



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

Appeal Number: IA/10823/2015

THE IMMIGRATION ACTS

Heard at Field House

On 13th June 2016

Ex Tempore Judgment given on 13th June 2016

**Decision & Reasons
Promulgated
On 4th July 2016**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

**MR RONAKKUMAR MAHENDRABHAI PATEL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Khan of Counsel

For the Respondent: Ms Z Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against a decision of the First-tier Tribunal Judge Walker made on 23rd November 2015 refusing the

appellant's appeal against the respondent's decision of 16th March 2015 to cancel his leave and issue removal directions under Section 47.

2. This case follows the recent government investigation of fraudulent practice in colleges that revealed more than, according to the evidence, 29,000 invalid and 19,000 questionable results of ETS English language tests taken in 2012 and 2013 as a result of which licences of those 50 colleges and three universities were suspended. Those colleges included Stanford College where the appellant took an English language test in 2013.
3. The appellant is a citizen of India born on 18th August 1980 and his appeal was made under Section 82(2) of the Nationality, Immigration and Asylum Act.
4. I set out his immigration history. He was initially granted leave to remain in the United Kingdom on 16th June 2011 as a dependant of his wife who had leave to remain as a Tier 4 (General) Student. That leave expired on 26th August 2013 and he was then granted leave to remain in the United Kingdom as a Tier 2 (General) Migrant. That leave was effective from 16th August 2013 and was due to expire on 26th August 2015.
5. On 15th March 2015 the appellant returned to the UK from a trip to Paris and was detained and interviewed. The following day he was given notice that his leave to remain had been cancelled and that removal directions had been made. Those decisions were made on the basis that the respondent was satisfied that the appellant had used a false document namely an English language test obtained by using a proxy to take the speaking test in order to obtain his Tier 2 permission and it is against that decision that the appeal was made.
6. The Upper Tribunal case **SM and Qadir (ETS burden of proof) [2016] UKUT 229**, sets out that

(i) 'the Secretary of State's generic evidence, combined with her evidence in relation to particular to these two appellants suffices to discharge the evidential burden of proving that their TOEIC certificates had been proved by dishonesty'.

'(ii) However given the multiple frailties from which this generic evidence was considered to suffer and in the light of the evidence adduced by the appellant the Secretary of State failed to discharge the legal burden of proving dishonesty on their part'.

That head note appears to have expanded further at paragraph 68 of **SM and Qadir** which I will set out in full and says this:

68. 'As our analysis and conclusions in the immediately preceding section make clear we have substantial reservations about the strength and quality of the Secretary of State's evidence. Its shortcomings are manifest. On the other hand, and bearing in mind that the context is one of the

alleged deceptions we must be mindful of the comparatively modest threshold which an evidential burden entails. The calls for an evaluative assessment on the part of the Tribunal. By an admittedly narrow margin we are satisfied that the Secretary of State has discharged this burden. The effect of this is that there is a burden again an evidential one on the appellant of raising an innocent explanation’.

7. In this case Mr Khan has suggested that in fact on examination of the decision of the First-tier Tribunal that the three stage process was not set out by the judge and in fact the decision would appear to have considered the appellant’s evidence but really relied on the evidence of the Secretary of State which is just the generic evidence. In effect the judge only undertook the first part of the three stage analysis which he was required to do and on examination of the decision I find there was an error of law to conclude that the respondent’s evidence was capable of demonstrating the last stage, that is to the required standard.
8. The reasoning is set out in the decision at paragraphs 39 to 45 which concluded that the appellant had acted dishonestly but without factoring in all the evidence of the appellant and without more analysis of the individual facts of this case. The judge concludes that there had been a change of circumstances entitling the decision, but it is clear that had the evidence been analysed in a manner according to **Qadir**, a different conclusion could be drawn.
9. At the hearing before me Ms Ahmed validly attempted to submit further evidence that being from Professor French which I refused to admit as it failed to comply with Rule 15(2) of the Procedure Rules. In effect what has been provided by the Secretary of State is just generic evidence together with the spreadsheet tool which shows that there was an invalid test but in fact, that, was reliant as I said on the generic evidence.
10. Looking at paragraph 32 of the judge’s decision I note that in particular it was accepted that the appellant has a Bachelor of Commerce degree issued by the Sardar Patel University and that this was taught in English and this would have entitled the appellant to 10 points as shown by the UK Visas and Immigration points calculator. Although I note that this degree was not in fact used nor did the appellant seek to rely on it, it would appear that he could have done so and did not. That however clearly indicates that he had English to a standard which would question why he would even have the incentive to take a proxy test.
11. I also note a further factor to take into account. That it was noted that the appellant was asked why he had taken the TOEIC test at all and he said that he took the test at the centre where they had the earliest date and I also note that the judge did not attach and nor do I, much weight to the fact that he took the test at a centre not so close to home. Equally it is perfectly possible that a test could have obtained a perfect score and that should not be taken against the appellant.

12. As pointed out by the appellant in his witness statement the test itself was taken some time ago and obviously he would have some difficulty in recalling what were the exact events. I also noted that from his interview, when he was detained on return at the airport, he gave his responses in English albeit that I do take into account that the test was taken in 2013 and this evidence was given some time afterwards, in 2015. Nonetheless I do not find there are any significant discrepancies between the appellant's witness statement evidence and that which he described in his interview when he was detained.
13. I also note that reference was given from PTC Travel which is where the appellant has worked and that is an IATA and CAA, ATOL licence holder and a fully bonded travel agent and the witness evidence is such that he has worked for that organisation since 2010 and according to the reference that he had had to use English for that purpose and could not perform these duties without a strong command of the English language.
14. In the light of the evidence I think that the appellant has produced sufficient counter to the Secretary of State's generic evidence and the Secretary of State has failed to discharge the final legal burden of showing that the appellant obtained this test certificate by proxy. It follows therefore that I allow the appeal.

Notice of Decision

The First-tier Tribunal Judge made an error of law and his decision is set aside. I remake the decision and allow the appeal.

No anonymity direction is made.

Signed

Upper Tribunal Judge Rimington
Date: 4th July 2016

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because of the complexity of the case.

Signed

Upper Tribunal Judge Rimington
Date: 4th July 2016