



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

Appeal Number: HU/24660/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 7 March 2019**

**Decision & Reasons Promulgated
On 9 April 2019**

Before

JUDGE OF THE FIRST-TIER TRIBUNAL CHANA

Between

**MR HAROON IMTIAZ
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R De Mello of Counsel

For the Respondent: Mrs N Willocks, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on 26 May 1989. He appealed against the decision of the respondent dated 6 October 2016 refusing him indefinite leave to remain in the United Kingdom under the Immigration Rules as the Secretary of State claimed that the appellant produced a false ETS certificate document for indefinite leave to remain in the United Kingdom.
2. First-tier Tribunal Judge Hussain dismissed the appellant's appeal in a decision promulgated on 15 June 2017.

3. The appellant's appealed against the decision and a Judge of the First-tier Tribunal Scott Baker refused permission to appeal the decision dated 8 January 2018 but he was subsequently granted permission on 7 June 2018 by First-tier Tribunal Judge McMillan stating that it is arguable that the Judge may have erred by not appreciating the distinction between "questionable" and "invalid" in assessing whether the respondent has discharged the evidential burden.
4. Thus, the appeal came before me on an error of law hearing.
5. The Judge found that the appellant was not able to recall where the college or its name or any physical features of the college or its surroundings where he claimed to have taken his test even though he was familiar with the city of Nottingham as he had family there who he would visit. The Judge stated that the only evidence provided was the appellant's bare assertion that he took the test. The Judge found that on the evidence he finds that the appellant did not take the test. The Judge found that the appellant's removal with his child would not breach the United Kingdom's obligations under Article 8 of the European Convention on Human Rights as they could move to Pakistan as a family.
6. The respondent's response to the grounds of appeal under rule 24 stated that the Judge assessed the evidence with regards to the appellant's knowledge and evidence of what occurred during the test process alongside evidence of the Home Office interview on the Judge's observations of the appellant's English language skills at the hearing. The Judge give adequate reasons for his findings. Even though the test may have been found questionable, it was still incumbent upon the Judge to make a finding whether or not the respondent adduced adequate evidence to discharge his initial burden of deception.
7. The complaint against the Judge is that he did not appreciate the difference between a "questionable" result and an "invalid" result. Nowhere in the decision does the judge make reference to this distinction and what it means in assessing the appellant's case. The difference between questionable and invalid is an important one. In respect of invalid or cancelled it is evidence that it was taken by a proxy test taker but questionable means that there was a possibility it was not taken by a proxy test taker and that is why it is considered to be inconclusive.
8. The respondent accepted that the policy in respect of a questionable test result is that the applicant is offered another free test. It is submitted that the appellant although not offered another test took the test and passed.
9. This however is not determinative of whether or not the appellant cheated. Plainly, there may be reasons why a person who is able to speak English to the required level would nonetheless cause or permit a

proxy candidate to undertaking ETS test on their behalf, or otherwise to cheat. The case of **MA Nigeria [2016] UKUT 50 at paragraph 57** refers.

10. However, the case of **SM and Qadir** makes it abundantly clear that the e Secretary of State's generic evidence combined with evidence particular to an appellant did, in fact, discharge the evidential burden of proving that a TOEIC certificate had been produced by dishonesty. The test is whether on the balance of probabilities, the appellant employed deception.
11. In Peter Millington's witness statement where he states that questionable result is where an individual test result was cancelled on the basis of test administration irregularity including the fact that the test was taken at a United Kingdom testing Centre where numerous other results have been invalidated the basis of a "match".
12. Therefore, it is important to appreciate the distinction between questionable and invalid in order to come to a sustainable decision. There was evidence before the Judge upon which he could have reached the conclusion that he did but the decision is not safe without appreciation of this distinction. The consequences to an appellant are very serious and therefore only the most anxious scrutiny would suffice.
13. For the reasons given above, I set aside the decision of the First-tier Tribunal and remit the appeal to the First-tier Tribunal to be heard by any Judge other than Judge Hussain.

Notice of Decision

The appeal be remitted to the First-tier Tribunal

Signed

Dated this 7thApril 2019.

A Deputy Judge of the Upper Tribunal
Ms S Chana