



**Upper Tribunal  
Immigration and Asylum Chamber  
Judicial Review Decision Notice**

The Queen on the application of Mohammad Kutub Uddin

**Applicant**

v

Secretary of State for the Home Department

**Respondent**

**Before Upper Tribunal Judge Kamara**

**Application for judicial review: substantive decision**

Having considered all documents lodged and having heard from Mr G Ó Ceallaigh of counsel, instructed by Londonium Solicitors and Ms E Wilsdon, of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 7 May 2019.

**Decision: the application for judicial review is granted**

**Introduction**

1. These judicial review proceedings, issued on 10 April 2015, challenge the respondent's decision dated 9 February 2015 to curtail the applicant's leave to remain pursuant to section 10(1)(b) of the Immigration and Asylum Act 1999, on the basis of an allegation that the applicant had used a proxy test taker. Also challenged is correspondence from the respondent dated 4 March 2015 in which an application to reconsider that earlier decision was refused.

**Procedural history**

2. The applicant arrived in the United Kingdom on 23 October 2009 with leave to enter under Tier 4 (General) of the Points-based system. He was granted further periods of leave to remain in the same capacity, most recently from 22 May 2014 until 28 August 2015. On 10 February 2015, the applicant was served with notice of an immigration decision to remove him from the United Kingdom which could only be appealed from abroad.
3. The pre-action protocol process was utilised.

4. The decision dated 9 February 2015 stated that the applicant submitted a certificate from Educational Testing Service (ETS) in relation to an English language test taken at Colwell College on 16 May 2012 in support of an application he made for further leave to remain on 7 November 2012 and that ETS checked the test and that his scores had been cancelled. Consequently, the respondent was of the view that the applicant was liable to be removed under Section 10 of the Immigration and Asylum Act 1999 as a person who used deception in seeking leave to remain.
5. The grounds of challenge were threefold. Firstly, the decision to remove the applicant was unlawful because there was inadequate evidence of deception and an out of country appeal was insufficient. Secondly, Article 5 ECHR was raised in relation to the proposed removal of the applicant. Thirdly, it was argued that the respondent unlawfully delegated power to ETS in order to determine that he had practised deception.
6. Following the decision of the Court of Appeal in *Mehmood & Shahbaz Ali V SSHD* [2015] EWCA Civ 744, an Upper Tribunal lawyer made directions, for the applicant to lodge amended grounds within 7 days of 18 September 2015, failing which his claim would be struck out. No amended grounds were received. The claim was struck out on 30 September 2015.
7. On 2 November 2015, the applicant sought to reopen his claim and amended grounds were filed. Those grounds primarily argued that the applicant had not been given the opportunity to make representations on Article 8 ECHR.
8. Upper Tribunal Judge Reeds granted the applications to reopen the claim and file amended grounds but refused permission on 8 March 2016. Upper Tribunal Judge Craig refused permission at an oral renewal hearing on 6 May 2016. The applicant subsequently sought leave to appeal to the Court of Appeal.
9. The applicant's Court of Appeal challenge ended by consent on 26 November 2018, with it being ordered by Master Bancroft-Rimmer, that his application for permission for judicial review be granted and that the case be remitted to the Upper Tribunal for a substantive hearing.
10. Detailed grounds of defence were filed on 2 April 2019, in which it was argued that other than the applicant's contention that he did not use deception, his pleaded grounds were academic. The respondent did not contend that an out of country appeal amounted to an alternative remedy that operated as a bar to the claim. The issue for the Upper Tribunal was whether the applicant obtained his English-language certificate fraudulently. The Secretary of State indicated that he would make appropriate submissions once the evidence adduced by the parties was heard and tested by cross-examination.
11. In advance of the hearing the applicant provided trial bundles which included two witness statements for the applicant dated 4 April 2015 and 14 February 2017. The content of those witness statements is summarised below.

12. The first statement says that the applicant began his studies in the United Kingdom on 26 August 2009 at Transatlantic College where he studied for a diploma in management, however the course ended prematurely when the college was shut down. The applicant sought the Secretary of State's permission to enrol at London Trinity College to read accountancy. His leave was extended until December 2013 for him to do so. London Trinity College closed down during August 2011. On 16 May 2012, the applicant sat TOEIC examinations in speaking and writing at Colwell College.
13. During June 2012 the applicant received a (60-day) letter curtailing his previous leave which was granted for him to study at London Trinity College. He required the said letter in order to obtain a new educational sponsor. The applicant applied for further leave to remain to study business management at West End College London, however this institution was also closed down by the respondent in July 2012. The applicant was subsequently issued with a further '60-day' letter enabling him to obtain a new Confirmation of Acceptance for Studies (CAS).
14. On 7 November 2012, the applicant gained admission to London Regal College on a strategic management course and submitted a CAS to the respondent along with the TOEIC certificate. The Secretary of State granted the applicant leave to remain to enable him to complete this course, which he did in April 2014.
15. Thereafter, the applicant enrolled on an MSc in Travel and Tourism at Sunderland University and his leave was extended until 28 August 2015. After his leave to remain was curtailed owing to the allegation that he had used deception in a TOEIC examination, the applicant was unable to complete the modules for his master's degree. The applicant contended that he sat the TOEIC examination in person, that he had a sound knowledge of English, a strong academic record in English, he had been taught in English throughout his education including for the degree he gained in Bangladesh. The applicant spoke of the extreme effects of the decision to curtail his leave, which included the termination of his career hopes upon which he had spent many thousands of pounds.
16. In the second witness statement, the applicant expanded upon his education in Bangladesh which he undertook in English from the age of four and until he graduated with a First-Class degree in Anthropology from the Shahjalal University of Science and Technology. The applicant addressed his immigration and educational history in the United Kingdom in a similar manner to the first witness statement which is not repeated here. From [10] onwards the applicant addressed the respondent's allegation, which he categorically denied and provided a detailed account of the circumstances in which he took his TOIEC examinations.
17. The applicant describes in some detail the nature of the TEOIC tests in listening and reading which he took on 23 April 2012 at London School of Management and Development Studies as well as the speaking and writing tests at Colwell College, which he described as being situated near Aldgate East station. The applicant explains that the former School had its licence suspended or revoked, and this is why he had to complete the TOEIC tests at Colwell College.

18. The applicant added that he had passed some modules of his master's degree course in the United Kingdom which demonstrated that he had a good grasp of English, however the University had not allowed him to continue his studies. He expressed frustration that he had paid £9,000 in fees to Sunderland University for a course he could not complete. The applicant described himself as depressed and explained that the allegation had humiliated him in the eyes of his family. He added that it would be degrading for him to return to Bangladesh with "practically nothing" having spent a huge amount of money and time in the United Kingdom and that he would not be able to find a decent job with his current qualifications.

### THE RELEVANT LAW

19. s10 of the Immigration and Asylum Act 1999 provided, at the material time, as follows.

10. – *Removal of certain persons unlawfully in the United Kingdom.*

(1) *A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if –*

...

(b) *he uses deception in seeking (whether successfully or not) leave to remain;*

...

(8) *When a person is notified that a decision has been made to remove him in accordance with this section, the notification invalidates any leave to enter or remain in the United Kingdom previously given to him.*

20. In *SM and Qadir (ETS - Evidence - Burden of Proof)* [2016] UKUT 229 (IAC), the Upper Tribunal concluded:

- (i) *The Secretary of State's generic evidence, combined with her evidence particular to these two appellants, sufficed to discharge the evidential burden of proving that their TOEIC certificates had been procured by dishonesty.*
- (ii) *However, given the multiple frailties from which this generic evidence was considered to suffer and, in the light of the evidence adduced by the appellants, the Secretary of State failed to discharge the legal burden of proving dishonesty on their part.*

21. In *MA (ETS - TOEIC testing) Nigeria* [2016] UKUT 450 (IAC), the following observations were made on the expert evidence at [15] of the decision:

- (iv) *There is conflicting evidence about whether the spoken and written responses of candidates to individual questions are stored on individual electronic files or otherwise...*
- (xi) *The integrity of the test taking procedures and systems established by ETS in its manuals depends heavily on the reliability and probity of test centre staff. Further, the ETS security precautions concentration on the elicit conduct of candidates and not test centre employees.*
- (xii) *With the sole exception of audio files, all of the computer files produced have been in the form of " print-out to PDF": the effect of this " ... has been not to preserve any original date - and - time stamps or internal metadata either or both of which would have assisted analysis using digital forensic analysis and helped produce a chronology of events".*

(xiv) A study of the spreadsheets attached to the witness statements of the Home Office employee, Mr Sewell reveals a lack of any nexus between the data supplied to him by ETS and the unique ID of individual candidates. As a result, the experts say

" We do not know the processes by which the candidate's name is linked to each test".

(xv) The experts acknowledge the documentary evidence of "simple impersonation", with particular reference to the unannounced ETS audit at Synergy College on 16 January 2013. They express the opinion that the simple impersonation mechanism would be "vulnerable" in any speaking tests.

(xvi) While there is also some evidence of "dictated answers", "viz" answers to test questions being called out by a person in the examination room, this method would not be viable for the spoken English test.

(xvii) The investigation of a particular test centre in Birmingham established the use of the "remote control software" mechanism by the use of "Team Viewer" software whereby a person using another computer could secure access to the computer being used by the candidate. The possibility of other, covert, remote control mechanisms is acknowledged.

(xix) Yet another mechanism, entailing a simultaneous testing session using proxies in a "hidden room" at the test centre or elsewhere is acknowledged.

(xx) According to the experts, " particular opportunities for mistakes appear to arise if the actual registration on the ETS system is sometimes carried out by test centre staff and not by the candidates themselves", creating the risk of the data provided by the test centre to ETS mis-matching the candidates and their tests. There was no security precaution available to counter this risk, with the exception of an unannounced ETS audit.

(xxi) As none of the computers or data media associated with the test centres involved in these cases is available, there is no information relating to the important issues of audit, log and configuration files and related time and date stamps. This is one aspect giving rise to the recurring lament of the experts:

"We have been limited by the quantity and quality of material actually available to us."

(xxii) The "naming conventions" for the digital files of the voice recordings produced do not provide an explicit link between the candidate and the recording: rather, there is only reference to the particular test being taken. Contrary to a suggestion emanating from ETS via their solicitors, the file name does not include the candidate's "unique registration code". Thus:

"... What this naming system does is to provide linkage between a registered candidate and the responses and recording but assumes that the unique registration code is reliably linked to the real candidate. As we have already pointed out, in the two spreadsheets exhibited by Adam Sewell there are no columns uniquely to identify candidates by reference to the ID they originally tendered (e.g. the passport number)."

(xxiii) " The experts have examined the supplied audio files and find that there is no embedded metadata which might assist their enquiries. Time and date stamps appear to be of the most recent copying of the file and not of the point of origination".

22. The correct approach to determining whether a person engaged in TOEIC fraud was set out in *Majumder v SSHD* [2016] EWCA Civ 1167:

"...in considering an allegation of dishonesty the relevant factors included the following: what the person accused had to gain from being dishonest; what he had to lose; what is known about his character; the cultural environment in which he operated; how the individual accused of dishonesty performed under cross-examination, and whether the Tribunal's assessment of that person's English language proficiency is commensurate with his or her TOEIC scores; and whether his or her academic achievements are such that it was unnecessary or illogical for them to have cheated."

### The hearing

23. Mr Ó Ceallaigh referred to an application made on 3 May 2019 to extend the time to file the applicant's skeleton argument by 3 May 2019. Time was extended as requested. Similarly, time was extended for the respondent's skeleton argument to be filed by 7 May 2019.
24. Both representatives were in agreement as to the relevant law and that the hearing would concern solely whether or not the applicant had used deception in taking his English language test at Colwell College on 12 May 2012.
25. I permitted Mr Ó Ceallaigh to submit a report of Georgia Costa, a psychologist who saw the applicant on 25 April 2019. He stated that this report was relevant to how the Tribunal assessed the applicant's evidence. In addition, the applicant was fasting for Ramadan and he apologised for the weakness of his voice at the beginning of examination-in-chief.
26. The content of the applicant's oral evidence was in line with that of his witness statements and I will therefore only summarise any new evidence which emerged.
27. During examination-in-chief the applicant clarified that he also took and failed the speaking and writing tests he sat at the London School of Management and Development Studies on 23 April 2012 and needed to retake them. When asked about the ETS SELT Source Data, showing that he had also taken three tests at New College of Finance on 18 April 2012, he denied that he had attended that institution or taken tests there.
28. In response to questions posed in cross-examination, the applicant explained that his initial career goals had changed amid the constant closure of his Tier 4 sponsors. In the end, he had decided to pursue a career in travel and tourism which was why he commenced the master's degree at Sunderland University.
29. The applicant clarified that the reference to East End College in the second witness statement was incorrect and that he attended West End College. In relation to the tests taken at Colwell College, the applicant explained that he had paid for the tests in cash and had not received any communications from the College. He had retained no documentary evidence in relation to Colwell College. The applicant explained that he had not contacted Colwell College after his leave was curtailed because he was aware that the College had had its licence revoked and it had closed down.
30. When asked by Ms Wilsdon why he had not contacted ETS, the applicant explained that his solicitors had obtained a copy of the voice recording linked to his test. The applicant accepted that it was not his voice on the recording. He explained that he had no witnesses to his claim that he took the test in person because he attended the test alone. Ms Wilsdon put the allegation of deception directly to the applicant, which he robustly denied.

### Submissions

31. Ms Wilsdon relied on her skeleton argument as well as the Project Façade report on Colwell College, Leicester dated 15 May 2015. She emphasised that 53% of tests results

were invalid and most of the remainder were questionable. The audit into Colwell College showed widespread abuse including the invigilator being kept out of the room when tests were taken.

32. Ms Wilsdon argued that the respondent had raised sufficient evidence to discharge the initial burden and that the applicant had given no particular explanation other than a straight denial. She emphasised that the applicant had provided no evidence to support his explanation in the form of a witness, evidence of booking the test or his travel history. Furthermore, the applicant admitted the voice recording was not his. She contended that it was unlikely that someone else's recording was linked to the applicant.
33. Referring to the applicant's education history and qualifications, Ms Wilsdon submitted that there could be all kinds of reasons for cheating, only one of which was lack of confidence in English.
34. Ms Wilsdon contended that the applicant had not provided any samples of his work from the past to show the level at which he was working in English or from others who knew him at the time. She argued that the applicant had said that he failed two elements previously and that he chose the TOEIC qualification as he wanted an English language certificate within 60 days. That the applicant was under pressure of time after he failed the first time amounted to real motivation for carrying out fraud. She considered it relevant that the applicant's educational history did not show clear objectives in that he had changed from business to accountancy and then back to business. She argued that it was no coincidence that the applicant had attended a series of colleges which had had licences revoked. Ms Wilsdon was of the opinion that the applicant was not "completely fluent" in English and she concluded her submissions by contending that his evidence was insufficient to demonstrate an innocent explanation.
35. During his submissions, Mr Ó Ceallaigh asked me to accept that the applicant's evidence was coherent and credible and that no discrepancies had emerged despite extensive, careful cross-examination. He accepted that there was probably some fraud at Colwell College given the suggestion of the use of pilots and the level of invalid tests. Nonetheless, he argued that it was clear from *MA (ETS - TOEIC testing) Nigeria* [2016] UKUT 450 (IAC) that there was no way of knowing how a voice file was connected to the test, no reliable evidence regarding the chain of evidence, no metadata and that the wrong voice file attached was not an indication of fraud. With reference to *MA*, Mr Ó Ceallaigh listed the number of ways in which a different voice file might have been attached to the applicant's test such as the use of Teamviewer software, impersonation, a hidden room for pilots, the copying of voice files used for everyone present whether cheating or not. That the applicant's test result was invalid did not indicate that he cheated. Colwell College was a large institution with two campuses, and it was fanciful that everyone was cheating or that the College would turn away genuine students. The applicant had never heard of the New College of Finance until the day of the hearing and had no reason to lie about that, whereas the Secretary of State said the look-up tool was reliable. At this stage, Ms Wilsdon interjected to indicate that the respondent was relying only on deception in relation to Colwell College which was the sole institution referred to in the decision letter.

36. Mr Ó Ceallaigh made the point that the applicant would not have needed to be resitting tests if he was cheating. Whereas it probably would have been helpful if the applicant adduced more evidence, it was not likely that he could have called someone who could have recalled that he attended a test seven years ago. It would be surprising if the applicant had kept records however, even if he cheated it was likely that he would have receipts or tickets at the time. He submitted that the applicant's English was very good and of a level which indicated that he did not need to cheat. It was to his credit that he had volunteered his previous failure to pass the speaking and writing test which otherwise would be unknown. The applicant's IELTS result from 2014 (5.5 in speaking) was consistent with the applicant's level of English at the hearing.
37. In relation to motivation to cheat, Mr Ó Ceallaigh argued that the applicant only needed to re-take the speaking and writing test and thus the time pressure was not great. Furthermore, there was nothing suspicious in the applicant switching courses in the context of the multiple college closures between 2009 and 2013. He emphasised that the applicant was a genuine student who was a graduate in his home country and who had commenced a master's degree in the United Kingdom. He concluded by submitting that the applicant had raised a plausible explanation.
38. At the end of the hearing I reserved my decision.

### Discussion

39. Counsel were in agreement that the sole issue before the Tribunal is whether or not the respondent can prove that the applicant obtained leave to remain by deception, specifically that he obtained his TOEIC test certificate by the use of a proxy.
40. It is not in dispute that the respondent met the initial evidential burden of raising a case that requires the applicant to provide an innocent explanation. Indeed, the applicant obtained the recordings and confirmed that it is not his voice which was captured. This raises a *prima facie* case of fraud.
41. I have also considered the Project Façade report provided by the respondent and which is dated 15 May 2015. The report concerns a criminal inquiry into Colwell College, Leicester. At this point I note that the applicant states that he took his test in London and not Leicester and that Mr Ó Ceallaigh referred to Colwell College having two campuses. In any event, the report notes that all test results were withdrawn as either invalid or questionable which were taken between 18 October 2011 and 15 January 2013. The applicant took his test between those dates, albeit not in Leicester. By comparison, the level of invalid or questionable tests at public test centres was less than one per cent. A number of issues were identified during the audits of Colwell College, Leicester including that the ETS employed invigilator was kept out of the test room and five pilots were identified in the telephone contact list of one of the test centre directors. While the report refers to an ongoing criminal inquiry, there was no evidence before



me as to the progress or outcome of that investigation. Despite the foregoing issues with this evidence, I have placed some weight upon the report.

42. The issues with the evidence identified by Ms Wilsdon in her submissions did not undermine the applicant's case. The test in question was taken seven years ago and the applicant was unaware of the respondent's concerns for a further three years. In these circumstances the lack of a witness, transcripts, receipts and tickets is not remotely surprising.
43. It is the case that the applicant required an up to date English language qualification in order to progress his studies and therefore he stood to gain a further period of study in the United Kingdom. Nonetheless, it could not be said that the applicant was desperate to pass because he was not under any time pressure because he had already passed the listening and reading tests and was still waiting for the Home Office letter granting him 60-days leave to obtain a CAS.
44. As for what the applicant had to lose, paying for someone to take his test would represent a significant risk to his reputation and position in the UK. The applicant's track record indicates that he was plainly capable of passing a spoken English test and it would have been wholly illogical, for him to have cheated when he could simply have taken the test again, as before.
45. There is no evidence of any previous or subsequent concerns about the applicant's character. He is a man of good character and has conducted himself impeccably since arriving in the United Kingdom and abided by the terms of his leave to enter and remain.
46. I heard no submissions regarding the cultural environment in which the applicant operated, other than perhaps Ms Wilsdon's submission that it was no coincidence that the Tier 4 sponsors chosen by the applicant had been closed down. It was not in dispute that a great many sponsors had licences revoked at the time the applicant was studying. There was no evidence produced as to why any of the applicant's previous colleges were closed down, let alone any indication that the applicant was implicated in that or was deserving of criticism for choosing those colleges at a time when they were licenced to sponsor overseas students.
47. The applicant performed well under robust cross-examination, notwithstanding that this was in circumstances where he was fasting as well as suffering mental health issues. He was able to understand complex questions posed in English in cross-examination and to give detailed responses in English.
48. The applicant was able to satisfactorily describe the circumstances in which he took the English test in question including his thinking process prior to the test. Ms Georgia Costa, the psychologist who saw the applicant on 25 April 2019, was of the opinion that he was suffering from Generalised Anxiety Disorder. In her detailed report, she states that the applicant's GP previously diagnosed him with anxiety, that he is prescribed medication and has been referred for talking therapy. Ms Costa records that the applicant told her that he cannot see a future for himself, that he feels "stuck," that he has become very irritable and his self-esteem has been adversely affected in the years since his leave was curtailed. In addition, he cannot stop worrying about everything. Ms Costa considered the applicant to be "chronically anxious." The applicant's demeanour while giving evidence was not incongruous with the content of this report.

There was no challenge to the psychological report, upon which I have placed a moderate degree of weight as evidence of the applicant's mental state at the time of the hearing. Furthermore, I consider that it is less likely that the applicant would be experiencing such distress for the reasons he gives if he had cheated in his English test. In summary, the applicant gave a clear and credible account of having taken the test in person during cross-examination.

49. The applicant's standard of English during his evidence was not native-speaker standard, however there was no indication that he required an interpreter. His English language proficiency was commensurate with his TOEIC scores as well as the IELTS score he took just under two years later.
50. In considering whether the applicant's academic achievements are such that it was unnecessary or illogical for him to have cheated, I have taken into consideration that he needed to retake his spoken English test. If the appellant was inclined to cheat in his TOEIC tests, he would not have needed to re-sit them. In addition, the applicant's previous unsuccessful test was not known to the respondent and it is to his credit that he volunteered this information during examination in chief.
51. It is also relevant that the applicant studied English from a very early age and that he attained a degree in anthropology in Bangladesh, in English, prior to arriving in the UK. At the time the applicant took the test in issue, he had been studying in the United Kingdom for close to three years and he had sat an IELTS examination in March 2014, achieving 5.5 in speaking, a not dissimilar score to that shown in the TOEIC taken less than two years earlier. Notwithstanding that IELTS score, the University of Sunderland tested his level of English again prior to accepting him on the master's course in 2014 and he passed that assessment.
52. The applicant successfully completed a level 7 qualification (the diploma in strategic management) before his leave was curtailed. Even after his leave was curtailed, the applicant completed most of his MSc at the University of Sunderland. On balance, given this level of achievement in the English language, notwithstanding that he failed one test, I find that it would be unnecessary for him to have cheated.
53. The applicant has raised an innocent explanation. His account is highly detailed, plausible, and supported by evidence of his academic history. Applying *SM and Qadir* therefore, the burden returns to the respondent to prove that he committed fraud. The respondent cannot do so owing to the difficulties with the evidence identified in *MA*. Notwithstanding the applicant's concession that it is not his voice on the voice file attributed to his test, as noted from *MA*, the respondent has no way of establishing whether a voice file with another person's voice on it has been correctly attributed to the applicant's test.
54. Considering the matter in the round, the respondent has not discharged the legal burden of establishing that the applicant's innocent explanation is to be rejected.
55. For the reasons given, the application is granted.

### Costs

The respondent is to meet the reasonable costs of the applicant to be assessed if not agreed. The respondent shall pay a reasonable sum on account within 28 days of being served a bill of costs.