Judge Norton-Taylor at paragraph 11 stated: "*I can see no reference to any question being asked about either a request for the voice recording or any details about the format of the test itself or why the appellant chose the particular college that he did.*" The matter was remitted to the First-tier Tribunal for a de novo hearing.

5. The appeal came before the First-tier Tribunal on 2nd July 2019 and the judge made the following findings:

> "*21. The appellant incorrectly remembered the name of the centre where he sat the tests, he could not remember the day of the week and he no longer has the receipt he was given for the £120 he paid to sit the tests. For this he is criticized by the respondent. The incidents with which I am concerned took place fully seven years ago. Concerns were first raised with the appellant fully two years after he had sat the tests. It is not, in these circumstances fair to criticize his memory or the fact he failed to preserve a piece of paper for two years before he was aware of its potential importance.*
>
> *22. In order to satisfy me it is more likely than not it was not this appellant the respondent points to the documents submitted to establish the use of a proxy test taker.*
>
> *23. A careful analysis of the documents clarifies the picture. The documents that are specific to this appeal start with the statement of Parminder Singh. At paragraph*

6 of her statement she states 'The test result had been cancelled by ETS on the basis its own analyses indicated that the test result had been obtained via the use of a proxy tester'. In the next paragraph he references the earlier generic statement of Rebecca Collins in which Ms Collins describes the process by which ETS informed the Home Office of those cases in which it had cancelled the English language test certificates of individuals whose test results it had deemed to be invalid. Ms Collin's statement sets out the analytical tool employed to detect a proxy tester and thus the conclusion the test result is invalid.

24. *Mr Singh cites this in the context of the appellant's test the conclusion reached by ETS in their 'ETS SELT SOURCE DATA' document, which on this occasion does support this analysis. Critically, applying ETS methodology in order to assert the applicant used a proxy tester the investigation record the result as invalid, per Ms Collins statement and here the investigation recorded the result as invalid. In terms, according to Ms Collins, where a test is deemed invalid 'they [ETS] were certain there was evidence of proxy test-taking or impersonation in those cases.' This supports the conclusion advanced by the respondent namely that a proxy tester was used. However, I must consider the alternatives as found in **SM and Qadir**. The most significant of these is the opinion expressed by Professor French, upon whom the respondent relies, when he stated that there will have been 'false positives'. When looking at the evidence in the round I am not satisfied this is not an instance of a 'false positive'.*

25. *In so finding the respondent has not discharged the legal burden on him."*

Application for permission to appeal

6. The Secretary of State challenged that decision on the following grounds. With reference to **Secretary of State for the Home Department v Shehzad & Anor [2016] EWCA Civ 615** Beatson LJ at paragraph 22 held that the initial evidential burden was on the Secretary of State and if that was satisfied it was then incumbent on the individual whose leave had been curtailed to provide evidence in response raising an innocent explanation and at paragraph 26 stated

> *"in my judgment the in limine rejection of the Secretary of State's evidence as even sufficient to shift the evidential burden was an error of law".*

7. Properly read, the witness statements and the spreadsheet extract showed the appellant's English language test had been invalidated because of the evidence of fraud in the test taken by the appellant. It was incumbent on the appellant to offer an innocent explanation and the latter had not been adequately addressed.

8. It was not clear why the evidence from the appellant which the Tribunal relied on at 19 would preclude the use of a proxy test taker during the test, particularly in the light of the finding at 21 (see above).

> *"19. The appellant's innocent explanation is simply that it was he who sat the tests at the Thames Islamic Centre as he calls it, but did not employ a proxy test taker, the specific allegation leveled(sic) at him by the respondent. He describes going to the*

centre, the number of people that were there with him and the duration of the test."

9. The witness statements and spreadsheet provided the necessary evidence to demonstrate that the appellant did employ deception and there may be reasons why a person who is able to speak English to the required level would nonetheless cause or permit a proxy candidate to undertake an ETS test on their behalf or otherwise cheat. This was demonstrated in the judgment of **MA (Nigeria) [2016] UKUT 450** at paragraph 57. That was not considered.

10. It was submitted that the Tribunal had materially erred by failing to give adequate reasons for their ultimate conclusion in favour of the appellant.

11. Secondly, the maintenance of effective immigration control was in the public interest under Section 117B of the Nationality, Immigration and Asylum Act 2002 and it was submitted that the appellant did not meet the Immigration Rules and accordingly the interference with his right to private life under Article 8 of the ECHR was justified.

The Hearing

12. At the hearing Mr Clarke relied on his written grounds principally on the basis that the judge had not adequately reasoned his findings. Criticism of the Secretary of State's case in relation to **SM and Qadir (ETS -Evidence-Burden of Proof)** [2016] UKUT 00229 (IAC) was inaccurate because Professor French's report was not before **SM and Qadir** and albeit Professor French's report was in front of the Tribunal, but the report indicated the percentage of false positives was only 1%. It was difficult to see how that would assist the appellant and the reasoning was inadequate.

13. Looking at the Article 8 findings, there were inconsistencies and no proper analysis of the Immigration Rules, that is paragraph 276. If it was considered outside the Rules the fraud had been adequately reasoned.

14. Mr Clarke accepted that the exercise of discretion under the suitability requirements should have been different, and he requested permission to serve an addendum decision identifying paragraph 4.2 (which is granted) but in fact nothing turned on this.

15. Mr Ahmed stated that this was a classic example of the Secretary of State disagreeing with the findings of fact made by the First-tier Tribunal. A detailed witness statement was submitted. The appellant spoke fluent English, he had produced the judicial review decision from Judge King. It could be seen that the judge accepted that the Secretary of State had met the evidential burden and that could be seen from decision at paragraph 18. The judge's approach to the evidence was measured and balanced and he had looked at the negatives and positives. When read as a whole, the decision was adequately reasoned. The judge accepted that the ETS TOEIC Look-up Tool document told him that the results of 27 people, that is 50% of those tested, had their results deemed invalid. At the outset of paragraph 10 the judge had stated

that he had considered all the material the appellant had submitted in support of the appeal and the appellant had submitted a detailed witness statement.

16. I asked Mr Ahmed to indicate where the judge had specifically given reasons for accepting the account of the appellant in the face of the negative findings, and he responded that the judge effectively had considered all of the points in favour of the appellant and arrived at his conclusions at paragraph 26.

17. In relation to considering the Rules, the reference to the Immigration Rule not being met responded to how the Secretary of State had pleaded her refusal. It was not correct that the requirements were not met for the want of suitability, and he referred to **SM and Qadir**.

18. Mr Clarke responded that **SM** was not country guidance and did not set out how a future Tribunal should consider the evidence. Paragraph 24 of the decision made no sense. The judge had not explained what the alternatives were in **SM and Qadir** and he stated it was most significant.

Analysis

19. I find the Secretary of State's criticism of the decision is sustainable. At paragraph 19 the judge states: "The appellant's innocent explanation is simply that it was he who sat the tests at the Thames Islamic Centre as he calls it but did not employ a proxy test taker". As the judge recorded at paragraph 21, the appellant incorrectly remembered the name of the test centre, where he sat the test, and he could not remember the day of the week but the judge dismissed the concerns and criticisms of the respondent because the incidents took place seven years ago. The judge does not refer to the appellant's witness statement, (unsurprisingly because contrary to Mr Ahmed's submissions, it has minimal detail in it as to the test taking) but merely reflects the oral evidence that the appellant incorrectly remembered the name of the test centre and could not remember the day of the week on which he took the test. That does not explain why the appellant's account was accepted in the face of the evidence presented.

20. The judge states at paragraph 20 that he further considered the matters found to be relevant in assessing the likelihood of the appellant employing a proxy test taker as identified in **SM and Qadir**. The judge stated that "of greater significance in this appeal is the fact that the appellant had taken other English language tests successfully and without the suspicion of deception being raised". The judge, however, failed to identify further authorities such as **MA (ETS - TOEIC testing) [2016] UKUT 00450**, particularly paragraph 57 where it stated that there may be a range of reasons why persons proficient in English may engage in TOEIC fraud. Nowhere did the judge factor those considerations into the assessment. The judge does not engage with the reasoning in **MA** at all.

21. The judge specifically at paragraph 24 stated in response to the evidence from ETS and Ms Collings' statement that he "must consider the alternatives as found in **SM and Qadir**". This is wholly unclear. The judge goes on to consider the opinion

expressed by Professor French but as Mr Clarke pointed out, Professor French did not give evidence before **SM and Qadir** and the judge does not address the point made by Professor French that false positives amounted to only 1%.

22. Simply to state at the outset of paragraph 10 that he, the judge, had considered all the material the appellant had submitted and to make a reference at paragraph 15 that "50% of the tests taken were invalid" goes no way to explaining to the Secretary of State why the innocent explanation had been accepted. Indeed, I asked Mr Ahmed to point in the decision to where the judge had explained his acceptance of the innocent explanation and was directed to paragraphs 25 and 26, which state as follows:

> *"25. In so finding the respondent has not discharged the legal burden on him.*
>
> *26. Accordingly I am not satisfied there was deception employed on the 12th of May 2012."*

23. It was submitted that the judge took into account all the relevant evidence and stated so. Within the bundle itself presented by the Home Office, however, was the document entitled 'Project Façade – criminal inquiry into abuse of the TOEIC-Thames Education Centre Hounslow' dated 15th May 2015. The college where the appellant claimed to have taken the test was part of a criminal investigation and an ETS auditor observed an imposter taking tests on 16th May 2012 (the date of the appellant's test). That document was a part of the evidence produced by the Secretary of State and yet formed no part of the reasoning in the decision.

24. I am aware of **UT (Sri Lanka) [2019] EWCA 1095 exhorts such that** judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined, but the judge has not engaged with the evidence on the basis of the relevant judicial authorities. As such, the judge's finding "to remove someone who meets the relevant Immigration Rules cannot be held to be proportionate" cannot be sustained. I will not pursue further criticism in relation to ground 2, merely to state that in the light of my findings in ground 1 the Secretary of State also succeeds in relation to her challenge in ground 2.

25. As a result, I find an error of law in the approach and because of the inadequacy of the reasoning of the decision.

26. Both representatives agreed that despite the long history of this the appeal should be remitted to the First-tier Tribunal should an error of law be found.

27. As a final point, and separate from my findings above, in October 2018 (see above) the issue of the request of tests from ETS was specifically raised. **R (Mahmud) v SSHD** [2021] EWCA Civ 1004 noted that ETS *'had retained copies of the individual voice recordings. These were supplied, without charge, on request. If the individual can identify their own voice on the recording and it is either agreed or proved by expert evidence that it is their voice it will be obvious that the charge of fraud against the individual cannot be sustained.*

Notice of Decision

The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Signed *Helen Rimington* Date 7th October 2021

Upper Tribunal Judge Rimington