Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18088/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 February 2018	**On 24 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

v

MR DON BUDDHIKA PRIYANTHA ABEYWICKREMA GUNAWARDANA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr. T. Melvin, Senior Presenting Officer
For the Respondent: Mr Z. Hussain, Hubers Law Solicitors

ERROR OF LAW DECISION & REASONS

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1. The Respondent, to whom I shall refer as the Claimant, is a national of Sri Lanka, born on 4.8.71. He entered the United

Kingdom on 29 April 2014 with entry clearance as a spouse of a settled person. He subsequently made an in time human rights application for leave to remain on the basis of his marriage to a British citizen. This application was refused in a decision dated 14 July 2016 on the basis that the Secretary of State considered that the Claimant had, in an earlier application in 2013, submitted a fraudulently obtained TOEIC certificate, by use of a proxy test taker and thus he did not meet the suitability requirement of S-LTR 1.6 of Appendix FM of the Rules.

2. The Claimant appealed and his appeal came before First tier Tribunal Judge Clarke for hearing on 6 September 2017. In a decision and reasons promulgated on 1 November 2017, he allowed the Claimant's appeal under the Immigration Rules, on the basis that he was satisfied that the Claimant did not cheat, as alleged.

3. The Secretary of State sought permission to appeal to the Upper Tribunal, in time, on the basis that the Judge erred materially in law:

(i) in allowing the appeal under the Rules, when the appeal was restricted to human rights grounds only;

(ii) in misinterpreting the evidence in that, had the Judge properly considered the evidence on the part of the Secretary of State, it would have been clear that deception had been demonstrated to the standard of the balance of probabilities; the Judge failed to give adequate reasoning why the Secretary of State had not met the legal burden nor is there any innocent explanation; the Judge materially erred in failing to give adequate reasons for holding that a person who clearly speaks English would have no reason to secure a test certificate by deception.

4. Permission to appeal was granted by First tier Tribunal Judge Boyes on the basis that the grounds were arguable for the reasons propounded in the application.

Hearing

4. At the hearing before me, Mr Melvin on behalf of the Secretary of State sought to rely upon the judgments in R (ota) Gaogalawe [2017] EWHC 1709 (Admin); R(ota) Nawaz [2017] UKUT 00288 (IAC) and MA [2016] UKUT 450 (IAC). He submitted that it was clear from the determination that the Judge found the Secretary of State had not discharged the evidential burden but has gone on in the alternative to reject the evidence put in by her. He submitted that there was a supplementary bundle and the Judge treated this dismissively at [17] and has dismissed the witness statement of the caseworker which contained evidence of the look up tool which had been accepted by the High Court as being of assistance. He

submitted that evidence of the test results and the college have both been analysed in the supplementary bundle and found favour with the court in *Gaogalalwe* at [29] onwards. The Judge has not made any findings in respect of Professor French's report on the evidence before him and that significant weight has been placed on the look up tool and that evidence in the case law *cf. Nawaz* at [47] found the evidence of Professor French is particularly significant.

5. Mr Melvin submitted that the evidence before this Judge has moved on dramatically and the evidence regarding the look up tool and that of Professor French has found favour with the higher courts and it was a shame that that evidence was not before the Courts in *SM & Qadir*. At [44] of *Gaogalalwe* the Judge finds the evidence of the Secretary of State is irresistible. The new evidence before the Tribunal has found favour in the caselaw and the Judge should have considered the Professor French report and erred in rejecting the evidence of the caseworker on the basis that she did not attend to give evidence. Mr Melvin submitted that there was only a very, very small likelihood that the Respondent could not have cheated if ETS, on the voice recognition software, found that the test result was invalid. There were 106 tests and 75% were invalid and the rest were questionable so there were no tests on that day that ETS found to be acceptable. The Judge relied on the fact that the Claimant knew the building had three stories to find he had rebutted the evidence. Mr Melvin submitted that there is a clear material error of law in finding that the Respondent has not cleared the evidential burden required in this matter.

6. Mr Melvin made reference to the Panorama programme and the fact that the Claimant sat next to the proxy test taker at another college and the Judge's lack of consideration of the evidence relied upon by the Secretary of State has clearly infected his finding as to whether the Secretary of State has made out the evidential requirement needed to have the appeal dismissed against the Claimant. He submitted that the Judge appears to rely on the failure to provide a voice recording, but there is no record of a request for a recording. The Judge also considers the fact that the Claimant in cross-examination mentioned an entirely different college but dismissed this out of hand. The Judge's reliance on the Claimant's proficiency in English and the fact he knew where the college was were points considered at [44] of *Gaogalalwe* where they were considered insufficient to discharge the burden. In respect of the finding at [43] that the fact the Claimant subsequently passed a test does not indicate that he cheated was indicative of the fact that the Judge has not considered the Secretary of State's evidence correctly for the reasons given and clearly is not accepting of the evidential burden. At [47] of *Nawaz* the Upper Tribunal found that clearly new evidence not considered by the Judge is very weighty indeed when considering an appeal of this sort. In respect of *MA* and the

conclusions of the Upper Tribunal at [57] there was consideration of the reasons why the Claimant engaged in deception of this kind and the submissions that the Claimant speaks English was rejected as being sufficient to discharge the burden of proof. Mr Melvin submitted that there were significant errors in the Judge's consideration which amounted to a material error of law in this decision.

7. In his submissions, Mr Hussain submitted that the Judge has applied himself correctly; had considered the relevant caselaw and explained himself more than adequately. He submitted that the Judge had looked at the evidence as a whole and laid out the tests, which were that there was an initial burden on the Secretary of State which, if met, bounces back to the Claimant and then reverts to the Secretary of State if the Claimant offers an innocent explanation.

8. Mr Hussain submitted that Ahsan [2017] EWCA Civ 2009 makes clear that where voice recordings are provided and the recording is not of the Claimant he can still succeed. He submitted that concerns have been raised about the accuracy of the look-up tool and how this information is recorded. He took the position that oral evidence given as part of the evidence and subject to cross-examination can rebut the evidence relied upon by the Secretary of State. In respect of the decision in *MA,* the Upper Tribunal at [15] set out the many different ways in which colleges have managed the system and the fact that applicants are ignorant about this and there are criticisms about the way data is recorded and fact ETS relied upon colleges exercising fraud to make accurate recordings of candidate numbers. Consequently, the submission that the look up tool and the Secretary of State's evidence is irrefutable were rejected.

9. In terms of the other caselaw, Mr Hussain submitted that *Nawaz* is a judicial review decision and not a substantive appeal and what it deals with is English language skills and that is all and this was not the sole basis of Judge's reasons. In respect of *Gaogalalwe* at [41]-[44] there was no witness statement from the Appellant and it was, therefore, fact specific).

10. Mr Hussain submitted that it is clear from [44] and [45] of the decision of Judge that the conclusion does not relate to the Claimant's language skills but goes much further. The Judge found the Claimant spoke English and Japanese in the course of his employment. At [39] and [40] there is a description of what the Claimant did; he describes the building and what happened on the day and this is lacking in the other cases eg *MA* where the Claimant did not know the name of the college he attended and the fact that there were two tests rather than one. At [31] of the decision the Judge does apply the correct test and considers whether the

evidential and legal burdens were met. The Judge finds the legal burden was not met and gives reasons as to why he considered it had not been met.

11. Mr Melvin requested the opportunity to consider the judgment in *Ahsan* at [25] and [33] which were being relied upon by Mr Hussain and requested 21 days in which to make written submissions. I informed Mr Hussain that he could then have 7 days to respond, following which I would make a decision on the appeal.

12. On 27 February 2018, I received submissions from Mr Melvin in respect of the judgment of the Court of Appeal in *Ahsan* in which he submitted as follows:
(i) *Ahsan* is primarily concerned with "Out of country" appeal rights in ETS cases that concern section 10 removal decisions and certified human rights claims.

(ii) Lord Justice Underhill helpfully records the development of the Secretary of State's evidence which includes the ability of any appellant faced with an adverse decision to apply (free of charge) for a copy of the voice recording to enable an expert to be instructed and that in a case where the voice file does not contain the applicants voice or the fact that no attempt has been made to obtain voice recording the case that he had cheated would be hard to resist.

(iii) In this appeal the Claimant had made no attempt to obtain the voice recording since the refusal of his application for further leave was refused on 14 July 2016. This was well over 1 year before the appeal came before the First tier Tribunal on 6 September 2017. This in itself is an obvious point but Judge Clarke in allowing this appeal found in favour of the appellant's rebuttal in part [33] finding that it was the responsibility of the Secretary of State to provide the voice file and the Secretary of State's failure to do so counted in favour of the Claimant;

(iv) The Respondent accepts Lord Justice Underhill's statement at [33] that the allegation of deception is fact specific and that the evidence now before the Courts is much stronger than initially provided, however, it is not of sufficient quality to show that all cases must fail.

(v) It is submitted that the case of *Ahsan* takes this Claimant's appeal little further and if anything it goes to strengthen the Secretary of State's view that there is a material error in law in the decision of the First tier Tribunal.

(vi) The Secretary of State maintains her position that First tier Tribunal Judge Clarke has materially erred in law and relies on the Grounds of appeal as submitted;

(vii) In addition it was submitted that the judge erred by failing to adequately reason the finding that the Secretary of State has failed to discharge the initial evidential burden (p34). As submitted at the hearing the FtT failed to even consider the report of Professor French which appeared in the supplementary bundle and his evidence, which has been accepted by the higher Courts, clearly shows the very small percentage (below 1%) of mistakes in the process.

(viii) Given that the Secretary of State had provided expert evidence for the hearing, it was incumbent on the Judge to at least, consider and incorporate that evidence when drawing conclusions on the Secretary of State's allegation of deception.

13. I have not, to date, received any response from Mr Hussain or from Hubers Solicitors. However, I have had full regard to his skeleton argument dated 21 February 2018, which was served at the hearing.

My Findings

14. I have carefully considered the evidence submitted to the First tier Tribunal; the skeleton argument of Mr Hussain and the written submissions of Mr Melvin in addition to the oral submissions made at the hearing. The caselaw *viz* SM & Qadir [ETS – evidence – burden of proof] [2016] UKUT 229 (IAC) and Shezhad & Chowdhury [2016] EWCA Civ 615 at [23] make clear that each ETS-TOEIC case is fact sensitive and the outcome will depend on the evidence adduced by the parties.

15. The Secretary of State contends that the Judge erred in law in allowing the appeal under the Immigration rules, given that the appeal was restricted to human rights only. This is correct, however, it does not call into question the findings made by the Judge. The Secretary of State further contends that the Judge erred: in failing to apply the correct burden of proof in line with *viz* SM & Qadir (op cit); in his approach to the evidence in that, had the Judge properly considered the evidence on the part of the Secretary of State, it would have been clear that deception had been demonstrated to the standard of the balance of probabilities; that the Judge erroneously failed to find that the Respondent had discharged the evidential burden of proof, given that witness statements and the spreadsheet extract had been produced; the Judge failed to give adequate reasoning why the Secretary of State had not met the legal burden nor is there any innocent explanation; the Judge

materially erred in failing to give adequate reasons for holding that a person who clearly speaks English would have no reason to secure a test certificate by deception.

16. I do not consider that there is any substance in the first ground of appeal. It is apparent from [15] of the decision that the Judge directed himself correctly in line with SM & Qadir that the initial burden of proof is upon the Secretary of State; if this is discharged then the burden shifts to the Claimant to provide a plausible innocent explanation and if so then the burden shifts back to the Secretary of State.

17. In a careful and detailed decision, the Judge went through the evidence before him, noting at [17] that the Secretary of State had submitted a supplementary bundle; further noting at [24] that the TOEIC certificate in respect of the second day of testing, on 16 November 2011, in respect of speaking and writing (the listening and reading part having taken place earlier and not apparently impugned) had been cancelled due to alleged deception and further noting at [25] that a BBC Panorama programme had investigated allegations in widespread fraud in TOEIC tests run by ETS, as has been set out in previous jurisprudence, which he cites. At [28] the Judge made express reference to and cited from the witness statement of Chandrika Mindelsohn dated 25 August 2017, which essentially served to adduce the spreadsheet relied on to demonstrate that the test result was invalid. The majority of the statement is concerned with the evidence of Rebecca Collings and Peter Millington. The Judge at [30] attached little weight to this statement for this reason due to the fact that the Upper Tribunal in *SM & Qadir* found the evidence of Ms Collings and Mr Millington to have manifest failings and at [32] because the witness failed to attend the Tribunal to be cross-examined.

18. However, I do consider that the Judge fell into error in two respects, both of which may have been material to the outcome. The first of these is that at [35] the Judge concluded that the Secretary of State had failed to discharge the initial evidential burden. This finding was based not only on the dim view that he had taken of the statements of Chandrika Mindelsohn, Rebecca Collings and Peter Millington but on the fact that the Secretary of State had failed to provide a copy of the voice recording. The difficulty with this is that, although true, there is no evidence that the Claimant himself requested a copy of the voice recording. It is clear from the judgment in *Ahsan* at [33] that the failure so to do may be material to any assessment of the appeal. The second error is the failure by the Judge to make any reference to or consideration of the report of Professor French. Whilst this may be a generic report it was still incumbent upon the Judge to address it as part of his determination and it may have made a difference to his conclusion that the

Secretary of State had failed to discharge the initial evidential burden.

19. For the avoidance of doubt, I find that the Judge gave adequate reasons for accepting the Claimant's oral evidence. Whilst he did place weight on the fact that the Claimant provided himself to be proficient in English, including during substantial cross-examination and attached sufficient weight to the fact that he had subsequently passed an English language test in 2016 through Trinity College, these were not the only reasons for his finding and it was open to him to be persuaded by the Claimant's detailed description of undergoing the test itself. I should also add that I do not consider that the judgment in *Ahsan* ultimately takes matters much further in a case such as this where the Claimant has remained in the United Kingdom.

20. However, for the reasons set out at [18] above, I find errors in the approach by the Judge to the Respondent's evidence, in particular his failure to consider the expert report of Professor French, albeit generic and his failure to consider that the Claimant had not himself requested a copy of the voice recording file and the impact of that on his assessment of the case as a whole. It is also the case that it was not open to the Judge to allow the appeal under the Immigration Rules as the appeal was restricted to human rights only.

Decision

21. I remit the appeal back to First tier Tribunal Judge Clarke to consider the matters set out at [20] above and to re-make his decision in light of those matters. The Judge's findings that are unaffected by error of law are preserved.

Rebecca Chapman
Deputy Upper Tribunal Judge Chapman

22 April 2018