



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

Appeal Number: IA/25860/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision &  
Promulgated**

**Reasons**

**Oral decision given following hearing  
On 20 July 2017**

**On 17 August 2017**

**Before**

**UPPER TRIBUNAL JUDGE CRAIG**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR MD SHOHEL RANA  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms K Pal, Home Office Presenting Officer

For the Respondent: Mr S Karim, Counsel, instructed by E1 Solicitors

**DECISION AND REASONS**

1. This is the Secretary of State's appeal against a decision of First-tier Tribunal Judge R Scott. For ease of reference I shall throughout this decision refer to the Secretary of State, who was the original respondent, as "the Secretary of State" and to Mr Rana, who was the original appellant, as "the claimant".

2. The claimant is a national of Bangladesh who was born in 1989. He was married in 2013 to a British citizen and in 2014 he applied for leave to remain as the spouse of his wife. In support of his application he was required to establish that his English was of the requisite standard and for this purpose he submitted a TOEIC test certificate provided by ETS which was said to be valid from 22 August 2012 until 21 August 2014. This certificate would, if a valid certificate, have been sufficient evidence of his ability to speak English for the purpose of this application.
3. The application was refused on the basis that the test certificate had been obtained via the use of a proxy and the claimant appealed against this decision, the basis of his appeal being that he had taken the test himself on 22 August 2012 at a college known as Sanjari International College in Mile End Road, London E1 and he had passed that test. The issue before the judge hearing that appeal, First-tier Tribunal Judge Wilsher, was whether or not the certificate was a valid certificate properly obtained or whether as the Secretary of State maintained the certificate had been acquired through use of a proxy.
4. Although the history of this litigation is not strictly relevant to this appeal it is a fact that the claimant's appeal was successful but thereafter it was set aside by the Upper Tribunal and remitted back for rehearing; it came before First-tier Tribunal Judge Scott, sitting at Taylor House on 29 November 2016. In the course of that appeal she heard submissions put before her on behalf of both the Secretary of State and the claimant and also had the benefit of hearing the claimant give evidence when he was cross-examined. Following that hearing Judge Scott in a Decision and Reasons promulgated on 15 December 2016 allowed the claimant's appeal under the Immigration Rules. The basis of her decision was that she was satisfied on the balance of probabilities, having considered all the evidence, that this claimant was an honest individual and that he had taken the test himself and on this particular occasion the respondent's belief that he had used a proxy was incorrect.
5. The Secretary of State now appeals (again) with leave having been given by First-tier Tribunal Judge I Murray.
6. Before me, in her admirably concise but persuasive submissions, Ms Pal has essentially argued that the judge failed to accord adequate weight to what were very strong reasons why the Secretary of State should believe that a proxy had been used. She referred to the evidence provided by the Secretary of State linking the test taken at Elizabeth College with the certificate provided which, she claims, established that it was extremely likely indeed that this particular test certificate had been given following the use of a proxy who was not this individual. The alternative way in which the Secretary of State's case is advanced is that in any event the reasons given by the judge for rejecting this evidence were inadequately reasoned. Although the Secretary of State's case had been set out at paragraph 27 of her Decision, there was no reference to this case within the Judge's findings later in the Decision.

7. In my judgment, attractively though the Secretary of State's case was advanced before this Tribunal, it must fail. It is right to say that in this as in many other ETS cases the generic evidence is in fact far stronger than had first been considered to be the case by this Tribunal. In *SM and Qadir* a Presidential Tribunal had concluded that although there were very substantial weaknesses in the Secretary of State's evidence, which relied very heavily on generic evidence, nonetheless it was sufficient to satisfy the primary evidential burden of showing that there was a case against people accused in these circumstances of having used a proxy such as to require explanation on their part. Subsequently, in a judicial review claim before a differently constituted Presidential Tribunal, *R (on the application of Saha and Another) v Secretary of State for the Home Department (Secretary of State's duty of candour)* [2017] UKUT 00017, the Tribunal made it clear that the evidence produced on behalf of the Secretary of State in that case (in particular relating to Elizabeth College) was much stronger than had initially been thought. However, it remained the position that where an appeal was brought (either in country or out of country) against a decision of the Secretary of State that an English language certificate had been obtained fraudulently that was a matter to be determined by a First-tier Tribunal Judge having regard to all the evidence which was before the Tribunal on that occasion.
8. Accordingly, the First-tier Tribunal Judge is obliged to take consideration not only of the evidence adduced on behalf of the Secretary of State (however strong that is now felt to be generically) but also of such evidence as is given on behalf of an individual applicant. It is only where the finding that is subsequently made either fails to take account of material evidence before it or where the decision is effectively perverse that such a decision could properly be said to contain an error of law.
9. In this case the judge did identify the factors which had been argued on behalf of the Secretary of State. At paragraph 27 she sets out why it is that the test is shown to be invalid. She notes that the Secretary of State has linked the number with a test said to have been taken at Elizabeth College. She then refers to some arguments which have been advanced on behalf of the claimant such as that he had no reason to cheat by submitting a false test as he was fluent in English but correctly notes that whatever his ability of English might have been at the time of the hearing before her does not establish that his English was as proficient at an earlier stage. Also, even if his English was fluent, she acknowledges that there "could be other possible reasons why he might engage in a scam anyway; [such as] fear of failure, and lack of time to study ...". She also discounted as a reason why she should not accept the Secretary of State's evidence that he had not required an interpreter at the hearing (see paragraph 31 of the decision).
10. The judge then refers to the evidence given on behalf of the claimant, having previously set out the Secretary of State's case, and refers to some of the difficulties there are inherent in the Secretary of State's case such as that the Secretary of State has not considered it appropriate even to

give the address of Elizabeth College, which was not the college where this claimant claims to have sat his test. Even though the decision of the First-tier Tribunal first hearing the appeal was not strictly relevant, it is relevant that the first judge had recorded that the claimant could not provide evidence from Sanjari College where he said he had taken the test because by this time that college had been closed. It is also of note that as long ago as 8 September 2014 the claimant had written to ETS requiring that organisation to provide a verification report regarding the test which he claimed even then to have taken at Sanjari International College. At no stage in these proceedings has the Secretary of State considered it appropriate to provide the voice recordings which were taken to enable the Tribunal itself to consider further whether or not it was indeed a proxy who had taken the test as the Secretary of State claimed.

11. I do not understand the generic and expert evidence which has been provided on behalf of the Secretary of State in ETS cases generally to be so strong as to exclude the possibility of a mistake being made. The highest it comes is to suggest that mistakes would be relatively rare and the likelihood of there being a mistake very low. It must follow that there may be at least some cases where a mistake was made. In these circumstances a judge will always, in an individual case, have to assess the strength of what is essentially generic evidence against the specific evidence provided by and on behalf of an individual applicant. In these cases all a judge can do is consider all the evidence carefully and decide whether on the balance of probabilities in the particular case he or she is considering it is more likely than not that a proxy was used. In this case the judge considered all the evidence and in particular the evidence of this claimant, whom she considered to be entirely credible, and in these circumstances her decision that the respondent had not established that he had sat his test at Elizabeth College and had used a proxy test taker for this purpose was open to her. It may not have been the decision that every judge would have taken and indeed it may be a decision which relatively few judges would have taken, but I cannot, having considered this decision as a whole, find that there was any arguable error of law in the manner in which this judge considered the evidence. In these circumstances it follows that there is no basis for setting her decision aside and I do not do so.

### **Decision**

**There being no material error of law in the decision of the First-tier Tribunal, the Secretary of State's appeal against that decision is dismissed, and Judge Scott's decision, allowing the claimant's appeal, is affirmed.**

No anonymity direction is made.

Signed:

A handwritten signature in black ink on a light blue background. The signature reads "Ken Craig" in a cursive, flowing script. The "K" is large and loops back, and the "C" in "Craig" is also large and loops back.

Upper Tribunal Judge Craig

Date: 25 July 2017