

**Upper Tribunal**

**(Immigration and Asylum Chamber) Appeal Numbers: IA/02461/2016**

**IA/02459/2016**

**THE IMMIGRATION ACTS**

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| **Heard at Field House** | **Decision & Reasons Promulgated** |
| **On 5 June 2018** | **On 12 June 2018** |
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**Before**

**UPPER TRIBUNAL JUDGE WARR**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**(1) MRS ANITABEN RAKESHKUMAR PATEL**

**(2) mr Rakeshkumar Vitthalbhai Patel**

(ANONYMITY DIRECTION NOT MADE)

Respondents

**Representation:**

For the Appellant: Mr I Jarvis

For the Respondents: Mr D O Ayodele (Solicitor), Goodfellows Solicitors

**DECISION AND REASONS**

1. This is the appeal of the Secretary of State but I will refer to the original appellants as the appellants herein. The first named appellant was born on 7 August 1980 and the second appellant, her husband, was born on 17 August 1977. As the outcome of this appeal depends upon the case of the first named appellant I will refer to her as the appellant.

2. The appellant was granted entry clearance as a Tier 4 (General) Student and arrived in the UK on 18 March 2009 and her leave was extended on various occasions until 22 May 2013. The appellant’s husband arrived on 20 July 2010 and his leave was extended in line with the appellant’s. The couple had a child born in the UK on 26 November 2012.

3. The refusal herein stems from an application made on 20 April 2013 which was initially refused without a right of appeal. However it was agreed to reconsider the matter and the reconsideration resulted in the decision appealed from dated 30 August 2016.

4. It is the Secretary of State’s case that in her application of 20 April 2013 the appellant had submitted a TOEIC certificate from the Educational Testing Service (ETS) and her sponsor in order for the sponsor to provide her with a Confirmation of Acceptance for Studies (CAS). According to the information provided to the Home Office by ETS the appellant had obtained her TOEIC certificate as a result of a test that she had taken at Synergy Business College of London on 27 June 2012. ETS it was said had a record of the appellant’s speaking test and using voice verification software ETS was able to detect when a single person was undertaking multiple tests. ETS had confirmed to the Secretary of State that there was significant evidence to conclude that the appellant’s certificate had been fraudulently obtained by the use of a proxy test taker. Her test was declared invalid and her scores cancelled.

5. Accordingly the Secretary of State refused the application on the footing that the certificate had been fraudulently obtained under paragraph 322(1A) of the Immigration Rules and that any future applications would be refused under paragraph 320(7B) for periods depending on the circumstances in which the appellant left the country. The Secretary of State also refused the application under Article 8. It is not necessary to say more about that aspect of the case because the First-tier Judge dismissed the appellants’ appeal under Article 8 and there has been no challenge to that aspect of the decision. The judge heard oral evidence from the appellant and her husband in Gujarati. While studying at the East London College in Harrow she had become pregnant and due to complications was unable to attend college regularly. After the birth of her child she applied to study for the business management diploma at the Belgravia College, Harrow in 2013 because it was closer to her home. She had paid the college fees and had been issued with a CAS letter. She had attended college for about three months when she had been informed that there was a problem with the Home Office and while the students continued attending, the college had closed two months later. She had been invited to an interview with the Home Office on 26 November 2013 but did not hear from the Home Office after the interview. The judge records the Presenting Officer’s submissions as follows:

“15. Mr Petryszyn relied on the refusal letter. He submitted that the appellant used a fraudulent certificate in a previous application. Evidence has been provided of the appellant’s ETS source data together with a statement from Senior Presenting Officer Mr J Singh. The Project Facade report says that 65 of 204 tests undertaken were invalid. The appellant appears with certificate number 6002, which the evidence says is invalid. The respondent has discharged the burden on the basis of the evidence. The appellant obtained a CAS from Belgravia College but their licence was revoked.”

6. Mr Ayodele’s submissions are recorded as follows:

“17. Mr Ayodele submitted the respondent has not discharged the evidential or legal burden of deception. There is no connection that the appellant colluded, conspired or cheated to take her exam. She attended the centre in person, paid a fee and they telephoned her with a date for the exam. She received her results and certificate by post. Reliance is placed in the case of ‘AA (Nigeria) v Secretary of State for the Home Department [2010] EWCA Civ 773’. In the case of ‘SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC)’ every candidate was considered to have an invalid certificate. The appellant does not know who conducted the fraud after she sat the test.

18. The CAS was issued by the college, which the Home Office had approved. For the respondent to now say that the document was obtained fraudulently is wrong. The respondent needs to confirm whether the College licence was revoked when the CAS was issued. The appellant says she sat her English language test and the respondent needs to show that the appellant colluded with the college to obtain her certificate and CAS. On the basis of the evidence the respondent does not prove that the appellant was involved.”

I have omitted the submissions made by the representatives in respect of Article 8.

7. The judge dealt with the appeal under the Rules, noting that the appellant had a right of appeal because her application had been made before 20 October 2014. The determination on this aspect concludes as follows:

“22. In the refusal the respondent alleges the appellant submitted a TOEIC English test certificate in 2012, which she had obtained by deception and her application was refused under paragraph 322 (1A) of the rules.

23. I have considered the case of *“SM and Qadir”*, where the Upper Tribunal held the onus rests on the Secretary of State to prove that the Appellant is guilty of fraud in the respect alleged. I have also considered the case of “Shehzad Chowdhury [2016] EWCA Civ 615” where the Court of Appeal held that in order to prove allegations of fraud or deception in immigration cases the burden is initially on the Secretary of State and must show that there is, on the face of it, evidence of deception. If proved, the burden shifts to the appellant to provide a plausible innocent explanation and if such an explanation is provided the burden shifts back to the Secretary of State to disprove it.

24. The respondent filed witness statements of Jagdev Singh, Rebecca Collings and Peter Millington, expert report of Professor French, Project façade criminal enquiry into Synergy College, ETS test Centre Lookup tool.

25. The respondent alleges that the ETS Lookup Tool printout shows that the appellant sat a test at Synergy College, which is invalid. In Qadir the Upper Tribunal prefaced its judgment with a glossary of terms; “Invalid” is explained as: “The ETS assessment of TOEIC testing scores, which must be rejected.”

26. In the refusal the respondent alleges, “… ETS has a record of your speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker. The ETS Look Up Tool shows the test date as the 27 June 2012 and the certificate number 6002, which was marked as invalid.

27. I find on balance that the respondent has satisfied the evidential burden that on the face of it there is evidence of deception. The burden now shifts to the appellant to provide a plausible innocent explanation.

28. I found the appellant to be a credible witness giving her evidence in a candid and frank manner. I accept her evidence that she chose Synergy College following a chat with friends. There was no challenge to her evidence that she personally travelled to the college, paid the fees in cash and was telephoned with the test date. It has been almost 5 – years since the test and I find her explanation plausible that she has not held on to the fee receipt. The appellant said in cross-examination that she produced her passport as identity at the college. The appellant was not challenged on her evidence that she personally sat all parts of the test. I find on balance that the appellant has provided a plausible innocent explanation of having personally taking the test and the burden shifts back to the Secretary of State.

29. I note the refusal letter specifically refers to the voice-recording test of the appellant’s speaking test. I find on balance that the respondent has not disclosed the recording of the appellant’s speaking test, which is relied upon, which is specific to the appellant in a way that I find Professor French’s expert report is not, although the respondent seeks to rely on it.

30. Having considered all the evidence before me in the round I find on balance the respondent has failed to produce the ETS record of the appellant’s speaking test that the refusal letter relies upon. The respondent says it is proof that ETS found that the appellant’s test was obtained fraudulently and she had used a proxy. This is what the appellant has had to rebut and I find that she has given a credible explanation that she took the test personally. Although she was challenged about where and how she chose the test centre and taking the test, I find on balance that the appellant gave a consistent and satisfactory explanation of the background to how the test was booked and personally attending and sitting the test at Synergy College.

31. I therefore find on balance that the Secretary of State has not discharged the burden of proof that the appellant submitted a fraudulent English language certificate in a previous application.

32. I find on balance that the refusal under paragraph 322 is not in accordance with the law because I have found on balance that the appellant did not use a fraudulent English language certificate, and therefore I find she did not secure a CAS from Belgravia College by deception. The CAS (in RB) was assigned to the appellant on the 17 May 2013 and the College licence was revoked, according to the respondent several months later on the 27 January 2014. It was held in ‘Patel (revocation of sponsor licence – fairness) India [2011] UKUT 00211 (IAC)’ that the appellant be given a fair opportunity of 60-days to vary her Tier 4 sponsor. For all these reasons I find on balance the appellant satisfies the requirements and her appeal succeeds under the rules.”

8. The Secretary of State applied for permission to appeal and permission was granted on 4 April 2018 by the First-tier Tribunal and it was found to be arguable as claimed in paragraph 5 of the grounds that the judge had erred by placing undue weight on the respondent’s failure to produce the voice recording without sufficiently considering the other evidence produced by the respondent.

9. Mr Jarvis relied on the case of **Abbas [2017] EWHC 78 (Admin)**. He referred in particular to paragraphs 11 and 12 of the decision. It was plain that Professor French had been able greatly to reduce the number of false positives and his evidence in particular allowed “real weight to be given to the result of the ETS review in the claimant’s case.”

10. Mere attendance at the college or at the language test was not enough. It was clear that proxies could take the place of the candidate for the purposes of the test. There was a range of reasons why people might engage in fraud as found by the Tribunal in **MA (ETS – TOEIC testing) [2016] UKUT 00450 (IAC)**. I was referred to paragraph 57.

11. Mr Jarvis submitted that the judge’s approach in paragraph 29 was unlawful and the expert report was the property of ETS. The Secretary of State was not required to produce the analysis.

12. Mr Ayodele submitted that the Secretary of State had asserted fraudulent conduct and the judge had properly directed herself and applied the correct burden and standard of proof. Mr Ayodele referred to **AA (Nigeria)** on which he had relied before the First-tier Judge as recorded in paragraph 17 of her decision. It was clear from the case of **SM and Qadir** that every case was fact sensitive. I was referred to **Shehzad and Chowdhury [2016] EWCA Civ 615** at paragraph 30. My attention was drawn to paragraph 12 of the case of **Abbas** and on the positive credibility findings made by the First-tier Judge in paragraph 28.

13. Mr Jarvis submitted that the case of **AA** was not relevant. The judge had been satisfied in paragraph 27 that the initial evidential burden had been discharged. It was clear that the evidence had moved on in the light of the expert report provided by Professor French. It was accepted that the cases were fact sensitive. In paragraph 30 of **Shehzad and Chowdhury** reference had been made to the documents produced by the respondent in that case. In the instant appeal the respondent had produced the material and it had been specifically found that a proxy had been used.

14. It had been said by the judge in paragraph 28 that there had been no challenge to the appellant’s evidence. What was said in paragraph 28 needed to be read with what had been said in paragraph 30 about her evidence being challenged in various respects. Deception lay at the heart of the case. There was no legal reason to produce a voice recording.

15. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the determination of the First-tier Judge if it was fraud in law.

16. It is clear that the judge directed herself properly in respect of the burden and standard of proof and the shifting burden in a case such as this. In ground 3 of the grounds – the first point taken – the Secretary of State argued that the determination was inadequately reasoned and it was pointed out that reliance had been placed on an interpreter at the hearing. It was submitted that the judge had failed to take this into account:

“The appellant would have been aware that her standard of English was in question and it is of concern that she chose not to demonstrate her ability at the hearing. It is submitted that the judge has erred in failing to consider this when accepting the appellant’s explanation.”

17. I do not find it remotely arguable that the judge who has recorded that the appellant gave evidence through an interpreter would have not had this in mind when reaching her decision. I note that Mr Jarvis cited paragraph 57 of **MA** where the court refers to a range of reasons why persons proficient in English might engage in TOEIC fraud. It is a very common feature of the grounds filed by the Secretary of State in this type of case where the appellant has given oral evidence before the First-tier Judge in English to draw attention to this paragraph. This is simply an example of a case where an interpreter was used. Nor am I satisfied that the judge erred as claimed in ground 4 – it was said that the judge had placed weight on the fact that the appellant had been able to recall details of her journey to the test centre and the examination process but this did not mean that the appellant personally took the test.

18. The point was made by Mr Jarvis that there was a tension between paragraphs 28 and 30 in relation to what the appellant was challenged about. However I find that it is perfectly plain when the determination is read as a whole that the judge was indeed satisfied that the appellant had sat the test in person.

19. I remind myself that the judge had the benefit of hearing oral evidence from both the parties and her manuscript record confirms that the evidence given was subject to cross-examination. The judge states in paragraph 7 and 8 of her decision that she had had regard to the material lodged by the respondent and she specifically refers to the expert of Professor French and the project façade criminal enquiry into Synergy College at paragraph 24 of her decision. I do not find that her reference in paragraph 29 of her decision to Professor French’s report indicates that she had misdirected herself or misunderstood it. As Mr Ayodele pointed out by reference to paragraph 12 of **Abbas** it was not suggested by Professor French that the conclusion of the ETS review in any particular case was correct nor was it suggested that a specific degree of certainty could be attached to any individual finding of test invalidity. It was conceded the expert evidence could not be determinative. Cases still turn on their own facts. In the case of **Ahsan and Others v Secretary of State [2017] EWCA Civ [2009]** there is reference at paragraph 33 to “the extent to which the forensic landscape had changed since the Secretary of State’s initial, and frankly stumbling steps in this litigation.” However Underhill LJ indicated he was not prepared to accept

“That even in such specially strong cases the observations in the earlier case law to the effect that a decision whether the applicant or appellant has cheated is fact specific are no longer applicable or that there is no prospect of their oral evidence affecting the outcome.”

20. It might well be that another First-tier Judge would have reached a different decision but I am not satisfied that the decision reached was not properly open to her following a careful overview of the evidence.

21. For the reasons I have given the appeal of the Secretary of State is dismissed and the decision of the First-tier Judge to allow the appeal under the Immigration Rules shall stand.

**Anonymity Direction**

22. The First-tier Judge made no anonymity direction and I make none.

**TO THE RESPONDENT**

**FEE AWARD**

The First-tier Judge made a fee award of a fee with which there is no reason to interfere.

Signed Date 11 June 2018

G Warr, Judge of the Upper Tribunal