



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16932/2018

THE IMMIGRATION ACTS

Heard at Field House
On the 4th June 2019

Decision & Reasons Promulgated
On the 12th July 2019

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

SHUVO BARMAN

Respondent

Representation:

For the Appellant: Mr D. Clarke, Senior Presenting Officer

For the Respondent: Mr Spurling, Counsel instructed on behalf of the Respondent

DECISION AND REASONS

1. The Secretary of State with permission, appeals against the decision of the First-tier Tribunal (Judge Lingam) (hereinafter referred to as the "FtTJ") who, in a determination promulgated on the 19th March 2019 allowed his appeal against the decision of the Respondent dated 22 July 2018 to refuse his human rights claim.
2. Whilst the Secretary of State is the appellant, for the sake of convenience I intend to refer to the parties as they were before the First-tier Tribunal.

3. The appellant is a national of Bangladesh. His immigration history is set out within the determination at paragraphs 1-6 of the FtT determination and in the comprehensive decision letter issued by the Secretary of State of the 24th July 2018 entitled "notice of cancellation of leave". It can be summarised briefly as follows. The appellant entered the United Kingdom in January 2009 with leave to enter as a Tier 4 General student valid until 30th April 2012. On 28 April 2012 he applied for further leave to remain as a Tier 4 (General) student, but the application was refused on 12 July 2012 as he failed to meet the maintenance requirements.
4. On 31 July 2012 he submitted a further application for leave to remain and as a result was granted leave to remain until 28 June 2014 as a Tier 4 student. On 10 June 2013 he was granted further leave to remain as a Tier 4 (General) student until 13 March 2016.
5. On 5 September 2015 when returning to the United Kingdom, the immigration officer made routine checks against the Home Office records which showed that he had sought leave to remain in the United Kingdom by deception. This related to the TOEIC certificate awarded to him following the test taken on 20 March 2012 at Elizabeth College, which he submitted as part of his application for leave to remain on 31 July 2012. That certificate was found by ETS to be invalid and fraudulently obtained.
6. As a consequence, the leave granted to him was cancelled under rule 321A (2) of the immigration rules as it was asserted that he had obtained leave to remain by deception. The immigration officer therefore cancelled his leave to remain and refused him leave to enter the United Kingdom on 5 September 2015.
7. Following the cancellation of leave, the appellant lodged a claim for judicial review challenging the decision and in particular, that he had used deception. The claim for judicial review was considered on the papers by an Upper Tribunal Judge (Judge Jordan) who refused permission on 29 February 2016. However on an oral renewal hearing on 3 August 2016 Upper Tribunal Judge Kekic granted permission on the basis that it was arguable that it had not been adequately explained why leave had been cancelled and that the Secretary of State did not have regard to material evidence available to her when making the decision, specifically the interview record undertaken by one of the officers and the fact that the applicant was studying for a postgraduate degree.
8. It appears that the parties entered into a consent order shortly before the substantive judicial review hearing. The respondent agreed to reconsider the decision but made a new decision on 8 April 2017 maintaining the earlier decision to cancel his leave. The applicant sought administrative review against the second decision. In a further decision dated 28 April 2017 the original decision was maintained, and the administrative review refused.
9. The appellant filed a second judicial review application and permission was granted on 6 April 2018 (see appendix L). The basis of that grant was that the cancellation of

leave engaged Article 8 which required procedural fairness so that the applicant could be given an opportunity to challenge the respondent's decision in which deception was alleged.

10. According to the decision letter of 24 July 2018, at paragraph 6 it states that the judicial review was conceded by the Secretary of State and that the decisions of 8 April 2017 and the administrative review decision of 28th of April 2017 had been withdrawn. It makes reference to the decision of 8 April 2017 being reissued to provide the appellant with an alternative remedy of an in-country right of appeal. Therefore, the decision of 24 July 2018 was said to be a "reconsideration of the decision to cancel your leave on arrival."
11. The decision of 24 July 2018 entitled "notice of cancellation of leave to enter" sets out the immigration history and the litigation is set out above. The letter made reference to the appellants interview with the immigration officer taken in September 2015.
12. It was noted that the interview notes were taken three years after the TOEIC testing question, but whilst the officer concluded that he was "fluent" in English, it did not demonstrate whether he was fluent the time of the original test. At paragraph 17, the respondent set out answers given by the appellant relevant to his circumstances in 2012. The respondent considered that the replies demonstrated that he was not confident in English language and that he was running out of time with regards to extending his leave to remain in the UK. He took the test on 20 March 2012 and his leave was expiring on 30 April. Thus, it was asserted that he had a motive to use a proxy due to uncertainty as a result of this lack of confidence in English and running out of time with regards to the application.
13. The respondent relied upon the ETS lookup tool confirming his certificate was invalid (appendix 1). Further evidence relied upon was set out at paragraph 20 of the decision letter, including generic evidence from Peter Millington, Rebecca Collings, Dr Harrison, Prof French and a project façade report in relation to abuse of the TOEIC at Elizabeth College dated 15 May 2015 and a report commissioned in October 2016 accompanied by witness statement of Adam Sewell.
14. At paragraphs 21 - 31 the respondent set out an analysis of that evidence.
15. At paragraphs 32 - 38 the respondent set out a summary of the project façade report noting that between 18 October 2011 and 26 September 2012 Elizabeth College undertook 3919 TOEIC speaking and writing tests of which 69% were invalid and therefore show the organised widespread abuse that took place there. It made reference to an incident on 15 May 2012, two months after it took the test when ETS conducted an audit during which an ETS auditor suspected that an impostor was sitting at the test on behalf of the candidate. One test taker whose scores were found to be invalid and been interviewed admitted that an impostor had taken the test and also named the agent that had arranged it. Financial enquiries established that payments from six TOEIC candidates were well in excess of the test fee were made into a named directors account.

16. At paragraphs 39 – 43 the respondent made reference to the Elizabeth College report commissioned in October 2016. An analysis of the credibility of the results achieved at the test centre were undertaken and at appendix 10 the analyst concluded that the majority of tests at Elizabeth College were not conducted under genuine test conditions and that the results reported by Elizabeth College were not a true reflection of the English ability of the candidates. The respondent therefore concluded at paragraph 43 that the presumption of fraud applied in the appellant's case and that the objective evidence strongly demonstrated widespread fraudulent activity at the college and that as he had reasons to use a proxy, it was concluded that he had obtained his TOEIC certificate by deception and cancelled his leave to remain pursuant to rule 321A(2) of immigration rules.
17. The respondent was also satisfied that his leave to remain should be cancelled under a change of circumstances. In this respect it was stated at paragraph 44 that ETS cancelled his language certificate and that was a change in circumstances since leave was given to justify cancellation at port. It was stated "I take the view that there is no requirement to prove fraud individually against you in order to cancel your leave to remain in the UK. This is because I'm satisfied that a widescale fraud had been revealed, that ETS had carried out an investigation and ETS had chosen to cancel your English language certificate leading to the change in your circumstances which resulted in my decision to also cancel your leave under rule 321A(1). "
18. There is also a decision letter which was a decision on a human rights claim. As far as I understand the position, as part of a section 120 notice served in April 2017, the Home Office considered it as a human right claim and rejected it as clearly unfounded under section 94 of the NI AA 2002. The appellant did not challenge the human rights decision that was dated 16 June 2017 and it was not part of the consent order. However, it appears that decision was withdrawn but the decision on his human rights claim had been reissued and was not now certified which provided the appellant with an in-country right of appeal. That decision set out at appendix M and is dated 22 July 2018. It is this decision which brought the proceedings before the First-tier Tribunal.
19. In that decision, his immigration history is set out again and it was noted that the appellant had not informed the respondent that he had any partner, parent or dependent children and therefore the application was not considered under Appendix FM. It was also noted that there were no provisions under the immigration rules for a person to be granted leave to enter on account of a private life established in the United Kingdom. Under the heading "exceptional circumstances" and whether there would be exceptional circumstances render a refusal in breach of Article 8 on the basis that it would result in unjustifiably harsh consequences for the appellant, it was stated that there were no such exceptional circumstances to warrant a grant of leave to remain outside the rules. It made reference to his claim to have family members in the UK, but no details been provided. The decision letter made reference to his claim that he was completely integrated with his sister's family and that he would be liable to hardship if returned to Bangladesh. In this context it was noted

that he was a 27-year-old adult and it was reasonable to expect and be able to support himself independently without the direct support from family members.

20. In respect of the allegation of deception, the respondent again made reference to the information set out in the previous decision noting that his scores from the test taken on 20 March 2012 Elizabeth College had been cancelled by ETS and that he had used deception in an application dated 31 July 2012. It was stated that in fraudulently obtaining a certificate he participated in what was an organised and serious attempt to defraud the Home Office. It was then noted that his case had been considered with regard to the possibility that he had established a private life, but he provided no evidence of the substance of that private life. He had not been in the United Kingdom 20 years nor did he demonstrate very significant obstacles to his integration if required to leave the United Kingdom. He had never been settled in the United Kingdom and was refused leave to enter in September 2015. He should not be entitled to benefit from a breach of immigration control.
21. The Appellant appealed that decision and the appeal came before the First- Tier Tribunal at a hearing on the 6th March 2019.
22. In a determination promulgated on the 19th March 2019, the FtTJ allowed the appeal on the basis that she was satisfied that the respondent's decision under Paragraph 321(A) was, in essence, not in accordance with the law and as stated at paragraph 47 "Given the appellant argues Article 8 in the alternative, I am satisfied that it is not necessary for me to determine his Article 8 rights" and at 48, " The appellant succeeds in his appeal. The decision is wrong in law."
23. The Respondent sought permission to appeal that decision and permission was granted by the First-tier Tribunal on the 17th April 2019.
24. The appeal was therefore listed before the Upper Tribunal. Mr Clarke relied upon the grounds save that he did not rely upon paragraphs 4-6 and 8 which referred to evidence which the respondent asserted that had come to their attention after the hearing relating to the appellant obtaining his voice recording. Mr Clarke stated that there had been no evidence provided or filed and served on the appellant or the Tribunal and he was in no position to advance those grounds.
25. In the written grounds it is stated that the judge had no power to allow the appeal under the rules when the Tribunal's jurisdiction was limited to human rights and that no family or private life was identified or any respective breach of either category to justify allowing the appeal.
26. It was stated that the appellant had had no leave to remain two years prior to the human rights claim being made in light of the cancellation decision. It was said that was no consideration of the human rights aspect or on grounds specific to the appellant and that his witness statement (page 25) did not set out a human right claim and it was specific to ETS. There was no evidence put forward in relation to his private life in light of the lack of leave.

27. Mr Spurling, who did not appear before the First-tier Tribunal provided a skeleton argument in lieu of the rule 24 response. In that written response he set out at paragraph 2 the following:

“it is accepted that the Secretary of State has identified material errors of law in the determination as noted at paragraph 3 and the grant of permission:

(a) when the FTTJ purported to allow the appeal under the immigration rules she erred because, in consequence of the changes of the Immigration Act 2014 he did not have a right of appeal on the basis that the decision was not in accordance with immigration rules; and

(b) when the judge declared it was not necessary to determine the respondent’s Article 8 rights the judge erred because, in the factual premises of this case and in consequence the changes wrought by the Immigration Act 2014, the only grounds appeal to the appellant was that the Secretary of State’s decision was incompatible with his Article 8 rights.

Nevertheless, it is submitted that these errors did not infect the findings of fact, which were open to her on the evidence before her. It is submitted that the proper disposal of this case would be for the Upper Tribunal to allow the Secretary of State’s appeal on the limited basis that the FtTJ failed to consider the appellant’s case under Article 8 in light of the facts found and to remit the case to the First-tier Tribunal to reach findings on his human rights appeal in light of the preserved findings of fact and any further relevant evidence produced by the parties.”

28. Therefore, as set out above and in his oral submissions it was agreed by Mr Spurling that the error identified at paragraph 1 was made out and that if the Secretary of State’s appeal against the findings of fact relating to the TOEIC certificate was dismissed, it should return to the FtT by way of remittal on that limited basis with the other findings being preserved.
29. Mr Clarke also agreed with that approach. In the light of the agreement reached by both advocates that there was a material error of law as set out in paragraph 1 of the grounds and that this is material to the outcome and that it should be remitted to the First-tier Tribunal on this issue, there only remains one outstanding issue that requires determination. That issue relates to the remaining grounds in which the Secretary of State challenges the findings of fact made by the FtTJ relating to the issue of deception.
30. As I have set out above Mr Clarke withdrew paragraphs 4 –6 of the grounds. No evidence has ever been served in relation to these allegations, either before the FtTJ not before the Upper Tribunal. In the circumstances those allegations cannot, nor should they, form any part of the case and I observe that it is difficult to see how permission could have been granted in relation to those grounds where no evidence in support had either been advanced before the FtT nor had it been identified how that material now (even on the basis it was available) would be admissible at this stage.

31. He made the following oral submissions. He stated that at paragraph 42 the judge stated that there was no direct evidence of the appellant having cheated in his English language test but that ignored the look tool. That had been referred to at paragraph 27 in the respondent's evidence. He submitted that the evidential landscape had moved on and it was important to consider the direct evidence of the lookup tool. The appellant's score was invalidated as shown by the evidence -64 (47%) were questionable and 71 (53%) were invalid and that demonstrated direct evidence. But taking into account the generic evidence demonstrates that appellant scores were invalidated. The checks show that the false positives are less than 1% therefore it was not true to say that that was no direct evidence against the appellant. The direct evidence was due to his test being invalidated.
32. The next point made by Mr Clarke related to paragraph 38 where the judge made reference to the port interview which took place three years after the test. The judge noted that the immigration officer found that he was fluent, but this had to be looked at in the context of it taking place three years after the test. He referred to the decision of MA, the Tribunal recognised reasons why someone fraudulently would use a proxy to take the test. Therefore, he submitted that there should have been a more holistic assessment of the evidence.
33. The last point he relied upon related to paragraph 40 where the judge made reference to an argument that the test results because they relate to 135 students which meant that all 135 individuals cheated in their test papers. The judge stated "given the numbers it is not plausible that all rooms or every individual had used a proxy. I accept that the figures make the claim untenable." In this respect he submitted that it was not the case that 135 tests were invalidated but 71 and also some were questionable. It is therefore arguable that the finding was unsustainable. He therefore invited the Tribunal to find that the judge's findings of fact were insufficient to deal with the issue of deception in light of the evidence.
34. Mr Spurling relied upon paragraph 5 of his written submissions. They can be summarised as follows:
 - (i) paragraph 2 is a disagreement with the FtTJ's findings. The judge was plainly aware of and took account of the ETS lookup tool which the judge referred to at paragraphs 10, 11 and 28. The lookup tool is a record of an allegation which is not backed up by any detailed record of specific investigation of his test results. Therefore, the judge was entirely right to say paragraph 42 there was no direct evidence of him cheating.
 - (ii) Paragraph 3 is also disagreement. The judge did not place undue emphasis on the interview. At [37] so judge noted that "the observation of the initial immigration officer sits at odds with the subsequent decision-making officers view of his credibility" and then went on to consider "a plethora of evidence" that the appellant had taken the language tests several times prior to 20 March 2012 and additional evidence relating to his language proficiency in the test he had taken.

- (iii) Paragraphs 5(c)-(d) related to paragraphs 4 - 6 of the respondent's grounds which had been withdrawn by Mr Clarke.
 - (iv) Paragraph 7 was a difference of opinion. The judge was entitled to find on the evidence that it was inherently implausible that every single test carried out by the college on the day the appellant took his test was fraudulent. Even if it can be shown that many or most of them were, it did not inevitably follow that all of them were (relying on Underhill LJ in Ahsan at [2]). Therefore, the judge was entitled to make a finding paragraph 40.
 - (v) Paragraph 8 speculative and unsupported by evidence.
35. In respect of paragraph 40, he submitted that on his understanding of the last sentence of that paragraph which stated "I accept that the figures make the claim untenable" is that the judge was referring to the claim that all 135 cheated. However, the judge was stating that 135 cheating on one day was not tenable and therefore paragraph 40 did not take it further by either side.
36. As to the lookup tool, the judge was entitled to state that there was no direct evidence and the tool recorded a conclusion and did not tell how the conclusion was reached in the appellant's case. It was not accompanied by any notes explaining any samples of detailed conclusions and there was no record of any investigation or indication of any time. The other evidence was not direct evidence for example, the report of Prof French. Mr Spurling submitted that the judge was entitled to take into account the individual evidence put forward by the appellant when assessing his competence in the English language. It was not just the immigration officers' interview -it was that he had passed English language test prior to the ETS test and the surrounding evidence showed him to have been competent in English and having passed an advanced degree. The grounds in this respect are simply a disagreement.

Decision:

37. The only issue in contention relates to the issue of deception relating to the use of an English Language certificate to obtain leave. The allegation was set out in the decision letter in which it was stated that in an application made by the Appellant on the 31st July 2012 he had submitted a TOEIC certificate from ETS. The test scores were taken on 20th March 2012 at Elizabeth College, but they had been cancelled by ETS.
38. I have therefore considered the decision of the FtTJ. At paragraphs 20 - 26 the judge summarised the decision letter which expressly considered the issue of deception, including the interview that took place with the appellant in 2015 and the decision of MA which it made reference to the range of reasons as to why someone proficient in English may engage in TOIEC fraud (paragraph 25).
39. At paragraphs 27 - 29 the judge made reference to the respondent's evidence, including the generic evidence but importantly at paragraph 28 the source datasheet confirming the appellant scored 180 marks in the speaking test which was deemed

“invalid” and that the lookup tool for the specified date showed that 135 students who sat for their tests, 64 or 47% were questionable and 71 or 53% were deemed invalid. At paragraph 29 the judge made reference to the evidence that was set out in the project façade report and the review taken of Elizabeth College.

40. At paragraphs 30 – 33, the judge properly directed herself to the case law and the burden and standard of proof in relation to the deception issue. The legal burden of proving that the applicant used deception lies on the Secretary of State albeit there is a three- stage process. The Secretary of State must first adduce sufficient evidence to raise the issue of fraud. The claimant has then a burden of raising an innocent explanation which satisfies the minimum level of plausibility. If that burden is discharged, the Secretary of State must establish on the balance of probabilities that this innocent explanation is to be rejected. There is one civil standard of proof (which is the standard to be applied). The seriousness of the consequences does not require a different standard of proof that flexibility in its application will involve consideration of the strength and quality of the evidence. The more serious the consequence, the stronger must be the evidence used for the necessary standard to be reached.
41. In the decision of *SM & Qadir* [2016] EWCA Civ 1167 the three-stage approach was summarised. That involves considering, first, whether the Secretary of State has met the burden on her of identifying evidence that the TOEIC certificate was obtained by deception; second whether the claimant satisfies the evidential burden on her of raising an innocent explanation for the suggested deception; and third, if so, whether the Secretary of State can meet the legal burden of showing, on the balance of probabilities, that deception in fact took place.
42. The respondent does not argue that the judge failed to apply the correct approach in determining the issue of whether deception had been used. What is asserted is that the judge had reached findings that either did not take into account evidence (the lookup tool) or placed too much weight on evidence (the port interview).
43. I do not find that there is any error in the judge’s assessment of the evidence. It is plain from reading the decision that the judge properly reached the conclusion at paragraph 35 that the respondent had discharged the initial evidential burden. It is also plain from reading the evidence referred to in the decision that the appellant had offered an innocent explanation thus the judge was required to consider the evidence as a whole to consider whether the respondent discharged the burden on him to demonstrate that deception had taken place on the balance of probabilities.
44. Contrary to the grounds, the judge made specific reference to the lookup tool at paragraph 11 (when setting out the documentary evidence) and paragraph 28 where the judge summarised that evidence. When the judge stated that there was no direct evidence against him having cheated in his English language test, the judge was plainly aware of the lookup tool and that whilst the source data confirmed that his test was deemed invalid because a proxy test had been used, and that on the date in question, 53% were deemed invalid, his being one of them. I do not consider that

analysis when seen in the context of the findings of fact and analysis overall, demonstrates that the judge failed to properly consider the lookup tool.

45. Similarly, the assertion that too much weight was given to the interview that took place in 2015 is also not justified when looking at the decision as a whole. The judge was plainly aware of the respondent's contention that his fluency in English in 2015 may not necessarily reflect the position in 2012 (see paragraphs 24- 26 of the decision). The judgement of MA Nigeria [2016] UKUT 450 records at [57], "second, we acknowledge the suggestion that the Appellant had no reason to engage in deception which we have found proven. However, this has not deflected any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, in exhaustively, 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 the deceitful conduct in the sphere. We are not required to make a further finding of why the Appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter."
46. The decision in MA was a statutory appeal and the evidence before the Upper Tribunal was more extensive than it had heard before in SM and Qadir. In particular, the ETS voice files of the appellant had been obtained and it was agreed that the voice was not his. However, he challenged whether the file was indeed a recording of the test he had taken and there was evidence from three experts exploring the issues of how the wrong file may have been supplied. At [47] the Upper Tribunal acknowledged that there were "enduring unanswered questions and uncertainties relating in particular to the systems processes and procedures concerning TOEIC testing and in the subsequent allocation of scores in the later conduct and activities of ETS." Accordingly, much still turned on the Upper Tribunal's assessment of the appellant's oral evidence. They found his evidence to be a fabrication. Both parties have therefore emphasised that "the question of whether a person is engaged in fraud in procuring a TOEIC in this language proficiency qualification will invariably be intrinsically fact sensitive."
47. In reaching an overall conclusion, the judge was entitled to take into account the interview in 2015 where the immigration officer was satisfied that the appellant was able to answer the questions in basic English and was "fluent". The judge recorded "at no point of the interview the appellant appeared to lack credibility". It was open to the judge to reach the conclusion that the observation of the initial immigration officer was inconsistent with the subsequent decision-making officers view of the apparent credibility and his knowledge of the English language (see paragraph 37). The judge gave reasons at paragraph 38. Firstly, that there was a "plethora of evidence" that the appellant had taken language tests several times prior to 20 March 2012 (my emphasis). The judge stated that the "best example of the appellant's exposure and level of proficiency and in this language is demonstrated by his ability at an interview conducted when he was stopped at 2.30 7 AM returning from France.

The conditions were not been ideal but the record shows that he gave a good interview sufficient for the immigration officer to agree he was credible, and this also came through his oral evidence before me.” The judge also had regard to his academic achievements set out pages 46 – 47 gaining one A and 3B grades in his diploma English language course with an average of grade B. The judge was entitled to place weight on the fact that he had gained those results “just days before his ETS language test.”

48. The judge also found that the appellant’s evidence regarding his test papers during his interview was “indicative as to his credibility because at question 15 he was able to say that his papers covered two days, that he spent 20 minutes at a speaking part of his test and for 60 minutes writing and also that it took about 90 minutes for the reading and listening papers.” The judge found that evidence to be significant because it was consistent with the objective information pages 143 – 150 which he would not of had the knowledge of when interviewed by the immigration officer. Thus, in addition to having identified his previous English language ability at a time that was contemporaneous with the test in 2012, the judge found that he had given a credible account of actually having taken the test. At paragraph 38, the judge gave further reasons as to why his evidence was consistent with the objective material.
49. At paragraph 39, the judge took into account his earlier English language ability as demonstrated by his IELTS and in particular that the speaking component part of the test was his “strongest skill” and that it was not credible that he would use a proxy in an area of skill in which he was the most proficient. Further qualifications in English were also taken into account (in 2015 the University had independently assessed him), he had gained a City and Guilds English certificate showing grade B in speaking and when applying the dicta in MA (Nigeria) are set out above, it was open to the judge to conclude that in the light of his experience and ability there was no reason why he needed to cheat in his exams in March 2012.
50. The judge at paragraph 39 also took into account that there was no evidence that he had ever cheated in any of his academic papers during his student career. The judge therefore concluded at paragraph 42 when looking at the evidence “in totality” the appellant was a student who had been diligent fulfilling his academic achievements and overall, meeting his aim to join the family business as a director or working for a company in Bangladesh.
51. In my judgement, the submission made on behalf of the respondent that the judge placed too much weight on the interview in reaching an overall conclusion is not made out. In the preceding paragraphs I have set out the findings of the judge which did place weight on the interview but also placed weight on a number of other factors which were relevant in reaching a decision on the evidence in its totality.
52. The final point relied upon relates to paragraph 40. Having heard the submissions of the parties, it is not entirely clear to me what the “interesting argument” of the previous Counsel was. The judge makes reference to it being stated that the test result scores relate to 135 students which means that all 135 individuals cheated in

their test papers. Given the numbers it is not plausible that all rooms or every individual had used a proxy. The judge then stated, "I accept that the figures make the claim untenable."

53. The grounds assert that the judge was in error in finding that because the objective evidence from the project façade report demonstrated that the results at Elizabeth College were at odds with genuine colleges and that the comment also was contrary to Lord Justice Underhill's characterisation of Elizabeth College as a "fraud factory".
54. However, whilst the evidence made reference to 135 tests been cancelled, they were not all said to be invalid-71 was said to be invalid and the rest were questionable. It therefore does not demonstrate that all 135 individuals cheated or used a proxy. I do not think that that finding, if it is one, assists either party.
55. Furthermore, the grounds seek to rely on the observations of Lord Justice Underhill at paragraph 33 but fail to make reference to the remainder of that paragraph. In this context I remind myself of the words of Lord Justice Underhill in Ahsan (as cited) at paragraph 33 and that although it seems clear that deception took place on a wide scale it does not follow that every person who took the TOEIC test was engaging in deception.
56. The judge therefore concluded that the evidential burden on the Respondent had not been discharged. Given the evidence that I have set out above, that was a decision that was open to the judge to reach. Having considered the evidence that was before the Tribunal and in the light of the grounds I am not satisfied that the judge erred in law in reaching that decision.
57. Consequently, the appeal of the Secretary of State is dismissed on the grounds relating to that part of the decision. I do not set aside those findings of fact; they are findings properly open to the judge to make and I accept Mr Spurling's submission that they should be preserved on that issue and that the issue of deception is now settled by those findings.
58. As set out in the preceding paragraphs, Mr Spurling submitted that the Tribunal should remit the appeal to the FtIJ only on the issue of Article 8 (see his skeleton argument). Mr Clarke agreed with that disposal. Given that that is the only issue, and that the findings on the deception issue have not been made out and are preserved, the parties also agreed that the appeal should be put before Judge Lingam to consider any further evidence or submissions relating to Article 8. I note that at paragraph 45 the judge made reference to the argument of the appellant being returned to the position that he would have been had his cancellation of leave not occurred. Neither advocate made any submissions on this point. The parties will therefore be expected to provide submissions on this alongside the Article 8 claim.

Decision:

The appeal of the Secretary of State against the decision of the FtT relating to the issue of deception (Paragraph 321 (A) is dismissed; there is no error of law demonstrated for the reasons set out above.

The appeal is remitted to the FtT (Judge Lingam) to complete the decision on human rights grounds (Article 8).

Signed:
Upper Tribunal Judge Reeds

Date: 9/7/2019