



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/32735/2015
IA/32736/2015

THE IMMIGRATION ACTS

Heard at Field House
On 04 September 2017

Decision & Reasons Promulgated
On 15 September 2017

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SUNITA KHURANA
MANISH KHURANA

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr M. Iqbal, Counsel instructed by Addison & Khan Solicitors
For the respondent: Ms Z. Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first appellant ("the appellant") appealed against the respondent's decision dated 24 September 2015 to refuse leave to remain as a Tier 4 (General) Student Migrant with the second appellant (her husband) as her dependent. The respondent refused the application under the general grounds for refusal because it was alleged

that she used deception in the application for leave to remain because she produced a fraudulent English language certificate. The application was also refused under 'Attributes' because the Tier 4 sponsor licence was revoked and the Confirmation of Acceptance for Studies (CAS) was invalid.

2. The appellant appealed to the First-tier Tribunal. Her appeal was allowed but the Upper Tribunal subsequently set aside the decision in a decision promulgated on 03 July 2017 (annexed).
3. The appeal was listed for a resumed hearing to remake the decision. I heard evidence from the appellant and have considered the submissions made by both parties as well as the documentary evidence before the Upper Tribunal.

Decision and reasons

4. The burden of proof is on the respondent to show on the balance of probabilities that the TOEIC English language certificate issued by Educational Testing Services (ETS) was obtained by fraud and that the appellant therefore used deception in the application for leave to remain.

The respondent's evidence

5. I have considered whether the evidence produced by the respondent is sufficient to discharge the initial evidential burden of proof. The appellant say that she took more than one TOEIC test. The one that forms the basis of the decision is a test taken on 17 July 2012 (certificate no: 004420173403024). The respondent asserts that ETS has a record of the speaking test. Using voice verification software ETS confirmed that there was significant evidence to conclude that the certificate was fraudulently obtained by the use of a proxy test taker. ETS declared the test taken on 17 July 2012 as "Invalid". ETS declares a test as "Invalid" if evidence exists of proxy test taking or impersonation. ETS declares a test as "Questionable" if there is evidence of 'administrative irregularities', but not necessarily evidence of fraud or deception: see *R (Gazi) v SSHD (ETS – judicial review)* IJR [2015] UKUT 327.
6. The respondent has produced two copies of the 'Look-up tool', which is print out from a Home Office spreadsheet containing information from ETS and other information held by the Home Office: see *MA (ETS – TOEIC testing)* [2016] UKUR 00450 [15(ii)]. At the last hearing, Mr Iqbal pointed out discrepancies between the two print-outs, but I explained at [8-12] of the error of law decision why I did not consider those discrepancies affected the reliability of the information contained in the 'Look-up tool' print-outs. The core details relating to the date of the test, the test centre, the score, the certificate number and the invalidation of the test are consistent in both print-outs. The evidence is only produced to show what information the respondent received from ETS. The appellant does not dispute any of those details, save that she denies that deception was used, so it is unclear how or why Mr Iqbal considers the alleged discrepancies affect the reliability of the core piece of

information in the 'Look-up tool' print-outs, which is that ETS cancelled the test as "Invalid".

7. There is no direct information from ETS to show how the test result in this case was assessed or why it was then cancelled as "Invalid" because of evidence of a proxy test taker. The respondent relies on 'generic' evidence in the form of witness statements from Home Office officials, Rebecca Collings and Peter Millington, which were considered in some detail by the Tribunal in *SM & Qadir (ETS - Evidence - Burden of Proof)* [2016] UKUT 229. They outline general information about the investigation of widespread fraud following a Panorama programme aired in February 2014. Whilst the Tribunal outlined weaknesses in the evidence it concluded that the combination of evidence contained in the 'Look-up tool' and the 'generic statements' was sufficient to discharge the initial evidential burden of proof [67-68]. The Court of Appeal in *SSHD v Shehzad & Chowdhury* [2016] EWCA Civ 615 found the rejection by a First-tier Tribunal of the same combination of evidence as insufficient to discharge the initial evidential burden of proof amounted to an error of law [26].
8. In light of those decisions I find that the combination of the ETS 'Look-up tool' and the 'generic statements' is sufficient to shift the burden of proof to the appellant to provide an innocent explanation to the allegation. Before I move on to her evidence it is necessary to note that further evidence is produced by the respondent.
9. The respondent has produced an expert report by Professor Peter French dated 20 April 2016. He was instructed by the respondent following the Tribunal's decision in *SM & Qadir*. The report is 'generic' in the sense that it does not deal specifically with information or analysis relating to this case. Professor French is an expert in forensic speech science. He was asked to give an opinion on the reliability of the methodology used by ETS, and in particular, the likelihood of false positives being reported on voice analysis of test results. He considered the report produced by Dr Harrison, which had been considered by the Tribunal in *SM & Qadir*. Much of the report is quite technical, but Professor French concluded that the methods used would have resulted in substantially more false negative results than false positive results. It was not possible to establish a closely specified percentage of false positives. He estimated that the rate of false positive results was likely to be "substantially less than 1% after the process of assessment by trained listeners had been applied". This evidence forms part of a body of evidence, including Dr Harrison's evidence as outlined in *SM & Qadir*. It shows that the possibility of false positive results in assessing the use of a proxy test taker cannot be discounted. The number of false positives is difficult to assess, but it seems likely that the number of false positive results in the ETS assessment process is low.
10. The respondent has also produced evidence relating to the college where the appellant took the TOEIC test (Premier Language Training Centre in Barking). A 'Look-up tool' print-out for 17 July 2012 states that a total of 182 test were taken at the centre on that day. The rest of the information is difficult to decipher. The

information appears to suggest that 54 of the tests were deemed to be “Questionable” and 128 were deemed “Invalid” and that none were “Released”. The average scores for speaking were 176.4 and writing 138.8. It is unclear whether the information relates solely to results questioned by ETS because there is no information to suggest that any valid tests were taken that day. Given the lack of clarity regarding this information I find that I cannot place a great deal of weight on this print-out, taken alone, but in so far as it might suggest a high level of fraud and administrative irregularities at that test centre it is consistent with other evidence produced by the respondent.

11. The final piece of evidence relied upon by the respondent is a Home Office report by Project Façade, a criminal inquiry into abuse at TOEIC test centres. The report is dated 05 May 2015 and relates to Premier Language Training Centre (PLTC) in Barking. The report states that the criminal inquiry at PLTC revealed that between 20 March 2012 and 05 February 2014 PLTC undertook 5055 TOEIC speaking and writing tests of which ETS identified 3780 as “Invalid”, 1275 as “Questionable” and no tests were “Not withdrawn” i.e. there was no evidence of invalidity. This information appears to show that ETS withdrew all test results taken in that period as either “Invalid” or “Questionable”. The percentage of test results that were deemed “Invalid” indicating evidence of fraud was 75%. The test taken by the appellant on 17 July 2012 fell within that period. Her test result formed part of the 75% of tests that were deemed “Invalid” due to evidence of fraud.
12. The report goes on to state that ETS carried out an audit inspection on 18 September 2013 in which a test centre employee is reported to have admitted that cheating took place. Documents relating to TOEIC exams were discovered during a search on 16 June 2014, which listed tests taken between 19 November 2013 and 05 February 2014 that were suspected to be fraudulent. Alongside the names of the candidates were the names of “pilots” (imposters) who sat the test on behalf of the candidates. The documents also appeared to disclose the names of people who they suspected acted as middle men in the deception. Analysis of telecom devices seized from test centre employees revealed numerous SMS messages discussing the use of “pilots”. Voice analysis was said to show evidence of widespread cheating. While some of the evidence related to tests taken outside the period when the appellant took her test, overall, the evidence provides a damning picture of a widespread and deliberate use of fraud at the test centre.

The appellant's evidence

13. The appellant did not give evidence before the First-tier Tribunal, but decided to give evidence at the resumed hearing. Her witness statement provided a brief response to the allegations made by the respondent. She denied cheating on the test and asserted that the respondent had failed to produce any direct evidence to show that she used a fraudulent certificate. She asserted that her photograph was on the test certificate, which indicated that she took the test. She stated that she had achieved 7.5 for

speaking in a previous IELTS test taken on 26 May 2012. The appellant asserted that this showed that she did not need to use a proxy test taker.

14. At the hearing the appellant was quite open in admitting that she did not achieved the scores she required in the previous IELTS test taken on 24 May 2012 or in the first TOEIC test that she took at PLTC on 19 June 2012. Although she is correct to say that her speaking score for the IELTS test was 7.5, which was by far her highest score of the four elements of the test, the rest of the scores were inadequate and resulted in an overall band score of 5.0. The appellant only achieved 4.5 for 'Listening', 3.0 for 'Reading' and 5.6 for 'Writing'. To apply for an extension of leave to remain as a Tier 4 student she required a score at level B2 CEFR. An overall band score of 5.0 fell short of the 5.5 band score she needed.
15. The appellant said that she went to PLTC in order to take another test to try to improve her score. The reason why she chose that college was because she was living near to the test centre, so it was a convenient place to take the test. The appellant sought to introduce evidence to show that she was living at an address in Strone Road, London E7. However, the payslip is dated July 2013 so it does not cover the period when she claims to have taken the tests at PLTC in 2012. A document from HMRC relating to her National Insurance number provides the same address, but is equally unhelpful because it is undated.
16. The appellant claimed that she was living at this address at the date when she took the TOEIC tests at PLTC in June and July 2012. Other evidence shows that she was likely to be living at that address in July 2013. However, when she made the application for further leave to remain in September 2012 she gave her "current address in the UK" at B16 of the application form as an address in Station Parade in Northolt, Middlesex. At the hearing the appellant sought to explain this apparent discrepancy. She said it was the address of her husband's cousin. She said that her husband was living with his cousin in Northolt, but she was living in shared accommodation nearer to college. She thought it would be better to give the address in Northolt so that any post was not misplaced. When pressed as to why she claimed to be living apart from her husband at the time the appellant said that her college was near to the address in Strone Road and her husband wanted to spend time with his cousin. He was working with his cousin. The appellant said that she attended Infonexus College in Ilford at the time.
17. On the face of it there is nothing inherently implausible about the appellant's explanation that she chose an English language test centre because it was conveniently close to where she was living. However, the appellant has failed to produce any evidence to show that she was living in Strone Road at the time and it seems implausible that the appellant would go to the expense of renting a room in a shared house, and would live separately from her husband, just to save some time on travel to college in Ilford. I found the appellant's explanation weak and unpersuasive.

18. There is evidence of two tests recorded at PLTC in June and July 2012. The first test was on 19 June 2012. The certificate for the TOEIC speaking and writing test includes a photograph of the appellant and states that she achieved a score of 140 for 'Speaking' and 150 for 'Writing'. Although the 'Writing' score was sufficient to reach level B2 CEFR the 'Speaking' score was not. There is no evidence to show what the test results were for the 'Listening' and 'Reading' aspects of the test taken on 19 June 2012. The appellant claims that she was suffering from hayfever that day, which is why she did not do so well in the 'Speaking' test. That test result was deemed "Questionable" by ETS, which accordingly to their general categorisation, suggests that ETS thought there was some evidence of irregularity, but not necessarily of fraud. An applicant would normally be asked to sit the test again in such circumstances. For the purpose of this appeal I do not need to determine whether it was properly deemed as "Questionable" because the test result the respondent relies upon is the one taken on 17 July 2012.
19. The certificate for the second TOEIC test taken on 17 July 2012 also includes a photograph of the appellant. The appellant is different in appearance, which suggests that it was taken on a different day to the first. The test certificate states that she obtained a score of 170 for 'Speaking', which is the minimum score required to achieve level B2 CEFR. The CAS outlines the other score results. She obtained 150 for 'Writing', the same as before. Overall, the scores were sufficient to meet the level required to apply for an extension of leave to remain as a Tier 4 Migrant.
20. The appellant argues that the fact that she is pictured on the certificates is evidence to show that she took the test. However, I find that this argument is neutral because it is apparent that every test certificate requires a photograph of the person who it is claimed took the test. If a test certificate is obtained by use of fraud a photograph of the person would have to be included in the certificate whether it was genuine or not. If an applicant is complicit in the fraud they would still need to have their photograph taken for the certificate. Although the photographs indicate that the appellant had her photograph taken on both occasions, the fact that she might have gone to the test centre to have a photograph taken does not assist in rebutting the central allegation that a proxy test taker was used.
21. The appellant also argues that it does not make sense that she would fail the first TOEIC test if she was using a proxy test taker. There would be no sense in her paying someone to fix the test if it did not achieve the result that she needed. There is some force in this argument, but it requires further analysis in the context of the other evidence.
22. The respondent does not allege that fraud was used in the first TOEIC test taken in June 2012. The test result was only cancelled as "Questionable". It is the second test that forms the basis of the fraud/deception allegation. At that stage the appellant clearly had a motive to achieve the required test result. She had fallen short of the scores she needed in the IELTS test in May 2012. If the appellant took the first TOEIC test in June 2012 as she claims, she failed to obtain the scores needed to apply for

further leave to remain. At that point she had contact with a test centre where there is evidence to indicate that widespread fraud took place. All the scores in the period in which the appellant took the test were cancelled by ETS as “Questionable” or “Invalid”. It is reported that at least one test centre employee admitted that fraud took place at the centre. Other evidence seized by the police also indicated that “pilots” were used in tests at the centre. It is plausible that the appellant might have taken the first TOEIC test, but after having failed to achieve the score she needed, then employed the use of a proxy test taker. It is plausible that staff at the centre might have offered to assist her given the extent of the criminal enterprise taking place at the test centre. In short, the appellant had every motive to use fraud in the second TOEIC test having failed to achieve the score she needed in the two previous tests.

23. I have had the opportunity of assessing the appellant as a witness. I was asked to take into account the fact that she gave her evidence in English and therefore didn't need to use a proxy to take the test. All I can note is that the appellant was largely able to understand and answer questions in English, although at times she was unable to express herself fluently. She came across as someone who has a relatively good standard of conversational English, but who was not always able to express herself in a grammatically correct way. English is clearly her second language. Although she can communicate in English I am unable to place much weight on this issue one way or the other because I am not qualified to assess whether her standard of English is sufficient to meet the level that was required.
24. Although the appellant was fairly open regarding certain aspects of her evidence, such as admitting that the previous scores were not sufficient, those were points that were easily verifiable and could not be denied. Her account of why she chose to live at a different address to her husband was vague and unpersuasive. Although she provided some detail about the registration process for the test, those details do not assist me in assessing her overall credibility. It is obvious that a person would need to provide a passport and pay a fee to book a test. The appellant had already been through a similar process when she took the IELTS test. When she was asked to describe the process when she took the ‘Speaking’ test the appellant's evidence was somewhat vague. She said that the test took 20 minutes and she was asked 11 questions. She said that the questions were on a computer and that she had a “phone” (indicating an earphone). She told me that “you have a few seconds to prepare speaking test. 20 seconds or 30 seconds. They recorded it”. She couldn't remember any of the questions. Despite efforts to obtain a little more detail the appellant's evidence remained vague.

Conclusion

25. In weighing up the evidence I have taken into account the fact that, aside from the record that ETS has recorded the second TOEIC test result as “Invalid” due to evidence of a proxy test taker, there is no direct evidence from ETS to show how or why the company came to the conclusion that this particular appellant obtained a

fraudulent test certificate. The evidence produced by the respondent is largely circumstantial or generic in nature. However, it seems clear that ETS has carried out an investigation into a large number of test results, which includes assessment of recordings of the speaking tests, in which proxy test takers were found to have been used. Although the evidence relating to the reliability of the ETS process is difficult to assess with any accuracy, expert evidence suggests that the likelihood of a 'false positive' result arising from the ETS process of verification is low. The categorisation of the second test result taken on 17 July 2012 as "Invalid" suggests that ETS considered that there was evidence of fraud or deception involved in the test as opposed to a categorisation of "Questionable", which only suggests administrative irregularities were identified. Evidence from the police investigation indicates the likelihood of a massive scale of fraud at PLTC. The fact that all of the 5055 tests taken at PLTC in the relevant period were cancelled as "Invalid" or "Questionable" indicates to a high degree of likelihood that fraud was used in a large number of cases.

26. While the appellant has been able to provide some plausible explanations to the allegations, on the whole, I found her to be a vague and unimpressive witness. Her explanation about her address was implausible and was used to explain why she might take a test at a centre that was quite far away from her registered address in Northolt. Although she might have lived at an address in Strone Road at some point, there is no evidence to show that she lived at that address in June and July 2012. I accept that it seems unlikely that the appellant would pay a proxy test taker to cheat on the test if the result was inadequate. As such, it seems likely that the appellant might have taken the first TOEIC test in June 2012. The test result was deemed as "Questionable", but there is no evidence to show what the administrative irregularities were that underpin the ETS assessment. Even if the appellant took the test in June 2012 she had dealings with a test centre where there is evidence of widespread fraud. Having failed to achieve the result she needed on two tests taken in May and June 2012 the appellant had every motive to seek to improve her score. Having heard evidence from the appellant I did not find her to be a persuasive witness. I am not satisfied that she has provided a sufficiently credible explanation in response to the allegation.
27. Although the respondent's evidence falls far short of being able to say with any certainty that the appellant cheated by using a proxy test taker, or indeed any other method of fraud, I am not required to be certain. The respondent only needs to produce sufficiently cogent evidence to show that it is more likely than not that the appellant relied on a fraudulent certificate. After having weighed the evidence produced by both parties I am satisfied that the respondent has discharged the legal burden of proof to justify refusal of the application under paragraph 322(1A) of the immigration rules.
28. Mr Iqbal accepted that the '60 day' issue regarding the CAS would fall away if the respondent made out the allegation of deception. The application would have been

refused whether or not the applicant was given an opportunity to find another Tier 4 sponsor.

29. It follows that the second appellant's appeal also fails because he is dependent on the first appellant's application. The refusal of leave to remain focussed solely on the application under Tier 4. No human rights issues were considered by the respondent or raised during the appeal.

DECISION

The appeal is dismissed under the immigration rules

Signed  Date 14 September 2017
Upper Tribunal Judge Canavan

[ANNEX]



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/32735/2015
IA/32736/2015

THE IMMIGRATION ACTS

Heard at Field House
On 19 June 2017

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SUNITA KHURANA
MANISH KHURANA

Respondents

Representation:

For the appellant: Ms K. Pal, Senior Home Office Presenting Officer

For the respondent: Mr M. Iqbal, Counsel instructed by Addison & Khan Solicitors

DECISION AND REASONS

1. For the sake of continuity I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal to the Upper Tribunal.

2. The first appellant (“the appellant”) appealed against the respondent’s decision dated 24 September 2015 to refuse leave to remain as a Tier 4 (General) Student Migrant with her husband, the second appellant, as her dependent. The initial application for leave to remain was made on 27 September 2012. It is unclear why it took so long to make a decision. The Secretary of State refused the application under the general grounds of refusal contained in the immigration rules (paragraph 322(1A)) asserting that a false document was submitted in support of the application. The allegation related to an English language test certificate issued by ETS. The respondent stated that following an investigation ETS cancelled the test certificate as “invalid” because there was thought to be “significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker”.
3. First-tier Tribunal Judge Buckwell (“the judge”) allowed the appeal in a decision promulgated on 14 November 2016. The judge noted the evidence produced by the respondent in support of the allegation. This included the generic statements of Rebecca Collings and Peter Millington, a copy of a forensic speaker comparison test report by Professor Peter French and a Home Office Report on “Project Façade” relating to Premier Language Training Centre in Barking [5]. He was also given copies of the decisions in *SM and Qadir (ETS – evidence – burden of proof)* [2016] UKUT 229 and *Shehzad & Chowdhury v SSHD* [2016] EWCA Civ 615 [6]. The judge went on to summarise the submissions made by both parties, including points made by Mr Iqbal relating to apparent inconsistencies between two different ‘Look Up Tool’ print outs produced by the respondent [17 & 19]. He then went on to correctly summarise the burden and standard of proof and was clearly aware of the shifting evidential burdens that might occur [22 & 25]. The substance of the judge’s findings is found in paragraphs 24-29 of the decision:

“24. Looking very carefully at the case guidance which has been put before me, including the decision of the Upper Tribunal in *SM and Qadir* (above) I am of the view that here the Respondent seeks to rely virtually wholly upon the generic evidence presented and upon an assessment made in relation to the validity of the English language test. The statements presented on behalf of the Respondent, in the Respondent’s supplementary bundle, set out the generic evidence. Indeed, a photograph of the First Appellant appears on the test certificate and it was not claimed that the First Appellant had not attended for the interview.

25. In relation to the burden of proof, matters are indeed set out by the Upper Tribunal in *Muhandiramge* [2015] UKUT 675 (IAC), particularly wherein the earlier Upper Tribunal decision in *Shen* [2014] UKUT 236 (IAC) is referred to at paragraph 10 of the decision. That relates to the interchange as to the burden of proof between the parties. It is described as an “evidential pendulum” in *Shen* (above).

26. Here the Respondent asserts that there are sufficient reasons presented within the generic evidence and by reference to a “look up tool” to state that there has been an assessment which touches directly on the test undertaken by the First Appellant, the consequences of which indicate that there were sufficient concerns to discharge the burden that in all likelihood the test taken by the First Appellant was not properly undertaken. Specifically it is alleged that a proxy took the test.

27. Whilst the First Appellant did not give evidence, I have taken into account what is stated in her witness statement, although her evidence of course was not tested. The reality is that she says that she attended the test, there is a photograph of her which appears (which the system appeared to require to be undertaken at the relevant test centre) and there is no more specific of direct allegation against the First Appellant herself.

Conclusions

28. Ultimately in relation to the Respondent's decision concerning the First Appellant the burden of proof needed to be discharged by the Respondent and I do not find in the particular circumstances that there is sufficient evidence beyond the generic evidence to discharge the Respondent's burden by reference to the generic witness statements or to the ETS "look up tool". I find, as was asserted by Mr Iqbal, that the assessment by the Respondent, with the printout at page F1 to the Respondent's bundle, is insufficient by way of direct evidence concerning the alleged demeanours of the First Appellant in the test process.

29. In relation to the First Appellant I therefore do not find that the Respondent has discharged the burden overall which rested on her in relation to the allegations made against the First Appellant with respect to the processes which she undertook in relation to the testing of her abilities in the English language. That being so, I do not find that the refusal decision was appropriate. Instead, upon the Respondent finding that the institutional sponsor was not longer registered as a Tier 4 sponsor, the Respondent should have allowed the First Appellant a further 60 day period in order to attempt to obtain a new Tier 4 sponsor and an opportunity to elicit a new CAS."

4. The Secretary of State seeks to appeal the First-tier Tribunal decision on the following grounds:
 - (i) The First-tier Tribunal failed to have proper regard to the decision in *Shehzad*, where the Court of Appeal made clear that the combination of the generic witness statements, albeit criticised in *SM & Qadir*, and a 'Look Up Tool' print out was sufficient to meet the initial evidential burden of proof. In that case the Tribunal's rejection of the evidence as insufficient to shift the evidential burden amounted to an error of law.
 - (ii) The respondent asserts that the initial evidential burden was made out and it fell to the appellant to offer an innocent explanation in response. The First-tier Tribunal erred in apparently accepting the appellant's evidence that she attended the test when she chose not give evidence and in circumstances where her credibility had been called into question.

Decision and reasons

5. After having considered the arguments put forward by both parties I am satisfied that the First-tier Tribunal decision involved the making of an error on a point of law.
6. Although it is clear that the judge was aware of the relevant legal principles relating to the burden and standard of proof in cases involving allegations of deception [22 & 25] the substance of the decision in paragraphs 22-27 set out the evidence without

making any clear findings as to what weight he placed on the evidence and why. The judge referred to *SM & Qadir* [24], but did not say how the decision impacted on his findings. In that case the Tribunal concluded that the combination of the Look Up Tool and the generic evidence, despite its weaknesses, was sufficient to shift the evidential burden of proof to the appellant to provide an innocent explanation. The Court of Appeal in *Shehzad* came to a similar conclusion.

7. Mr Iqbal's submissions said little in defence of the First-tier Tribunal decision, but instead repeated the substantive submissions he made before the First-tier Tribunal. He asserted that there were discrepancies between the two Look Up Tool print outs provided by the respondent, which reduced the weight that could be given to the evidence.
8. I find that the points raised about the Look Up Tool print outs are not as significant as he asserts. He does not suggest any cynicism in the presentation of the evidence, but asserts that it is unreliable because there are slightly different details recorded on the initial Look Up Tool print out contained in the respondent's bundle and the subsequent print out produced as an attachment to Hilary Rackstraw's statement at the hearing.
9. The first thing to note is that counsel for the Secretary of State in *Shehzad* accepted that the presentation of evidence from ETS was developed over time [30]. The initial refusal decision in this case dates back to September 2015. The Look Up Tool print out contained in the respondent's bundle is consistent with the format seen in a number of earlier cases involving ETS deception allegations. It seems quite clear from the up to date statement prepared by Hilary Rackshaw, a Home Office employee, on 14 October 2016, that she sought to introduce a copy of the latest database print out. The fact that the two print outs do not have a similar format, in itself, is insufficient reason to doubt the reliability of the information that they purport to present.
10. Mr Iqbal made much of the fact that the record numbers contained in the first print out were not the same as those in the second. There is no evidence to show how or why that might be. If the database has been developed over time it is certainly possible that some record numbers might have changed. I cannot see how this might be material to the core issue that the evidence seeks to present, which is the fact that ETS cancelled the appellant's speaking test result as 'invalid' because there was evidence to show that she had used a proxy test taker.
11. Mr Iqbal also sought to highlight the fact that the most recent print out included reference to the appellant's previous and current passport numbers. He questioned how ETS could obtain her previous passport number. There is no discrepancy between the two records. This issue also seems immaterial to the core information that the documents seeks to present. The original Look Up Tool print out, although difficult to read due to the tiny font, clearly did include both passport references and this is consistent on both records.

12. Aside from the record numbers, the purpose of which is simply unknown, both print outs contain exactly the same core data. Both records state the data source from the Home Office "CID" case information database. The material information relating to the relevant issue that the evidence seeks to present, which is whether ETS cancelled the test result as 'invalid', is consistent in both records. The certificate number is the same, the appellant's name, nationality, date of birth, the test date, the test centre, the scores and the "ETS Batch date". In short, there are no material discrepancies in the data presented albeit that the most up to date Look Up Tool is printed out in a slightly different format.
13. Returning to the First-tier Tribunal decision, the judge's findings are limited to paragraphs 28-29. Despite having been referred to the decisions in *SM & Qadir* and *Shehzad* the judge found that the combination of the Look Up Tool and 'generic evidence' was insufficient to discharge the burden of proof. He said that the first Look Up Tool print out was "insufficient by way of direct evidence". In doing so he failed to explain why he was departing from the clear findings made in the *SM & Qadir* and *Shehzad*. Nor did the judge explain why the points made by Mr Iqbal undermined the Look Up Tool evidence.
14. The evidence produced by the respondent was not limited to the Look Up Tool and generic witness statements of Rebecca Collings and Peter Millington, which were the focus of the decisions in *SM & Qadir* and *Shehzad*. The respondent produced other evidence, albeit not directly relating to the appellant, which was relevant to the likelihood that she might have used deception in the test.
15. The up to date Look Up Tool information now included information relating to test results from particular colleges. The appellant claimed to have taken the speaking test at Premier Language Training Centre in Barking on 17 July 2012. The data relating to tests taken at the Premier Language Training Centre on 17 July 2012 indicated that 70% of the tests taken on that day had been marked by ETS as 'invalid'. A report from the criminal investigation into the college by Project Façade dated 05 May 2015 set out further data. In the period from 20 March 2012 and 05 February 2014, which included the date the appellant says she took the test, Premier Language Training Centre undertook 5055 TOEIC speaking and writing tests of which ETS identified 3780 as 'invalid' and 1275 as 'questionable'. 75% of tests taken at the centre during that period were called into question. Project Façade concluded that there was evidence to show "organised and widespread" abuse at the test centre. The respondent also produced a copy of a report from Professor Peter French, who is an expert in forensic speech science.
16. This evidence formed no part of the judge's findings albeit that it was material to an overall assessment of the strength of the respondent's evidence. The fact that there was evidence of widespread fraud at the particular test centre where the appellant says she took the test was relevant to the allegation made in relation to this particular appellant.

17. Although the judge was clearly aware of the shifting burden of proof it is not clear from the findings made in paragraph 28 whether the judge found the respondent's evidence was insufficient to shift the evidential burden or whether he was referring to the overall burden. If the combination of the Look Up Tool and generic evidence is likely to shift the evidential burden as found by the Tribunal and the Court of Appeal, the judge then failed to make any clear findings as to whether the appellant produced sufficient evidence in rebuttal.
18. The judge did not hear evidence from the appellant. The evidence given in her witness statement was fairly limited. The judge made no clear finding to explain why the fact that the certificate contained the appellant's photograph, as most English language certificates normally do, might rebut the allegation that she used a proxy test taker.
19. After having considered the First-tier Tribunal decision in detail, as well as the arguments put forward by both parties, I conclude that the First-tier Tribunal decision failed to take into account relevant case law from the Upper Tribunal and the Court of Appeal, failed to make findings in relation to material evidence, and failed to give adequate reasons to explain the conclusions in paragraphs 28-29. Given that the subsequent finding relating to the 60-day policy issue could only succeed if the respondent failed to show deception in relation to the ETS issue, that finding must also be set aside.

DECISION


The First-tier Tribunal involved the making of an error on a point of law

The decision is set aside

The appeal will be relisted for a resumed hearing in the Upper Tribunal

DIRECTIONS

1. The appellant shall inform the Upper Tribunal by **Friday 14 July 2017** at the latest whether any witnesses will be called to give evidence at the resumed hearing and whether an interpreter is needed.
2. Any up to date evidence relied upon by either party, including up to date witness statements, should be served **no later than 7 days** before the resumed hearing.

Signed 
Upper Tribunal Judge Canavan

Date 29 June 2017