



**Upper Tribunal
(Immigration and Asylum Chamber)
OA/08751/2014**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 24 May 2016**

**Decision & Reasons
Promulgated
On 6 June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

**MR SHAOWEN ZHANG
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Claimant

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: No appearance by or on behalf of the Claimant

DECISION AND REASONS

1. The appellant in this error of law matter is the Secretary of State. I shall refer to the parties as “the Secretary of State” and “the Claimant” (who was the appellant in the proceedings before the First-tier Tribunal (“FTT”). There was no appearance by or on behalf of the Claimant at the hearing before me to consider whether or not there was a material error of law by the FTT.
2. The Claimant is a citizen of China whose date of birth is 3 August 1990. His appeal was decided on the papers by First-tier Tribunal (Judge Nolan),

who allowed the appeal against the Secretary of State's refusal to grant leave to remain as a Tier 4 Student with reference to the general grounds of appeal under paragraph 322(1A) of the Immigration Rules, HC395 (as amended). The FtT concluded that there was insufficient evidence to show that the Claimant had used deception in obtaining his English language certificate. The decision giving rise to a right of appeal was a removal decision under Section 10(1)(b) of the Immigration and Asylum Act 1999, which gave rise to an out of country appeal right. The Claimant Mr Zhang returned to China and submitted a notice and grounds of appeal dated 1 August 2014 stating that the decision was not in accordance with the law and he had not obtained the TOEIC through deception.

3. The decision and reasons sets out the burden and standard of proof at [10]. The FtT stated that the burden was on the Secretary of State and the standard of proof for deception was "a high degree of probability" that deception has been used. The FtT considered the generic evidence relied on in such cases by the Secretary of State and cited guidance in the Upper Tribunal decision of **R (on the application of Gazi) v SSHD (ETS - judicial review) 1JR [2015] UKUT 327 (IAC)** [13]. The FtT concluded that the generic evidence was insufficient to discharge the high degree of probability required [15]. The FtT took into account the following:

"He did score very well in his test, but he argues that he has already completed qualifications in the UK taught in English, and thus he has a very good English ability already and had no reason to cheat in his test. I accept this. The level he has achieved in the test is consistent with his current academic level as set out in his (now cancelled) CAS, which states that he is progressing onto the main graduate diploma course now as he has improved his English sufficiently during the previous year."

Grounds of Application

4. It is contended on behalf of the Secretary of State that firstly the FtT applied the wrong standard of proof. Further that the FtT failed to place sufficient weight on the generic evidence and/or failed to give adequate reasoning for rejecting the same.

Permission

5. Permission was granted by FtT Judge Garrett on 8 April 2016 on the grounds that the First-tier Tribunal erred by applying the wrong standard of proof in considering the respondent's evidence.

Error of Law Hearing

6. At the start of the hearing I indicated to Mr Bramble that the main issue for determination was whether or not the error of law was material. I was satisfied that the FtT erred in law by applying a higher test by reference to a "high degree of probability", than the ordinary civil standard when considering the respondent's evidence alleging deception.

7. Mr Bramble relied on the recent decision of **Qadir** arguing that the situation had now been clarified by the Upper Tribunal to the effect that there is a two-stage approach to be applied in these cases. The head note in **Qadir** is as follows:
 - “(i) The Secretary of State’s generic evidence, combined with her evidence particular to these two appellants, sufficed to discharge the evidential burden of proving that their TOEIC certificates had been procured 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 appellants, the Secretary of State failed to discharge the legal burden of proving dishonesty on their part.”
8. Mr Bramble submitted that the FtT focus was solely on the issue of whether or not the Secretary of State had discharged the burden having regard to the generic evidence provided. Following **Qadir**, this was sufficient to discharge the burden to the civil standard on the part of the respondent. Mr Bramble submitted that the FtT’s approach thereafter is flawed as it failed to consider what evidence there was or make any findings as to what the Claimant relied on in support of his claim that he had not acted dishonestly.
9. In respect of the findings at [15] made by the FtT, Mr Bramble argued that this was not sufficient to show that the second stage of the process had been satisfied. He argued that having erred in law by applying a higher benchmark the whole determination was infected. However, he acknowledged that if the Upper Tribunal were to accept that the Secretary of State had effectively demonstrated evidence to meet the first hurdle then the question remained whether or not there was evidence from the claimant sufficient to satisfy that he was a genuine student.
10. It is to this latter issue that I now turn. I agree with the submissions made by Mr Bramble as to the two stage approach outlined in **Qadir** in the head note quoted above. The FtT did go on to consider other evidence as set out in [15] in respect of the second stage. The FtT looked at the CAS and the grounds of appeal. There was no witness statement and no account from the Claimant before the FtT. I take the view that there was insufficient evidence before the FtT to make the findings that it did at [15], and furthermore that its consideration of all the evidence was tainted by the error as to the standard of proof.

Decision

11. I find a material error of law in the decision and reasons which shall be set aside. The Secretary of State’s appeal is allowed to that extent. The decision falls to be remade.

Remaking the decision

12. I am conscious of the fact that this is an out of country appeal, the Claimant requested a paper hearing and further time in which to provide documentary evidence, which was refused. In the light of the fact that neither he nor his representatives have taken steps to pursue this matter or to adduce any evidence whatsoever, I am satisfied that I can go on to remake the decision on the basis of the evidence before me having regard to the correct standard of proof. I am unable to find that the Secretary of State has discharged the evidential burden on the balance of probabilities to show that the invalid test was obtained by deception. The only evidence adduced in addition to the generic evidence is a CAS (C1-3) withdrawn on 21.5.2014 which states that the application was withdrawn by the student who will defer his studies. In addition at (B1-3) copies of ETS source data are produced which fail to give full details as to the test date and the Claimant's date of birth and are not reliable evidence as to material facts. There is no evidence to tie in the source data with the CAS. There is no evidence relied on by the Secretary of State such as an interview with the Claimant seeking to question him about the allegation made. I rely on and apply the guidance in **Qadir [58-68]** regarding the standard of proof in TOIEC deception cases. It is reiterated that the standard is the civil standard the balance of probabilities but that is qualified in terms of the need to have strong evidence compatible with the level of seriousness of the allegation and potential consequences. The question is whether there is evidence of sufficient cogency to warrant the conclusion that the burden has been discharged to the civil standard. In this instance I find that the evidence relied on by the Secretary of State fails to meet the standard of proof.

13. I remake the decision by substituting a decision to allow the appeal.

No anonymity direction is made.

Signed

Date 3.6.2016

GA Black
Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

I have decided to make no fee award.

Signed

Date 3.6.2016

GA Black
Deputy Upper Tribunal Judge G A Black