Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/08414/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 November 2019	**On 09 December 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN
UPPER TRIBUNAL JUDGE KEITH

Between

MRS RENU ADHIKARI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOMW DEPARTMENT

Respondent

Representation:

For the Appellant: *Mr J Trussler*, instructed by direct legal access
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. These are the approved record of the decision and written reasons which were given orally at the end of the hearing on 21 November 2019.

Introduction

2. This is an appeal brought by the appellant against the decision of First-tier Tribunal Judge Davidge (the 'FtT') promulgated on 15 July 2019, in which she dismissed the appeal of the appellant and her husband against the respondent's refusal of leave to remain on the basis of human rights.

3. The thrust of the appeal, and the FtT's decision, was whether the appellant had engaged in deception in arranging a proxy to take an English language test, or

'TOEIC', which was administered by a third party provider, 'ETS' at a number of approved test centres. The issue was important because if it were found as proven that she had engaged in deception, the appellant would fall for refusal for leave to remain or re-entry on 'suitability' grounds, in the Immigration Rules.

4. The FtT noted in her decision the evidence given both by the appellant and her husband as to the circumstances in which she had taken the test; and why she had not participated in the TOEIC deception, as alleged.

5. The FtT also noted the respondent's evidence that the test centre at which the appellant claimed to have taken the test, New London College, was the subject of a criminal investigation, which discovered the use of 'pilots' who had admitted under caution the use of widespread fraud. The FtT preferred the evidence of the respondent and dismissed the appellant's appeal.

6. While the FtT also considered the wider proportionality of the refusal of the applicant's leave to remain, no other element of that proportionality assessment was challenged in the application for permission to appeal to this Tribunal or in the hearing before us. The sole issue was whether the appellant had engaged in TOEIC deception. If she had done, her appeal would fail. Her husband did not appeal the FtT's decision (he was the appellant's dependant, in any event).

The grant of permission

7. The appellant sought permission on 8 October 2019 to appeal the FtT's decision, and while permission was initially refused by First-tier Tribunal Judge Feeney on 13 September 2019, permission for a renewed application was granted by Upper Tribunal Judge S Smith on 14 October 2019. We repeat his comments, as they succinctly identify the issues before us, at [2] of his permission grant: -

> "[2] *It is arguable at [25] and [26] that the FtT irrationally rejected the appellant's proffered innocent explanation for the alleged TOEIC cheating, without providing sufficient reasons for doing so. At [26], the judge said 'there are many reasons as to why people cheat, and it is not for me to speculate as to why the appellant chose to do so…..' Arguably the judge did not engage with the appellant's innocent explanation, as, when considering its plausibility, she assumed that the appellant had cheated……."*
>
> *"[3] The judge found that the motive and ability in English were no indication of whether a person did, in fact, cheat (see [24]) and observed 'I am not in a position to assess the appellant's abilities historically'. Arguably, on the judge's approach, it would not be possible for anyone ever to succeed with an innocent explanation of the sort advanced by the appellant (no need to cheat, diligent attempt to comply with the English language test requirements). Arguably, that was an irrational approach as it rendered the provision of an innocent explanation almost (if not actually) impossible."*

8. In terms of the appellant's submissions today, without any discourtesy to Mr Trussler, he did little more substantively to develop beyond the points identified by Judge Smith. This was not a question that there was no evidence. While the

respondent had adduced the 'look-up' tool, which indicated an 'invalid' test result, nevertheless, the appellant was simply unable to understand why her proffered innocent explanation was rejected.

9. In contrast, in submissions for the respondent, Mr Clarke invited us to consider that none of Judge Smith's concerns were made out and that the evidence had developed over the years since the well-known authority of SM and Qadir v SSHD (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC). By way of example, considering the recent report of Professor French there was now less than a 1% chance of 'false positives', and in particular we had to consider the circumstances of the New London College fraud, which was widespread. The FtT was entitled to find that the appellant had cheated, at [9], considering her evaluation of the evidence at [20] and [21]. There was nothing wrong in her view (explained at [24]) that proficiency in English did not provide a sufficient evidential basis for the appellant's appeal to succeed. While there was no evidence that the appellant was observed using a proxy, nevertheless her claims had to be considered in the light of Professor French's report.

10. If there were any error of law, it was immaterial in light of the lack of challenge to the FtT's findings on the appellant's ability to return to Nepal.

Discussion and conclusions – error of law

11. Taking in reverse order the issue of materiality, we accepted Mr Trussler's submission that even if there was no challenge to the FtT's conclusions on the ability of the appellant to return to Nepal, whether she had participated in TOEIC deception remained material, as it would inevitably have a serious impact on her ability to re-enter the United Kingdom in the future, because of serious question marks will be raised about her being able to meet the suitability requirements of the Immigration Rules. This is particularly important should, as here, the appellant wish to continue her studies in the UK. In our view, therefore, the submission that any error could not be material was simply not sustained.

12. Dealing next with the issue of whether the FtT had erred in law, on the one hand, we accepted Mr Clarke' submission that at [13], the FtT had reminded herself of the SM and Qadir guidance on the legal and evidential burdens of proof. Where we find that the FtT fell into error was that, having recited the evidence of the appellant and her husband relating to her innocent explanation, the FtT failed to explain why she disbelieved the appellant's evidence, including her prior English qualifications; her explanation for why she chose to take the test at the New London College (its physical proximity to her); her journey to the test centre; and her husband's evidence. There was no evaluation by the FtT of the credibility and the plausibility of the appellant's explanation. While it might be argued that it was implicit in the FtT's conclusions that she disbelieved the appellant, that does not, in our view, adequately explain her reasoning. Instead, at [25], the reasoning is limited to recitations of the statistical evidence about the widespread fraud at New London College, noting one point in the appellant's favour that she was not personally observed using a proxy.

13. In failing to explain her analysis of the appellant's explanation, the FtT erred in law; and that error was material.

Decision – error of law

14. The FtT erred in law in her findings on whether the appellant had engaged in a TOEIC deception. We set aside her decision on the appellant's appeal, which we agreed with the parties, was an appropriate one for us to remake, rather than to remit to the First-tier Tribunal. In doing so, we limit our remaking to that single issue, as the remainder of the FtT's analysis on proportionality was unchallenged.

The remaking decision

15. The sole issue is whether the appellant had engaged in 'TOEIC' fraud. The respondent had discharged the initial evidential burden, as there was not only a report into wider cheating at the New London College, Hounslow, but also an individual 'look up' result for the appellant, which showed her spoken English result as 'invalid'. The evidential burden then shifted to the appellant to provide an innocent explanation and the final question was then whether the respondent had discharged the legal burden of proving that the appellant had cheated.

16. We considered all the evidence before us in remaking the decision on the appellant's appeal, whether we refer to it expressly or not. The appellant adopted her written witness statement at pages [1] to [3] of the appellant's bundle ('AB') and she also gave oral evidence before us, on which she was cross-examined. The parties' representatives agreed that the appellant's husband did not need to give oral evidence as his written statement at [4] AB merely recited his support for the appellant and the fact that he accompanied her to the test centre in question, which was unlikely to be of much evidential weight, as even if we accepted the appellant's account, others who were involved in TOEIC fraud would need to have attended the test centre to have their photographs taken for the test certificate.

17. Much of the evidence before us was not in dispute and had been considered by the FtT previously, namely the appellant having successfully qualifications with various diplomas and certificates in the UK, including an English language certificate in 2010 and a level 7 diploma in 2012, at [9] to [14] AB.

18. We were conscious that we are not expert in assessing spoken English, and we are not aware of the precise level of comparability between the spoken test that the appellant would have taken at the test centre which is the subject of the cheating allegation; and any prior qualifications. We are also conscious that a person's ability to speak in English is relevant to the question of whether they have participated in a TOEIC fraud, but also that someone may, despite having proficiency in spoken English, nevertheless chose to engage in such a fraud.

19. In her written statement, the appellant recited her history of having obtained qualifications prior to taking the TOEIC test, and she also gave explanations for why she chose the test centre she did; noting that it was on a list of providers authorised by the respondent, although the same was true of all colleges, including those at

which there was widespread cheating. We conclude that the appellant has provided a plausible account of why she booked the test at the test centre she did (it was authorised and close to where she studied) and her account of travelling to the test centre is corroborated by her husband's brief witness statement.

20. Noting her choice of test centre and her travel to it, we focussed on the circumstances in which, once having arrived at the test centre, the appellant claimed to have taken the speaking test. Her written witness statement provided very limited detail on the point. In oral evidence, the appellant was clearly able to speak English, but in our view, she clearly contradicted herself in describing the circumstances of taking the test and her descriptions of it were also noticeably vague.

21. On the one hand, she was able to describe how long the spoken test took. On the other hand, her oral evidence about the number of those who took the spoken English test at the same time, in the same room as her, varied, from either being 20, or 4. Her evidence on the number of those supervising the test also varied between either 2, or 1. When she was asked precisely how she took the speaking test, she referred to having to '*describe a picture in front of a screen*', but despite being repeatedly asked by Mr Clarke for more detail, particularly how this was then conveyed to those assessing her spoken English, she repeated having to describe a picture in front of a screen. Her vagueness in describing the test was striking to us, although the eventual gist, as we understand it, was that she had spoken into some sort of microphone with a headset, while in a some form of a booth, but she did not explain this without significant pressing. Her vagueness caused us to have significant doubts over her credibility when this issue, i.e. the circumstances in which she had taken the test, was well-known to her for a number of years; was central to her appeal; and she will have had the chance to reflect on the circumstances in which she took the test.

22. We take into account that the appellant will have been naturally nervous in giving evidence, and we are conscious that the test was taken a number years ago, on 19 March 2013, but these factors do not, in our view, adequately explain her inconsistencies and vagueness.

23. When asked to comment on the fact that not a single oral test was found to be reliable on the day she took the test at New London College; and the evidence appeared to support that there had been widespread cheating for many months, in the period in which she claimed to have taken the test, she merely asserted that these wider allegations were not accurate.

24. In light of her oral evidence, we drew adverse inferences about the appellant's credibility and placed limited weight on her oral evidence. Nevertheless, we considered all of the evidence in the round, when considering whether she has provided an innocent explanation capable of putting the evidential burden back on the respondent. On the one hand we have the background of somebody who does have academic achievement, with some English proficiency. We note that those who may be proficient may still have chosen to be have been involved in having a proxy test taker take their test. We have her description of the journey to the college, and

the choice of college, which while plausible, have limited evidential weight. The most weighty evidence, in the context of evidence of widespread cheating at New London College, including on the day she took the test, and where her test result was assessed as 'invalid,' was likely to be the circumstances in which the appellant actually took the speaking test and it was in this particular context that the appellant's evidence was noticeably weak.

25. We also considered whether the appellant had challenged the college, or the respondent upon learning that the TOEIC result had been invalidated. The test was taken on 19 March 2013. By 2 September 2014 when she was served with curtailment of her leave, she was aware of the TOEIC invalidation, as demonstrated in judicial review papers. Despite presenting a claim for judicial review, (which of course is a separate legal test to the one we are considering), she had not sought her money back from the college or raised issues with ETS, despite being, in her words, '*cross*'. This lack of complaint is an additional, although not central factor, which weakened her case, based on the lack of plausibility of her failure to complain to the college, which she suggested to us she didn't realise she could do, despite applying for judicial review.

26. Considering all of the above evidence, we conclude that appellant has not provided an adequate innocent explanation, so as to shift the evidential burden back to the respondent.

27. For completeness, that is not the end of our analysis. Even had we concluded differently, going on to consider the issue of whether the respondent had discharged the legal burden of showing that the appellant had cheated, we considered the appellant's invalid 'look up' result in the wider context of cheating at New London College. As we have identified, the spoken test was taken on 19 March 2013. The 'Project Façade' criminal inquiry report into New London College, dated 5 May 2015, by Detective Inspector Andrew Carter, states at [11]: -

> *"11. Between 20 March 2012 and 15 May 2013, New London College undertook 1,423 TOEIC speaking and writing tests of which ETS identified the following:*
>
> - *Invalid* *1,055*
> - *Questionable* *368*
> - *Not withdrawn (no evidence of invalidity)* *0*
> - *Percentage Invalid* *74%"*

28. Detective Inspector Carter further went on to note that one 'pilot' had been arrested and interviewed and admitted to taking tests on behalf of others.

29. This evidence was important not only at the stage of consideration of the appellant's 'innocent explanation, but in the final consideration of the overall legal burden on the respondent. The evidence against the appellant was overwhelming. In the period in which the appellant took the test at New London College, not a single test was regarded as 'valid', and the majority (74%) of those test results, including the appellant's, were invalid. Appendix A provided further evidence for the specific

date on which the appellant took the test. Once again, not a single one of the tests taken was valid and 87% were assessed as invalid.

30. In summary, even had we found that the appellant had shown an adequate explanation, we find that the respondent had discharged the legal burden of showing that the appellant had cheated, in light of the overwhelming evidence in the Project Façade report, when weighed against the vague and contradictory explanation provided by the appellant.

Notice of Decision

31. We find that whilst the FtT had erred in law in assessing the appellant's innocent explanation, we remake the decision by concluding that the respondent has discharged the legal burden of showing that the appellant had participated in a TOEIC deception, and so we dismiss the appellant's appeal.

32. No anonymity direction is made.

Signed J Keith Date 4 December 2019

Upper Tribunal Judge Keith

TO THE RESPONDENT
FEE AWARD

We have dismissed the appeal and therefore there can be no fee award.

Signed J Keith Date 4 December 2019
Upper Tribunal Judge Keith