



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/10837/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 24 May 2017

**Decision & Reasons
Promulgated
On 31 May 2017**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

**AFZAAL LAAL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondent

Representation:

For the Appellant: Mr P Singh, Senior Home Office Presenting Officer
For the Respondent: Ms F Shaw, Counsel instructed by All Nations Legal Services

DECISION AND REASONS

1. The respondent, Mr Laal, to whom I shall refer hereafter as “the appellant”, as he was before the judge, appealed to the First-tier Tribunal against the decision of the Secretary of State, to whom I shall refer hereafter as “the respondent” as she was before the judge, refusing his application for further leave to remain as a partner.

2. It was concluded by the respondent that the appellant failed to meet the suitability requirements in the Immigration Rules because, he having submitted a TOEIC certificate from Educational Testing Service (ETS), ETS had undertaken a check of his test and confirmed to the respondent there was significant evidence to conclude that his certificate was fraudulently obtained by the use of a proxy test taker. His scores from the test taken on 16 October 2012 at Stanford College had been cancelled by ETS.
3. The judge noted that it had been held in SM and Qadir [2016] UKUT 00229 (IAC) that the Secretary of State's generic evidence combined with her evidence particular to the appellants in SM and Qadir sufficed to discharge the evidential burden of proving that their TOEIC certificates had been procured by dishonesty. However, given the frailties of that evidence and in light of the evidence of the appellants in that case, the legal burden of proving dishonesty had not been discharged. This approach was upheld in the Court of Appeal decision in Shehzad [2016] EWCA Civ 615. With regard to the burden on the appellant, the judge heard oral evidence from the appellant and his wife who both adopted their witness statements and the judge noted that the appellant within his witness statement had set out fully evidence as to his taking the test himself and how the test was conducted, including how long each section took. He had also provided a number of documents in relation to his educational undertakings during his time in the United Kingdom including a document from Business School London relating from May 2011 to October 2012 confirming his attendance and also confirming that he had undertaken a number of modules within that period, all of which he passed. In addition he had provided a Trinity College London Grade 2 examination in Spoken English certificate dated 19 October 2012.
4. The judge went on to say at paragraph 34 that, having taken into account all of the evidence available to him, he was satisfied that the appellant did have a sufficient level of the English language and that he had undertaken courses in the past in English. He was satisfied that the appellant had shown on the balance of probabilities that he himself did in fact undertake the test and had not therefore used deception in either his previous application or in the current application which was the subject of the appeal before the judge. It was accepted that he met the requirements of the Immigration Rules subject to the suitability requirement. The appeal was allowed.
5. In her grounds of appeal the respondent referred to the witness statements of Mr Millington and Miss Collins and ETS SELT source data which indicated that the appellant's test had been categorised by ETS as invalid. The Millington and Collins' witness statements clearly provided that the test was characterised as invalid where ETS was certain there was evidence of proxy test-taking or impersonation. It was clear that the case had to have gone through a computer programme analysing speech and then two independent voice analysts, and if all three were in agreement that a proxy had been used the test would be characterised as invalid. As a consequence it was concluded that it was clear that the Secretary of

State had reasonably concluded that the appellant had used deception in the application. As regards the appellant's English qualifications and level of English spoken at interview, it was argued that there plainly might be reasons why a person who was 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 to cheat.

6. At the hearing Mr Singh relied on the grounds. He emphasised the point that there could not be an explanation for the appellant sufficient for him to discharge the burden by saying that he had good knowledge of English anyway, the fact that a person had good English did not mean that they would not employ a proxy test-taker in their stead. So even if he had good English, it was not enough to discharge the burden.
7. In her submissions Ms Shaw helpfully clarified that the position under the Rules was that although there was reference in the decision letter to the appellant not demonstrating there would be insurmountable obstacles to family life with his partner continuing outside the UK as set out in paragraph EX.2. of Appendix FM, paragraphs EX.1. and EX.2. were not relevant in this case, as the appellant had been found to satisfy the eligibility requirements and therefore it was simply a question of whether or not the findings on suitability were sound. Mr Singh agreed that this was the correct approach.
8. In this regard Ms Shaw argued that the judge was entitled to find as he had done. His conclusions were not just based on the appellant's good English, but he had heard live evidence in English, found the appellant credible and had seen the detail in the witness statement as to the circumstances in which he took the test. The appellant had been doing a degree in English during the period in which the test was taken. These matters taken together were enough to discharge the burden of proof.
9. Mr Singh had no further points to make by way of reply.
10. I reserved my determination.
11. It must be right, as Mr Singh argued, that the simple fact that an appellant is able to display proficiency in English at the relevant time as well as thereafter is not enough to discharge the burden of proof. There may be other reasons why a person who is proficient in English might nevertheless choose to employ a proxy to take an English test.
12. However, I agree with Ms Shaw that this was by no means the sole basis on which the appeal was allowed. The judge clearly placed reliance on the appellant's witness statement. He referred in his witness statement to sitting the test on 16 October 2012 at Stanford College in Norbury, London, described the circumstances in which he travelled to the tube station and then on to Norbury Park where the test centre was. He described the amount of time the travel took him. He also described in some detail the set-up of the building where the test was taken, the

number of people who were in the waiting room, the amount of time he had to wait before he took the test and the number of people taking the test with him and the duration of the test. In my view it was open to the judge, bearing in mind the guidance in SM and Qadir and Shehzad, to conclude that the appellant had discharged the burden on him in the particular circumstances of this case. Clearly the respondent had discharged her evidential burden, but thereafter there was nothing to discharge the legal burden on the respondent in light of the evidence put forward by the appellant upon which the judge placed weight. Accordingly, I conclude that there is no error of law in the judge's decision and the decision allowing the appeal in this case stands.

13. No anonymity direction is made.



Signed

Date 26 May 2017

Upper Tribunal Judge Allen

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 a fee award of any fee which has been paid or may be payable (adjusted where full award not justified).



Signed

Date

Upper Tribunal Judge Allen