



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal no: HU/06100/2016

**THE IMMIGRATION ACTS**

At Field House  
On 27.02.2018

Decision signed: 27.02.2018  
On 06.03.2018

Before:

Upper Tribunal Judge **John FREEMAN** and  
Deputy Upper Tribunal Judge **Satvinder JUSS**

Between:

**Keshav ADHIKARI**

appellant

and

**Secretary of State for the Home Department**

respondent

**Representation:**

For the appellant: *Rajiv Sharma* (counsel instructed by Malik Law Chambers)

For the respondent: Mr S Kotas

**DECISION AND REASONS**

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Kirsty Real), sitting at Newport on 2 May 2017, to allow an ETS appeal by a citizen of Nepal, born 1982. The judge found that the Home Office evidence of his proxy-taking the relevant test, through the Premier Language Training Centre at Barking, on 21 August 2012, gave him a case to answer on deception; but, for reasons she gave, did not establish it on the required balance of probabilities. The suggestion at paragraphs 1 – 7 of the grounds that the judge did not apply this standard of proof is quite simply unarguable, in view of her express reference to the authorities at paragraphs 18 – 19.

2. Various complaints are raised in the inordinately prolix grounds of appeal, most of which are unjustified: we shall deal with these briefly, but concentrate on what seems to us the real issue. The following relevant documents were before the judge, all from the Home Office, (b) and (c) using their Look-up Tool, and attached to a statement by Kelvin Hibbs:

**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.*

- (a) a report ‘Project Façade – criminal inquiry’;
  - (b) an analysis of the results obtained with Premier on the relevant day; and
  - (c) the appellant’s own results: there is no explanation for the two separate entries, but both are in the same terms.
3. The judge dealt with (a) at 25. It is a Home Office report; but signed by temporary Detective Inspector Andrew Carter of the police team responsible for it. There is nothing in *MA* (ETS – TOEIC testing)[2016] UKUT 450 (IAC), to which Mr Kotas referred us, to give any specific approval to that report, and we see no error of law in the judge’s conclusion that it raised no *prima facie* case of fraud against any individual. It did however contain a relevant analysis of Premier’s results on TOEIC tests taken there between 2011 and 2014.
  4. At 26 the judge went on to deal with (b) ‘annex AA’, and (c) ‘annex A’. So far as these documents were concerned, she accepted at 30 that ETS’s conclusions, to the effect that the appellant’s test had been taken by proxy, and that the day’s results with Premier showed *prima facie* evidence of corruption there, were “... sufficient to discharge an initial evidential burden”.
  5. This conclusion was very much in line with *SM and Qadir* (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC), and all ‘reported’ decisions on statutory appeals of this kind since then. It also answers the point made at paragraph 12 of the grounds, since what the judge went on to do was to assess the evidence on both sides, including the basic ‘generic evidence’ (statements by Rebecca Collings and Peter Millington) and conclude, at 47, that the Home Office had not established fraud by the appellant. This was of course a question for her on the facts; and, provided she took the right approach to it, the decision was one for her alone.
  6. Dealing first with the other bad points in the grounds:
    - (a) (paragraphs 8 – 10) the judge gave reasons at 33 – 36 for concluding the appellant had no motive to cheat, on the basis of what she found to be his English-language skills in 2012. The relevance of this is challenged, on the basis of a passage at paragraph 57 of *MA*.

However, the Tribunal there did no more than to acknowledge the possibility of other reasons than need to have a proxy take one’s test. As they said, the issue had not been explored before them, and they declined to speculate about it. Here the judge reviewed the evidence on the point carefully, making proper distinction between the appellant’s English then and now. It might well have been wrong, given the other possible reasons, to regard the lack of motive as conclusive in his favour; but she did no more than take it into account as a factor, and there is no reason why she should not have done so, subject to what we say later about the general evidence on Premier’s results.

- (b) (paragraph 11), also on this point, it is suggested that the judge was wrong not to take into account the well-known *Panorama* programme, showing students standing by their proxies as they took their tests for them (so that they would know all about the questions and procedure, without having done so themselves). The basis for this bold assertion is that the programme “... was provided on DVD to every hearing centre”.

This shows an astonishing ignorance of the general rules of evidence and procedure. Judges are not expected to deal with any evidence which has not been put in, or at least referred to, as part of a party’s case, so that the other side have a chance to deal with it. Sometimes they will wish to take judicial notice of something which is common knowledge; but they will always bring that to the parties’ attention, for the same reason.

7. Coming to the real issue, the judge reached her conclusion about the appellant having a case to answer on fraud despite finding at 29 that “... the record of ETS categorising a test as “invalid” has limited weight, because it is a hearsay assertion where the basis for the categorisation cannot be evaluated in this Appellant’s individual case”. She went on to give as an additional reason for that finding that Mr Hibbs had effectively invited her to evaluate the appellant’s evidence for herself. However that did no more than recognize the approach laid down in *SM and Qadir*: see 5.

8. That point is not material in itself, since the judge decided that the appellant did have a case to answer; but it sheds some light on her approach to the question of whether on all the evidence the Home Office had established fraud on his part. This can be seen at 39:

Since this appeal cannot entail an examination of the quality of the evidence relied upon by ETS in forming its conclusions in the Appellant’s individual case I am unable to attribute more than the limited weight I identified above to the Respondent’s evidence.

9. At this stage we need to set out the relevant evidence in the various items at 2.

- (a) is best shown in a table, together with (b):

<u>results</u>	<u>total</u>	<u>invalid</u>	<u>questionable</u>	<u>no evidence of invalidity</u>
<u>Secure public ETS centres 2011 -14</u>	1039	3 (0.28%)	0	1036 (99.72%)
<u>Premier 2012 - 14</u>	5055	3780 (75%)	1275 (25%)	0
<u>Premier 21 August 2012 (b)</u>	170	117 (69%)	53 (31%)	0

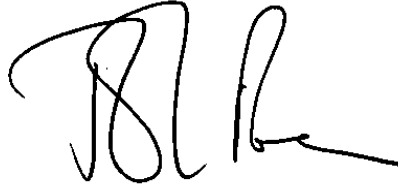
10. At (c) the appellant's own results are assessed as 'invalid'. If that assessment had stood alone, then there might have been more justification for the judge's approach; but it did not. Simply as a matter of common sense, she needed to consider the discrepancy, surprising to say the least, between the secure test centre results, very nearly all valid, and Premier's, 75% invalid and the remaining 25% no better than questionable. The pattern of results was unquestionably relevant, as can be seen from the reference to general evidence of corruption at particular centres at paragraph 44 of *MA*.
11. The Home Office's use of the Look-up Tool has been referred to in many 'reported' decisions, and upheld on the basis of the supporting evidence. We shall not go into this here, because, quite apart from the validity or otherwise of the judge's giving 'limited weight' to the evidence of invalidity in the appellant's individual case, there is the need to look at that in terms of the general discrepancy between the secure results and Premier's.
12. Mr Kotas realistically conceded that the judge's decision might have been sustainable, on her reasoning, if the appellant's own results had been assessed as questionable. As we have said, it might also have been open to the judge to decide as she did if they had stood alone; but neither of these was the case. While the judge was entitled to look into the evidential basis for the assessment in the appellant's individual case, she had to consider it, not only against her view of his evidence as a whole, but against the results obtained through Premier in general. Those would have been particularly relevant to the conclusions she reached on accepting the appellant's evidence that he had indeed taken his test through Premier.
13. For those reasons we have reluctantly decided that the judge's decision cannot stand on her reasoning; reluctantly because in our view she wrote it very clearly and with great care, and most of the criticisms made of it in the grounds were unfair or misconceived, for the reasons we have given in dealing with paragraphs 1 – 11 of the grounds.
14. The judge allowed the appeal on the only ground now open to her, that the decision was contrary to the appellant's human rights. While she approached that question by way of the requirements of the Rules, as required by the authorities, her conclusions, both on the long residence point at 43 – 44, and, at 44 – 45, in terms of the general law, including the requirements of s. 117B of the Nationality, Immigration and Asylum Act 2002, both relied on her finding that the Home Office had not established fraud on the appellant's part.
15. That is the central question in this case, which will have to be decided at a fresh hearing. Shortly after we heard this case, the Home Office's 'position statement' on ETS cases (both 'new-style' as here, and 'old-style') was made available. This was made in two judicial review cases pending before a presidential panel, and invited the Upper Tribunal

“... to consider staying all New-Style ETS Cases pending the judgment of the Court of Appeal in the linked cases of *R (Hossain) v SSHD* (C6/2016/3560) and *R (Islam) v SSHD* (C8/2017/1385), which are to be heard together in June 2018.”

16. Since we had no opportunity to refer the parties to this, and so far as we know no view has been taken on it by the panel or the Tribunal generally, we shall say no more than that in our view there would be a great deal to be said for the fresh hearing in this case to follow without waiting for the Court of Appeal's decision in the judicial review cases referred to. A conclusion can be reached on all the evidence as to whether the Home Office have established fraud on this appellant's part, and his human rights considered in the light of that.

**Appeal allowed: decision set aside**

**Fresh hearing in First-tier Tribunal, not before Judge Real**

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

(a judge of the Upper Tribunal)