



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/31104/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 5 September 2017

Decision & Reasons Promulgated  
On 24 October 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

KRISHNAPRASANTH SITTAMPALAM  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Ahmed, Counsel  
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Sri Lanka born on 11 December 1988. He appealed against the respondent's decision dated 27 August 2015 to refuse him leave to remain in the UK as a Tier 4 (General) Student under the points-based system and for a biometric residence permit. The appellant had applied on 12 November 2012. The respondent decided to remove the appellant from the UK with directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The reasons were that the appellant had submitted a TOEIC certificate from Educational Testing Service (ETS) to the respondent and to his sponsor which, it was alleged, was

obtained by deception. The respondent refused the application under paragraph 322(1A) of the Immigration Rules HC 395, as amended.

2. The appellant's appeal was dismissed by First-tier Tribunal Judge Solly in a determination promulgated on 24 October 2016.
3. The appellant appealed Judge Solly's decision. On 24 March 2017 First-tier Tribunal Judge Gibb granted the appellant permission to appeal on the basis that it was arguable that the judge had erred in her approach to the photographs of the appellant which appeared on the results of his test certificates at Appendix F1 and F2 of the Home Office's bundle.
4. In a determination promulgated on 8 June 2017, I ruled that Judge Solly had materially erred in law in her approach to the photographs. She had chosen to make the photographs an issue in this case but had not made the appellant aware of this. The respondent had better copies of Appendices F1 and F2 on her file and could have been asked to produce them in order to resolve the matter. As this was not done, I could not say that if the conclusions in respect of the photographs were removed, whether the judge's decision would have been the same. I therefore set aside the judge's decision in order to remake it. I adjourned the hearing to another date.
5. The appellant's appeal came before me for hearing on 5 September 2017. The appellant gave oral evidence.
6. Mr Ahmed relied on two bundles of documents; the first bundle consisted of fourteen pages and included the appellant's witness statement dated 25 January 2016. The second bundle consisted of sixteen pages and contained the appellant's statement dated 14 October 2016. He also relied on the Upper Tribunal's decision in **SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC)**.
7. Mr Jarvis relied on Professor Peter French's report on Forensic Speaker Comparison Tests Undertaken by ETS dated 20 April 2016, Project Façade - Criminal Inquiry into Abuse of the TOEIC dated 5 May 2015 and the case of **MA (ETS - TOEIC testing) Nigeria [2016] UKUT 450 (IAC) (16 September 2016)**.
8. The appellant relied on his two statements dated 25 January 2016 and 14 October 2016 as being true and accurate.
9. The appellant said he took the two tests in the respondent's bundle at F1 and F2. He took the F1 test on 18 September 2012. It was a speaking test. The photograph on the certificate was his. The certificate at F2 was in respect of the test he took on 20 November 2012. The photograph on this certificate was his.
10. He was referred to paragraph 9 of the statement he had made on 14 October 2016. He said therein that following the completion of his Business Management course, he enrolled on a two year Diploma in Management Studies at the Alyssa School in

Birmingham as evidenced by the Confirmation of Acceptance for Studies dated 12 November 2012. The Alyssa School was part of BIETTEC College and classes took place in the building next door. He explained that there were two buildings next to each other. The first building was the Alyssa School and the second was BIETTEC College. He studied for the Diploma in Business Management course at BIETTEC. The Diploma in Management Studies course was to take place at the Alyssa School. He took the tests on 18 September and 20 November 2012 at the Alyssa Test Centre.

11. He was then referred to paragraph 10 of the same statement wherein he had said that on 8 November 2013, he sat the International English for Speakers of Other Languages (IELTS) – Communicator – B2 test and achieved a first class pass in Reading, Writing and Listening, as evidenced by the copy of the certificate and notice of results issued on 27 November 2013. He also achieved a first class pass in the Spoken Examination as evidenced by the certificate and notice of results issued on 9 December 2013. He explained that he took these tests because the first application he had made to the Home Office for leave to remain in November 2012 for which he had attached a TOEIC certificate had been refused by the Secretary of State on the basis that the TOEIC test had been taken at two different sittings. The Secretary of State said that the tests should have been taken at one sitting. He explained that at the time he made his application the Immigration Rules did not require him to take the TOEIC test at one sitting. The test comprised reading, listening, writing and speaking. At the time he made his application there was no requirement that the test for each component should be taken at one sitting. Because he had sat the test on two different dates, the Secretary of State refused his application. The Rule requiring the component tests be taken on the same date came into effect in October 2013. This was not in existence at the time of the decision by the respondent on 17 June 2013.
12. The appellant was asked by Mr Ahmed if he used deception in making an application to the Home Office. The appellant replied “No, not to my knowledge. I took the test.” He said that he has always been of the understanding that his application would be refused if there was deception and he knew of the consequences.
13. In cross-examination, the appellant was referred to his original statement dated 24 October 2013. At paragraph 28 the appellant had accepted that the first attempt at the speaking examination was not successfully passed. At paragraph 29 he said he did not have a reasonable explanation why he was not successful in his first speaking exam, apart from the fact that he was worried and nervous before and during the exam. Similarly, he was worried how his pronunciation would be perceived and as such, he was extremely careful with the words he used during the exam.
14. The appellant said that at the time of the tests in 2012, he was living with his uncle in Coventry. He travelled by bus to BIETTEC and that journey took nearly an hour. He travelled alone. His uncle knew he was travelling to take the tests. After the tests, he spoke to his uncle who asked him how the tests went and he said he did everything well. On 20 November 2012 when he was carrying out the tests he did not recognise any student from his course. He did not recognise any of the staff as staff from

Alyssa or BIETTEC. On 18 September 2012, there were two students from his course also taking the test. He has not been in contact with any of them for five years. It was put to him that when he received his refusal on 17 June 2013, BIETTEC was closed down by then because of issues with the Home Office. Alyssa School had also lost its licence. The appellant said he was not sure when this was. He found out from BIETTEC that Alyssa had closed down.

15. The appellant said he had no evidence that his solicitor had requested the voice recording from the Home Office or tried to trace the recording from ETS. He thought his solicitor had, but he had no evidence to support this.
16. The appellant was referred to his bank statements at J1 and J2 of the respondent's bundle. He was also referred to page 8 of his second bundle which was a payment plan he had set up with BIETTEC in September 2011 to pay his tuition fees. The payment plan showed that on 18 September 2012, he made a payment of £600 to Sam from his Lloyds account. On 30 October 2012, he again paid Sam £600 by cheque. It was put to him that at J2 there was no outgoing of £600 by cheque on 30 October 2012. The appellant said that the £1,750 transferred to his account on 9 October 2012 was from his uncle (Sakthi Services STA Chana). This was a transfer from his uncle's business account. He withdrew the same amount in cash on 10 October 2012. He explained that the £370 paid into his account on 29 October 2012 was his wages from his uncle whom he was working with. It was put to him that at the last hearing he had said in respect of the £1,750 that that was his college fee. He explained that about a month-and-a-half after the hearing he asked his uncle about the money. His uncle told him that he had paid this money into his account by mistake. That was why he took out the money in cash and gave it back to his uncle. He said the £300 was a cheque that had cleared on 10 October 2012. He denied that having failed the speaking test, and being nervous and concerned about failing it again, someone had offered him a chance of taking it by proxy as the safest way of passing it. He denied that he had paid that person to make it happen and had withdrawn the £1,750 to make it happen. He said that when he made his student application in Sri Lanka, he took the IELTS test at the British Council and got band 5 score which was a pass. He did not pay anyone to take the TOEIC test for him as he did not need to. He failed the first test he sat on 18 September 2012. On that occasion, he was scored 150. On the second attempt on 20 November 2012 he passed with a score of 170.
17. Mr Jarvis said to him that the Secretary of State was of the opinion that he used a proxy in both tests. The printout at E1 from ETS showed both tests were invalid because he had used a proxy on both dates. The appellant denied that he had used a proxy on both occasions.
18. Mr Ahmed questioned the appellant about the procedure at the test centre. He said he entered the test centre at Alyssa. In September there were ten other students taking the tests. He entered through the door and there was a supervisor who checked his name on his passport and checked he was on the list of candidates taking the tests. A supervisor took his photograph. He was then given a cubicle which was number 7. It had a computer in it. He entered his personal details on the computer.

He put on his headphones and spoke into the computer for about one-and-a-half hours. He said it was impossible for an imposter to enter the test centre. He went into it by himself and was not accompanied by anyone else.

19. I put some questions to the appellant. He told me that his spoken English in 2012 was quite good. He had passed the IELTS test at the time he made his student application at the British High Commission in Sri Lanka. He said his solicitor had requested a recording from ETS after the last hearing and was still chasing up ETS for a reply. I said I would like to see documentary evidence from the solicitors in respect of their requests to ETS. I gave Mr Ahmed a week to submit the evidence. Mr Jarvis said he wished to respond to the evidence when he received it.
20. I then heard submissions from both parties. I shall incorporate the submissions into my findings.

### **Findings**

21. The issue in this case is whether the appellant used deception by supporting the application he made on 20 November 2011 with a TOEIC certificate which he had obtained by use of a proxy. At the first stage, the evidential burden is on the respondent to establish that there is prima facie evidence of deceit. In **SM & Qadir**, the Upper Tribunal found that in the light of the evidence from ETS, the respondent had satisfied the legal burden on her. I find this is the case here.
22. The second stage is for the appellant to provide a plausible explanation. It is interesting to note that the two tests the appellant sat on 18 September 2012 and 20 November 2012 were declared invalid by ETS. It is interesting in the sense that he had failed the speaking test taken on 18 September 2012, and yet that test had been declared invalid. I note that the appellant made his application to remain as a Tier 4 Student on 12 November 2012. When he submitted his application, he had yet to sit the test on 20 November 2012. I therefore presume that the TOEIC certificate from ETS which he had submitted to the Home Office and to his sponsor, that is Alyssa School, was certificate number 00442022016034001 in respect of the test taken on 18 September 2012. By the time the respondent refused his application on 27 August 2015, the respondent had received information from ETS that the speaking test the appellant had taken on 20 November 2012 was invalid as it had been taken by a proxy. It was on the basis of the information from ETS that the respondent refused the appellant's application.
23. The appellant's defence is that he did not use a proxy and there was no need for him to. This was because when he had made his application for a student visa in Sri Lanka in 2010 he had sat the IELTS and had the opportunity of speaking personally to a test officer at the British Council and had scored a band 5 which was a pass. He had said in his original statement of 2013 that he was nervous and concerned about his pronunciation and that may have led to an unsuccessful test. I can understand that he might have been nervous on that occasion, but it still does not explain why he would fail the test taken on 18 September 2012 when he had been in the UK since 5

September 2010 and had been interacting with English speaking people for two years prior to taking the test. Mr Ahmed questioned why the appellant did not pass the test if he had used a proxy on 18 September. He said it was unusual that the respondent was challenging the validity of a failed test. I do not, in my opinion, believe that the respondent was challenging the result of the test. Because of the evidence from ETS, the respondent took the view the appellant had employed a proxy to take the test on his behalf. The fact that he failed that test was not of itself evidence that the appellant took the test himself.

24. Mr Jarvis relied on the Home Office Project Façade – Criminal Inquiry into Abuse of the TOEIC, in particular at the Birmingham Institute of Education, Training and Technology (BIETTEC). A criminal inquiry was into the various test centres. The report highlighted the difference between invalid and questionable TOEIC results. Invalid results were where evidence exists of proxy test taking and/or impersonation and questionable meant that test takers who should retake the test due to administrative irregularities. Paragraph 6 of the report recorded that between 11 April 2011 and 9 February 2014 public test centres (Bloomsbury and Westminster) undertook 1,039 TOEIC speaking and writing tests, of which ETS identified that three were invalid, none were questionable and the percentage of invalid tests was 0.28%. In comparison, the level of cheating found at the majority of private test centres was significant; in one case 88% of the tests taken were found to be invalid. In some of the private test centres the number of tests invalidated was in the thousands. In the report by Rebecca Collings, she said at paragraph 28 that ETS described that any tests categorised as cancelled (which later became known as invalid) had the same voice for multiple test takers questioning ETS advised that they were certain there was evidence of proxy test taking or impersonation in those cases. Following further communication with ETS they confirmed the definition of “questionable” as set out in Peter Millington’s witness statement. It is where an individual’s test result was still cancelled on the basis of tests administration irregularity, including the fact that the test was taken at a UK testing centre when numerous other results have been invalidated on the basis of a “match”. ETS had analysed over 10,000 test scores at that point, of which the majority were cancelled as invalid, the remainder were cancelled as questionable. I rely on this evidence as it particularly refers to BIETTEC, the test centre where the appellant took his tests.
25. I note that two months later, on 20 November 2012, the appellant sat another test and passed it but not by a very large margin. I had no evidence as to what he did to prepare for the second test. Even if he had sat the first test himself, I am not persuaded that he would have passed the second test two months later without help. In the circumstances, I am not persuaded by his evidence that he sat the tests himself.
26. I gave the appellant seven days to submit evidence from his solicitors that they had made enquiries with ETS about his test results. As at the time of having this determination promulgated, I had not received any such evidence from the appellant or his solicitors. I draw an adverse inference from this omission and conclude that no such evidence exists because no enquiries were made by his solicitors.

27. In **MA (ETS - TOEIC testing) Nigeria [2016] UKUT 450 (IAC) (16 September 2016)**, the Tribunal held at paragraph 57 that:-

*"... we acknowledge the suggestion that the Appellant had no reason to engage in the deception which we have found proven. However, this has not deflected us in 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, inexhaustively, 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 for deceitful conduct in this sphere. We are not required to make the 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."*

28. I take account of the appellant's evidence that he travelled alone to the test centre and gave a detailed account of his journey. I find that this adds little weight to his case as he had studied in that building for about a year and would have been familiar with the journey to the test centre.
29. I have also taken into account the appellant's evidence about the procedure at the test centre. In the light of the evidence thrown up by the criminal investigations into the abuse of TOEIC at BIETTEC and the conclusions drawn by Professor French in his report of 20 April 2016, I find that it is conceivable that the procedure at the test centre was not full proof.
30. Mr Ahmed questioned why the appellant would use another proxy if a proxy failed the first test. I have no answer to this question and I would be speculating if I said I had. In court, he spoke English well but this is five years after the results of the tests that he took in 2012. I accept that he passed the test in 2013 but this was a year after the failed tests. Mr Ahmed's submission that in **MA** paragraph 48(v) the Tribunal held that the applicant's TOEIC certificate dated 28 February 2013 was not the product of any test undertaken on that date and any occasion or at all because of the absence of a photograph of the first of the two TOEIC certificates. In this case I found that the photograph on each of the appellant's two test certificates was of him. However, I am in agreement with Mr Jarvis' submission that nothing turns on the photographs because it is possible that the appellant colluded with people in the college to engage in the deception. The appellant has not provided any evidence from his solicitors that they made enquiries with ETS about his tests, despite being given the opportunity to do so.
31. I turn to the issue of the appellant's finances. At J1 and J2 of the respondent's bundle is the appellant's bank statement from his Lloyds Bank account from 2 October 2012 to 5 November 2012. The statement shows that on 9 October 2012 £1,750 was transferred into his account by Sakthi Services. On 10 October 2012 that amount was withdrawn from the appellant's account. I bear in mind that his appeal was heard by First-tier Tribunal Judge Solly on 18 October 2016, eight days after he withdrew the money. He told Judge Solly that the £1,750 was a college fee that he paid by cheque. At the hearing before me he said that his uncle had mistakenly paid £1,750 into his

account and the withdrawal on 10 October was to give the money back to his uncle. The explanation he had given today was the explanation given to him by his uncle after he had questioned his uncle about the money. I do not believe him. There was no evidence from the uncle to support his evidence. If that was the explanation given to him by his uncle, I question why he did not give this explanation to Judge Solly.

32. At page 8 of his second bundle was a payment plan between the appellant and BIETTEC to pay his tuition fees. The start date was September 2011. It showed that on 18 September 2012 he had paid £600 to Sam, on 30 October 2012 he had again paid £600 to Sam and on 5 November 2012 had paid £250 to Sam. None of these payments is reflected in his bank statement. His bank statement showed that £300 was debited from his account on 15 October 2012. He had told Judge Solly that the £300 was a cheque for a college fee. I accept the appellant's evidence that payment of £370 into his account on 20 October 2012 represented his wages. Other than these two payments, I do not accept that the appellant has been entirely honest about his finances.
33. Having considered all the evidence before me, I find that the respondent has discharged the legal burden on her in proving that the appellant obtained the certificate on 20 November 2012 by deception.

### **Notice of Decision**

34. The appellant's appeal is dismissed.
35. No anonymity direction is made.

Signed

Date: 25 September 2017

Deputy Upper Tribunal Judge Eshun