Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/03192/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 December 2018	**On 15 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BRITU LAMA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T. Melvin, Home Office Presenting Officer
For the Respondent: Mr S. Ahmed, Counsel instructed by 12 Bridge Solicitors

DECISION AND REASONS

1. The Secretary of State's appeals against the determination of First-tier Tribunal Judge O'Garro promulgated on 6 June 2018 after a hearing which took place on 16 April 2018 at Hatton Cross. I shall refer to Mr Lama as "the appellant" as he was in the proceedings before the First-tier Tribunal.

2. The appellant is a citizen of Nepal, born on 17 August 1980, and applied for leave as a partner. It was refused by the Secretary of State and the basis upon which the refusal was made was that, on a previous occasion, on 20 April 2013, he had submitted a TOEIC certificate from Educational Testing Service (normally referred to as "ETS") which had been declared to be invalid. The process by which that

invalidity arose was that a test had been made using software in order to determine whether a proxy test-taker had been used. That was supported by two listeners who had also considered that a proxy test-taker had been used. That is a fact which is often disputed in these ETS cases, but in this case, there was no dispute because the appellant himself had applied for the recording and had himself declared that that recording was not his own. The evidence going to the weight to be attached to the ETS certificate is therefore rather different than in cases where the appellant denies that the recording was accurately assessed as not being genuine.

3. The appeal took its normal course. There was a spreadsheet provided of source data, always accompanied by the decision letter in such cases. This recorded that the application was invalid. The certificate number was provided. It may be that the two certificates relate one to the speaking score and another to the writing score, although I do not know that. The appellant's name is properly recorded, so too his date of birth, so too the test centre which was Premier Language Training Centre. The date of the test was not in dispute. The speaking score was also recorded, but in view of the fact that it was not the appellant's voice on that speaking score, it ceases to be material.

4. The judge therefore had before her a case where the appellant conceded that the recording was not his own and he had written to the ETS to ask for an explanation for what he claimed was a mistake. No response was received from ETS. However, I suspect that no response could have been provided in that all ETS could have said was, in effect, that '*This is our record of this appellant taking this test on this day and this is the recording that we have allocated to this event*'.

5. The judge in paragraph 24 of the determination found that an impersonator had been used for the test that was taken at Premier Language Training Centre on 6 March 2013. She described the evidence as compelling and she took that into account in assessing the primary evidential burden placed upon the Secretary of State. The primary evidential burden is normally discharged by the provision of the spreadsheet and the conventional witness statements of the Secretary of State's supporting witnesses and the evidence of Professor French. In this case, however, there was the additional evidence that the appellant conceded the test attributed to him, did not contain his voice.

6. The judge therefore considered the appellant's explanation. Before doing so, I pause to point out that the ETS spreadsheet did contain an error. The appellant's nationality was recorded as being from the United Kingdom. That was plainly wrong, but it does raise questions as to the care with which this certificate was printed out, if not whether the voice recording was correctly attributed to the appellant. Although we have not seen the certificate in this case, one assumes that it would have contained the evidence that the appellant is recorded as having a score as stated. It therefore probably does not take matters much further. That was the material that was relied upon by the Secretary of State.

7. Although a number of cases have been put before me, I think probably the most important one is the case of *Ahsan v The Secretary of State* [2017] EWCA Civ 2009.

That was a decision where Underhill LJ provided the judgment to which Floyd and Irwin LJJ agreed. In the course of the judgment, the Court of Appeal recorded the submissions that were made by Miss Giovannetti on behalf of the Secretary of State. She said:-

> "Where the impugned test was taken at an established fraud factory such as Elizabeth College, and also where the voice-file does not record the applicant's voice (or no attempt has been made to obtain it), the case that he or she cheated will be hard to resist".

However the Court of Appeal went on to say:-

> "However, I am not prepared to accept – and I do not in fact understand Ms Giovannetti to have been contending – that even in such specially strong cases the observations in the earlier case-law to the effect that a decision whether the applicant or appellant has cheated is fact-specific are no longer applicable or that there is no prospect of their oral evidence affecting the outcome".

8. Consequently, although the judge treated the evidence of the ETS test centre as compelling, it was open to the judge not to treat it as being determinative. Mr Ahmed on behalf of the appellant who appeared both before Judge O'Garro and before me referred to paragraph 156 and the reference to the absence of a voice file and the judge's conclusion that although that might well be a weighty consideration, he was not prepared to say that in all cases it would be decisive. That is merely no more than an example of the extent to which these cases are fact-sensitive.

9. The judge had in mind therefore what she considered to be the compelling evidence that was provided by the Secretary of State in support of the evidential burden placed upon the Secretary of State. She accepted that the evidential burden had been discharged. She also then went on to consider that the evidential burden passed to the appellant and that was a burden to raise an innocent explanation. The effect of raising an innocent explanation is that when one has considered both the evidence of the Secretary of State and the evidence of the appellant, there is then a balance to be struck as to whether or not the legal burden of proof has been discharged by the Secretary of State and that is the final stage in the assessment that has to be conducted on the evidence. The judge therefore looked at a number of factors in paragraph 25 which might be of assistance in assessing whether the Secretary of State had discharged the legal burden.

10. She then went on to deal with, in paragraph 26 of her determination, the evidence that the appellant had attended the testing centre on the day in question and had taken the test. The appellant had provided evidence which showed he purchased a ticket from Tilbury station to Barking train station where the test centre was situated. Mr Ahmed said that this was in the form of a bank statement that had been provided by the appellant. It was not simply the ticket itself, which might have been purchased by anybody. The appellant also provided a receipt for food that he had purchased at a restaurant that he had used on that day. Presumably that was evidence which established his presence in the area of the test centre at the relevant time.

11. The judge, of course, had the benefit, which I do not have, of hearing the appellant's evidence. He gave a lot of detail. He said that he attended the test centre. He provided details of the questions he was asked during the speaking test and the judge, importantly, found that the appellant was a credible witness. He gave a full and consistent account during his evidence-in-chief and cross-examination. The judge described the manner in which he gave his evidence and found it was cogent and compelling. Of course, none of these matters is determinative of the appellant's innocent explanation. He could have gone to the test centre on the material day, met up with the proxy test-taker, paid him whatever a proxy test-taker requires for payment, and had then departed knowing that a test had been taken by somebody else. That would account for his ability to provide evidence of his presence in the area on that day and evidence that he had purchased the ticket on that day. One might well say that, had this been an entire fabrication on the appellant's part, he might have provided the actual ticket rather than a printout from his bank statement.

12. The judge also took into account that he had produced an IELTS score taken on 14 February which was less than a month before he took the subsequent test and that the English language score had been 5.5, indicating a good understanding of English. The judge was also well-aware that there are a number of reasons why people might use a proxy test-taker rather than relying upon their own skills, if only merely as a matter of nerves. The judge considered the general proficiency of the appellant, including on the day of the hearing, and took all of these matters into account.

13. The Secretary of State relies upon the appellant's own admission that the recording was not his as being effectively determinative so that the judge was not properly entitled to disregard it in coming to her conclusion. That strikes me as being very close to saying that the detection of another voice being used was determinative. That presupposes that the voice recording attributed to the appellant was properly linked to the test taken by the appellant. The Secretary of State's case is not consistent with the case law. The case is not essentially different from other cases where the evidence comes from ETS that a proxy test-taker had been used and the appellant had simply denied it. In other words, the admission does not take the matter substantially further than another case where the Tribunal comes to the conclusion that, notwithstanding the fact that the primary evidential burden has been discharged, a proxy test-taker was not used.

14. In the cases to which I have been referred, it is a theme which runs through many of them that the evidence provided by the appellants was unsatisfactory when consideration was given to their oral evidence. That is plainly not the case in this particular appeal. In paragraph 27 of the determination the judge makes an express finding that she found the appellant to be a credible witness. She was therefore between what might be described as 'a rock and a hard place'. She had on the one hand compelling evidence of the fact that the test result did not reveal the voice of the appellant. On the other hand, there was the credible evidence of the appellant about what he did on that day. Having balanced both of those competing pieces of evidence the judge found that the Secretary of State had not discharged the legal burden placed upon him to establish that fraud had been used. Whilst I fully understand why the Secretary of State may have seen the significance of the

appellant's concession that the recording was not his own voice, it does not overcome the issue as to whether or not there was an error on the part of the ETS recording system, such that there was an error made on the part of the individual who attributed the particular recording to this particular appellant. Although the judge used the expression "an impersonator", it is not my understanding that this was the evidence adduced by the appellant. He was simply saying that the recording was not his. That was a matter which he was entitled to be heard upon, and having heard his evidence, the judge clearly found his evidence credible. In those circumstances I do not find that there was an error of law. In saying this I readily concede that other judges may have taken a different view of the evidence, but that was not the view that was taken by this judge and it was a conclusion, in my judgement, which was properly open to her having heard the evidence of the appellant.

DECISION

I dismiss the appeal of the Secretary of State against the decision of the First-tier Tribunal and uphold the determination of the First-tier Tribunal allowing the appellant's appeal against the decision of the Secretary of State to refuse his application for further leave to remain.

ANDREW JORDAN
DEPUTY JUDGE OF THE UPPER TRIBUNAL

Date 10th January 2019