



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal no: HU/12158/2016

THE IMMIGRATION ACTS

Heard at Field House
On 21 May 2018

Decision and Reasons Promulgated
On 24 May 2018

Before:

Upper Tribunal Judge
John FREEMAN

Between:

RAJWANT KAUR

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Charlotte Fletcher* (counsel instructed by Charles Simmons, Ilford)

For the respondent: Mr Ian Jarvis

DECISION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Alastair Trevaskis), sitting at Newport on 26 May 2017, to allow an ETS appeal by a citizen of India, born 1986. Permission was given on the basis that the judge had put too much weight on the appellant's English-speaking skills, contrary to what had been said in *MA* (ETS – TOEIC testing)[2016] UKUT 450 (IAC): see below.

2. This appellant had been here with leave as a student from 2010 to 2012, when on 19 May she took an ETS English-language test at New London College [NLC], on the strength of which she got further leave till 2013, and eventually, as the wife of a settled person, till 22 April 2016. On the 20th she applied for further leave; but on the 26th this was refused, partly on suitability grounds, as it was said she had had the 2012 test taken by a proxy.

NOTE: (1) *no anonymity direction made at first instance will continue, unless extended by me.*
(2) *persons under 18 are referred to by initials, and must not be further identified.*

3. The judge accepted the appellant's oral evidence about taking the test herself, and found her English was good enough for her to have got the scores she did. He noted the statement in *SM and Qadir* (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC) that the software used by the Home Office to analyse the readings gave 30% false positives. (This was contrary to later generic evidence, by Professor French; but since there is nothing to show that this was put before the judge, he can hardly be blamed for that).
4. One reason the judge gave (at 25) for accepting the appellant's evidence about taking the test herself was what she had said about having to produce her passport and have her picture taken before she did so. Another (at 26) was based on his understanding that the NLC's results over the 14 months including the date in question were found to be 74% invalid. While this was right so far, the judge does not seem to have appreciated the status of the remaining 26%.
5. The crucial piece of evidence, which was before, the judge was a statement by Kelvin Hibbs of the Home Office, signed 25 May 2017: attached to it were
 - (A) a print-out of the appellant's own test results;
 - (AA) one of all the NLC's results for the day in question, and for another day; and
 - (unnumbered) a report on 'Project Façade'.
6. The judge took in the details given at 3 – 4; but he does not seem to have taken in, from the Façade report, that the 14-month sample showed the following results:

Total	1423
Invalid	1055 (74%)
Questionable	368
No evidence of invalidity	0

It might have been helpful if the report had spelt out that the 'questionable' results amounted to the whole of the 'missing' 26% (to the nearest whole number); but the evidence was there. However the judge did no more than to note that there was no direct evidence of this appellant cheating.

7. The other important part of the report is at paragraph 17: it deals with NLC's own role.

Documents relating to [ETS tests] were found within IT seized from the directors' home addresses that were searched on 17/07/2014. These documents list each of the test dates for the entire testing period alongside the candidate names, the name of the "pilot" [*proxy*] ...

This was clear evidence of complicity on the part of NLC, which the judge needed to take in, before he accepted the appellant's evidence about being passported and photographed as showing that all was above board there.
8. The result is that, although the judge was fully entitled to reach his own view of the appellant's credibility, he did so on a number of false premises:
 - (a) the appellant's own English skills were enough to give her no good reason to cheat; but see *MA* (ETS – TOEIC testing), , at 57:

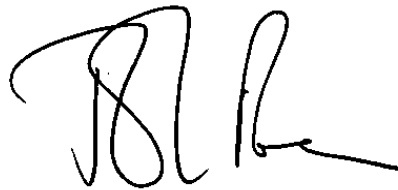
In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure,

lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere.

- (b) the lack of any direct evidence of this appellant cheating did not mean that there was no evidence against her, simply on the basis of being someone who had taken her ETS test at NLC at the time in question; and
 - (c) the evidence of direct involvement in cheating by NLC management tended to negate any point that could be made about the appellant having been passported and photographed.
9. The appellant's use, or not, of a proxy remains a credibility point for the judge who is to decide it; since Judge Trevaskis also seems to have gone wrong (though no-one seems to have mentioned this point to him, or to me) in dealing with an appeal against a decision made at the date in question solely on a Rules, rather than a human rights basis, the best solution will be a fresh hearing of the appellant's human rights appeal, of course through the lens of the Rules. Since he lives near Uxbridge, that will take place at Hatton Cross.

Home Office appeal allowed: first-tier decision set aside

Direction for fresh hearing at Hatton Cross, not before Judge Trevaskis

A handwritten signature in black ink, appearing to be 'JL R', written in a cursive style.

(a judge of the Upper Tribunal)

Dated 23 May 2018