**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal number: JR/13138/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 7th November 2019**

**Determination Promulgated**
**24th September 2020**

**Before**

**MR JUSTICE DOVE**
**(SITTING AS AN UPPER TRIBUNAL JUDGE)**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**ALAM**

Respondent

**Representation:**
For the Appellant: Mr S Kalim
For the Respondent: Mr Z Malik

**DECISION AND REASONS**

1. The applicant is a national of Bangladesh. He entered the UK on 11 February 2010 with entry clearance and leave to remain until 31 December 2012. He made an application on 28 December 2012 for further leave to remain. That application was refused on 5 March 2013 with a right of appeal which the applicant exercised. His appeal was dismissed on 4 September 2013 leaving him appeal rights exhausted on 16 October 2013.

2. On the 24 October 2013 the applicant made a further application for leave to remain as a Tier 4 (General) Student which was supported by a TOEIC certificate which had been obtained following the taking of a test conducted by ETS over two separate days on the 20th and 22 June 2012 at one of their testing centres, the details for which are set out below. This application was granted on 10 January 2014, and the applicant was granted leave to remain until 7 March 2015. Following this, on 30 September 2014, the respondent made a decision under section 10 of the Immigration and Asylum Act 1999 to remove the applicant on the basis that the TOEIC certificate which had been provided following the test set out above was fraudulent. That decision is the subject of this judicial review. In short, permission was initially refused to apply for judicial review, but following the consideration of an appeal by the Court of Appeal permission to appeal was granted, the appeal was allowed, permission to apply for judicial review was granted, and the matter was remitted to the Upper Tribunal for this substantive hearing.

3. During the currency of these judicial review proceedings the applicant made a human rights claim based upon his marriage to a British national. That application was refused on 15 July 2016. The applicant appealed that decision to the First Tier Tribunal, and his appeal succeeded, following which the respondent granted the applicant leave to remain until 20 August 2020. Of note in relation to that appeal is that the Judge of the First Tier Tribunal noted at paragraph 4 of his determination (promulgated on 19 December 2017) that the applicant had had his leave curtailed as a result of having obtained it by deception as set out above. It does not appear that this point was relied upon by the respondent in relation to that appeal as a basis for resisting it. The judge of the First Tier Tribunal heard evidence from the applicant and his wife, and determined on the basis of well-known article 8 principles that it would be unjustifiably harsh to refuse the appeal, in circumstances where the appellant's article 8 rights were engaged. The existence of this appeal, the success of the appeal, the fact that the applicant gave evidence to the hearing without the assistance of an interpreter, and the failure of the respondent to take any point in the appeal in respect of the present decision, were all matters which featured in due course in the submissions in respect of this judicial review.

4. Both the applicant and the respondent accepted that it was necessary, albeit unusual in judicial review proceedings, for the Upper Tribunal to assess as a question of precedent fact the issue of whether or not leave had been fraudulently obtained by virtue of the applicant exercising deception, in that he was not the person who undertook the ETS test and therefore the TOEIC certificate had been obtained by the use of fraud. The staged approach which it is necessary to take in assessing this question is set out in greater detail below. At this stage it is necessary to set out the evidence which the applicant gave in support of his case.

5. The applicant provided a witness statement which he adopted as his evidence-in-chief. In that witness statement he sets out the immigration history which is recorded above. He robustly rejects the allegation that he cheated in order to gain his TOEIC certificate. In his witness statement he points out that prior to coming to the UK his school certificates demonstrate that he had a good command of English and, in 2008,

he scored an A in English in his Higher Secondary Certificate examination. His documents from school show that he had been studying English since 2005. In addition, in 2011, the applicant had undertaken a test of his English language abilities in accordance with the International English Language Testing System. This test showed him scoring an overall score of 5.5, together with a speaking ability of 6.0 and reading and writing abilities of 5.0. In subsequent submissions Mr Karim illustrated that these scores were equivalent to a score of Bl to B2 in respect of the Common European Framework for describing language ability. This in turn correlates to between 120 and 150 or 160 points under the TOEIC scoring system.

6. The applicant describes taking the TOEIC test at the Queensway College in Walthamstow in June 2012. He says in the witness statement that this venue was within walking distance of a friend's house, and that he paid between £120 and £140 for the test, attending the college on two separate dates. The test was held, he recalls, on the ground floor and there were around 8 to 10 people also taking the test. The applicant explains that he has an established family and private life in the UK and no longer has any meaningful ties to Bangladesh as all of his friends and family are in the UK. He contends that he had no reason or motive to engage a proxy to take the test for him and cheat in order to obtain a satisfactory English language certificate.

7. The applicant was cross-examined by Mr Malik who appeared on behalf of the respondent. The applicant explained that he originally came to the UK in order to study for a Travel and Tourism management diploma. This course was at the Icon College of Technology and Management in Whitechapel. The applicant had studied English at first, but then moved to a different college to undertake a different course. He changed to the Opal College in London in September 2010, but did not tell the respondent that he had changed course as he did not know he was supposed to do so. At Opal college he undertook a Diploma in Business Management which lasted for two years and was a level 5 BTEC course. On 28 December 2012 he had applied for entry clearance for a level 6 BTEC diploma course at another college whose name he could no longer remember. That application was refused. He did not study from December 2012 until October 2013 as he had no permission to do so, and no college would accept him without an appropriate visa clearance. In October 2013 he again applied for an extended level 6 BTEC diploma at the European College for Higher Education, and he finished the course in that college although there was no certificate to that effect in the bundle he had confirmed the completion of the course in paragraph 13 of his witness statement. Subsequently, a copy of the Level 6 Diploma was produced, albeit subject to objection from Mr Malik on the basis that it was produced late and was not an original.

8. The applicant explained that he had been living in Kingston at the time when he took the test in June 2012. As set out above he had obtained 5.0 in some categories in his IELTS test in 2011, but he explained that he needed 5.5 in each category in order to have a satisfactory test result. He was unable to recall the address of the Queensway College in Walthamstow, and he explained that he had not memorised it and it was now eight years ago or thereabouts. His student counsellor at his college in East London had suggested three potential testing centres and he had chosen Queensway

College because he had a friend who lived near it whose name was Mr Bhujian. He could not recall this person's address or the street name where he lived, but he had picked the applicant up from the station and taken him to the test centre, and the applicant had attended his house after the test. When questioned, the applicant explained that Mr Bhujian now resided in America and he was no longer in touch with him other than by Facebook. He had not told him about the case because he was ashamed to do so. He explained that he had booked the test and registered a few days prior to it with the receptionist at the Queensway College and on the test day had taken himself there and paid £l00 to £140 in cash. He had been given a receipt, but he had not kept it as he didn't think he needed to do so. In all he attended Queensway College four times, once for registration, twice for the purposes of the test and then finally to pick up his certificate. When he attended the test on 20 June 2012 there were 8 to 10 people seated in the room. There were other rooms with other people in them. During the test he had to read a text and had to describe a picture. He did not see staff handing out answers to other candidates at the college.

9. He was asked about a witness statement which he had provided on 22 August 2014 dealing with the concerns which had been raised in relation to the testing certificate. It was pointed out to him by Mr Malik that at paragraph 8 he had not mentioned attending the test on 22 June 2012 but only 20 June 2012. He explained in response that it was the speaking test which was being relied upon. He had not mentioned the involvement of his friend in that statement because it was a small matter and not central to the issues involved.

10. The applicant was asked whether or not he had contacted Queensway College after the decision and he explained that he had not done so, principally because he was fighting for an in-country right of appeal. He was also asked whether he had contacted ETS in relation to the disputed test result and he explained that he had not contacted them either, again on the basis that he was fighting for an in-country right of appeal. The applicant said that he had not been told by anyone to contact ETS, and in particular when questioned on the point he indicated that he had not been told to get hold of the recordings of his test, and that he was not aware that he could do so. He insisted that he had sat the test and was unaware that a proxy could have done so. He explained that he had taken photo identification to the test process.

11. Mr Malik questioned the applicant about the test results which he had obtained in June 2012, noting in particular that in the June 2012 test which was in question he had achieved a perfect score in relation to speaking, and had scored 190 out of 200 in relation to writing. Mr Malik asked the applicant to contrast those results with those which he had achieved the previous year set out above. The applicant explained that in his view his English language ability had improved in the intervening period as a result of study and working hard on his language skills and that this explained the improvement in his scores which were evident from the 2012 test result.

12. The respondent's conclusion that the applicant's English language test result from June 2012 had been obtained fraudulently is initially substantiated by the respondent's reliance upon generic evidence from Ms Rebecca Collings and Mr Peter

Millington who describe the investigations which were undertaken in respect of ETS test results following an investigation by a television programme disclosing widespread abuse in respect of English language tests undertaken at UK test centres administered by ETS. ETS were a test provider who operated and administered the TOEIC test at a number of UK testing centres. The respondent's investigations led to a detailed examination by ETS in relation to the validity of test results through the examination of electronic recordings of the tests which had been taken deploying voice recognition software as well as human analysts to detect fraud. In addition to this material other generic evidence commonly deployed by the respondent in cases involving ETS English language test fraud includes reports from Prof French, Prof Harrison and Kroll Ontrack, which were also relied upon in the present case. This material underpins a document known as the ETS Look Up Tool, which in the present case establishes that the applicants TOEIC certificate has been invalidated by ETS following their investigations.

13. In addition to the generic evidence the respondent also relies upon a report compiled specifically in respect of Queensway College dated January 2017. The conclusions of that report were that the majority of tests undertaken at Queensway College were not conducted under genuine test conditions and were not a true reflection of the English language ability of the candidates who undertook the tests. Indeed, following the ETS voice analysis in relation to the speaking element of the test, it was determined that 71% of the speaking results were invalid "i.e. the results were obtained via the use of a proxy test taker". The report noted that proxy test takers were identified in 259 of the 283 speaking and writing test sessions which the authors took as indicating that abuse was widespread and occurred throughout the entire period that Queensway College were offering these tests. The score distribution for speaking, writing, listening and reading all deviated significantly from the results observed by Pearson at their test centres, but correlated with the distribution of scores within other ETS test centres where abuse had been identified. This report led Mr Malik to characterise Queensway College as a "fraud factory" in respect of the delivery of English language testing.

14. Given the history of this litigation, and in particular the terms upon which it was remitted to the Upper Tribunal by the Court of Appeal, there is a consensus that the Upper Tribunal should consider and determine this judicial review notwithstanding that an out-of-country appeal right exists in relation to the removal decision made by the respondent pursuant to section 10 of the 1999 Act. The issues in relation to ETS English language training have given rise to a significant volume of litigation. The approach to be taken in respect of the evaluation of the question of precedent fact in relation to whether or not deception was used in the taking of an English language test in order to obtain immigration status is now well settled in the light of the following authorities: *SM and Qadir v SSHD (ETS-Evidence-Burden of Proof)* [2016] UKUT 229; *SSHD v Shehzad and Chowdhury* [2016] EWCA Civ 615; *Majumber and Qadir* [2016] EWCA Civ 1167 and *R (Abbas) v SSHD* [2017] EWHC 78. The first step to be considered is whether or not sufficient evidence has been adduced by the respondent to raise the issue of fraud in relation to the TOEIC certificate. The authorities illustrate, and it is agreed in the present case, that the production of both

the generic evidence and also the ETS Look Up Tool identifying the applicants test as having been invalidated, is sufficient to discharge this first step in the evidential analysis. The second stage is to seek to establish whether or not the applicant has raised an innocent explanation which satisfies a minimum level of plausibility so as to discharge the burden placed upon him by the satisfaction of the first stage in the evidential analysis. Again, in the present case it is agreed that the applicant has raised, through his evidence to the Tribunal, sufficient evidence of an innocent explanation so as to discharge the burden placed upon him at this second stage of consideration. The third stage is the examination of whether or not the respondent has established on the balance of probabilities that the applicant's explanation can properly be rejected. It is this third and final stage of the analysis which is determinative of the present application for judicial review, and which was the focus of the assessment and submissions made at the hearing.

15. It is clear from the authorities that the assessment of the evidence in ETS test cases will be "an intensely fact-specific matter" (per *Shehzad and Chowdhury*, paragraph 23). In *Majumber and Qadir*, at paragraph 18, Beatson LJ observed that the Upper Tribunal had correctly included as relevant factors in assessing the allegation of dishonesty in an ETS test case "what the applicant had to lose; what is known about his character; the cultural environment in which he operated; how the individual accused of dishonesty performed under cross-examination, and whether the tribunal's assessment of that person's English language proficiency is commensurate with his or her TOEIC scores; and whether his or her academic achievements are such that it was unnecessary or illogical for them to have cheated." In relation to the approach to be taken to the factual evidence in the present case, Mr Malik drew particular attention that to the observations of Underhill LJ in the case of *Ahsan and others v SSHD* [2017] EWCA Civ 2009 when, having reviewed a number of authorities dealing with ETS test cases (including those cited above) he stated as follows:

> "[W]here 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. We were not ourselves taken to any of the underlying evidence, but I am willing to accept that that appears to be a reasonable summary of the effect of the recent decisions to which we were referred. However, I am not prepared to accept - and I do not in fact understand Ms Giovanetti to have been contending - that even in such specially strong cases the abs 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."

16. In his submissions on behalf of the respondent, Mr Malik made the following points in support of the submission that the respondent had discharged the burden placed upon her at the third stage of consideration of the evidence. Firstly, he submitted that the use of the Look Up Tool demonstrated that the chance of the result being false was less than 1%. In the case of *Abbas* it was accepted by William Davies J that the

effect of the generic evidence of, in particular, Prof French was that the number of false positives in the overall number of results was likely to be less than 1% on the basis of the analysis that had been undertaken. Secondly, Mr Malik submitted that Queensway College was a fraud factory for the reasons set out above. Thirdly, Mr Malik submitted that it was common knowledge that a person in the position of the applicant could obtain his voice recording from ETS in order to establish beyond doubt that it was him who had taken the test. In this connection, Mr Malik relied upon paragraph 33 of *Ahsan* as set out above, and in particular the observation that a case would be hard to resist where a person had not sought to obtain his voice recording from ETS leading to the drawing of an inevitable inference that the applicant knew that were he to do so it would expose his fraud. Again, in *Abbas* at paragraph 24 William Davies J placed reliance on the failure of that claimant to obtain the voice recording, and pointed out that it would be of little assistance to the respondent to obtain the recording but of critical significance to an applicant or claimant in supporting his or her case. Fourthly, Mr Malik relied upon the payment of cash for the fee. In *Abbas* at paragraph 21 the court had concluded that the payment of cash, whilst not in and of itself determinative of a fraudulent transaction, was, nonetheless, consistent with criminality. Finally, Mr Malik drew attention to the observations of the Upper Tribunal in *MA* at paragraph 57, where it was pointed out that there may be a range of reasons why a person might engage in a fraudulent English language test, such reasons including lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. The Upper Tribunal noted that it was not necessary to make a finding of why the appellant or applicant had engaged in deception, but it sufficed to note that there were alternative reasons why fraud might be engaged in respect of an English language test even by a person who was otherwise proficient in English.

17. Mr Malik made a number of submissions based upon the applicant's evidence. He submitted that it was of relevance that the applicant had failed to inform the respondent of his change of college. In his statement of 22 August 2014 the applicant had not set out that he had pursued a course of study at Opal College; moreover, there was no evidence of his study for the Level 6 Diploma set out above. Mr Malik submitted that the applicant had provided no credible reason for picking Queensway College as the place where he was going to take his test, and that he had omitted from his witness statement the number of times he had attended the test centre. Mr Malik relied upon the absence of any evidence from his friend, and indeed submitted that his friend did not exist. Whereas the applicant had said that 8 to 10 people had taken the test at that test centre that day, the evidence from ETS was that 45 tests had been taken that day and they had all been cancelled following the investigations as either invalid or questionable. The applicant had failed to provide the address or even the street name of either the college or his friend in his evidence. Mr Malik submitted that far greater particularity would be required before the applicant could be regarded as a credible witness. Finally, he submitted that it was wholly lacking credibility for the applicant to have improved his English language skills from a level of Bl in 2011, amounting to a score of 120 to 149, to a level of 190 just over a year later. In short Mr Malik submitted that the respondent had clearly discharged the burden of proof in the present case.

18. In his submissions Mr Karim submitted that the matters raised by the respondent ought to have been relied upon in the appeal before the First Tier Tribunal in relation to the applicant's article 8 application. Instead, in the context of that decision, the respondent accepted that the applicant satisfied the suitability requirements in terms. In the witness statement that the applicant had produced for the purposes of the appeal before the First Tier Tribunal the applicant had dealt with the issue of the decision to remove him, but this had simply not been pursued by the respondent at that time when it ought to have been.

19. Mr Karim relied upon a report of the All-Party Parliamentary Group ("the Group") on TOEIC which was completed on 18 July 2019. Mr Karim noted that this Group had received evidence from Prof French and Dr Harrison during the course of their hearings in June 2019. In their Key Findings the Group noted that all of the experts from whom they heard agreed that the respondents generic evidence was questionable. Moreover, they noted that Prof French gave evidence that he was included in a meeting in August 2014 convened by the respondent at which the experts present had requested more information in order to reliably assess the generic evidence, but in fact Prof French had heard nothing further from the respondent following the meeting until February 2016. In his evidence to the Group, Prof French indicated that caution should be exercised in using his conclusions to argue that any particular student cheated in the light of his concern as to the reliability of the results given to the respondent by ETS. Mr Karim noted the observations made by the Group in relation to the Look Up Tool, and in that connection to attention to the fact that in the present case the Look Up Tool records the applicant's nationality as being UK. To Karim further noted the evidence that the Group received about the lack of continuity evidence in relation to the voice files.

20. Mr Karim submitted that the applicant had been an impressive witness without inconsistencies or exaggerations in his evidence. None of the suggested omissions alluded to by Mr Malik were matters which were central to his account. It stood to the applicant's credit that he had continued to pursue this judicial review notwithstanding that he could have awaited August 2020 or thereabouts to raise the issues contained in this application. At the time when the applicant took his test in June 2012 the expiration of his leave was not imminent, and he had plenty of time to take the test and no need or incentive to engage a proxy to take it for him. It was not lacking in credibility that his English could have improved in between the testing in 2011 and that testing of it in dispute. Mr Karim submitted that Mr Malik's reliance upon the absence from the statement of 22 August 2014 of the two occasions on which the test was taken was simply nit-picking, in particular in circumstances where in earlier documentation the applicant had specifically recorded the two days upon which he had sat the test as part of his case. Mr Karim submitted it simply lacked any credibility to suggest, as the respondent did, that all of the tests which were undertaken on the dates in question at the Queensway College were fraudulent and this, he submitted, cast significant doubt over the credibility of the respondent's evidence. In respect of the applicant not having obtained the voice recording he submitted that there was no continuity evidence which could provide securely for the production of the correct recording of the applicant's test. The description that

the applicant had given of the test which he undertook matched that in the literature provided in the TOEIC User Guide, reinforcing the realism of the applicants evidence. In the circumstances, the respondent had failed to discharge the burden of proof in this case.

21. Further post-hearing submissions were made in writing by both parties which I have taken into account in making my decision.

22. As set out above, it is accepted that the generic evidence provided by the respondent in this case, alongside the Look Up Tool invalidating the applicants test result, suffices to establish the issue of fraud in relation to the test certificate requiring the applicant to provide plausible evidence of an innocent explanation. I am unable to accept that the simple error in relation to the nationality of the applicant is sufficient to preclude the respondent relying upon the Look Up Tool: it is an administrative error of little if any moment in the evaluation of the material. As a consequence of the evidence which the applicant provided at the hearing it was conceded on behalf of the respondent that the applicant had discharged this burden. The issue which then arises is as to whether or not the respondent has discharged the subsequent burden upon her of demonstrating on the balance of probabilities that the applicants explanation should be rejected. The reasons for my conclusion in respect of that issue are as follows.

23. The starting point must be my observations about the applicant's evidence, bearing in mind that the conclusions in a case of this kind will inevitably be highly fact-sensitive, and bespoke only to the case which is under consideration and the particular circumstances of the applicant being evaluated. The first point to observe is that the applicant gave his evidence in fluent English without any need for interpretation. He presented as a competent English speaker. His account was consistent, and I do not set much store by the points made by Mr Malik in relation to matters which may have been absent from earlier statements, such as whether he took the test on one day or two (particularly bearing in mind earlier documentation in which he mentioned both dates). There is some substance in the points raised by Mr Malik in respect of absence of detail from the applicant's account. As he observed, there were details provided in the applicant's oral evidence about, for instance, the number of times that he visited Queensway College and other gaps in the evidence for instance in relation to the street names for either the college or his friend which were surprising. In my view, there were other more particularly troubling aspects of the applicant's evidence. In particular, the applicant was unable to provide any explanation as to why he had not contacted either Queensway College immediately upon the decision to remove him having be made or, perhaps more pertinently, why he had failed thereafter to make any attempt to contact ETS, or obtain the recording of his test, in order to establish with clarity that he was the person who had taken it. This is a feature I shall return to below.

24. The significance of the relatively small proportion of inaccurate results in relation to invalidity found in the case of *Abbas* is difficult to ignore. There is also considerable force in the contention made by Mr Malik that the results from Queensway College

demonstrate that it was a fraud factory, in which there was substantial abuse of the testing regime. I am satisfied on the evidence that Queensway College was a fraud factory. Similarly, and although the subject of dispute and contention after the hearing, the findings of the All-Party Parliamentary Group and the record of the evidence which they received from, for instance, Prof French, questioning the reliability of the generic evidence cannot be overlooked. The evaluation of the generic material and the Group's report is not straightforward, but doing the best that I can it appears that the evidence which the Group received potentially diminishes the weight to be attached to the generic material on the basis that it appears to raise issues which have yet to be forensically explored and definitively concluded upon. Thus, all of these factors have to be placed into the balance in assessing whether or not the respondent has discharged the burden upon her.

25. I am unable to accept any contention that the conclusions of the First Tier Tribunal, or the failure of the respondent to take any point in that appeal in respect of the reasons for the removal decision in the applicant's case prevent the respondent from raising these matters or sustaining them in the context of this judicial review. As Mr Malik rightly points out they do not give rise to any issue estoppel or similar obstacle to the respondent relying upon them in the present proceedings. Nonetheless, the fact that the respondent in reaching a decision in respect of the applicant's human rights application found him to be able to satisfy the requirements of suitability is a relevant consideration in the present case which needs to be taken into account. That said, it is not a matter to which I attach very significant weight in making the decision in the present case.

26. My overall conclusion in relation to the issues in this application are as follows. The assessment must commence from the observation that the respondent has demonstrated on any view both that there were a significant number of false tests identified by ETS at the Queensway College and that the applicant's was identified in the investigations undertaken following the discovery of issues with the testing undertaken by ETS as being amongst that number. Whilst further doubt has been cast over the reliability of that material in the recent report by the All-Party Parliamentary Group, in my view it is difficult to conclude other than on the balance of probabilities there was a significant amount of cheating being undertaken at the Queensway College and that it was a location at which proxy tests were occurring: it was a fraud factory. Whilst I am able to place some weight upon the evidence of the applicant on the basis that in many respects it was coherent and given in fluent English, that weight has to be significantly tempered in my judgement by the significant omissions from it and, in particular, by the failure of the applicant to have taken any steps to obtain from the archive the electronic recording of his test. As Mr Malik, observed the failure to do so gives rise to a clear and weighty inference that the reluctance to do so is based OQ the concern that it might prove the respondent’s case beyond doubt. In my view, the suggestion from Mr Karim that the continuity evidence did not exist to establish whether any test recording was in fact that of the applicant was a speculative and unsubstantiated submission: in truth this is a completely untested hypothesis. I have therefore formed the view that the applicant's

evidence contains material gaps which undermine the reliance which can be placed upon it when evaluating the evidence as a whole.

27. I have considered the other contextual issues which have been raised by the applicant and the respondent during the course of their submissions. For instance, I accept the applicant's submission that in reality he was under no pressure of time in respect of the expiration of his leave which might have explained his use of a proxy to take the test. Further, there appears to be no obvious motivation for the applicant engaging a proxy to take the test. These are factors which I have taken into account in reaching my overall evaluation. I have also taken account of the submission made by Mr Malik that the applicant's use of cash to pay the fee for the test is of significance, although I am bound to observe that I do not consider that this is a factor to which any great weight can attach. As was observed above, it is not in and of itself indicative of the transaction being fraudulent. I attach more significance in evaluating the weight which can properly be attached to the applicant's evidence the submission made by Mr Malik in respect of the extent of the improvement in his English language skills between the 2011 test and that which is in question in 2012. In my view it is a factor which is clearly in support of the respondent's case that there was a relatively dramatic apparent improvement between these two tests and in the space of around 13 months. The marked improvement from a result the equivalent of between 120-149 to a result of 190 clearly raises question marks which undermine the evidence of the applicant.

28. It will be apparent from what has been set out above that in my view the decision in this case is finely balanced. I have reached the conclusion, in particular in the light of the absence of any attempt to locate and evaluate the recording of the applicant's test, that on balance the weight which can still properly be attributed to the generic evidence and the material pertaining to Queensway College justifies the conclusion that the respondent has discharged the burden placed upon her to demonstrate that it is more likely than not that the applicants TOIEC certificate in the present case was obtained by deception. I emphasise that this is a conclusion which I have reached solely on the basis of the balance of the evidence contained in this application. Plainly, were additional evidence or analysis to emerge then then a different conclusion might be justified. However, on the basis of the material before me I am satisfied that the respondent should succeed and that the applicant's application for judicial review must be refused.

**DECISION**

l. The applicant's application for judicial review is dismissed.

Signed: MR JUSTICE DOVE

# Upper Tribunal
# Immigration and Asylum Chamber

# Judicial Review Decision Notice

The Queen on the application of
ALAM

**Applicant**

v

Secretary of State for the Home Department

**Respondent**

**Before High Court Judge**
**MR JUSTICE DOVE**

Having considered all documents lodged and having heard the parties' respective representatives, Mr S Karim, of Counsel, on behalf of the Applicant, instructed by Shahid Rahman Solicitors and, Mr Z Malik, of Counsel, on behalf of the Respondent, instructed by the Government Legal Department, at a hearing at Field House, London on 7th November 2019.

**Decision: permission is refused**

(1) The Applicant's application for judicial review is dismissed.

**Permission to appeal to the Court of Appeal**

(2) I refuse permission to appeal to the Court of Appeal for the reasons given in my judgment.

**Costs**

(3) No order for costs.

Signed: MR JUSTICE DOVE

**High Court Judge**

Dated: **24/09/2020**

**Applicant's solicitors:**
**Respondent's solicitors:**
**Home Office Ref:**
**Decision(s) sent to above parties on: 24.09.2020**
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**Notification of appeal rights**

A refusal by the Upper Tribunal of permission to bring judicial review proceedings following a hearing, is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 7 days** of the Tribunal's decision refusing permission to appeal to the Court of Appeal (CPR 52.9(3)(a)).