



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01130/2019

THE IMMIGRATION ACTS

Heard at Field House via Skype
On 27 May 2021

Decision & Reasons Promulgated
On 25 June 2021

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR MOHSIN ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Lewis, instructed by Londonium Solicitors

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against a decision of the Secretary of State made on 11 October 2018 to refuse him leave to remain in the United Kingdom on human rights grounds. His appeal against that decision was dismissed in a decision promulgated on 8 November 2019. For the reasons set out in my decision of 9 November 2020, that decision was set aside (a copy is attached).
2. The appellant entered the United Kingdom on 20 January 2010 with entry clearance as a Tier 4 (General) Student valid until 18 July 2011. He was granted further periods

of leave to remain as a student. Although he had leave to remain until 20 March 2015, he was subsequently accused of working without permission. He appealed against that decision, successfully, but the respondent did not grant him further leave, subsequently in February 2015, alleging that he had employed deception in obtaining a TOEIC English test result.

3. The respondent's case is set out initially in the letter of 11 October 2018 and is that, essentially, the appellant had used a proxy test taker and thus he had obtained his TOEIC certificate by deception.
4. The thrust of the appellant's argument is that, notwithstanding SM and Qadir [2016] UKUT 00229 the generic evidence concerned with TOEIC fraud is now no longer reliable as it is now clear that a number of people identified by the test providers as having cheated did not in fact cheat and as ETS are not able to tie an individual test to an individual test taker, there being no "chain of custody" metadata and that thus the only way of tying a test to an individual is to assume the bona fides (or otherwise) of the testing college.
5. The appellant has now obtained a recording from ETS of the relevant voice tests. He accepts that the recording is not of him but he submits, relying on the expert evidence in Saha v SSHD [2017] UKUT 17, that there was a distinct possibility that ETS computer records could not be relied upon because of serious problems in how the data and the voice recordings are managed by the relevant college after the test and their transmission to ETS, and in how ETS manages the relevant data.
6. The appellant also sought to rely on the report of the APPG but accepts, following DK and RK (Parliamentary privilege; evidence) India [2021] UKUT 61, that the opinions of the APPG are not admissible. He appellant submits however that the evidence contained in those is admissible.
7. The appellant puts forward a number of reasons why in light of the new evidence, there are a number of reasons why fraudulent methods may have been used by various colleges leading to the conclusion that the ETS lists were not a reliable indicator of whether or not a student had cheated.
8. Three principal points are made:
 - (1) there is a number of possible innocent explanations as to why the voice recording might be somebody else: it could be a simple mix-up by admin staff because even though safeguards required by ETS were being observed, there could have been at the relevant college, more technically sophisticated fraud such as remote access and file substitution;
 - (2) there was no evidence linking the voice recording back to any individual, the chain of custody not being established, no identifying number or other matter linking the test to the taker and thus a link could only be established when assuming the college staff had done things properly, a problem if it were the college staff who were the main fraudsters;

- (3) relying on the National Audit Office's report, the identification of a test as invalid or questionable by ETS is not a viable indicator of whether in fact a student cheated; and, the figure that 97% of all results in the UK being identified as invalid or questionable was clearly implausible.

The Hearing

9. There were significant problems in connecting to the video link and it was not possible to start the hearing until 11.20. At that point a further delay was required as the respondent had not received all relevant documents.
10. I heard evidence from the appellant who adopted his witness statements and was cross-examined. I then heard submissions from both representatives.

The Law

11. The appeal in this case is against a decision to refuse the appellant leave to remain on human rights grounds. It is agreed between the parties that the sole issue before me is whether or not the appellant used fraud in obtaining a TOEIC certificate. If that is decided in his favour then it will be for the respondent to decide what leave to grant.
12. In assessing whether the appellant has, as the respondent alleges, used deception both parties are agreed that there is a three part test to be addressed:
 - (a) the Secretary of State must produce sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue indicating prima facie deception;
 - (b) it is then for the appellant to raise an innocent explanation, namely an account which satisfies the minimum level of plausibility; if that is produced then
 - (c) the burden rests on the Secretary of State to establish on the balance of probabilities that the appellant's prima facie explanation is to be rejected.

Submissions

13. The first dispute between the parties is to whether the Secretary of State has met the initial evidential burden. The appellant says that it has not but equally, in submissions, Mr Whitwell accepted that the appellant had met the second part of the test, thus it was for the Secretary of State to establish that the innocent explanation was to be rejected.
14. Mr Whitwell submitted that the evidence including the ETS look-up tool was sufficient to discharge the prima facie burden and that although the appellant's explanation, that he had no need to cheat, is plausible, the respondent had nonetheless established that dishonesty had been used. He submitted that there was inconsistent evidence as to whether the appellant had anything to gain, given that it was not consistent that family issues in isolation were the sole causes of distress, GP records certainly regarding stress in 2012 around the time of the test in which he had said that he was under pressure about studies, money and visa was different from

family issues but indicated that there was a reason for using a proxy test. He submitted that the appellant's current level of English was not relevant given how long ago the test had been conducted and that although the appellant was an able student, his results were not "stellar", his GCSE results being Cs and Ds, again Ds in his studies in the United Kingdom and he had received a 2:2 honours degree.

15. Turning to Project Façade Mr Whitwell asked me to note that of 118 tests that day all had been called into question, 47 of them being questionable and the remaining ones being invalid. He submitted that the evidence of what had gone on there did not bear close comparison with what the appellant had said in his witness statement of people sitting at computer terminals. He submitted further that it was instructive the appellant could not recall what had happened in the IELTS test but could recall what had happened in the TOEIC test.
16. Mr Whitwell submitted further that the appellant had lied about working in a hardware shop and having used cannabis recreationally and that these responses went to the reliability of his statement that he would not cheat as it was wrong. Mr Whitwell asked me to note also the witnesses who had given testimony on the earlier occasion did not deal with the issue of cheating head-on yet they did not say why it was not wrong.
17. Mr Whitwell submitted that little weight could be attached to the report of Georgia Da Costa indicative that there was suicidal ideation on the part of the appellant contrary to what was said at paragraph 110 of the bundle.
18. Mr Lewis submitted that the explanation provided by the appellant was plausible and it is of note that he had taken a degree at an established university which had been done in English. There is also evidence from his tutors who confirmed his English was of a high standard and that in order to succeed he required an IELTS equivalent of 5.5 which is lower than what he had got before. He submitted that the appellant was confident and he had done mock tests and had described what he did and that there was no challenge to whether he took the test, noting that Operation Façade was done at Colwell College in Leicester but the appellant had attended in the Whitechapel branch.
19. Mr Lewis submitted that credit should be given to the appellant who when interviewed without notice, was able to explain what was required in the test, the procedures of what he had undertaken, that this had not been challenged and was entirely consistent. He submitted that the appellant had no reason to cheat, was not of significant means so there was no reason to pay someone and that the appeal ought to be allowed.

Discussion

20. The question in this case is, in reality, can the appellant account for why, as he accepts, the extracts from the voice recordings provided by ETS as evidence of what was said during the test are clearly not him.

21. While I have some sympathy for Mr Lewis' submissions there are now additional doubts regarding the prima facie evidence in generic terms about the reliability of material such as to generate a prima facie case for the Home Office, given the matters identified by the joint expert report that as in this case by the fact that the appellant admits that it is not his voice on the recordings. I am not in the circumstances satisfied that the Secretary of State has not established a prima facie case on all the evidence that the appellant had not been dishonest.
22. The next stage is to consider whether the appellant's explanation, that he had taken the test, and that there are defects in the software and means of recording the voice responses to questions such that the Secretary of State has failed to show on the balance of probabilities that the appellant had cheated.
23. Having considered carefully the appellant's evidence set out in paragraphs 5 to 12 of his witness statement, I consider that the appellant has given significant detail about the test that he attended at Colwell College. It is evident from his evidence that this was the branch in Whitechapel and there is, as Mr Lewis submitted, a copy of a receipt from a nearby Sports Direct shop on the same date. I have considered also the report entitled "Project Façade" but the material in that relates to Colwell College, Leicester, not Colwell College, Whitechapel. The report does not make it clear if it includes the latter, and it appears it does not. It is thus of limited or no assistance in assessing the circumstances applicable at the Whitechapel branch.
24. There are, as Mr Whitwell submitted, a number of issues regarding what is recorded in the appellant's medical notes obtained from the GP and his evidence before me. He said, in examination-in-chief, that he had not had additional support to take exams in the past, had never had reason to go to a doctor with problems about taking exams and was confident on this occasion that he could pass. In cross-examination, he confirmed that he did not have a history of depressive illness before coming to the United Kingdom and that what had triggered it was mostly family related, his parents were ill, he was away from them, he was isolated from them. He did not accept that his difficulties with his studies in the United Kingdom were an underlying cause and it was nothing to do with his education.
25. It is evident from a letter of 7 March 2013 from Homerton University Hospital that the appellant was seen in the Primary Care Psychology Service on 25 February 2013 for managing anxiety and low mood and had scored highly on severe depression and anxiety indicators. The appellant was registered with the practice on 6 March 2012 and it is not in dispute that he has been prescribed Citalopram in the past but the list of "minor past events" first records stress related problems on 23 January 2013. The appellant sat his test in June 2012 but there is no record for stress related problems until 23 January 2013. The notes are relatively brief and record that he had been worrying about his studies, money, visa, student and business management and that he was "under a lot of stress, too much pressure, mind wandering a lot, poor concentration, forgetfulness started one year, now one getting worse". The notes are, however, brief as are the notes of 20 February 2103, 4 September 2013 in which it is recorded that he had stopped using antidepressants in February 2013.

26. On 29 August 2014 the problem identified is that

“The appellant is forgetful, is concerned he cannot retain new information, is studying for a Masters degree, this seems worse in the past couple of years and feels worse than his peers, he is also suffering with low mood, does feel affected by this, is unsure that psychology is helping”.

27. I bear in mind that the doctor’s notes ought not to be treated as an accurate verbatim report of what he had said and phrases like “past couple of years” are in their nature imprecise. It is difficult to attach much weight to the phrase “forgetfulness started one year” from 23 January 2013 as being evidence of problems existing exactly one year, ago and I bear in mind that at this point the appellant refers to stress and anxiety rather than depression. I do, however, note that the appellant had been to see the doctor about stress and whilst he mentioned in evidence that it was related to his family, this is not mentioned to the doctor. This is, I consider, an omission rather than any inconsistency but it does require some explanation. I can accept that the appellant might not recall what he told the doctor, as he said in cross-examination, I draw no inferences adverse to him from him being unable to recall precisely what he said. It is entirely different being asked to recall nine years after the event what one told the doctor as opposed to the events around a test which the appellant has had to recall in detail because of the importance that they have taken in his life. There is no real comparison between these. It could be that the doctor wrote down only some stressors; it could be that any discussion focussed on these rather than others; it could be that the appellant did not mention family. But at this distance in time, I do not consider that I can safely reach a conclusion as to why worries about family were omitted from the notes.

28. The appellant is recorded in the doctor’s notes on 1 May 2019 as using cannabis as he thought it would help with sleep. Yet when it was put to him he simply denied it saying that he had never taken drugs. He also denied saying that he had worked in a hardware store, contrary to the doctor’s notes at 12 October 2016.

29. The appellant has not provided any good reason for why the doctor would have recorded that he had tried cannabis to help him sleep and worked in a hardware store and I am satisfied that he has not told the truth. I am satisfied that he did use cannabis and has been working unlawfully.

30. But equally, I bear in mind that people tell lies for different reasons. In both cases the appellant was being asked in cross-examination to admit to what he could easily have perceived as criminal offences – that is, working illegally and having possessed class B drugs.

31. I consider it appropriate to direct myself that sometimes people do not tell the truth and in fact lie, for many reasons: see MA (Somalia) [2010] UKSC 49 at [32] to [33], per Dyson SCJ.

32. Nonetheless it is a point I must consider in assessing the appellant’s protestation that he would not have cheated.

33. I draw no inferences adverse to the appellant from his inability to recall in detail the IELTS test or from the witness statement of the uncle and friends who do not address the issue of cheating head-on. Further, they were not present to be examined and cross-examined.
34. As regards IELTS, I can accept that the appellant would not know when he had sat the test given that he has had no reason to have to recall that until long after the event. That is in contrast with him having to recall what happened in respect of the TOEIC test which has become central to his case.
35. In the appellant's favour I do accept that his academic achievements, although not stellar, are good. He obtained a 2:2 honours degree in the United Kingdom which is in itself indicative of a relatively high command of English. With regard to the IELTS test level, which was 5.5 a year before the TOEIC test, it is of note that his score for speaking was 6.5. The tests are, I accept, different and that IELTS is more difficult. The Common European Framework of Reference indicates that an IELTS speaking test score of 6.5 is borderline B2/C1 (C1 being higher) and the 2012 TOEIC speaking test score of 200 was equivalent to a C1 CEFR. But, given that the score that the voice recordings did not match up, little weight can be attached to that. But having achieved one year before the ETS test a speaking score of 6.5, and, given that living and studying in the United Kingdom that was unlikely to have deteriorated, it is indicative that he would not have had to have recourse to a proxy test taker for the spoken element of the test.
36. In addition to the above, I note that there are significant difficulties with the chain of custody. Without taking into account the evidence considered by the APPG or the National Audit Office, it is sufficiently clear that there are a number of ways in which evidence may well have become muddled particularly given the lack of rigour, if not outright dishonesty, which appears to have occurred at various colleges. That much is clear from the conclusions of the experts as set out in MA (ETS - TOEIC testing) at [15] and in Saha v SSHD [2017] UKUT 17 (IAC)
37. With regard to the National Audit Office evidence, it is difficult to attach much weight to that. It is in the form of conclusions it reached on the basis of evidence and in particular statistics made available to it. It does not, in my view, add much of substance to the evidence of the experts already referred to. And, even at its highest, it only supports the premise that what ETS has said is not reliable; it does not say that there were no candidates cheating, only that some innocents were wrongly classified as having done so. It does not assist in determining whether this appellant has been truthful or not as, ultimately, that depends on my assessment of his evidence.
38. I turn finally to the report from Ms Georgia Costa. Her credentials are unclear as indeed are the basis on which she concluded that the appellant was showing suicidal ideation. There is no indication of that in the extensive medical notes from the GP and I attach no weight to it.

39. Drawing these strands and factors together, I accept that it is possible that the appellant did take the test but that, given the lack of transparency as to how recordings processed by the college and any metadata linking it to a specific candidate and test session were recorded or processed, that another test was linked to him, hence the recording supplied to him is not of him.
40. Has the respondent shown that explanation cannot be sustained? The appellant has provided detailed evidence of him taking the test and what it involved. There is also circumstantial evidence of him being in the area on the day in question. He was also, when interviewed with little notice of him being able to recall detail. There is also the unchallenged testimony of his tutors George Clearly [AB §83] and Professor Bruce Cronin from the University of Greenwich who attested to his high level of understanding and ability to 'express and present his ideas to professional standards'.
41. The appellant has no criminal convictions, and the occasional use of cannabis and working unlawfully, perhaps understandable given his financial circumstance, does not diminish his good character to any great extent. But his lack of candour when cross-examined on these points does cause me concern as it may indicate a propensity to lie when confronted with evidence of having committed an offence.
42. There is, however, a difference between a straightforward and, frankly, clumsy denial and the confection of an account of taking a test with all the detail provided, with consistency, and being tested about that when questioned. That would indicate a significant degree of sophisticated and deliberation. The appellant's denials are, however, indicative of someone not used to deceiving and while they do not do him credit, I do not find that they undermine his other evidence.
43. Taking all of these factors into account, I am satisfied that the appellant has told the truth about sitting the test and that the respondent has not shown, on the balance of probabilities, that the appellant has exercised deception.
44. For these reasons, I allow the appeal.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remake the decision by allowing the appeal on Human Rights grounds.

Signed

Date 24 June 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul



IAC-AH-SAR-V1

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

Appeal Number: HU/01130/2019

THE IMMIGRATION ACTS

**Decided under Rule 34 Without a Hearing
At Field House
On 23 October 2020**

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**MOHSIN ALI
(NOANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

45. The appellant appeals with permission against the decision of First-tier Tribunal Judge Siddall promulgated on 8 November 2019, dismissing his appeal under the Nationality, Immigration and Asylum Act 2002 against a decision of the respondent made on 21 March 2019 to refuse his human rights claim.
46. The core reason for the refusal of the claim, in this case, is the respondent's finding that the appellant did not meet the suitability requirements under S-LTR of Appendix FM as he had obtained a TOEIC certificate from ETS by deception, that is, by using a proxy test taker.

47. Given that the respondent accepts that the decision of the First-tier Tribunal involved the making of an error of law as claimed, and does not assert that any of the findings can be preserved there is no need to set out here the facts of the appeal in detail. It is sufficient to state the judge found that the respondent had, through the generic evidence and look-up tool found that the respondent had discharged the burden of proof in establishing deception.
48. The appellant sought permission to appeal on the grounds, inter alia, that the judge had erred in his evaluation of the generic evidence, in particular failing to have regard to submissions made as to the reliability of that evidence as set out in the skeleton argument.
49. On 3 June 2020, Upper Tribunal Judge Macleman granted permission on all grounds and gave directions which provided amongst other matters:
1. I have reviewed the file in this case. In the light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules¹, I have reached the provisional view, that it would in this case be appropriate to determine the following questions without a hearing:
 - (a) whether the making of the First-tier Tribunal's decision involved the making of an error of law, and, if so
 - (b) whether that decision should be set aside.
 2. I therefore make the following DIRECTIONS:
 - (i) The appellant may submit further submissions in support of the assertion of an error of law, and on the question whether the First-tier Tribunal's decision should be set aside if error of law is found, to be filed and served on all other parties no later than **14 days after this notice is sent out** (the date of sending is on the covering letter or covering email);
 - (ii) Any other party may file and serve submissions in response, no later than **21 days after this notice is sent out**;
 - (iii) If submissions are made in accordance with paragraph (ii) above the party who sought permission to appeal may file and serve a reply no later than **28 days after this notice is sent out**.
 - (iv) All submissions that rely on any document not previously provided to all other parties in electronic form must be accompanied by electronic copies of any such document.
 3. Any party **who considers that despite the foregoing directions a hearing is necessary** to consider the questions set out in paragraph 1 (or either of them) above must submit reasons for that view no later than **21 days after this notice is sent out** and they will be

¹ The overriding objective is to enable the Upper Tribunal to deal with cases fairly and justly: rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008; see also rule 2(2) to (4).

taken into account by the Tribunal. The directions in paragraph 2 above must be complied with in every case.

50. Both parties made submissions in response to directions, the respondent on 13 August 2020 stating that she did not oppose the application for permission, and inviting the Upper Tribunal to set aside the decision and remit it to the First-tier Tribunal.
51. In a more detailed skeleton argument served on 18 August 2020, the appellant draws attention to the summary of the joint expert evidence in MA (ETS-TOEIC testing) Nigeria [2016] UKUT 450 which drew attention to the absence of a chain of custody or audit trail that would link a particular voice recording to a particular candidate and additional evidence on this issue put before the APPG (see skeleton at [6] to [9]).
52. The Tribunal has the power to make the decision without a hearing under Rule 34 of the Procedure Rules. Rule 34(2) requires me to have regard to the views of the parties. Bearing in mind the overriding objective in Rule 2 to enable the Tribunal to deal with cases fairly and justly, and bearing in mind the concession by the respondent, I am satisfied that in the particular circumstances of this case that it would be correct to make a decision being made in the absence of a hearing.
53. I am satisfied that the judge did err in reaching his decision as is claimed in the grounds of appeal and as is accepted by the respondent. The decision clearly involved the making of an error of law as claimed as these errors went to the core of the case.
54. I am not, however, persuaded that it would be appropriate to remit this case to the First-tier Tribunal. The Upper Tribunal is able to make the relevant factual findings and the issues raised in ground 1 may, potentially, have much wider impact than in this one appeal and may be a matter on which the Upper Tribunal may wish to give guidance.

Notice of Decision & Directions

1. The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.
2. The appeal will be heard in the Upper Tribunal on a date to be fixed.
3. Having regard to the Pilot Practice Direction and the UTIAC Guidance Note No 1 of 2020, the Upper Tribunal is provisionally of the view that there should be a Case Management Review (“CMR”) in this appeal which can and should be held remotely, by Skype for Business on a date to be fixed within the period 15 November 2020 to 15 January 2021.
4. No later than 7 days after these directions are sent by the Upper Tribunal:

(a) the parties shall file and serve by email any objection to the hearing being a remote CMR hat all/by the proposed means; in either case giving reasons; and

(b) without prejudice to the Tribunal's consideration of any such objections, the parties shall also file and serve:

(i) contact/join-in details, were the hearing is to take place remotely by the means currently proposed; and

(ii) in that event, dates to avoid in the period specified.

5. The Tribunal will at the CMR then give further directions as to how this matter is to proceed.

Signed

Date 23 October 2020

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul