



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/07868/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 22nd February 2018**

**Decision & Reasons
Promulgated
On 28th March 2018**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**SHAKIL MOLLA
(NO ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Ms A Everett, a Senior Home Office Presenting Officer

For the Respondent: No appearance or representation

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge M B Hussein, allowing the claimant's appeal against her decision on 7 March 2016 to refuse the claimant further leave to remain as a Tier 4 (General) Student pursuant to paragraphs 322(1), (2) and (5) of the Immigration Rules HC 395 (as amended) with particular reference to the making of false representations or the failure to disclose a material fact in the previous application.

2. The claimant's Tier 4 application on 18 December 2012 relied on an ETS TOEIC certificate obtained at the Eden International College on 21 November 2012.
3. Although the claimant appealed successfully to the First-tier Tribunal, he has not responded under Rule 24 to the grant of permission to the Secretary of State in this appeal nor has he attended today or explained his absence. I approach this appeal on the basis that the claimant has no interest in prosecuting it.
4. Even if the claimant had appeared today, I do not consider that it would have been possible to uphold the decision of the First-tier Tribunal. The decision of the First-tier Tribunal relied upon that of the Upper Tribunal in *SM and Qadir* (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC) but failed to take into account the improved evidence which was available to the Upper Tribunal in *MA* (ETS - TOEIC testing) Nigeria [2016] UKUT 450 (IAC), approved in *Majumder v Secretary of State for the Home Department (Rev 1)* [2016] EWCA Civ 1167 and *Ahsan v The Secretary of State for the Home Department* [2017] EWCA Civ 2009. That is an error of both fact and law, for which it is necessary to set aside the decision of the First-tier Tribunal and remake it.

Remaking the decision

5. The Secretary of State produced evidence to the First-tier Tribunal and the Upper Tribunal from the ETS Enhanced Lookup Tool showing that on 21 November 2012, when the claimant alleges that he sat his TOEIC test at Eden International College, 66% of the tests taken there were invalid, 34% were questionable and none were released as genuine. The average score out of 200 on that day was 180.9 for speaking and 172.5 for writing and the claimant's results were 180 for speaking and 160 for writing. ETS has withdrawn the certificate relied upon and the Secretary of State was entitled to place weight thereon.
6. Much more evidence is available now as to the 'fraud factories' which operated in the ETS/TOEIC testing field; in particular, voice recordings of individual tests are available and can be requested and tested. on that, and also on the evidence of the evidence of the Look-Up Tool that, on the day the claimant sat his test, 100% of the TOEIC tests at Eden International College were found to be either invalid or questionable and none were released as genuine.
7. Absent attendance or representation by the claimant at today's hearing, it is not possible to ascertain what his explanation might be. Nor, it appears, has he sought to recover and test the voice recordings applicable to him.

8. I am satisfied, on the evidence before the First-tier Tribunal, that the Secretary of State had demonstrated that the claimant did use deception and accordingly she was entitled to refuse him the further leave sought.
9. The appeal of the Secretary of State is allowed and I substitute a decision dismissing the appeal.

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.

I re-make the decision in the appeal by dismissing it.

Signed: [Judith A J C Gleeson](#)
2018

Date: 26 March

Upper Tribunal Judge Gleeson