



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/20854/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 2<sup>nd</sup> August 2018

Decision & Reasons Promulgated  
On 28<sup>th</sup> August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR HIDAYAT ANVARHUSEN MANSURI  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr C Bates, Senior Home Office Presenting Officer  
For the Respondent: Mr M Biggs, instructed by JKR Solicitors

DECISION AND REASONS

1. Although the Appellant is the Secretary of State I refer to the parties as they were in the First-tier Tribunal.
2. The Appellant, a national of India, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 14<sup>th</sup> August 2014 refusing his application for indefinite leave to remain in the UK under paragraph 276B of the Immigration Rules on the basis of his long residence.
3. First-tier Tribunal Judge Hussain allowed the appeal in a decision promulgated on 23<sup>rd</sup> February 2018. The Secretary of State now appeals with permission granted by First-tier Tribunal Judge Andrew on 5<sup>th</sup> June 2018.

4. The Appellant first entered the UK on 11<sup>th</sup> June 2005 with entry clearance as a student. His leave to remain as a student was extended on a number of occasions until 28<sup>th</sup> July 2013. His application for leave to remain outside the Rules was granted until 30<sup>th</sup> November 2015 but his leave to remain was curtailed on 1<sup>st</sup> October 2015 and he applied for indefinite leave to remain on the basis of his long residence on 26<sup>th</sup> October 2015.
5. The Secretary of State refused the application under paragraph 276B(ii) and (iii) of the Rules. The Secretary of State also refused the application under paragraph 322(2) and 322(1A) on the basis of the fact that the Appellant submitted a TOEIC certificate from Educational Testing Service (ETS) with his application dated 8<sup>th</sup> October 2012 which the Secretary of State considered had been fraudulently obtained.
6. At the hearing in the First-tier Tribunal the judge noted at paragraph 8 that the Presenting Officer confirmed that, other than the good character requirement in the substantive Immigration Rules (paragraph 276B), the Appellant satisfied all of the requirements of the Immigration Rules.
7. The judge heard oral evidence from the Appellant. The judge reminded himself about that the evidential and legal burden is on the Respondent to justify a refusal on one or more of the general grounds of refusal. The judge noted that it has now been held that the generic material that the Secretary of State routinely produces in ETS cases together with the “look up tool” is sufficient to discharge the evidential burden on the Secretary of State and once that is discharged it is for the Appellant to persuade the court that he did not resort to the use of a proxy tester [12]. The judge considered the decision in MA (ETS - TOEIC testing) [2016] UKUT 00450 (IAC) [13].
8. The judge considered the evidence produced by the Secretary of State and the Appellant and the judge concluded that he was satisfied that the Appellant did sit the test himself and allowed the appeal.

#### Grounds of appeal

9. The Grounds of Appeal essentially take issue with the decision of the First-tier Tribunal on three grounds. The first ground contends that the judge failed to adequately address whether the Appellant had offered an innocent explanation in response to the Secretary of State’s allegation that he used a proxy to take the TOEIC.
10. It is contended in the second ground that the judge gave inadequate reasons for relying on the fact that the Appellant speaks English contrary to the guidance in MA. It is contended that the judge materially erred by failing to give adequate reasons for holding that a person who clearly speaks English would therefore have no reason to secure a test certificate by deception.
11. The third ground contends that the judge erred by failing to consider Section 117B of the Nationality, Immigration and Asylum Act 2002.

Error of law

12. At the hearing before me Mr Bates accepted, on the basis that the Presenting Officer identified the issues in the appeal as recorded at paragraph 8 as being only in relation to whether the Appellant met the good character requirement of the substantive Immigration Rules, that the judge could not be criticised for failing to engage with Section 117B.
13. I would also note that in circumstances such as these where if the Appellant could meet the only element of the Rules in dispute and therefore met the requirements of the Immigration Rules, there was no additional requirement on the judge to go on to consider the public interest given that the Appellant would have met the requirements of the Rules. In these circumstances the judge did not err in failing to consider Section 117B.
14. The procedure in appeals such as this is set out in the case of **SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC)** where the Tribunal set out how the evidential burden is on the Secretary of State to establish sufficient evidence of deception, the burden then shifts to the Appellant to raise an innocent explanation. It is then for the Secretary of State to establish, on the balance of probabilities, that the Appellant's *prima facie* innocent explanation is to be rejected in order to discharge the legal burden of proof. This was further considered in the case of **MA** where the Tribunal emphasised that the question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact sensitive.
15. Mr Bates submitted that the Secretary of State had discharged the initial evidential burden by providing the *look up tool* and that the judge appears to have accepted that the evidential burden had been discharged. Mr Bates did not dispute this position.
16. Accordingly, the burden moved onto the Appellant to provide an innocent explanation. The judge heard oral evidence from the Appellant as set out at paragraphs 9 and 10 of the decision. The judge also had documentary evidence before him. It is clear from paragraphs 13 to 21 that the judge took into account a number of factors.
17. The judge took into account the fact that the Secretary of State had carried out an interview with the Appellant on 19<sup>th</sup> February 2016 in relation to the TOEIC test. The judge noted that the interview records were only available because the Appellant had obtained them and that the Respondent had not included them in the Respondent's bundle. The judge also noted that, although it was normally the case that an Appellant would be interviewed only where the TOEIC results were "questionable", rather than "invalid" (as in this case), the Secretary of State still called the Appellant for an interview and the Home Office Presenting Officer was unable to explain why this was the case.
18. The judge took into account the contents of the interview record noting that the Appellant maintained his decision that he took his test at the London School of Scholars rather than South Quay College as alleged by ETS. The judge took into

account that at the end of the interview the Respondent concluded that the Appellant was “credible” [16].

19. The judge also took into account that the Appellant had obtained a recording of the alleged voice recording from TOEIC and accepted that the voice was not his, but noted the Appellant had queried whether there was evidence that the voice recording presented by TOEIC actually related to the test taken at the centre where he claims to have sat. The judge also took into account the fact that the Appellant has raised this issue with ETS most recently in a letter of 22<sup>nd</sup> December 2017 [17].
20. At the hearing Mr Bates suggested that the judge did not take into account the fact that this letter had only been sent a short time before the hearing. However, the judge properly noted that the Appellant had raised the issue as to the location of the test as far back as February 2016 [19]. It is clear that this was also a factor in the judge’s mind when making his decision.
21. At paragraph 19 the judge took into account in the Appellant's favour the fact that the Secretary of State had not sought any explanation from ETS in response to the Appellant’s assertion that he has had the test elsewhere. He also took into account the failure of ETS to respond to the Appellant’s request. The judge considered that this raised serious questions as to whether the claim that the Appellant sat his test at South Quay College is at all reliable.
22. I take into account the documentary evidence which was before the judge. I note that the Appellant made two witness statements. The Appellant also produced the record of interview with the Home Office along with copies of correspondence with ETS and their representative.
23. It is also apparent from the decision that the judge took into account the Appellant’s oral evidence. At paragraph 10 the judge recorded the Appellant's explanation as to the circumstances surrounding his arrangements to sit the test at London School of Scholars as set out in his witness statement. It is more than clear that the judge accepted the Appellant’s oral evidence.
24. In my view the judge has given adequate reasons for accepting the Appellant’s explanation as to where and when he sat the test and took into account the Appellant’s longstanding dispute as to the TOEIC certificates and the allegation that he used a proxy.
25. The third ground contends that the judge erred at paragraph 20 in failing to give adequate reasons for holding that a person who speaks English would have no reason to secure a test certificate by deception. However, that is not what the judge said. After considering all of the other issue, the judge noted that the Appellant had also sat an IELTS test in October 2011, a year before the TOEIC test. The judge went on to say;  

“Whilst I am aware that despite having the ability to pass the TOEIC test, an applicant may choose to appoint a proxy, in this case, I have found no good evidence why a candidate of the calibre that the present Appellant is, would choose to hire a person to sit in his place, by contrast, I have found the Secretary

of State's evidence to be lacking in coherency and raising many more questions than there are answers".

26. In **MA** the Tribunal gave the following guidance at paragraph 57:

"... 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."

27. Here it is clear that the judge was engaging in fact sensitive analysis of this particular case taking into account all of the evidence, including the fact that the Appellant had previously passed another English language test and the standard of the Appellant's English. I am satisfied that the judge has not simply concluded that because the Appellant speaks English he would have no reason to engage a proxy.

28. In these circumstances I find that the judge has adequately reasoned his decision and it is clear why the judge reached the conclusions he did. The grounds have not been made out.

### **Notice of Decision**

29. The decision of the First-tier Tribunal does not contain a material error of law.

The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed

Date: 17<sup>th</sup> August 2018

Deputy Upper Tribunal Judge Grimes

### **TO THE RESPONDENT**

### **FEE AWARD**

I maintain the fee award made by the First-tier Tribunal.

Signed

Date: 17<sup>th</sup> August 2018

Deputy Upper Tribunal Judge Grimes