Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12998/2015

THE IMMIGRATION ACTS

Heard at Field House
On 3rd August 2017

Decision & Reasons Promulgated
On 16th August 2017

Before

UPPER TRIBUNAL JUDGE REEDS

Between

SACHIN BUSAWON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Karim, Counsel instructed by AWS Solicitors
For the Respondent: Mr P. Nath, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Mauritius born on the 13th December 1980. He appeals with permission, against the decision of the First-tier Tribunal who, in a determination promulgated on the 21st March 2017 dismissed his appeal against the

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decision of the Respondent to refuse leave to remain on grounds of his long residence.

2. No anonymity direction was made by the First Tier-Tribunal and no application has been made on behalf of the Appellant or any grounds put forward to support such an application.

The background:

3. The Appellant entered the United Kingdom on the 21st July 2004 on a student Visa valid until 30th September 2009. His leave to remain as a Tier 4 student was extended on two occasions until February 2013. On the 9th May 2012 his leave was curtailed to expire on the 29th October 2012. On the 1st September 2012 he submitted an application for leave to remain as a Tier 4 student which was granted until 30th December 2013. On the 21st June 2013 he submitted an application for leave to remain as a Tier 4 student which was granted until the 27th July 2015. On the 19th January 2015 he was served with form IS151A.

4. On the 27th July 2015 he applied for leave to remain on long residence grounds.

5. The Respondent refused the application on the 25th November 2015 under paragraphs 276B(ii) and Appendix FM and paragraph 276ADE (1) of the Immigration Rules on the basis that the Appellant had, in an earlier application for leave to remain as a student on the 4th October 2013, submitted an English language test certificate from ETS which was false. The Respondent referred to the Appellant's test scores having been cancelled by ETS and in reliance on generic witness evidence about such fraudulent tests and was satisfied that the Appellant's certificate was fraudulently obtained and that he had used deception in his application. The Appellant's presence in the United Kingdom was not therefore considered conducive to the public good and it was undesirable to allow him to remain in the United Kingdom. It was refused under paragraph 276B (ii).

6. It was however accepted that for the purposes of paragraph 276B (i) of the Immigration Rules, that the Appellant had resided continuously lawfully in the United Kingdom since 21st July 2004.

7. Separately, the Respondent considered the Appellant's circumstances on the basis of his private and family life established in United Kingdom. There was no suggestion in the application mde by the Appellant that the he had any family life (partner or children) and no reference was made to any family relatives in the United Kingdom.

8. The application was refused on private life grounds under paragraph 276ADE (1) of the Immigration Rules. It was concluded by the respondent that the Appellant failed to meet the suitability requirements in S-LTR.1.6 of Appendix FM to 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 18th October 2011 at Westlink College had been cancelled by ETS.

9. It was further refused on the grounds that there were no very significant obstacles to his return to Mauritius where he had resided for the majority of his life and where he has retained knowledge of life, language and culture. There were no exceptional circumstances found to warrant a grant of leave to remain outside of the Immigration Rules.

10. The Appellant appealed that decision on the 7th December 2015. In the grounds he asserted that he had not received the IS151A notice (paragraph 7). The rest of the grounds can be described as "generic" grounds in which it was argued that the decision was "unfair" and a violation of his humanitarian rights under Article 8 of the ECHR" and the respondent had "overlooked the Appellant's personal circumstances" and should have "exercised differently a discretion conferred by the immigration rules." The grounds do not give any details personal to the Appellant concerning the allegation made by the SSHD that he had used deception. What was said at paragraph 3 was that " the respondent had misjudged has the Appellant is a qualified Tier 4 student who has studied the major part of studies in English and he can converse in English."

11. On the 14th March 2017 his appeal was heard by the First-tier Tribunal. In a determination promulgated on the 21st March 2017 the judge dismissed his appeal on all grounds.

12. The Appellant sought permission to appeal that decision and on the 14th June 2017 First-tier Tribunal Judge Andrews granted permission for the following reasons:

> "Having seen the letter and fax transmission verification report of 31 March 2017 I am satisfied that this application is in time.
>
> I am further satisfied that there is an arguable error of law in the decision in that the judge did not consider the evidence referred to at paragraph 5 of the application. Further, he failed to address whether it was undesirable for the Appellant not to be given leave. It is also arguable that the judge's findings in relation to article 8 are flawed given the length of time the Appellant has been in United Kingdom."

13. The Secretary of State responded to the grounds of appeal under rule 24. That document opposed the appeal observing the judge directed himself appropriately. The judge had sight of a significant number of documents and the fact that the Appellant had given an explanation that he did not need to cheat because of his

earlier English certificates did not detract from the fact that there may be a number of reasons why the Appellant would use a proxy. The judge had regard to the English language certificates and was entitled, having considered all the relevant evidence to find that the Appellant had used deception. Given that the judge found that the Appellant had used deception, whilst he may not explicitly refer to whether or not a grant of leave was undesirable, it is submitted that it would be in the light of the deception the judge found. As to relationships with family members, it was noted that family life was not pursued before the Tribunal and in any event, the judge did consider these relationships and there was nothing to suggest anything over and above normal emotional ties.

14. At the hearing, Mr Karim relied upon the grounds. He submitted that the judge failed to engage with the three stage process which he described as the "boomerang approach". He referred the Tribunal to the determination and in particular paragraph 22 where the judge recited the burden and standard of proof as follows; "the burden of proof is upon the Appellant and the standard of proof is on the balance of probabilities. However, there is an initial burden upon the respondent to show that there is a prima facie case against the Appellant."

15. He submitted that this was not an accurate representation of the correct burden and standard of proof and there was no reference to the respondent having the legal burden to demonstrate on the balance of probabilities that the Appellant had used deception.

16. At paragraph 26, he submitted that the judge again had wrongly characterised the burden of proof as stating that "the burden of proof was on the Appellant to rebut the evidence" of the Secretary of State. He submitted that the judge had not qualified this and in particular whether the Appellant had demonstrated any innocent explanation at the minimum level of plausibility. The judge had approached the case on the basis that there was a burden on the respondent and then a burden on the Appellant and had gone no further. At paragraph 30 the judge made reference to having been "quite satisfied that the respondent has provided specific evidence in this case to establish the Appellant used deception" and also stated "the Appellant has failed to rebut these assertions on the balance of probabilities. Quite simply he has adduced no evidence other than a number of English language certificates, which, in isolation proves nothing as there is no evidence of the standard of English achieved compared to the ETS standard." Mr Karim submitted that that was not in accordance with the decision of SM and Qadir at [57].

17. He submitted that at paragraph 33, the judge again fell into error by stating that "on the totality of the evidence before me, and bearing in mind the burden of proof lies on the Appellant, I find that the respondent's decision was in accordance with the law."

18. In summary he submitted the judge did not appreciate the correct burden of proof at the various stages did not appreciate the issue of the minimum level of plausibility of the innocent explanation and also reversed the burden which he placed on the

Appellant. Thus he submitted the judge had not carried out the legal exercise as necessary.

19. He also submitted that the judge had failed to make clear findings on the evidential aspects of the case, for example, not considering the Appellant's account of how he had taken the test as set out in the witness statement and the other matters relevant to whether or not he had provided and innocent explanation and to be placed in the overall balance. It was for the judge to make an assessment of those matters but the judge does not give any reasons for rejecting that evidence nor does he explicitly say he does reject that evidence. The judge had not appreciated the relevance of this and therefore had not approach the matter in the correct way.

20. Mr Karim accepted that paragraph 5d of the grounds was factually wrong as the project Façade report did cover the period when the test was undertaken.

21. Further submissions concerned the failure to consider an assessment under paragraph 276B (ii) and that the judge had not considered those factors and that the public interest references paragraph 31 related to S117 factors.

22. Mr Nath for the Secretary of State accepted that there was a three stage process in establishing the deception. He submitted that the burden did move to the Appellant and this was an assessment made by the judge. He submitted that paragraph 30 of the determination the judge having previously set out at paragraph 26 considered the innocent explanation and there was no evidence that he had contacted the college and therefore his decision was open to him. Paragraph 30 was therefore a summary. He submitted that the determination could have been clearer upon the approach used to determine the issue of deception but overall the Appellant had not shown an innocent explanation and the judge was right to say at paragraph 30 that the Appellant had not "rebutted" the evidence.

23. As to the point raised in relation to paragraph 276B (ii) paragraph 31 dealt adequately with this. The public interest factors identified with those relevant to an assessment under paragraph 276B (ii) and are the same as the suitability grounds and therefore was sufficient to demonstrate that it was undesirable that he be granted leave.

24. By way of reply Mr Karim submitted that it was incumbent on the judge to set out the correct approach given the grave consequences of the findings made for this Appellant and that it is not possible to read "between the lines". The decision plainly did not sufficiently engage the oral evidence provided. He submitted the determination be set aside and remitted for a de novo hearing.

25. At the conclusion of the hearing I reserved my decision which I now give.

Discussion:

26. There is no dispute between the parties of the correct approach that should be taken in cases involving the issue of deception. The key decisions relevant to determining whether the Appellant has used deception in this context are SM & Qadir (ETS - Evidence - Burden of Proof) [2016 UKUT 229 and Sharif Ahmed Majumder and Ihsan Qadir v Secretary of State for the Home Department [2016] EWCA Civ 1167. The respondent's evidence in SM and Qadir was found by the Upper Tribunal to suffice to meet, albeit by a narrow margin, the initial evidential burden of showing deception. The burden then shifted to the Appellants to raise an innocent explanation. In the cases of Mr Majumder and Mr Qadir, in the context of the explanations and evidence given by them, the respondent could not satisfy the legal burden to show that their TOEIC certificates were procured by dishonesty and so their appeals were allowed by the Upper Tribunal. The respondent initially appealed to the Court of Appeal but then settled those appeals by consent.

27. The question for me to consider is -has the judge approached the matter in the manner directed by the Court of Appeal in *SM and Qadir* [2016] EWCA Civ 1167? That involves considering, first, whether the Secretary of State has met the burden on her of identifying evidence that the TOEIC certificate was obtained by deception; second whether the claimant satisfies the evidential burden on him of raising an innocent explanation for the suggested deception; and third, if so, whether the Secretary of State can meet the legal burden of showing, on the balance of probabilities, that deception in fact took place.

28. I have considered this question in the light of the submissions made by the parties and by reference to the determination of the First-tier Tribunal. Having done so I am satisfied that the submissions made by Mr Karim are made out. I shall give my reasons for reaching that view.

29. It is plain from the determination that the judge did not apply the correct burden and standard of proof as set out in the case law and referred to above. There are a number of points within the determination where the test is not applied or is referred to wrongly. The judge began at a paragraph 22 by making reference to the burden of proof being on the Appellant. He did, however, recognise that there was an initial burden upon the respondent to show "that there is a prima facie case against the Appellant". Whilst the first part is not strictly accurate, the judge did identify albeit in confusing terms that there was an evidential burden on the Secretary of State. At paragraph 26, the judge made reference to the "generic and specific evidence" and that in the light of that being produced "the burden of proof is clearly upon the Appellant to rebut that evidence." He then stated that he had failed to do so. At paragraph 30 he made reference to "I am therefore quite satisfied that the respondent has provided sufficient generic and specific evidence in this case to establish the Appellant used deception…. And the Appellant has failed to rebut these assertions

on the balance of probabilities." In the notice of decision at paragraph 33 the judge once again refers to the burden of proof lying upon the Appellant stating "bearing in mind the burden of proof lies on the Appellant, I find that the response decision was in accordance with the law."

30. Whilst Mr Nath submitted that in general terms the judge did apply the correct test even though as he submitted the determination was unclear as to this, I am not satisfied that the correct approach was followed. As Mr Karim submitted in a case like this and the grave consequences that flow from a finding of deception require the correct approach to be adopted by the Tribunal. The determination demonstrates at the different paragraphs that have been identified that the correct approach and the analysis set out in the decision of SM and Qadir was not followed and it is unclear as to which party had the burden of proof at which stage and importantly, what the judge made of all the evidence at each stage.

31. There can be no dispute on the evidence before the judge that that the generic evidence taken together with the ETS spreadsheet providing specific details relating to the Appellant is sufficient to allow the Secretary State to discharge the evidential burden of the use of deception in the taking of an English language test. (see Shezhad and Chowdhury [2016] EWCA Civ 615 at [26],28] [43] and SM and Qadir [2016] EWCA Civ 1167 at [4]).

32. However there does not seem to have been any appreciation of the next stages whereby there was a burden, again an evidential one on the Appellant of raising an innocent explanation. This required the minimum level of plausibility as Mr Karim submitted. Thereafter the judge was required to consider whether the Secretary of State had discharged the legal burden of proof in relation to dishonesty which remains with the Secretary of State.

33. In reaching a decision on this issue and addressing the legal burden, the factors that the Upper Tribunal noted at paragraph 69 of their decision in SM and Qadir as being relevant to considering an allegation of dishonesty in this context: "include (in exhaustively, we would add) what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated. Mr Dunlop also highlighted the importance of three further considerations, namely how the Appellants performed under cross examination, whether the Tribunal's assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic achievements are such that it was unnecessary or illogical for them to have cheated."

34. The Court of Appeal in SM and Qadir [2016] EWCA Civ 1167 endorsed that approach.

35. At paragraph 89 the Upper Tribunal in SM and Qadir stated as follows

> "the final question is whether the Secretary of State is discharge the legal burden of establishing on the balance of probabilities that this Appellant

procured his TOEIC certificate by deceit. The answer to this question requires a balancing of all of the findings and the evaluative assessments rehearsed above."

36. In this context findings of fact were necessary on the evidence given by the Appellant to demonstrate that he had not engaged in deception but had sat the test. Whilst the judge made reference to the Appellant adducing no evidence to rebut the respondents evidence "other than a number of English-language certificates" (see paragraph 30) that was not the position. The Appellant had given a detailed account as to how he had sat the examination, why he had chosen the college and the format of the examination (see witness statement). In the case of SM and Qadir, one of the Appellants had given details of how he sat the test (see paragraph 45) although I accept in impressive detail. Therefore the judge was required to consider that aspect of his account along with the other factors set out in paragraph 69 relevant to the issue of dishonesty; in this case what was known about the Appellant's character (there being character references), what he would have to lose by using deception along with his level of English (which the judge did consider) and any other relevant factors. Whilst the judge made reference to the English-language certificates, it does not appear that this was analysed in any detail as to the level of English necessary for the certificates he obtained all the qualifications that he has obtained whilst being in United Kingdom. There is no record in the determination of the oral evidence given on this issue and it is not clear to me whether that evidence was given or not. However those were relevant matters.

37. The judge did record that the Appellant produced no evidence from the college itself but did not appear to weigh in the balance the evidence that the college had its licence revoked in 2014 (as supported by the document in the bundle) and therefore, as the Appellant claimed he could not obtain such information.

38. As the case law identifies, each case is fact sensitive and requires a balancing of findings and an evaluative assessment to be made and this is to be determined on all the evidence adduced by the parties (see SM and Qadir at paragraph 102).

39. Consequently I am satisfied that the grounds in this respect are made out. In the light of that conclusion it is not necessary for me to consider the other ground relating to paragraph 276B(ii) although I would observe that if the judge had applied the correct legal test and deception demonstrated, the findings at paragraph 31 would have been sufficient to discharge any consideration of paragraph 276B(ii). The fact that the judge did not appreciate that there was a factual assessment to make in relation to the paragraph 276B (ii) factors underlies the submissions made by Mr Karim that the correct legal test was not applied in the earlier part of the determination.

40. Nonetheless, for the reasons I have given I have found a material error of law and therefore I set aside the determination.

41. As to the remaking of the decision, Mr Karim submitted that the correct course to adopt in a case of this nature was for the appeal to be heard de novo and thus

remitted to the First-tier Tribunal because it would enable the judge to consider the applicant's evidence and his account and for findings to be made on all the evidence.

42. In the light of those submissions, I am satisfied that that is the correct course to take and therefore I set aside the decision of the First-tier Tribunal and it will be remitted to the First-tier Tribunal to hear afresh.

Decision:

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside; it shall be remitted to the First-tier Tribunal for a hearing.

Signed

Date: 15/8/2017

Upper Tribunal Judge Reeds