



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number:

HU/02866/2018

THE IMMIGRATION ACTS

Heard at: Field House

Decision and Reasons

Promulgated

On: 4 March 2019

On: 13 March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MOHAMMAD AMZAD HOSSAN  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation

For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer

For the Respondent: Mr S Hydar, legal representative

DECISION AND REASONS

1. I shall refer to the appellant as the secretary of state and to the respondent as the claimant.
2. The secretary of state appeals with permission against the decision of First-tier Tribunal Judge Colvin promulgated on 21 November 2018, dismissing the claimant's appeal against the secretary of state's decision dated 2 January 2018, refusing his application for leave to remain in the UK on human rights grounds.
3. In refusing the claimant's application the secretary of state contended that he had submitted a false TOEIC certificate for the previous applications made on 26 June 2012 and 14 February 2013.

### The proceedings before the First-tier Tribunal

4. In his evidence before the First-tier Tribunal, the claimant adopted his written statement dated 6 November 2018. He asserted that he has never cheated or attempted to deceive or give false information. He personally attended and took the TOEIC exams on two dates: 19 June 2012 and 7 July 2012. He has been a genuine student in the UK and successfully completed a BSc (Hons) degree in Business Computing and Networking in 2015.
5. He noted that he had completed an IELTS test prior to arriving in the UK and was granted entry clearance and admission to study on the basis of such qualification [4].
6. He arrived in the UK in September 2009. He took courses at various colleges where he ultimately obtained a degree in Business Computing and Networking.
7. He took the TOIEC test at Sevenoaks College after it was recommended to him by a friend and he confirmed that the College had available test dates as he needed to take it urgently.
8. He attended the college and paid £150. It took him two hours to travel there. The tests were on two days and were held in the afternoon.
9. The speaking test took between 45–50 minutes and the writing test between 35–40 minutes. He was required to describe a picture for the speaking test and give his opinion on a sentence; in the writing test he was required to fill in blanks and give his opinion on using new media. He used the same computer for both tests, with headphones.
10. He collected his certificate a couple of weeks later when he was given the scores. He wrote to ETS after the refusal notice from the respondent and received a letter referred to at page 40 in reply.
11. The claimant produced a letter sent to him by ETS. That letter was sent in response to his earlier communication which he sent by email to them. It was asserted in their response, that ETS is obligated to report test scores that accurately reflect the performance of test takers. ETS therefore routinely reviews testing irregularities and questions test results believed to be earned under abnormal or non-standard circumstances. As confirmed by relevant Policy, the reviews of scores by ETS are confidential. The claimant agreed to these policies and procedures when he registered for the TOIEC test.
12. ETS stated that because the validity of his test results could not be authenticated, those scores from the test taken on 19 June 2012 at Sevenoaks College have been cancelled.

13. In cross examination, the claimant stated that he knew about this allegation when he received the first refusal letter in 2015. He was not granted a right of appeal and issued judicial review proceedings. At that stage he had not asked for an audio of the test. He did write to ETS on 19 September 2018 and received the letter in reply which I have summarised and which he produced at page 40 of the bundle.
14. In his evidence he stated that he had to have a test certificate at B2 level for his Tier 4 sponsor application. This was the first English language test that he had taken in the UK.
15. Judge Colvin noted that the secretary of state relied on the usual generic evidence that had been put forward in such cases [17]. She referred to the decision in SM and Qadir. She directed herself in accordance with the court of appeal decision in SSHD v Shezad [2016] EWCA Civ 615 where the court gave guidance on what the secretary of state has to do in order to prove fraud in ETS cases where the results of a test are allegedly “invalid” .
16. At [19–20] Judge Colvin set out the claimant’s evidence. He accepted that he did not specifically request a copy of the audio recording and the letter from ETS does not refer to it being available. He accepted he had legal representation during the judicial review proceedings which commenced after the refusal in October 2015. However, his legal representation for the appeal before the First-tier Tribunal was only arranged a day prior to the hearing.
17. She referred to the various “case decisions” including SM and Qadir at [22]. She noted that in subsequent cases, the secretary of state submitted more evidence both generic and specific including the expert report of Professor French. She directed herself in accordance with MA (ETS - TOEIC testing) [2016] UKUT 00450. The evidence which would be sufficient to enable a Tribunal to conclude that there has been no deception is likely to be an intensely fact specific matter - Beatson LJ in Shehzad, supra at [23].
18. She set out the generic as well as the specific evidence in the Look up Tool relating to the claimant. She was satisfied that the secretary of state had “narrowly” discharged the evidential burden so as to shift the burden to the claimant to show that he had not cheated by providing a plausible innocent explanation [27]. She set out the evidence he gave in this respect to the Tribunal. She amended the date at [27] from 28 June 2016 to to 28 June 2012.
19. She also assessed the claimant’s demeanour and presentation. He had not been evasive; he had exaggerated his answers. His main reason for choosing Sevenoaks College was plausible. He had shown a reasonably good proficiency in English at this time in 2012 through the previous IELTS

certificate, the other TOEIC test taken at the same time and his admission in 2012 and subsequent completion in 2015 of a three year degree course.

20. In the circumstances, Judge Colvin concluded on the balance of probabilities that he has given a plausible explanation for why he did not cheat, albeit accepting that his omission actively to pursue obtaining a copy of the audio recording “gives rise to some concern,” but noted as well that the secretary of state has similarly not produced the audio evidence.
21. In the circumstances, she was satisfied that the secretary of state had not discharged the legal burden of proof of showing that the claimant committed deception with regard to the TOIEC test taken in June 2012. He accordingly met the suitability requirements under Appendix FM of the Rules.
22. She went on to allow the appeal under Article 8 of the Human Rights Convention to the extent that the claimant be provided with a 60 day period of discretionary leave to remain in order to permit him to make a fresh application for leave to remain if he so wishes.

### The error of law hearing

23. On 3 January 2019, Upper Tribunal Judge Martin granted the secretary of state permission to appeal. She noted that this was a case where the secretary of state alleged that the claimant had used a proxy in a TOEIC test. It was arguable that Judge Colvin applied the wrong test in deciding the appeal and has not considered whether the claimant may have chosen to use a proxy for reasons other than an inability in English.
24. Ms Cunha on behalf of the secretary of state relied on the secretary of state’s grounds seeking permission to appeal. She submitted that the Judge failed to give adequate reasons for her findings “on a material matter.”
25. She referred to the decision in Shehzad, supra. Whilst the Tribunal accepted that the evidential burden fell upon the claimant to offer an innocent explanation, “...that had not been adequately addressed.” It is not clear why evidence from the claimant which the Tribunal relied on would preclude the use of a proxy test taker during the test. He has simply stated that he did not use a proxy and therefore this does not displace the evidence of the secretary of state which stands absent an innocent explanation.
26. In reaching the “material finding”, Ms Cunha submitted that the Tribunal relied on the claimant’s English language ability. However, the test is not whether the claimant speaks English but whether, on the balance of probabilities, he has employed deception.

27. There may well be reasons why a person who is able to speak English to the required level would nonetheless cause or permit a proxy candidate to undertake an ETS test on their behalf or otherwise to cheat.
28. She referred to MA (Nigeria) [2016] UKUT 450 at [57] where it was noted that “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.
29. Ms Cunha referred to [28] where the Judge noted the fact that the claimant has shown a reasonably good proficiency in English in 2012 through the previous IELTS certificate and the other TOEIC test taken at the time of his admission that year. She also took into account the completion in 2015 of a three year degree course. She was concerned that the claimant had not actively pursued obtaining a copy of the audio recording. He only sought to ask ETS for a copy of the test in 2018 when he knew about this before. He accepted that he had not specifically submitted a request to ETS for a copy of the audio recording. Nor did the letter from ETS refer to its being available.
30. Ms Cunha submitted that the Judge failed however to have regard to this evidence when drawing her conclusions at [29]. That constituted the error of law: Her emphasis was on his explanation that he knew how to speak English, having regard to his background until then. Although the Judge was aware that there were problems in his evidence as set out at [28], she failed to address those concerns. She failed to have regard to the fact that he did not seek to make any approach or to remedy the situation before 2018. Further, the Home Office had not disputed the reading and written test. This was only in respect of the audio test that it was asserted he had used a proxy.
31. On behalf of the claimant, Mr Hydar submitted that contrary to these assertions, the Tribunal did apply the correct test. She referred to the claimant’s evidence at [4–6] of the decision and from [19–20]. She thus had regard to his witness statement produced to the Tribunal; his evidence in chief and the cross examination. The secretary of state’s evidence was set out. She referred to the applicable case law.
32. He contended that the Judge has not simply taken into account the ability of the claimant to speak English. He gave evidence regarding the circumstances leading up to the taking of the test as well as the actual taking of the test.
33. He submitted that the fact that another person’s voice was found on a student’s TOEIC audio file, as in this case, could rationally be considered to be some evidence that the student might have engaged in a

TOEIC fraud, but it does no more than raise a case to answer and it is certainly not highly probative of fraud, let alone virtually conclusive.

34. In reply, Ms Cunha submitted that the Judge did not mention the claimant's reasons for failing to seek to clear his name. The reasons given were insufficient.

### **Assessment**

35. The First-tier Tribunal Judge has properly directed herself as to the relevant decisions informing the claimant's appeal. She noted that in a case such as this, evidence which would be sufficient to enable a Tribunal to conclude that there has been no deception is likely to be an intensely fact specific matter.
36. She was satisfied in the circumstances that the secretary of state had discharged the evidential burden of showing dishonesty. In considering whether the claimant had provided a plausible, innocent explanation, she has set out his oral evidence and cross examination before the Tribunal at [4-6]. The college where he claimed to have taken the test was recommended to him by a friend. He needed to take the test urgently and it was confirmed that there was an available test date.
37. He set out the evidence relating to the payment of the necessary fee. She noted that he also described how he travelled to the test venue. The test was taken over two days, in the afternoon, and commenced at 12.30. There were some 15 people taking the test. He also described the content of both the speaking and writing test.
38. At [19] she again referred to his evidence: He relied on the fact that he had no need to use a proxy, having regard to his proficiency in English shown by his various qualifications. This included taking an IETLS English language test in Bangladesh in 2009. She again set out his oral evidence at [20] relating to events on the day of the test itself.
39. She took into account that he has written to ETS requiring the grounds for assessing his test as invalid. She noted however that the request was only made recently, in September 2018. The reply he received from ETS stated that the validity of his test results could not be authenticated and that he should refer any additional queries to the Home Office rather than ETS.
40. The claimant accepted that he did not specifically request a copy of the audio recording. She also noted that the letter from ETS did not refer to its not being available. She took into account that he had legal representation during the judicial review proceedings following the first refusal letter in 2015 and that he only arranged with the current representatives the day prior to the hearing.
41. Judge Colvin was concerned with his omission actively to pursue the obtaining of a copy of the audio recording. However, she also noted that the secretary of state has similarly not produced any audio evidence.

42. It has been contended that the Judge came to her conclusions without any reasoning as to why she accepted the claimant's omission. Further, she simply referred to the fact that he was able to speak English well and that he had been given a plausible explanation of why he did not need to cheat.
43. Had that been the only evidence relied on, there would have been no proper basis for the conclusion that the secretary of state has not discharged the legal burden of proof of showing that the claimant committed deception in relation to the taking of the test. However, the Judge took into account more than that. She has also taken into account his evidence from his witness statement, regarding the circumstances surrounding the taking of the test and his detailed evidence he gave of the two days on which the tests were taken. She also had regard to his recollection of the content of the test.
44. When cross examined he stated that he knew about the allegation when he received the first refusal letter dated December 2015. That was followed by judicial review proceedings as he had not been granted a right of appeal. He did not ask for an audio of the test at that stage. He confirmed that it was only on 19 September 2018 that he wrote to ETS. This was the first English language test that he had taken in the UK.
45. During a short cross examination, he was not tested as to his description of the circumstances prevailing at the time he took the tests at the test centre.
46. In the circumstances, the Judge did not exclusively rely on the claimant's English language ability in concluding that the secretary of state had not discharged the burden of showing that the appellant had committed deception with regard to the test taken in June 2012. In finding that the claimant was credible she also had regard to her assessment of his demeanour and presentation, noting that he was not evasive and did not exaggerate his answers.
47. Having considered all the evidence she went on to find at [29] that there was nothing put forward by the secretary of state to show on a balance of probabilities that his explanations are to be rejected as she found him to be a credible witness [29]. As part of that assessment she factored in his failure to obtain a copy of the recording, which did give rise to some concern, but noted that neither had the secretary of state produced it.
48. Judge Colvin has give sustainable reasons for her conclusion that the secretary of state had not shown on the balance of probabilities that the claimant had committed deceit.

### **Notice of Decision**

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall accordingly stand.

Anonymity direction not made.

Signed

Date 11 March 2019

Deputy Upper Tribunal Judge Mailer