



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/05376/2018

**THE IMMIGRATION ACTS**

Heard at Manchester CJC  
On 18<sup>th</sup> December 2018

Determination Promulgated  
On 9<sup>th</sup> January 2019

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT / Md ASHRAF HOSSAIN  
Appellant/respondent

And

Md ASHRAF HOSSAIN / SECRETARY OF STATE FOR THE HOME DEPARTMENT  
Respondent/appellant

**Representation:**

For Md Ashraf Hossain:  
For the SSHD:

Mr I Ahmed of Auua Law Solicitors  
Mr C Bates, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. Mr Hossain sought leave to remain on the basis of his family life with his settled partner and British child. He was refused for reasons set out in a decision of the respondent dated 13<sup>th</sup> February 2018 on the grounds, in summary, that he had relied upon a TOEIC certificate from ETS which was taken at Synergy Business College on 24<sup>th</sup> November 2011; the result of that test had been withdrawn by ETS and declared “questionable” and that, following an interview with a representative of the SSHD, the SSHD was satisfied that he had fraudulently obtained his certificate and that he used deception in his application for leave to remain.

2. Mr Hossain appealed and, for reasons set out in a decision promulgated on 20<sup>th</sup> July 2018, First-tier Tribunal Judge Kelly allowed his appeal.

3. In a short decision, judge Kelly found

7. The evidence relied upon by the respondent, taken at its highest, shows that the appellant's test result is "questionable" .... The only reason for this somewhat limited finding appears to be that a high percentage of the other tests taken at the centre that day are proved to have been taken by proxy. It is on this basis alone that ETS have declared the appellant's own test "invalid". This is notwithstanding the lack of any direct evidence to suggest that he employed fraud. This is not in my judgment a sufficient basis for proving on a balance of probabilities that the appellant took his test by proxy. It at most casts a cloud of suspicion over the result. I am therefore satisfied that the appellant does not, so to speak, have a 'case to answer'. It follows from this that he does not bear an evidential burden of providing an "innocent explanation" for that of which there is little or no evidence to begin with. It is right to say that there were certain anomalies in the appellant's testimony concerning matters extraneous to the test in question, such as precisely how many times he had previously failed. The appellant put this down to misunderstandings during an interview with a Home Office official that took place on the 27<sup>th</sup> June 2016. However in my judgement none of these anomalies assist the respondent in discharging the legal burden of proving that the appellant employed fraud on the day in question.

8. The respondent has not discharged the burden of proving on a balance of probabilities that the appellant employed fraud as claimed. It follows that the public interest does not require the appellant's removal under section 117B(6) of the 2002 Act.

4. As agreed between the parties, the First-tier Tribunal judge failed to carry out the full task required. The SSHD had provided sufficient information and evidence to 'shift' the burden of proof such that the First-tier Tribunal judge should have made a finding on whether the explanation and evidence given by Mr Hossain was such as to enable a finding that he had taken the test as claimed rather than find that the SSHD had not proved on a balance of probabilities that Mr Hossain had employed deception. Mr Hossain was asked questions, in English, both at interview with the Home Office on 27<sup>th</sup> June 2016 and at the appeal hearing – the judge just did not follow that through with a finding.

5. It follows that, as agreed with the parties, the judge materially erred in law and the decision of the First-tier Tribunal judge is set aside to be remade.

6. I heard submissions from both parties on the re-making. There was a full note of evidence in the file, taken by First-tier Tribunal judge Kelly and both parties, having seen and considered that note of evidence, were content for me to take that into account in reaching my decision. Both parties confirmed that there was no need for oral evidence; Mr Bates confirmed he did not seek to cross examine Mr Hossain being content to rely upon the evidence already before me.

7. In reaching my decision I have taken account of the interview record with the Home Office on 27<sup>th</sup> June 2016, the background material and statistical detail

relied upon by the Home Office in reaching their decision, the note of evidence taken by First-tier Tribunal Judge Kelly, the decision the subject of the appeal, the witness statement of Mr Hossain and the submissions made on 18<sup>th</sup> December 2018.

8. Mr Hossain's language certificate was declared invalid by ETS after investigation of results from Synergy Business College where he took the test. His test result was considered "questionable". Between 24<sup>th</sup> November 2011 and 15<sup>th</sup> January 2013, 49% of test results from Synergy were considered to be invalid and 51% were considered questionable. There were no test results recorded that did not fall into one or other of those two categories. On the day on which Mr Hossain took his test, there was a spike in the number of results considered to be invalid to 65% and those that were questionable were 35%. Again, there were none that did not fall within one or other of those two categories.
9. According to the report Project Façade into Synergy Business College, those individuals with 'questionable' test results were to 're-test'. Mr Hossain did not re-test. He was not offered the opportunity to re-test by the Home Office and, despite requests made by his solicitors for the return of his passport to enable him to organise a test on his own initiative, his passport was not returned to him. He was thus unable to book a test.
10. Included in the bundle were four test results:
 

15 <sup>th</sup> August 2011	listening 140;/495 reading 105/495
16 <sup>th</sup> August 2011	speaking 80/200; reading 20/200
14 <sup>th</sup> November 2011	listening 495/495; reading 445/495
24 <sup>th</sup> November 2011	speaking 150/200; writing 150/200

It is clear from these results that his overall language ability improved significantly over three months.

11. The interview on 27<sup>th</sup> June 2016 was conducted without an interpreter. It was almost five years after the tests in November 2011 and the answers given by Mr Hossain are vague in the sense that he provides answers to the questions asked but says on a number of occasions that he cannot recall exactly the cost of the test and other details. Such lack of recall would be significant for something that had occurred in the recent past but an inability to recall exactly how long a test took, how many questions were asked, or the cost does not impact adversely where the questions relate to an event some five years previously.
12. The interviewer did not put to Mr Hossain that the responses to the questions did not accord with a test that he was required to undertake in order to obtain the certificate he was given. Nor was he asked how his scores had improved so dramatically in only three months. It is not apparent from the record of the interview that Mr Hossain had any difficulty at all either in understanding the questions asked or in providing coherent and clear answers to the questions asked. The decision letter makes no significant reference to the interview or

why the interview failed to remedy what was considered by the Home Office to be a questionable test result.

13. Mr Hossain gave evidence in English before First-tier Tribunal Judge Kelly. It is not apparent from the note of that hearing that he had any difficulty understanding the questions asked or communicating his answers in fluent English. He was not asked why there was a difference between the results in August and the results in November. It was not put to him that his recollection of the format of the test was not consistent with a format that would have led to a non-questionable test result. It was not in fact put to him that he had used a proxy, but it can be inferred that this was the purpose of the questioning.
14. In reaching my decision my starting point is that the SSHD has shown sufficient evidence to require Mr Hossain to provide evidence to satisfy me, on the balance of probabilities, that he took the test as he claims. Adverse to Mr Hossain is the fact that his test scores from Synergy College showed a significant unexplained leap over a short period of time. That was not put to him and I can only infer that the Home Office did not consider it significant. The college where he took the test has had no valid test results recorded; his own score was questionable. As the Home Office documents state, questionable includes not only those where the use of a proxy was suspected but also where there had been test administration irregularity and where numerous other test results had been invalidated on the basis of a 'proxy match'. The test scores for that college overall are indicative of a large number of fraudulent tests being undertaken and a large number of questionable test results. But that is one factor; it does not mean that because of those figures, Mr Hossain has, on a balance of probabilities, himself practiced deception. The evidence as a whole has to be considered.
15. The Home Office did not enable Mr Hossain to re-test. Had they done so the decision on his application for leave to remain may (or may not) have been the same. That however is a neutral factor in as much it is not possible, because of that failure, to reach a tested decision on Mr Hossain's language skills in 2011/2012. It is however to Mr Hossain's credit that he attempted to retrieve his passport from the Home Office to undertake a re-test, even though not offered one by the Home Office; it is to be recalled that he was not informed by the Home Office that he was accused of deception until some 18 months after the interview in June 2016.
16. Mr Hossain has continued to work in the UK. That his language skills are more than sufficient now, is evidenced by the interview with the Home Office in June 2016 and his oral evidence before the First-tier Tribunal in 2018. That is not conclusive evidence that his language skills met the standard required in 2011 or that he did not obtain that test result by deception. It is of course possible that his language skills were adequate in 2011 but he still chose, for whatever reason, to obtain a test certificate by deception. That was not put to him and I have discounted that possibility.
17. In the decision letter the Home Office drew attention to Mr Hossain's statement that he had previously only taken a Pearson test and not submitted that whereas he had used a TOEIC test result to obtain leave to remain. There is no

discrepancy in Mr Hossain's evidence from that interview but there is confusion. The questions do not make clear which test is being asked about or the relevant dates. This was not clarified at the end of the interview and nor was it raised in oral evidence before the First-tier Tribunal. I have placed no weight either way on that confusion.

18. Mr Hossain took a successful language test (IELTS) in Bangladesh. He has been studying in the UK since 2008 until 2013, possibly later – it is not clear from the documents before me. He is working, has no criminal convictions, has two British citizen children and is married and living with his wife. There is no suggestion that he did not undertake the studies for which he had leave or that his language skills were in some way inadequate for that task. These are factors that add weight to his adamant assertion that he is of good character and did not obtain his language certificate by deception. His English language now appears to be fluent.
19. Taking all of these factors into account and placing significant weight on the Operation Façade report, I am satisfied that on the evidence before me, on a balance of probabilities, Mr Hossain did take the language test and did not obtain his language certificate by deception.
20. The SSHD accepts that Mr Hossain is in a genuine and subsisting relationship with his wife and they have two British Citizen children. There was no submission by Mr Bates that it would be reasonable for the family to relocate, it being impliedly accepted that if Mr Hossain succeeded in his challenge to the assertion that he had employed deception in connection with his language certificate, then he succeeded in his claim that a decision refusing him leave to remain in the UK was disproportionate.
21. In the light of my finding that Mr Hossain did, on the balance of probabilities take the test as he claims and did not employ deception, then it follows that he succeeds in his human rights claim 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 allowing Mr Hossain's appeal against the decision of the SSHD to refuse his human rights claim.

Date 19<sup>th</sup> December 2018



Upper Tribunal Judge Coker