



Case No: C8/2016/0245

**Neutral Citation Number: [2018] EWCA 3031 Civ**  
**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE UPPER TRIBUNAL**  
**(IMMIGRATION AND ASYLUM CHAMBER)**

The Royal Courts of Justice  
Strand, London, WC2A 2LL

Friday, 2 March 2018

**Before:**  
**LORD JUSTICE DAVIS**

**Between:**

**PALASH**

**Applicant**

**- and -**

**SECRETARY OF STATE FOR THE HOME**  
**DEPARTMENT**

**Respondent**

Transcript of Epiq Europe Ltd 165 Fleet Street, London, EC4A 2DY  
Tel No: 020 7404 1400 Email: [civil@epiqglobal.co.uk](mailto:civil@epiqglobal.co.uk) (Official Shorthand Writers to the Court)

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**Mr M Slater** (instructed by COAP) appeared on behalf of the **Applicant**

**Mr S Singh QC** (instructed by the Government Legal Department) appeared on behalf of the **Respondent**

**Judgment**  
**(Approved)**  
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**LORD JUSTICE DAVIS:**

1. There are before me two separate applications on behalf of Mr Kader and on behalf of Mr Palash seeking permission to appeal. Both cases have this link in common. They involve the now notorious kind of case in which an ETS TOEIC was issued. It has since been established that many of those certificates have been issued in circumstances of fraud where proxies have been used to take the English language test, and the individual purportedly passing the test has done no such thing. Initially the Home Office had relied on what might be called generic evidence produced to the tribunals to support assertions of fraud. That however became the subject of comment by the Court of Appeal in subsequent cases including the case of *Qadir* [2016] EWCA Civ 1167 and other such cases. In the instant case, so far as Mr Kader is concerned, when this point was raised he put in a witness statement for the purposes of his appeal to the Upper Tribunal, where he specifically and in terms and in detail explained that he had taken this particular test and he had passed it. He also explained much of his background, which includes him completing a Master's degree at Anglia Ruskin University and other such matters which would tend to support a proposition that he had good English language and would not need to engage in deception.
2. When the matter came before the First-tier Tribunal, the Home Office appears not to have wished to cross-examine Mr Kader on his statement. At all events, the First-tier Tribunal judge records Mr Kader being present, but "did not give evidence". The First-tier Tribunal judge was clearly intending to indicate that he had not given oral evidence. Mr Singh QC appearing for the Home Office today (although he had not appeared below) accepts that the witness statement had been put in for the purposes of the appeal. The First-tier Tribunal judge then refers to an explanatory statement which had

been put in, and it appears that in effect the Home Office was relying on the look-up which has been identified in previous evidence in previous cases. The judge in this case said that in coming to his decision he had taken into account the evidence before him, both from the appellant and from the Home Office. The judge amongst other things said, "Deception on behalf of the appellant had not been particularised".

Although that was to be criticised by the Upper Tribunal and to an extent by Mr Singh, one can see precisely what the judge was getting at. What he was saying was (as he records) that the evidence was both of the generic kind and also it is fair to say more particularly of the look-up kind, but there is no other itemised evidence to show that this appellant had not attended the relevant centre and passed his exam. The judge of course had the appellant's witness statement, unchallenged, which stated he had attended and passed the exam. The judge also properly referred to the interview, which records not only the appellant appearing to respond to questions in fluent and articulate English but also giving an account which entirely accorded with what he was to say in his witness statement. In those circumstances it is very hard indeed to see how this was anything other than a decision on the facts which was open to the First-tier Tribunal judge.

3. The Upper Tribunal judge, however, took a different view, stating that the First-tier Tribunal judge had failed entirely to provide adequate reasons for his finding as he did and in rejecting as invalid the look-up evidence produced. With all respect, I find it extremely difficult to comprehend that. The First-tier Tribunal on the face of it had certainly given reasons for his finding to the contrary. Those reasons were that he had accepted the evidence of the appellant. Amongst other things, the Upper Tribunal judge had said, "There is no other credible evidence provided by the appellant to

challenge the respondent's case". That is very difficult to comprehend. The appellant had given an amount of evidence not even challenged as not credible below to support what he said. In those circumstances, I think it well arguable that the Upper Tribunal judge erred in deciding that there was an error of law in the First-tier Tribunal judge's decision and in consequence erred in setting aside that decision and remaking it.

4. Mr Singh QC has submitted that this is a second appeals test. He is right in that. However, I think I should adopt a moderated approach given that the Upper Tribunal judge departed from the First-tier Tribunal judge. But, in any event, in my view, where there are grounds for thinking that something has gone very seriously wrong in the determination of the Upper Tribunal judge, the circumstances at any rate provide some other compelling reason for granting permission to appeal, and that is what I propose to do in the case of Mr Kader.
  
5. I turn then separately to the case of Mr Palash. He also had put in detailed evidence before the First-tier Tribunal stating that he had indeed attended for the purposes of taking the test and had indeed passed it. He gave oral evidence before the First-tier Tribunal judge. Again, the Home Office was relying on what might be called the generic evidence from Mr Millington and Ms Collings, which has featured so prominently in many of these cases. In addition, a statement from Mr Harold had been put in which in effect relied upon the look-up evidence relating to this particular applicant. It was pointed out by the first-tier Tribunal judge in that case that neither Mr Harold nor Mr Millington or Ms Collings was available to be cross-examined on their statements.

6. The First-tier Tribunal judge in the case of Mr Palash referred to the fact that he had been awarded various degrees from universities in England and Wales and currently was studying a Master of Business of Administration at Cardiff Metropolitan University. All that had been done by use of the English language. The judge further said this: "Before me he appeared and gave evidence, and his English was fluent". He said that at the time of the test his English had been fluent then, and there had been no need for him to employ deception, nor had he done so. He further gave details as to the circumstances in which he took the test, identifying the date and location and the circumstances of the test. The judge then said this:

"The appellant appeared to be a very credible individual. He asserted he has never committed any criminal offence and had not submitted any false documentation. I believe that the cancellation of this continued leave to remain on such grounds has been absolutely without any basis, and such cancellation is fundamentally flawed."  
(Quote unchecked)

7. The First-tier Tribunal judge went on to give what are perhaps somewhat garbled self-directions on the burden and standard of proof, but overall, in spirit, he got it right as it seems to me.
8. Those being clear findings of fact, he having heard the evidence, one then considers on what basis the Upper Tribunal judge felt entitled to interfere with the decision of the First-tier Tribunal as being on a point of law. It seems to me that, at least arguably, one can identify no proper reasons, with all respect, given by the deputy Upper Tribunal judge. In effect the deputy Upper Tribunal judge indicated that precedence, as it were, should be given to the generic and look-up evidence, and this had not been rebutted by evidence from the appellant. However, when one sees what actually happened before

the First-tier Tribunal judge, that simply is not right; and it is arguable that the Upper Tribunal judge had simply substituted his own view of the matter for that of the First-tier Tribunal who had actually heard the evidence.

9. Mr Singh did seek to say that this case (as indeed the previous case of Kader) involved some potential misapplication by the First-tier Tribunal of the decision of the Court of Appeal in *Secretary of State for the Home Department v Shehzad and Chowdhury* [2016] EWCA Civ 615. I do not think it does anything of the kind. The First-tier Tribunal judges approached the evidence in the correct way. Accordingly, in the case of Mr Palash also, and I bear in mind that he too is a second appeals test case, I think there is a compelling other reason to grant permission to appeal. It seems to me that there is concern here that a real injustice otherwise may have occurred. So in his case too I grant permission.

**Order:** Application granted