

TOEIC 4 YEAR'S ON:  
SOME ENDURING QUESTIONS

- 1) This very brief talk addresses just one of enduring legal (and related practical) issues concerning litigation of disputed allegations of TOEC fraud in the First-tier Tribunal and Upper Tribunal. The single issue selected is the 'evidential pendulum' or 'boomerang'.

*The Evidential Pendulum*

- 2) What is it? As per the Upper Tribunal (McCloskey P and DUTJ Saini) in SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC) at [56]-[57]:

“56. The legal principles engaged are set forth below. While we are content to proceed on this basis, we observe that there may be scope for further argument on the correct approach in law in some future case. We thus observe on account of two factors in particular. First, the Secretary of State, in all of these cases, is making the positive case that the student concerned dishonestly obtained the English language qualification by the use of a proxy test taker. Second, the Secretary of State seeks to make good this allegation to the requisite standard by adducing in evidence, in addition to the generic evidence noted above, a flimsy spreadsheet emanating from ETS which, in a single line, contains, in substance, only the name of the student concerned and the categorisation of either "questionable" or "invalid".

57. Both the applicable principles and the jurisprudence were reviewed by this Tribunal in its recent decision in Muhandiramge (Section S-LTR.1.7) [2015] UKUT 675 (IAC), at [9] - [11]:

" 9. Burdens and standard of proof have progressively, and almost with stealth, become an established feature of decision making in the field of immigration and asylum law. Their emergence may properly be described as organic. They have featured particularly in cases where it is alleged by the Secretary of State that the applicant has engaged in deception or dishonesty with the result that the application in question should be refused. This discrete line of authority is not recent, being traceable to the decision of the Immigration Appeal Tribunal in Olufosoye [1992] IMM AR 141. In tribunal jurisprudence, the origins of this particular lineage can be traced to the decision of the House of Lords in R v Secretary of State for the Home Department, ex parte Khawaja [1984] AC 74, which concerned the inter-related issues of procuring entry to the United Kingdom by deception and precedent fact in the Secretary of State's ensuing decision making process. It is well

established that in such cases the burden of proof rests on the Secretary of State and the standard of proof belongs to the higher end of the balance of probabilities spectrum.

10. One of the more recent reported decisions belonging to this stable is that of Shen (Paper Appeals: Proving Dishonesty) [2014] UKUT 236 (IAC). This decision is illustrative of the moderately complex exercise required of tribunals from time to time. Here the Upper Tribunal held, in harmony with established principle, that in certain contexts the evidential pendulum swings three times and in three different directions:

(a) First, where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue: for example, by producing the completed application which is *prima facie* deceitful in some material fashion.

(b) The spotlight thereby switches to the applicant. If he discharges the burden - again, an evidential one - of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.

(c) Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's *prima facie* innocent explanation is to be rejected.

A veritable burden of proof boomerang!

11. Shen is preceded by a lengthy line of Tribunal jurisprudence to this effect: see JC (Part 9 HC 395 - Burden of Proof) China [2007] UKAIT 00027, at [10]; MZ (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 919, at [25]; Mumu (Paragraph 320; Article 8; Scope) [2012] UKUT 143 (IAC); and Kareem (Proxy marriages - EU law) [2014] UKUT 24 (IAC). In short, in cases of alleged deceit, the legal rules are well settled."

In this context, we highlight what was stated at [11] of Shen:

" *At the end of the day the SSHD bears the burden of proof. This is a proposition which is uncontroversial and has been confirmed on many occasions.*"

We record here the submission of Mr Biggs on behalf of the second Appellant, with which we agree, that, doctrinally, a legal burden of proof does not "shift".

- 3) So, the "evidential pendulum" describes the shifting "evidential burden". It works like this. If sufficient evidence of fraud is adduced by the Secretary of State for the Home Department ("the SoS") this "shifts" the evidential burden to the appellant, who must then provide an "innocent explanation" rebutting the allegation of fraud, whereupon

the Tribunal must decide whether the legal burden (the true burden of proof) has been discharged<sup>1</sup>.

- 4) This is problematic for at least three reasons.
- 5) **First**, the evidential burden is not a burden of proof, but is a legal concept used to determine what issues are fit for consideration by the tribunal. Per Lord Bingham in Sheldrake v. Director of Public Prosecutions [2004] UKHL 43; [2005] 1 AC 264 at [1]:

“An evidential burden is not a burden of proof. It is a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact. If an issue is properly raised, it is for the prosecutor to prove, beyond reasonable doubt, that that ground of exoneration does not avail the defendant.”

- 6) Once the issue of fraud is raised, there is no more work for the evidential burden to do: Fraud is in issue. So how can the evidential burden “shift” in a TOEIC appeal? And, why should an appellant have the evidential burden of raising evidence in rebuttal to an allegation of fraud?

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<sup>1</sup> The authorities so far have confirmed that the SoS is able to discharge the ‘evidential burden’ merely by adducing general evidence and ‘specific evidence’ in the form of an excel spreadsheet printout stating that a given test is ‘invalid’ (see Secretary of State for the Home Department v Shehzad & Anor [2016] EWCA Civ 615).

The general or “generic” evidence comprises, amongst other things, witness statements explaining, *inter alia*, (1) that an ‘invalid’ TOEIC test is one where there is evidence a proxy tester was involved; and (2) ETS’s method of obtaining that evidence using voice recognition analysis leading to identification of the same person’s voice on test recordings re the impugned test as that identified on voice recordings re at least one other TOEIC test performance.

- 7) **Second**, if the evidential burden shifts the appellant is required to adduce evidence to respond to an allegation of fraud, even though the issue of fraud has been raised, and even though the SoS is making the allegation and has the legal burden of proof.
- 8) In practical terms this will almost always mean that an appellant is required to give evidence and will therefore be exposed to the risk of performing badly in cross-examination, even if the appellant, in a given case, is able to make convincing arguments undermining the SoS's evidence.
- 9) It will also mean that a submission of 'no case to answer', or something equivalent, cannot be made.
- 10) **Thirdly**, the appellant is required to put forward an "innocent explanation" satisfying a "minimum level of plausibility". But what does this mean?
- 11) For example, does it allow a First-tier Tribunal Judge to reject an appellant's account and find her guilty of fraud because of doubts about the credibility of her innocent explanation<sup>2</sup>. Or does this indicate that an appellant's "innocent explanation" is to be considered in isolation of the other evidence in the case?
- 12) If one analyses the evidential pendulum in terms of the 'evidential burden' the answer to the latter question (if not both questions) *might be* 'yes'. This is because, whether the evidential burden is discharged is determined by asking whether a reasonable tribunal of fact, properly directed on the correct standard of proof, could find that fact in issue<sup>3</sup> to be the case if the evidence relied upon by the party shouldering the evidential burden is considered in isolation (ie without considering any countervailing evidence): see Cross & Tapper on Evidence (2010) 12<sup>th</sup> Ed at p.122 and Ian Dennis The Law of Evidence (2013) 5<sup>th</sup> Ed. Para 11-006 at p.444.

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<sup>2</sup> What is clear is that, in a typical case, an innocent explanation which could satisfy the evidential burden is merely the appellant's account of having sat the test without using a proxy. It is submitted that this remains the position even if an appellant accepts that his or her voice is not on the voice recording he or she has obtained from ETS (see MA (ETS - TOEIC testing) Nigeria [2016] UKUT 450 (IAC)).

<sup>3</sup> This buttresses the first objection above, the fact in issue is fraud, not an innocent explanation.

- 13) It is hard to see how this approach is justified, since, in some cases, it will allow the Tribunal to avoid consideration of the weaknesses in the SoS's evidence by allowing it to focus only on whether a plausible explanation has been given in rebuttal. This arguably undermines the fundamental point, accepted in SM and Qadir at [58] that the legal burden rests on the SoS always.
- 14) The answer to these objections, it is submitted, is that what is "shifting" when the pendulum swings is not the 'evidential burden' properly so called, but rather the 'tactical burden', which is not a legal concept but a term acknowledging the practical desirability (or necessarily) of a party putting forward evidence in rebuttal if she is not to lose on a matter in issue.

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