



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/10572/2015 &  
HU/12759/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 30 September 2019

Decision and Reasons Promulgated  
On 16 October 2019

Before

UPPER TRIBUNAL JUDGE HANSON  
UPPER TRIBUNAL JUDGE KEITH

Between

MOHAMMAD ASHIQUL ISLAM  
SYED JANNATUL NAYMA  
(anonymity direction not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellants: Stephen Knafler QC, instructed by Westbrook Law.

For the Respondent: Mr Lindsay, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. On 10 June 2019 the Upper Tribunal found a judge of the First-Tier Tribunal had erred in law in a manner material to the decision to dismiss the appeal on human rights grounds.
2. The appellants are a husband and wife, both citizens of Bangladesh, born on 20 August 1985 and 31 December 1990 respectively. On 21 October 2014 the first appellant Mr Islam applied for indefinite leave to remain on the grounds of long residence in the United Kingdom. It is not in dispute that Mr Islam had at least 10 years continuous lawful residence in the United Kingdom when he made the application which was refused on 27 October 2015. Mrs Nayma entered the United Kingdom lawfully making a number of applications and eventually on 14 May 2015 submitted a human rights application on the grounds of family life enjoyed with Mr Islam and her private life in the UK which was also refused.
3. Mr Islam's application was refused as it was said he had used deception when making an application on 31 October 2010. In support of that application a TOEIC certificate from Educational Testing Service ("ETS") had been provided which was said to have been fraudulently obtained by Mr Islam through his use of a proxy test taker when he sat the test on 17 April 2012 at Colwell College. It is also said that on 20 September 2015 Mr Islam was arrested and later cautioned as an unlicensed person soliciting persons for hire car services. Such issues leading to the refusal pursuant to paragraphs 322(2) and 322(1C)(iv) of the Immigration Rules. The application for indefinite leave was refused by reference to paragraph 276D with reference to 276B(ii) and (iii) of the Rules.
4. The agreed issues in the appeal before us are (i) did the first appellant engage in a TOEIC fraud; (ii) if not, should the appeals be allowed; (iii) if so, should they be dismissed.
5. It is settled law that where an assertion has been made by the Secretary of State of the use of fraud/deception in the taking of an English language test the initial evidential burden rests upon the Secretary of State and, only if discharged, does it pass to the appellant to provide a satisfactory explanation. If such explanation is provided the burden will then passed back to the Secretary of State.
6. We focus initially on the first stage of the above process.

### The first stage assessment

7. In his skeleton argument filed for the purposes of these proceedings Mr Knafler conceded that the Secretary of State had, but only just, discharged the initial evidential burden on the basis of the documents provided. It transpired, however, at the outset of the hearing that such concession had been made without sight of all relevant documents including a statement filed by a Senior Home Office Presenting Officer, Hilary Rackstraw, dated 12 April 2017 to which we shall refer further below. In light of the content of that document the concession was withdrawn leaving all matters at large.
8. The appellant's contention throughout has been that he took his English language Test on 17 April 2012 at Colwell College, Aldgate East, London. The Secretary of State in the reasons for refusal letter addressed to the first appellant of the 27 October 2015 stated:

In support of the consideration of your application dated 31 October 2010 you submitted a TOEIC certificate from Educational Testing Services ("ETS").

ETS has a record of your speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker. Your scores from the test taken on 17 April 2012 at Colwell College have now been cancelled by ETS. On the basis of the information provided to her by ETS, the SSHD is satisfied that your certificate was fraudulently obtained and that used deception in your application of 31 October 2010.

...

On 8 September 2015 you were interviewed in relation to this ETS TOEIC test. Although it was concluded that you spoke a good level of English it was noted that you stated that you had retaken the speaking element of the TOEIC test having initially failed this aspect when you sat the test on 21 March 2012. It is this retaken speaking element which has been found to be invalid.

9. What appears to be an obvious error in the chronology was considered in the Error of Law finding at [14] where it is written:

"14. The assertion in the respondent's decision of the 27 October 2015 that Mr Islam had used deception in relying upon a TOEIC certificate in support of an application made on 31 October 2010 when that certificate was dated 21 March 2012 is clearly impossible. What the chronology shows, however, is that the application made on 31 October 2010 was varied on 12 June 2012. It was the varied application that was supported by the March 2012 certificate."

10. At no point in the initial refusal letter does the Secretary of State question or challenge the existence of Colwell College Aldgate East relying in support of her assertion of the use of deception upon the Project Façade report headed "Criminal Enquiry into Abuse of the TOEIC, Colwell College Leicester. Criminal Investigations (Immigration)".

11. At [17] of the Error of Law finding it is written:

"17. It is not disputed that there is a college with a similar name in Leicestershire and that a number of concerns arose as a result of TOEIC tests taken at that college resulting in a substantial number of tests taken at the venue in Leicester being declared invalid or questionable. What was not made out before either the First-tier Tribunal or the Upper Tribunal is that there is any connection between the colleges with similar names in London and Leicester. Mr Lindsay did not provide evidence to the Upper Tribunal showing that the Operation Façade enquiries extended to the test centre in London. There is no analysis of the numbers who took the test in Leicester and in London on the day Mr Islam took his test to show that the total of such numbers accord, with the number of disputed tests in the Operation Façade report. In short, there appears to have been very little evidence to make the arguably necessary connection between Colwell College in Leicester and that in London or to establish that the fraudulent practices clearly established at the Leicester centre were equally applicable to the centre in London and therefore arguably to Mr Islam. The generic evidence produced by the respondent is supported by the 'Look-up tool' but if error has been made in relation to the venue what weight can be given to the same needed to be considered."

12. Directions were given for the Secretary of State to file and serve any further evidence she may have relating to TOEIC fraud at Colwell College, Aldgate

East, London and any other evidence on which she wished to rely. On 27 June 2019 a witness statement was filed dated 14 June 2019 from a Ms Alexandra Bailey, an employee of the Home Office, in the following terms:

I, Alexandra Bailey, say as follows:

1. I am Alexandra Bailey and I have been employed by the Home Office since April 2006. Since July 2012, I have worked within Sponsor Compliance, part of the Sponsor Licensing Unit and have held a variety of different positions. I am currently a Tier 4 Compliance Manager, responsible for ensuring that licensed Tier 4 educational establishments (known as 'sponsors') adhere to the relevant policy guidance specific to the tier in which they operate.
2. I am duly authorised by the Secretary of State for the Home Department to make this witness statement in connection with this appeal.
3. Where the facts stated in this witness statement are within my own knowledge, they are true. Where the facts stated are not within my own knowledge, they are true to the best of my information and belief by reason of the fact that I have derived them from the relevant Home Office files and from discussions with colleagues within the Home Office who have had involvement with the relevant matters. Where the facts are not within my own knowledge, I have stated the source of the information and exhibited the relevant documents.
4. I have been asked to comment on the sponsor licence held by Colwell College; in particular their registered addresses, whether they registered a branch in Aldgate, London and the Test of English for International Communication (TOEIC) tests that were sat at the college.
5. Colwell College applied for a Tier 4 and Tier 2 sponsor licence on 18 December 2013. For sake of clarity, Tier 4 is the primary immigration route for non- European Economic Area (EEA) students who wish to study full-time in the UK and Tier 2 is one of the primary immigration routes for non-EEA migrants who wish to work in the UK.
6. The college's registered address was Allied Place (7<sup>th</sup> Floor), 44 Abbey Street, Leicester, LE1 3TD. Their sponsor licence application was granted on 10 February 2014 and they were assigned unique licence reference number; 4WJQ1MFY3.
7. On 13 August 2014 the college submitted a request via the Sponsor Management System (SMS); a system which allows sponsors to communicate electronically with UKVI, for example, informing of any changes to the status of and/or any changes to their organisation. This request sought that the business be incorporated under its new name of Milestone School of Business. The Home Office approved this request on 20 November 2014.
8. An un-announced visit was undertaken on 1 October 2014 at Allied Place (7<sup>th</sup> Floor, 44 Abbey Street, Leicester, LE1 3TD. The visit was conducted in order to assess the college's compliance with their sponsorship duties. During the visit, the college were specifically asked if they operated from another other premise. The interviewee; a Kamrul HASAN (CEO) confirmed that they did not but stated that they were intending on moving to an alternative location on 6 October 2014.
9. On 8 October 2014 the college submitted another SMS request asking that their registered address be changed to 82 London Road, Leicester, LE2 0QR. The Home Office also approved this request on 20 November 2014.
10. The sponsor licence of Colwell College was later revoked, on 11 June 2015. This was because the college had failed to pass their annual Basic Compliance

Assessment (BCA); formally known as Highly Trusted Sponsor Status (HTS). The BCA assesses a Tier 4 sponsor's refusal, enrolment and course completion rates against requisite percentages set out in the Tier 4 Guidance for Sponsors.

11. The college sought to challenge the revocation decision by way of judicial review and a consent order obtained required that the Home Office to return the sponsor licence status to that prior to the revocation and reconsidered its decision. Although a reconsideration occurred, the college failed to respond by way of mandatory representation and therefore on 2 December 2015 the licence was again, revoked.
12. In addition, I consider it relevant to mention that Colwell College attempted to apply for a sponsor licence on five occasions prior to their successful application above. On each occasion they were required to provide a registered address and therefore I provide the proposed registered addresses on each failed licence application below:
  - 20 March 2010 application - Colwell House, Derby Road, Gloucester, GL1 4AE;
  - 13 May 2010 application - Colwell House, Derby Road, Gloucester, GL1 4AE;
  - 27 May 2010 application - Colwell House, Derby Road, Gloucester, GL1 4AE;
  - 20 April 2011 application - Allied Place (7<sup>th</sup> Floor), 44 Abbey Street, Leicester, LE1 3TD;
  - 15 October 2011 application - Allied Place (7<sup>th</sup> Floor), 44 Abbey Street, Leicester, LE1 3TD.
13. Finally, in regards to the TOEIC tests sat by individuals at Colwell College, those tests were regulated by the Educational Testing Service (ETS) and therefore ETS should be able to provide information regarding any approved TOEIC test sites relating to the same.

**Statement of Truth**

I believe that the facts in this witness statement are true.

SIGNED: ALEXANDRA BAILEY

DATE: 14 June 2019

13. A letter written by the appellant's representatives to the respondent following receipt of the statement pointed out that it was not necessary for a college to have a valid Tier 4 Sponsor's Licence to be an approved test centre. The Upper Tribunal has also seen correspondence to the solicitors representing ETS in the United Kingdom specifically asking for evidence to establish that Colwell College Aldgate East was on the list of approved test centres. There has been no response to this correspondence and the Tribunal are grateful to Mr Lindsay for providing a redacted copy of a screenshot from the respondent's case management system relating to another appeal in which the refusal of ETS's representatives to provide further information is clearly stated. It was accepted

that in relation to this appeal the matter will have to be assessed on the available evidence as nothing further could be obtained from ETS's representatives at this stage.

14. There is nothing in the statement of Alexandra Bailey that deals with the specific point raised in directions. At [10] of his skeleton argument 11 July 2019 Mr Knafler writes:

“On one reading, Miss Bailey statement *may* be intended elliptically to suggest that there was no such places Colwell College, Aldgate East. The appellant's solicitors will ask the respondent to clarify whether he makes this point and, if not, what the purpose of Ms Bailey's statement is. If the respondent does intend to submit, at this very late stage, that there was no such place as Colwell College, Aldgate East, then the appellant will endeavour to obtain evidence relating to that and will apply for permission to rely on it.

15. In addition to the generic material, the witness statements of Rebecca Collins and Peter Millington, the Secretary of State relied upon the report of Professor French and the Project Façade report relating to Colwell College in Leicester. This evidence was supplemented by the witness statement from Hilary Rackstraw. In her statement Hilary Rackstraw writes at [10]:

“10. The evidence at Annex B is taken from the same data provided by ETS and shows the results of the analysis by ETS of all the spoken English TOEIC tests which were sat on the same day and at the same test centre as this appellant.”

16. There is within the annex the TOEIC Test Centre Look up Tool for Colwell College with a test date of 17 April 2012 confirming at that centre on that date 121 tests were taken. There follows a list of those tests in relation to which it is accepted the appellant's test results appear. No information was provided by the Secretary of State to show that all those whose details appear at Annex B related to Colwell College in London. Indeed in support of the respondent's position, and appearing as an addition to the annex, is a copy of the relevant extract from the Project Façade report relating to Colwell College, Leicester. It is not disputed this institution was a “fraud factory” in relation to which there have been a number of criminal convictions.

17. In his submissions Mr Lindsay appeared to adopt a further position inferring that what may have occurred in light of the lack of evidence of the existence of Colwell College Aldgate East is that the appellant's English Language test must have been taken at Colwell College in Leicester. This could, practically, only have occurred if the appellant attended the college in Leicester on the specified day or did not attend but it was made to appear as if had attended as a result of a proxy taking the English language test on his behalf at that venue. Such a suggestion had never been previously raised in these proceedings and there was no evidence to support it. It appears on the face of it to be a speculative submission based upon the fact there was strong evidence of widespread fraud at Colwell College in Leicester and the respondent's belief that the appellant had used deception when taking his English language test at a College with a similar name.

18. Although the burden falls upon the Secretary of State at this stage we have considered all the available evidence regarding this point provided by the appellant. The first appellant has throughout these proceedings maintained he

sat his test at Colwell College, East Aldgate which is near to his home in London. This was clearly his position in his initial interview of 8 September 2015 in which the appellant was specifically asked why he picked that particular test centre. His reply was *“When I was studying in the college in Aldgate East area, same area it was College so knew areas very well and it was one bus ride from my home to Aldgate East.”*

19. The appellant has been consistent in maintaining this stance throughout the First-Tier Tribunal proceedings and it was noted by the Upper Tribunal in the error of law finding at [15]:

*“The issue regarding the venue at which Mr Islam took the English language test is a matter that was an issue before the First-tier Tribunal. Mr Islam was interviewed as part of the application process on the 8 September 2015. Mr Islam was asked which test centre he took the test at and why he picked that particular test centre. His reply was because he studied at a college in Aldgate East in London and that it was only one bus ride away from his home to Aldgate East. Mr Islam confirmed the purpose of sitting the test was in relation to his application for a Tier 1 (Entrepreneur) Visa. The Judge also records in the determination under challenge Mr Islam’s evidence that he took the test at a test centre in London Aldgate East [7]. It does not appear to be disputed that this is the centre at which the relevant test was taken. Mr Lindsay did not suggest otherwise.”*

20. The appellant also sought to rely upon evidence from other sources to support his claim that Colwell College Aldgate East existed. This includes the decision of the Court of Appeal in *Ahsan and Others* [2017] EWCA Civ 2009. Mr Knafler also represented the lead appellant, Nabeel Ahsan, in that case. At [135] when setting out the facts and procedural history it is recorded:

*“135. NA is a Pakistani national, now aged 30. He came to this country on 23 August 2006 on a student visa valid until 30 November 2007. His leave was extended on various occasions. In support of applications made on 2 October 2012 and 26 July 2013 he submitted a TOEIC test certificate issued by Colwell College in London on the basis of a test taken on 27 June 2012. The most recent grant of leave was to 19 June 2015.”*

21. Mr Knafler was asked whether the Secretary of State had taken the point that Colwell College London did not exist. He confirmed such point had not been taken.
22. The appellant also relies upon an unreported decision of the First-Tier Tribunal, HU/12213/2017, dated 30 August 2018. This is the determination of Mr Mohammed Fakhruddin Hassan who attended on the appellant’s behalf as a witness. The judge in that case noted Mr Hassan’s assertion has always been that he took his test at Colwell College in London yet the Secretary of State, again, sought to rely upon evidence concerning Colwell College in Leicester rather than the college in London that Mr Hassan said he attended. Mr Hassan’s test results from ETS were recorded as “questionable” and the judge therefore found that the respondent had not discharged the evidential burden of establishing fraud.
23. There are other similar unreported decisions of challenges that have come before the Upper Tribunal where the test is said to have been taken at the college in London. Although Mr Lindsay submitted in his skeleton argument that the fact there were a number of decisions where appellants claimed to

- have studied at this college and who succeeded on appeal this did not establish that such a college existed, the weight of evidence and lack of anything from the respondent to prove her assertion that it did not exist is persuasive.
24. Mr Lindsay submitted that there would have been a volume of evidence available on the Internet to establish the existence of the college. Searches by all involved in the appeal had not provided any such evidence. Mr Lindsay referred to historic information being available in an archive section of the Internet but did not provide evidence that the same could be accessed or any successful search could have been made. There is merit in Mr Knafler's submission that if such facility existed it was accessible to both the appellant and respondent yet neither appears to have provided any evidence relating to the same.
  25. There was some discussion during the course of the hearing as to where the burden of proof lay in relation to this appeal. As can be seen above a number of discrete issues arose upon which findings are required to be made. The approach we have taken is that it is the appellant who asserted that he took the English language test at Colwell College Aldgate East and that the burden of establishing its existence was therefore initially upon him. We are satisfied in light of the evidence above that, on the balance of probabilities, the appellant has adduced sufficient evidence to establish that the college did exist at the time he took the test in question, particularly in light of lack of any evidence from the respondent to establish otherwise.
  26. The next issue to be considered is whether the respondent has discharged the evidential burden upon her to establish fraud. Whilst it is accepted the respondent received information from ETS referred to by Hillary Rackstraw and in the refusal letter classifying the appellant's test results as 'invalid', the result has been included within the list of those results specifically stated by Hillary Rackstraw to have been taken on the same day at the same test centre. As there is no evidence that all those test results referred to in annex were taken at the same college, and in light of the evidence relied upon by the respondent relates to Colwell College in Leicester, we are not satisfied in this case that the respondent has discharged the initial evidential burden. There is considerable evidence in the public domain now of issues that arise in relation to the ETS assessment. Although it is an accurate means of assessment it is not fool proof. We find the respondent has not established that we can put sufficient weight upon her evidence in relation to the appellant's test to find that she has discharged the evidential burden of establishing the use of fraud/deception. The foundation of such an assertion is fraught with so many evidential problems that we find, on the facts of this case, that no other conclusion is available to us.
  27. As the Secretary of State has failed to discharge the initial evidential burden we find she has failed to establish the refusal pursuant to paragraphs 322(2) and (5) of the Immigration Rules is sustainable in relation to the ETS issue.



The second question

28. The second question requires us to consider that if it had been established that the appellant had not used fraud whether the appeal should be allowed.
29. We focus on the first appellant above as the second appellant is his dependent whose claim stands or falls with his.
30. The refusal letter, in addition to the element of fraud, also indicated the appellant was unable to succeed under paragraph 322(1C)(iv) as a result of his being cautioned on 28 September 2015. This provision of the Rule states:
- ‘(1C) where the person is seeking indefinite leave to enter or remain:
- (i) they have been convicted of an offence for which they have been sentenced to imprisonment for at least 4 years; or
- (ii) they have been convicted of an offence for which they have been sentenced to imprisonment for at least 12 months but less than 4 years, unless a period of 15 years has passed since the end of the sentence; or
- (iii) they have been convicted of an offence for which they have been sentenced to imprisonment for less than 12 months, unless a period of 7 years has passed since the end of the sentence; or
- (iv) they have, within the 24 months prior to the date on which the application is decided, been convicted of or admitted an offence for which they have received a non-custodial sentence or other out of court disposal that is recorded on their criminal record.’
31. Mr Knafler submitted that, although a new matter, at the date of this hearing the 24-month period had expired meaning if a fresh application was made this provision would no longer be applicable. Mr Lindsay raised no issue in response to such submission or objection to this fact being taken into account.
32. It is not disputed the appellants have family life with each other in the United Kingdom and a private life. It was not disputed that pursuant to article 8 ECHR and applying a structured approach to assessing the merits of the evidence as set out in Razgar, the issue is the proportionality of the decision. It is not disputed that the burden of establishing a decision is proportionate falls upon the Secretary of State.
33. It is clear from the documentary evidence that the main concern in the minds of the original decision-maker was the use of fraud/deception in the English language test. Findings made above show this aspect in the original refusal is unsustainable. Mr Knafler standpoint has always been that should the appellant succeed on this ground he should succeed pursuant to article 8 ECHR too. Mr Lindsay in his submissions did not suggest otherwise and, in particular, did not advance sufficient argument to establish that the respondent’s decision is proportionate. In light of the above we conclude that both appellants are entitled to succeed with their appeals.
34. In relation to Mr Knafler’s ancillary argument regarding the duty of candour owed by the respondent in statutory appeals, it was conceded in his skeleton argument that this issue has already been decided by the Upper Tribunal and we are, therefore, not required to make any further findings on this point. *Miah (interviewer’s comments: disclosure: fairness) [2014] UKUT 00515 (IAC) at*

[20 – 22] and *MST (disclosure – restrictions – implied undertaking) [2016] UKUT 00337 (IAC)* at [19 – 20] considered.

**Decision**

35. **We remake the decision as follows. These appeals are allowed.**

Anonymity.

36. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

We make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....  
Upper Tribunal Judge Hanson

Dated the 11 October 2019