Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/04532/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 May 2017	**On 19 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR GM FARID HOSSAIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant:	Ms D. Ofei-Kwatia, counsel instructed by M Q Hassan Solicitors
For the Respondent:	Ms Z. Ahmed, Home Office Presenting Officer

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of Bangladesh, born on 15 July 1990. He arrived in the United Kingdom on 20 January 2010 in order to study for an HND, prior to which he was required to undertake a pre-sessional English language course. He sat a TOIEC exam between June and August 2012 and later sat an IELTS test in October 2014. On 17 January 2015, the Secretary of State made a decision to cancel the Claimant's leave and refuse him leave to enter, on the basis that he had made false representations in order to obtain leave as a student.

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2. The Claimant appealed against this decision and his appeal came before First tier Tribunal Phull for hearing on 13 August 2015. In a decision and reasons promulgated on 21 September 2015, the Judge allowed the appeal on the basis that the Secretary of State's decision was unlawful and thus not in accordance with the law. This decision was overturned by the Upper Tribunal and the appeal came before Judge of the First tier Tribunal Greasley for a hearing *de novo* on 31 October 2016. In a decision promulgated on 8 November 2016, the Judge allowed the Claimant's appeal, on the basis that the Claimant had provided truthful and credible evidence in relation to his participation in the TOEIC test on 25 July 2012 at Synergy Business College and that the collective evidence submitted by the Secretary of State did not, in evidential terms, counter or rebut the specific evidence provide by Dr Harrison and which had been accepted by the Upper Tribunal in *SM & Qadir* [2006] UKUT 00229 (IAC)..

3. The Secretary of State made an in-time application for permission to appeal to the Upper Tribunal on the basis that the Judge had erred materially in law: (i) in failing to give adequate reasons for findings on material matters *viz* the evidence of Professor French; (ii) for holding that a person who clearly speaks English would have no reason to secure a test certificate by deception and (iii) for failing to find that the witness statements and spreadsheet extract, particular to the Appellant, showed that his English language test had been invalidated because of evidence of fraud in the test he had taken.

4. Permission to appeal was granted by First tier Tribunal Judge Parkes on the basis that the grounds of appeal are arguable in that the Judge did not refer to the report of Professor French in his reasons, which focussed more on that of Dr Harrison and given the nature of the evidence relied on, the Judge needed to address the Secretary of State's evidence in its totality and arguably failed to do so.

Hearing

5. At the hearing, Ms Ahmed for the Secretary of State handed up a copy of *MA* (ETS-TOEIC testing) [2016] UKUT 450 (IAC). She made two submissions:

5.1. the First tier Tribunal Judge failed to engage with Professor French's report. Whilst he does refer to it at [12]-[13] this is before he makes findings at [22] where he simply said he considered the decision in *SM & Qadir* (op cit) and the report of Dr Harrison and does not engage with Professor French's report nor make findings upon it. In finding that the burden of proof has not been discharged by the Secretary of State, the Judge did not engage with the evidence being relied upon by the Respondent and had he engaged with it he could have reached a different decision. Professor French's conclusions are contrary to Dr Harrison's report specifically regarding the rate of false positives and that could have made a material difference.

5.2. The Judge erred in his consideration of the Claimant's ability to speak English at [25] of the decision. Whilst the Judge found that the Claimant was able to give evidence in English, the Secretary of State relies upon [80] of *SM & Qadir* (op cit) where the Tribunal held that one should be cautious about an applicant's ability to speak English and see also [57] of *MA* [2016] UKUT 450 (IAC) cited at [13] of the grounds. Ms Ahmed submitted that there are a range of reasons why someone fluent in English may still engage in fraud.

6. On behalf of the Claimant, Ms Ofei-Kwatia submitted that at [12]-[14] the First tier Tribunal Judge sets out rather forensically the evidence of Professor French and it is worthy of note that within his evidence he had also referred to the evidence of Mr Millington and Ms Collings and this was also set out by the Judge at [8]-[9] and [10]-[11] so it cannot be said that the Judge has not considered the evidence of the Secretary of State, in that he has given due attention to that evidence. However, the Judge made it abundantly clear that it is the evidence of Dr Harrison that is preferred and the Judge gave clear reasons as to why he prefers Dr Harrison's evidence and there was no reason to set out the evidence of Professor French, having already done so.

7. The evidential burden is upon the Secretary of State. At [22] the Judge finds that the Secretary of State has discharged the burden on the basis of her generic evidence but he goes on to state that the Claimant's innocent explanation offered is accepted. Even if there was an error of law in terms of the consideration of Professor French's evidence it is not material given how thoughtful the determination is and the fact that the Judge accepted that the Claimant had provided an innocent explanation and has been found credible. All the findings made by the Judge were open to him to make.

8. In respect of the Claimant's test result, this was a questionable result not an invalid result and the Judge correctly refers to this as an "administrative irregularity". This is clear from page 2 of the Respondent's bundle, which is the second page of the report concerning Synergy Business School and which defines the results at [5]. Consequently, even if Professor French's report had been dealt with in more detail in would not have made a difference given that the test result was questionable and thus the correct course should have been a re-test due to administrative irregularities and the Claimant was not given the opportunity. Thus any re-statement of Professor French's report would not negate the Claimant's innocent explanation or the administrative irregularities.

9. With regard to the Claimant's English language ability, the Judge's finding in this respect was not determinative in any way and should be weighed in the balance. At [17]-[20] the Judge considered the Claimant's evidence and his witness statement and response to cross-examination and in light of the decision in *SM & Qadir* (op cit) when considering the legal burden these are factors that can be weighed in ie. what the person can gain, character, honesty essentially a holistic picture and the Judge did this. The way the grounds are

framed implies that the Judge made the assessment based on the Claimant's fluency at the hearing but the Judge goes further: see [80] of *SM & Qadir* and this reinforces the wider remit not just his performance on the day. Ms Ofei-Kwatia submitted that the decision in *MA* at [57] was entirely distinguishable in that it involved different evidence and an admission by the Appellant that the voices on the recordings were not his and thus the focus was on the reasons for the dishonesty. Even on those facts the Tribunal concluded there were reasons that could overlap in individual cases and other reasons for deceitful conduct, although they were not required to make findings on this. She submitted that there was no material error of law in decision of the First tier Tribunal Judge and that, even if there was an error, it was not material and would not have lead to a different outcome.

10. In her reply, Ms Ahmed submitted that with regard to [12]-[13] of the decision, referring to the evidence and engaging with the evidence are two different things and that when evidence is relied on expressly by a party, the Judge's duty is to make a finding on it and a Judge has to give reasons for rejecting it. In this case, the Judge simply refers to Dr Harrison's report at [22] and [24] and fails to engage with Professor French's conclusions on the same point, thus the simple failure to make findings on that evidence is a material error. Ms Ahmed further submitted that, contrary to Ms Ofei-Kwatia's submission the Judge treated the Claimant's fluency in English as a determinative factor and this is contrary to the approach in *MA* at [57] *viz* that one should be cautious when considering this as a factor and the Judge was not cautious in this respect.

11. I reserved my decision, which I now give with my reasons.

Findings

12. There are three bases to the Secretary of State's challenge to the decision of First tier Tribunal Judge Greaseley. The first relates to an alleged failure to give adequate reasons for findings on material matters *viz* the evidence of Professor French. The thrust of the Secretary of State's argument is that the First tier Tribunal Judge made no findings regarding the evidence of Professor French at [27] when considering the evidence submitted by the Secretary of State against that of Dr Harrison. The difficulty with this basis of challenge is that it is unparticularised except regarding the difference between the reports of Professor French and Dr Harrison as to the rate of false positives and the fact that Professor French's conclusions were more up to date than those of Dr Harrison. However, that is not an issue in this particular appeal, given that it is undisputed that this Claimant's test result was questionable due to administrative irregularity, rather than an invalid result. It is clear that the First tier Tribunal Judge had regard to the evidence of Professor French because he sets out his evidence in some detail at [12]-14] of the decision, albeit he made no express reference to it in his findings. I have concluded that this ground of appeal is not made out, in light of the fact that

the Judge clearly considered the evidence of Professor French, but on the particular facts of this case it made no material difference to his findings.

13. The second ground of appeal is that the Judge 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. The difficulty with this basis of challenge is that is not in fact what the Judge found at [25]:

> *"It is the ETS voice recognition system that lays at the heart of the respondent's refusal decision and its specific decision to cancel the appellants leave. I accept that the appellant has previously studied in the United Kingdom and successfully secured an HND qualification. Prior to this course commencing, he also studied a pre-sessional six-month English language course which again he passed. In addition, the appellant has successfully studied a degree in the United Kingdom which I accept was taught wholly in the English language. He was able to give evidence in English at the appeal hearing and I accept that he did so with fluency and without hesitation. His responses to many of the questions asked of him were detailed and spontaneous."*

14. It is clear from the Judge's findings that he did not hold that a person who clearly speaks English would have no reason to secure a test certificate by deception, but simply that the Claimant spoke fluent English before him. I have had regard to the findings of the Upper Tribunal in *MA* (op cit) at [57] and *SM & Qadir* (op cit) at [80] where it was held that Judges should be cautious in making their own assessment of an appellant's English language proficiency based on performance at the appeal hearing due to the passage of time; the fact that Judges are not language testing or linguistics experts and the absence of any expert linguistic evidence in any of these cases. I find that in this particular case, the First tier Tribunal Judge took account not only of the Claimant's English language proficiency at the hearing, but also the fact that he studied a passed an HND qualification in English; completed a six month pre-sessional English language course and completed a degree in English. Further, this factor was one of a number of reasons set out at [22]-[24] and [26] as to why he concluded that the Claimant's evidence was truthful and credible.

15. The third basis of challenge, which was not the subject of additional submissions by Ms Ahmed at the hearing, is that the First tier Tribunal Judge's finding at [26] was not understood, given that the Claimant's test result was marked as "invalid" and properly read, the witness statements and spreadsheet extract, particular to the Appellant, showed that his English language test had been invalidated because of evidence of fraud in the test he had taken.

16. [26] of the decision of the First tier Tribunal Judge provides:

> *"Furthermore, I find it is relevant that the Project Façade witness statement included in the respondent's bundle, points to a questionable test result as pointing to an "administrative irregularity" only.*

17. I accept the submission of Ms Ofei-Kwatia that the Claimant's result was questionable and not an invalid result and thus the Judge correctly refers to this as an "administrative irregularity". This is clear from the evidence before the First tier Tribunal Judge set out at page 2 of the Respondent's bundle, which is the second page of the report concerning Synergy Business School and which defines the results at [5]. Given that the test result was questionable rather than invalid the correct course should have been a re-test due to administrative irregularities and the Claimant was not given the opportunity to do this.

18. Ultimately, therefore, First tier Tribunal Judge Greasley found at [27] that the evidence before the First tier Tribunal Judge, relied upon by the Secretary of State, did not discharge the burden of proving that the Claimant procured his TOEIC certificate by dishonesty. In light of all the evidence before him I find this was a conclusion he was entitled to reach.

Decision

19. There is no material error of law in the decision of First tier Tribunal Judge Greasley, which I uphold. The appeal by the Secretary of State for the Home Department is dismissed.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

16 June 2017