IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42398/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 November 2015 and 8 January 2016	**On 21 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUHAMMAD SAQLAIN HAIDER
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Appellant:	Mr I Jarvis (24.11.15) and Mr T. Melvin (08.01.16), Senior Presenting Officers
For the Respondent/Claimant:	Ms Malhotra, Counsel, instructed by Law & Lawyers Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Youngerwood sitting at Taylor House on 28 April 2015) allowing the claimant's appeal against the decision of a Border Force officer to cancel at port the claimant's existing leave to remain as a student and to refuse him leave to enter. The stated justification of the decision was that, on the basis of the information

provided by Educational Testing Service (ETS), his test of English for international communication (TOEIC) test on 16 April 2013 was taken by proxy and therefore his certificate was deemed invalid. He needed the certificate to apply for further leave to remain in the United Kingdom as a student, and it was considered that he had thereby employed false representations and deception for the purposes of obtaining such leave. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

The Initial Refusal Permission

2. It is convenient to refer to the reasons given for initially refusing permission to appeal to the Upper Tribunal as they provide a helpful introduction to the issues which lie at the heart of this appeal. On 16 July 2015 First-tier Tribunal Judge Osborne refused the Secretary of State permission to appeal for the following reasons:

> "1. The grounds seek permission to appeal a decision and reasons of First-tier Tribunal Judge Youngerwood who in a decision and reasons promulgated 14 May 2015 allowed the Appellant's appeal against the Respondent's decision to refuse leave to enter the UK under the Immigration Rules.
>
> 2. The grounds assert that the Judge erred in law in failing to give adequate reasons for findings on a material matter. The Judge failed to reason the finding that the Respondent has totally failed to provide clear evidence as to what tests took place in relation to this particular Appellant, making it impossible to judge the reliability of any such tests in the circumstances. The Respondent provided at appeal a bundle of documents in support of the allegation (in respect of paragraph 321A Immigration Rules). Additionally witness statements and an email from ETS Task Force dated 10 September 2014 were adduced. In the light of the evidence it is clear that the Judge erred in the above findings. It is clear from the evidence that where ETS invalidates the test result, as in this case, it is because there is evidence of proxy test taking or impersonation. The Judge failed entirely to provide adequate reasons for finding to the contrary.
>
> 3. In a careful and forensically nuanced and well-reasoned determination the Judge set out the pertinent issues, law and evidence relating to the facts of the appeal. In appeals of this nature it is the task of the Judge to make findings of fact on the basis of the evidence and to provide adequately clear reasons for those findings. That is precisely what the Judge did. The Judge scrutinised the evidence of Peter Millington and Rebecca Collings. If the whole decision and reasons is read and given full context, the Judge's finding at [29] is better understood. The Judge properly and adequately set out the reasons for his findings at [24, 25, 26, 27 and 28]. When the contents of those paragraphs are given their full effect, the meaning of [29] is adequately clear."

The Eventual Grant of Permission

3. On a renewed application to the Upper Tribunal, Upper Tribunal Judge Chalkley granted permission for the following reasons:

"I think that it *may* be possible that the judge has erred by failing to properly understand and appreciate the evidence of the two witnesses."

The Hearing Before, and the Decision of, the First-tier Tribunal

4. Both parties were represented before Judge Youngerwood, and the judge received oral evidence from the claimant. He confirmed attending the test centre on 16 April 2013 and taking the speaking and writing tests, with a two hour break, before then taking the listening test. He stated he had to show his photograph identification at the centre and that photographs were taken of him there. He left the test centre in the evening. In cross-examination, he stated he did not have any evidence of CCTV footage. There were a total of some 60 candidates taking the exams, in three rooms, and eighteen of those were in the room he was in. He had chosen the test centre because it was close to his home. He had not personally gone to ETS after the cancellation of his leave to question the allegations. He had returned to the UK in October 2014 when he was stopped, and ETS had now closed. He did not question the allegation with the governing body. His current two year course had started in March 2014.

5. In his subsequent decision, the judge set out the evidence, and the competing cases of the claimant and the Secretary of State, in considerable detail, before going on to state his findings at paragraphs [22] onwards. I reproduce these findings below:

> "22. This appeal was listed as a 'float' and, frankly, should never have been so categorised. There were complicated and difficult factual issues to be resolved and whilst, in the event, I allowed some time for consideration and further inquiries to be made, this was not an ideal solution.
>
> 23. One point made, in her submissions, by Ms Malhotra can be fairly easily dealt with. She referred to the evidence, at paragraph 29 of the witness Rebecca Collings, to raise the possibility that the appellant's leave had been cancelled due to suspicion and suggestion only, as some candidates had been listed as 'questionable'. However, that assertion is not made out. It is clear from the spreadsheets provided before me that the appellant was listed as 'invalid', and, therefore, the assertion was that testing had been carried out and the view taken that there had been abuse in the form of a proxy.
>
> 24. The use of generic statements, as in this case, is not uncommon in appeals before this Tribunal, especially where there are allegations of widespread abuse in particular testing centres, or, in general, over many testing centres. As stated above, the appellant is clearly identified as having been the subject of testing and a conclusion by ETS that he has used abuse to obtain his TOEIC result in 2013. Without knowing the result of the judicial review proceedings there is, on the face of it, sufficient evidence before me to assess that the testing quality, based on biometric voice recognition, is reliable.
>
> 25. However, however complicated the process used to undertake testing, at the end of the day, this Tribunal must be in a position to know what testing was carried out in relation to the particular appellant before it, and to then assess the reliability of that testing. What can certainly be inferred is that voice recognition samples were obtained, and, therefore, were tested, based on the person who took the speaking and reading tests at the centre on the date in question, on 16

April 2013. During the course of the hearing and submissions, I invited Ms Choudry to address me on an issue, which appeared to be absolutely vital – namely what other sample or samples were checked to justify the result. Clearly, any other samples checked, as with a fingerprint check, must be proven to be that of the appellant. Notwithstanding her best efforts, and, possibly, affected by the fact that this was a float case, she was unable to do more than submit that the tests must have been based on samples relating to the suspect. However, having again looked at the written evidence before me, I am still totally unaware of what samples, identified as coming from the appellant, were checked with the voice samples clearly obtainable from the tests taken on 16 April 2013. The appellant has confirmed that he has taken two other tests, one in Lahore, and one subsequently in 2014. However, unless I have missed a very obvious point, those could not be the sources of the samples tested, because Mr Millington in his witness statement, makes it clear (paragraph 19) that the individual electronic files transmitted and stored to or by ETS are in relation to tests 'administered in the UK' – so that this would not relate to a test taken in Pakistan or, so it seems to me, in relation to the subsequent IELTS test, taken on 15 March 2014, because that test was not administered by ETS.

26. Whether I am right or wrong in surmising what other sample(s) were used to conclude that the appellant had used a proxy, the simple fact remains that, nowhere in the statements, is it plainly and simply stated, what other samples, clearly identified in relation to the appellant, were used. If other samples were not used, then, again, the basis of the conclusion that a proxy had been used is simply not stated. This is simply not good enough. The burden of proof is on the respondent and, given the consequences for an appellant in relation to their educational progress, the burden of proof must be strictly complied with. I cannot see any practical reason whereby, the most complicated generic statement or statements, cannot be accompanied, or include, in clear terms, the basis on which the individual appellant, whose appeal is being dealt with, was assessed to have used a proxy, if that is the allegation.

27. Quite apart from my concerns about the documentation provided before me, the respondent has not answered the assertion, whether true or not, raised in the appeal grounds, that there was a CCTV recording of him at the actual premises when he took the test.

28. The fact that the appellant has taken previous and subsequent English Language tests, whilst indicative of his ability to speak English, which he did before me at the appeal, does not necessarily mean that a proxy could not have been used, whether because of a lack of confidence or for convenience. All the above matters emphasise the importance of having clear evidence of what samples were used to conclude that the appellant had used a proxy. It seems to me that that testing might have been easier than with others, for the obvious reason that the appellant spoke with a fairly frequent and marked stammer before me – this may possibly be in situations of stress, but that would likely also be a situation where this appellant took a reading or speaking test.

29. At the end of the day, because of the reasons provided above, the respondent in my view has totally failed to provide clear evidence as to what tests took place in relation to this particular appellant, making it impossible to judge the reliability of any such tests, in such circumstances."

The Error of Law Hearing

6. At the hearing before me to determine whether an error of law was made out, Mr Jarvis directed my attention to the passages in the witness statements of Mr Millington and Ms Collings on which he particularly relied. Ms Malhotra referred me to **Gazi v Secretary of State for the Home Department (ETS – judicial review) IJR [2015] UKUT 00327 (IAC)** and to **R (Ali and Mehmood) v SSHD [2015] EWCA Civ 744**. She submitted that the judge had rightly considered the particular circumstances of the claimant, and if he had misunderstood the Secretary of State's evidence, the error was not material. He had still reached a decision that was reasonably open to him on the totality of the evidence.

7. I found that an error of law was made out, and gave my reasons for so finding in short form, with written reasons to follow. The parties agreed that there should be a further hearing before me to remake the decision, and it was provisionally agreed (subject to listing) that the hearing would be at the beginning of January 2016.

Reasons for Finding an Error of Law

8. Giving the leading judgment in the **Ali and Mehmood** case, Beatson LJ said at paragraph [24] that in February 2014 the television programme Panorama revealed, using covert recording, that there was widespread fraud in the taking of language tests, in particular by the use of proxy test takers. As a result of this, ETS reviewed all its tests. It did so using computerised voice recognition software and two reviews by anti-fraud staff trained in voice recognition. ETS concluded that thousands of tests, including Mr Ali's test, had not been taken by the person who was named on the certificate but by another person.

9. At paragraph [25], Beatson LJ noted that the Secretary of State relied on the witness statements, both dated 23 June 2014, of Rebecca Collings and Peter Millington, which had originally been filed in proceedings brought by Zaheer Hussain Mohammed, and which had subsequently been relied on in all cases in defence of challenges to removal decisions on the ground of deception in language testing and TOEIC certificates issued by ETS. Beatson LJ continued in paragraph [26]:

> "These statements describe the way anti-fraud measures (particularly online verification systems) were introduced, and the steps taken following the 'Panorama' programme and the Home Office's contact with ETS, and why the Home Office accepted that, where ETS had cancelled a test score because of impersonation and proxy test taking, that test score had been obtained by deception. Mr Millington stated that ETS's statistics bore out the underlying reliability of the voice biometrics technology, and the reason the Home Office considered that, where ETS identifies positive voice matches for two candidates with different names, it is because one person has sat the speaking and writing exam for both candidates. That, he stated, is clear evidence that both candidates have fraudulently obtained their TOEIC certificate and employed deception in their application for leave to remain. In **R (Gazi) v Secretary of State for the Home Department (ETS – judicial review) [2015] UKUT 00327 (IAC)** at 6 and 9, the President of the Immigration and Asylum Chamber of the Upper Tribunal (UTIAC) described these as 'generic' witness statements, because they

> did not show the exact reason why ETS invalidated the certificate of a particular person or provide evidence relating to the personal circumstances of an individual."

10. One of the issues in **Gazi** was whether the Secretary of State's reliance on the generic evidence of Mr Millington and Ms Collings was compliant with the following published guidance, which is quoted at paragraph [28] of **Gazi**:

> "The evidence must always prove to a high degree of probability that deception had been used to gain the leave, whether or not an admission of deception is made. The onus – as always in such situations – is on the officer making the assertion to prove his case."

The President said as follows at paragraph [35]:

> "In my view, taking into account Chapter 50 of the EIG, the respondent's evidence, summarised in Chapter II above, was sufficient to warrant the assessment that the applicant's TOEIC had been procured by deception and, thus, provided an adequate foundation for the decision made under Section 10 of the 1999 Act. True it is that, at this remove and with the benefit of Dr Harrison's report, there may be grounds for contending that said evidence is not infallible, and there may be sufficient material for a lively debate about its various ingredients ... For the purpose of disposing of this ground of challenge and bearing in mind that the jurisdiction being exercised is one of supervisory review rather than merits appeal, it suffices for this Tribunal to be satisfied that the evidence upon which the impugned decision was made has the hallmarks of care, thoroughness, underlying expertise and sufficient reliability. The cornerstone of the applicant's case is that the evidence was insufficient for this purpose. I reject this challenge."

11. The claimant before me was pursuing a merits-based appeal, and it was open to the First-tier Tribunal judge to find on the particular facts of his case that the Secretary of State had not discharged the burden of proving that the TOEIC certificate had not been obtained through the use of a proxy text taker, and thus the claimant's leave to remain as a student had not been procured by deception. But the reasoning of the judge in paragraphs [25] and [26] shows that he misunderstood the evidence relied on by the Secretary of State. As summarised by Beatson LJ in the **Ali and Mehmood** case, the methodology used to identify the use of a proxy test taker in any given case is to compare voice recordings to see if there is an identical match. This involves comparing the voice recording for Candidate A with voice recordings made on other occasions. Unless Candidate A has sat the same language test on two separate occasions, there should not be another recording with an identical match to Candidate A's voice.

12. Matthew Harold, who has been employed by the Home Office as a senior caseworker since February 2014, made a witness statement with the claimant's appeal reference on it (as the judge noted at paragraph 10 of his decision) and he thus gave evidence which was specific to the claimant. Mr Harold confirmed that the claimant was one of many individuals in respect of whom leave to enter was refused by the Home Office following the invalidation of his English language test certificate by ETS. He confirmed that the test results had been cancelled by ETS because its own analyses indicated the test result had been obtained by the use of a proxy tester. This was

notified by way of an entry on a spreadsheet copy, which was attached to his statement as Annex A.

13. The judge found that this spreadsheet, and a further spreadsheet produced during the course of the appeal, clearly identified the claimant's test result, following the purported test on 16 April 2013, as being invalid.

14. As stated by the judge at the beginning of paragraph [25], what can certainly be inferred from that representation by ETS was that voice recognition samples were obtained, and were therefore tested, based on the person who took the speaking and reading tests at the centre on the date in question.

15. What the judge apparently failed to appreciate was that the sample of the candidate purporting to be the claimant was checked against numerous other samples of other candidates who did not purport to be him, in order to see whether there was a match. Instead, the judge proceeded on the wholly erroneous premise that the voice recording which purported to relate to the claimant was checked, or should have been checked, against other identifiable recordings of the claimant's voice, which were known to be authentic and reliable.

16. The judge thus criticises the Secretary of State's evidence for a non-existent defect, as the evidence does not purport to be based on identifiable discrepancies between the candidate's actual voice (as reliably recorded on one or more other occasions) and the voice of the speaker who sat the language test.

17. As a consequence, the judge has not given adequate reasons for holding that the Secretary of State's evidence against the claimant, which included not only the generic evidence of Mr Millington and Ms Collings, but also the specific evidence of Mr Harold, did not constitute clear prima facie evidence that the claimant had used a proxy. By the same token, the judge was wrong to hold that the failure to state what other samples of the claimant's voice had been used to compare with the sample taken on 16 April 2013 made it impossible for him to judge the reliability of the exercise which had been carried out in respect of the claimant. On the contrary, as established inter alia in **Gazi**, the generic evidence relied on by the Secretary of State in these cases is prima facie reliable, and this should have been the judge's starting point.

18. Accordingly, the decision of the First-tier Tribunal is vitiated by a material error of law, such that it must be set aside and remade.

The Resumed Hearing on 8 January 2016

19. The appellant was called as a witness, and he adopted as his evidence-in-chief the same witness statement which he had adopted before the First-tier Tribunal. In total he had attended three interviews conducted by Immigration Officers, "To determine my English language competency". He was told by the Immigration Officer that they were happy with his command of English. He had taken an IELTS test in Pakistan in order to obtain entry clearance to follow a level 5 course. In June 2003 he

applied for leave to remain in the UK to follow a level 6 course, and he wanted to take the IELTS test again. But there were no vacancies at the test centre, as they were fully booked. He checked on line with the website but the TOIEC was an alternative test that was acceptable to UKBA. He located a centre near where he lived to sit for the test.

20. After obtaining his TOEIC certificate, he completed his level 6 course. In April 2014 he wanted to progress to level 7. In his interview with his prospective new college, he sought to rely on his TOEIC certificate as evidence of his English language competency. But he was told to take another English test, as the Home Office were not accepting TOEIC certificates. He did a second IELTS test, and passed it with good grades.

21. In his oral evidence, he had confirmed that he had taken the test at the Premier Language Training Centre in Barking on 16 April 2013. He attended at 8am in the morning, when he produced his ID. He initially said they started at 9. He then said they started at 9.30 with a speaking test. He indicated that the speaking and writing test had lasted some two hours altogether. He clarified that the speaking test had taken about half an hour. He said it might have been as short as eighteen minutes. It involved looking at pictures on a screen and explaining what he could see. There were ten to fifteen others in the room. They each had headphones, and a microphone was installed in each of the headphone sets. There was a break between the speaking and writing tests. They brought him a keyboard, and they gave them "an essay" shown on the computer screen to explain. There were actually two different topics which he had to address. This exercise took fifteen to twenty minutes. He had a two hour break. They gave him the option of doing the remainder of the test the following day, or straight after the two hour break, or in the evening. He chose to do it as soon as possible. He had gone out to eat something during the two hour break.

22. The next series of tests started between 1 and 2pm. Neither of the two remaining tests, reading and listening, involved the use of a computer or headphones. The reading test involved reading a handout, and then answering questions which were printed on the handout. He wrote out the answers to the questions in manuscript. It took 40 to 45 minutes, and there were 30 or 40 people in the room. The listening test also took about 45 minutes. They played a CD for everyone in the hall, and they gave them a sheet to write down the answers to the questions they were given.

23. In cross-examination, the appellant said that the test for the TOEIC certificate had cost him between £160 and £180. He could not remember the precise figure. He had not kept a receipt for the payment. He finished between 4 and 5pm. He could not recall the nature of the photographs that he was asked to explain for the purposes of the speaking test. He confirmed that the questions he was asked about the photographs which were shown on the screen were also on the screen.

24. It was put to him that at his interview at Gatwick he had told Immigration Officers that the first set of tests had taken two to three hours in the morning, and the second set of tests had taken two to three hours in the evening. He agreed that in fact the

second set of tests had taken place in the afternoon. His explanation was that he had just come off a long flight.

25. In re-examination, he agreed that the interview in question had taken place at Gatwick a week after his arrival. He had made a mistake. The second set of tests had taken place in the afternoon between 2 and 4.

26. In his closing submissions on behalf of the Secretary of State, Mr Melvin relied on the additional evidence that had been produced by Mr Jarvis at the previous hearing, which was a report by Detective Inspector Andrew Carter of the Immigration and Enforcement Criminal and Financial Investigation team dated 5 May 2012 about the Premier Language Training Centre in Barking. On the topic of the appellant's oral evidence, he submitted that the appellant had been unable to give a coherent explanation of the speaking test, and what it entailed. Furthermore, his account of what had taken place at the hearing centre during the day was at best vague.

27. In reply, Ms Malhotra submitted that the appellant had given a very detailed account of what the tests had entailed, and he had been very fluent. As had been highlighted by the expert evidence discussed in **Gazi**, there were flaws in the generic evidence relied on by the Secretary of State, and the consequences of a false positive were dire for someone such as the appellant. He was a bona fide student, and a vital link was missing in the Secretary of State's case, which was motive. He had no motive for using a proxy when he clearly had sufficient competency in English not to require the use of a proxy in order to acquire a TOEIC certificate. As the appellant could not gain access to the recordings on which the allegation of use of a proxy were based, the Tribunal was not the fairest forum for examining the allegation of dishonest use of a proxy.

Discussion and Findings on Remaking

28. In **The Queen (On the application Of Bijendra Giri) v Secretary of State [2015] EWCA Civ 784** Richards LJ reviewed two reported decisions of the Upper Tribunal on the issue of standard of proof at paragraph [35] onwards. The Upper Tribunal had been wrong in **JC (Part 9 HC 395 - burden of proof) China [2007] UKAIT 0027** to hold that the standard of proof in relation to a question of deception will be at the higher end of the spectrum of balance of probability. The law had been correctly stated in **NA and Others (Cambridge College of Learning) Pakistan [2009] UKAIT 0031**. The seriousness of the consequences did not require a different standard of proof, citing Lord Hoffman in **Re B Children [2008] UKHL 35** where he said at paragraph [15]:

> "... there is only one rule of law, and only the occurrence of the fact and issue must be proved to be more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."

29. Detective Inspector Andrew Carter explains that Project Façade is a nationwide Home Office criminal enquiry into the abuse of the TOEIC exam. As part of this

enquiry, 21 separate criminal investigations have taken place into specific test centres which have been prioritised according to a number of factors, including high test volumes, audits that highlighted cheating and other intelligence and information indicated widespread abuse of the exam. The criminal enquiry at Premier Language Training Centre in Barking has revealed that between 20 May 2012 and 5 February 2014, Premier Language undertook 5,055 TOEIC speaking and writing tests at which ETS identified the following:

- Invalid 3,780
- Questionable 1,275
- Not withdrawn (no evidence of invalidity) 0
- Percentage invalid 75%

30. The following information, although not covering the entire testing period, was provided in support of and to corroborate the analysis completed by ETS to show the "organised and widespread" abuse of the TOEIC that took place at this test centre. On 18 September 2013 ETS carried out an audit inspection during which a test centre employee admitted that cheating took place. Documents relating to TOEIC exams were discovered during a search on 16 June 2014. They list the tests taken between 19 November 2013 to 5 February 2014 that involved 167 candidates, all of which the Home Office were satisfied were fraudulent. Alongside the names of the candidates were the names of "pilots" (imposters) who sat the test on behalf of the candidates. There were also the names of agents who were suspected as acting as the middle men in the deception. Analysis of telecom devices seized from test centre employees revealed numerous SMS messages discussing the use of "pilots".

31. Detective Inspector Carter concludes by saying this is an ongoing criminal investigation, and revealing further information may prejudice future prosecutions.

32. As Ms Malhotra submits, the appellant is plainly not one of the 167 candidates whose name was found on a list next to the name of a pilot who sat the test on his behalf. The period to which this list relates started some months after the date when the appellant claims to have attended the test centre to sit the test. However, the appellant purportedly took the test in the period between 20 March 2012 and 5 February 2014 in respect of which 75% of tests were assessed as invalid, and the remainder were assessed as questionable. This is consistent with there being organised and widespread abuse in place at the test centre, with the connivance of test centre employees. Supplementary evidence of widespread abuse has been obtained in the form of an admission from a test centre employee that cheating took place, and the discovery of the highly incriminating list referred to in paragraph 14 of the report.

33. As was held by the President in the case of **Gazi** at paragraph [35], "With the benefit of Dr Harrison's report, there may be grounds for contending the [generic] evidence is not infallible". But the Secretary of State's evidence does not need to be infallible. The generic evidence relied on before the First-tier Tribunal, taken in conjunction

with the additional evidence now relied on which is specific to the Premier Language Training Centre, discloses a strong prima facie case against the appellant that a proxy sat the speaking element of the test on his behalf.

34. The explanatory rubric on the back of the appellant's first IELTS test explains Bands 5 and 6 as follows. Band 5 corresponds to a modest user, who has a partial command of the language, coping with overall meaning in most situations, though is likely to make many mistakes. They should be able to handle basic communication in own field. Band 6 is a competent user, who has generally effective command of the language, despite some inaccuracies, "inappropriacies" and misunderstandings. Can usually understand fairly complex language, particularly in familiar situations.

35. The appellant took his first IELTS test on 19 November 2010. He achieved scores of 6.0 listening and reading, and scores of 5.0 in writing and speaking, giving him an overall band score of 5.5.

36. The appellant took his second IELTS test on 27 March 2014, in which he showed a modest improvement from his earlier test scores. In each category, he had improved his grade by 0.5. In speaking, he scored 5.5. His overall band score was 6.0.

37. The IELTS scoring system has three higher bands, Bands 7 to 9. Band 7 is a good user, Band 8 is a very good user, and Band 9 is an expert user.

38. Although the TOEIC scoring system is different from that of the IELTS, it is possible to draw some meaningful comparisons from the explanatory rubric in the TOEIC official score report. The highest score that the appellant could have obtained for speaking was 200. He was given a score of 190, and assessed as having a proficiency level of 8, which is the highest proficiency level available under the TOEIC scoring system. The explanatory rubric states as follows about the significance of a level 8 scale score range between 190 and 200:

> 'Typically, test takers at level 8 can create connected, sustained discourse appropriate to the typical workplace. When they express opinions or respond to complicated requests, their speech is highly intelligible. Their use of basic and complex grammar is good and their use of vocabulary is accurate and precise.
>
> Test takers at level 8 can also use spoken language to answer questions and give basic information.
>
> Their pronunciation and intonation and stress are at all times highly intelligible.'

39. On the face of it, the level of proficiency that the appellant purportedly displayed in the TOEIC test is significantly greater than that which he displayed in his second IELTS test, eleven months later. Furthermore, his account of what the speaking test allegedly involved does not correlate with what he is supposed to have been tested on, according to the explanatory rubric. It is very difficult to see from his account how he displayed proficiency in creating connected, sustained discourse appropriate

for the typical workplace, or how he displayed highly intelligible speech when expressing opinions or responding to complicated requests.

40. In addition, the explanatory rubric makes specific reference to reading aloud. The certificate states that when reading aloud, the appellant's pronunciation was highly intelligible. But his account of his testing did not involve any reading aloud. According to him, he was simply shown photographs and asked to respond to questions about these photographs that were written on the screen.

41. I accept that the appellant was being asked to recall details of a test he claimed to have sat some time ago, which placed him at a disadvantage. I also accept that the appellant had sufficient competency in the English language, including in speaking and writing, in order to be able to follow a course of study at level 7. So he did not need to cheat in order to demonstrate the required level of competency in the English language in order to continue his education in the UK as a student.

42. Nonetheless, having considered all the available evidence, I find that the Secretary of State has discharged the burden of proving that the appellant obtained his TOEIC certificate fraudulently, and therefore his appeal must be dismissed.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the appellant's appeal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson