Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26549/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 November 2018	**On 4 December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR HARMINDER SINGH
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Biggs of Counsel
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of India born 12 December 1984. He appealed against a decision of the Respondent dated 8 July 2015 to refuse him leave to remain in the United Kingdom and to remove him by way of directions under section 47 of the Asylum and Immigration Act 2006. His appeal was allowed by Judge of the First-tier Tribunal Adio sitting at Hatton Cross on 9 April 2018. The Respondent appealed with leave against that decision and the Respondent's

appeal came before me at Field House on 5 September 2018. I found a material error of law in the decision at first instance and set it aside. I directed that the rehearing of the appeal would be before me in the Upper Tribunal. Annexed to this determination is my decision dated 17th of September 2018 finding a material error of law and setting the earlier decision aside.

2. The Appellant was granted leave to enter the United Kingdom on 8 September 2006 valid until 31 October 2009. He studied an English course for one year in 2008. On 15 January 2010 his application for further leave to remain as a Tier 4 (General) student was refused but on 21 April 2010 he was granted further leave to remain in the United Kingdom as a student valid until 14 January 2011. This was extended until 30 April 2014 but on 10 August 2012 his leave was curtailed until 9 October 2012. The day before that curtailed leave was due to expire, 8 October 2012, the Respondent granted the Appellant further leave to remain in the United Kingdom valid until 3 February 2015. On 16 May 2014 his application for further leave to remain as an entrepreneur was refused and on 18 June 2014 the Appellant's leave to remain as a student was curtailed to expire on 22 August 2014. On that day the Appellant made a further application for leave to remain as a student and it was the refusal of that application on 8 July 2015 that gave rise to the present proceedings.

Documentation Considered

3. On the file was the Respondent's bundle which comprised: immigration information on form PF1; witness statements of Home Office officials Peter Millington and Rebecca Collings; report by Professor French 20 April 2016 and statement from Sonia Poulter 18 November 2016; Project Façade documentation; CAS details; ETS invalid test analysis; refusal letter; IELTS certificate dated 29 May 2014.

4. For the hearing the Appellant submitted a bundle which comprised: first statement of the Appellant dated 15 November 2016 and second dated 12 November 2018; statement of the witness Harvinder Bhuie dated 12 November 2018; e-mail correspondence with ETS; test certificates and educational documents

Explanation for Refusal

5. The Appellant made a number of applications for leave as a student during the time he has been in the United Kingdom but two in particular led to the Respondent refusing the August 2014 application. The first application was on 8 October 2012 and the second on 12 December 2012 in both of which the Appellant submitted a TOEIC certificate from Education Testing Services (ETS). The Respondent was satisfied that the Appellant had obtained that certificate fraudulently. There was significant evidence that the certificate was obtained by the use of a proxy test taker and the Appellant's test was therefore invalid. ETS had a record of the Appellant's speaking test and using voice verification software they had concluded that the language certificate was fraudulently

obtained by the use of a proxy test taker. ETS declared the Appellant's test to be invalid for that reason and cancelled the scores.

6. The Respondent refused the application on the general grounds contained in paragraph 322(2) of the Immigration Rules. Paragraph 322(2) provides that leave to remain should normally be refused where false representations have been made or there has been a failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave or in order to obtain documents from the Respondent or a third party required in support of the application for leave to enter or a previous variation of leave. The Appellant's sponsor had withdrawn the Confirmation of Acceptance for Studies (CAS) and the Appellant did not therefore obtain any points under appendix A of the Rules. He could not satisfy paragraph 245ZX (a) of the rules.

7. The Appellant appealed against that decision arguing there was a complete absence of any evidence of dishonesty. The Appellant had failed part of the ETS course and then had to complete it at another centre. The grounds wrongly stated that the Appellant had taken a test at Thames Graduate School in Gants Hill on 21 August 2012. In fact, he had taken it at South Quay College, which as will be seen hereunder was the subject of an investigation by the Respondent. The grounds continued by saying that the Appellant later took the speaking and writing module "in another test centre". This was a reference to Eden College in East Ham, London which was also the subject of an investigation.

8. If the Appellant had been making a dishonest application, the grounds continued, there would have been no need for him to go elsewhere. The Appellant spoke excellent English, he had an IELTS score of 6 for speaking and writing. He submitted his certificate dated 15 May 2014 confirming these scores to the Respondent on 6 June 2014. The Respondent should have given the Appellant a period of 60 days within which to find another college.

The History of the Proceedings

9. The Appellant's appeal initially came before Judge of the First-tier Tribunal Aziz sitting at Hatton Cross on 21 November 2016. He allowed the Appellant's appeal. At [24] and [25] he summarised the Appellant's evidence concerning the day the Appellant took the test. The Judge described the Respondent's evidence of a proxy test taker as generic and he was not persuaded that it was significant. The Respondent had not discharged the evidential burden placed upon him. The Appellant should have been awarded 60 days leave in order to find a new sponsor when his college lost its licence.

10. The Respondent appealed against that decision arguing that the withdrawal of the CAS was a matter for the Appellant's sponsor not the Respondent. The Respondent's evidence in relation to the proxy test taker allegation was wrongly rejected. Permission to appeal was granted and at an error of law

hearing before Deputy Upper Tribunal Judge Latter on 14 August 2017 a material error of law was found such that the appeal was ordered to be remitted to the First-tier to be reheard. Although there was no material error of law in allowing the appeal on the basis that the Respondent had failed to give the Appellant 60 days leave to find a new sponsor, the Judge had not correctly applied the 3-stage approach identified in the Upper Tribunal authority of **SM and Qadir [2016] UKUT 229**.

11. The first stage was whether the Respondent could satisfy the evidential burden of showing that there was evidence to justify the assertion of fraud or dishonesty; the second stage was whether the Appellant was able to raise an innocent explanation and thirdly if so whether the Respondent could discharge the legal burden of showing on a balance of probabilities that the assertion of fraud or dishonesty was made out. Judge Latter found that Judge Aziz had focused only on the first stage, whether the evidential burden was discharged. There was evidence that the Appellant's test taken at Eden college was identified as invalid. The generic evidence was sufficient to provide an adequate basis for an inference that the test was invalid because it was taken by proxy.

12. There was specific evidence relating to the test taken at South Quay college which was capable of supporting a finding that the test at Eden college was taken by proxy. There was an article from Project Façade setting out the percentages of those taking the test at Eden college and South Quay college. They formed part of the background against which evidence of an innocent explanation could be assessed. Judge Latter also found that the Respondent only had to produce sufficient evidence to discharge the evidential burden (at stage I) not significant evidence as Judge Aziz had stated.

13. In consequence of the remittal the matter came before Judge of the First-tier Tribunal Adio. He allowed the appeal finding that the Respondent had not been able to discharge the legal burden of proof as there was no voice evidence to compare the test taker with the Appellant. He noted that the Appellant's command of the English language was very good and the Appellant had academic qualifications. He was willing to give the Appellant the benefit of the doubt that the lack of documents such as the paperwork which would have been sent to the Appellant before he went to the test centre did not necessarily mean that the Appellant did not himself take the tests. The Appellant had shown himself to be a capable student. The Judge was satisfied with the Appellant's oral evidence and found the Appellant had discharged the evidential burden of raising a satisfactory explanation for the matters advanced by the Respondent. The appeal was allowed a second time.

14. The Respondent again appealed arguing that the test was not whether the Appellant could speak English well now but whether he had employed deception in the past. The Tribunal it was argued had failed to give adequate reasons when holding that a person who clearly spoke English would therefore

have no reason to secure a test certificate by deception. Properly read the Respondent's evidence submitted in this case showed that the Appellant's English language test had been invalidated because of evidence of fraud in the test taken by the Appellant.

15. Permission to appeal was granted to the Respondent and the matter came before me. I set the decision of the First-tier Tribunal aside and ordered that the matter be reheard. There needed to be further evidence from the Appellant about the circumstances in which he took the test and the Respondent should try to obtain any original voice recording if available. At the conclusion of the error of law hearing I indicated to both parties that I would consider my decision in this case and that if I found there was a material error of law I would to set aside the decision and make directions for the further hearing of the appeal. If there was not a material error of law, then the decision at first instance would stand. There were no representations made to me at the conclusion of the hearing as to further disposal and in my determination, I directed that the matter should be reheard before me for the reasons I gave.

The Preliminary Issue

16. My decision finding a material error of law was promulgated by the Upper Tribunal on 29 September 2018. On 18 October 2018 the Tribunal gave notice to the parties that the resumed hearing would take place on 14 November 2018, that is four weeks after promulgation and 6 weeks after sending out my decision on a material error of law. The day before the rehearing, on 13 November 2018, the Appellant's solicitors wrote to the Upper Tribunal applying to set aside my decision and asking for the case to be adjourned.

17. The basis of the application was that the Appellant should be afforded the opportunity of explaining why an appeal should be remitted to the First-tier for rehearing rather than retained in the Upper Tribunal following an error of law hearing. The application for an adjournment came before an Upper Tribunal lawyer who refused to adjourn the hearing. The application itself was described by the lawyer as unreasonably late and the matter could not and should not be dealt with without hearing submissions from the Respondent.

18. The normal approach to redetermining appeals where an error of law had been found was for the Upper Tribunal to remake the decision even if further fact-finding was necessary. If there was an issue about the Upper Tribunal retaining the case and not remitting it to the First-tier, those representing the applicant should have raised it at the hearing or certainly earlier than a day before the case was listed. Rule 2(4) of the Upper Tribunal Procedure Rules placed an obligation on the parties to help the Upper Tribunal to further the overriding objective and this had not been done. The matter remained in the list.

19. At the hearing before me counsel renewed his application for an adjournment and/or to set aside my decision. It was argued that by not remitting the case to the First-tier Tribunal the Appellant had been deprived of a right of appeal to the Upper Tribunal. When the decision of Judge Aziz was overturned the case had at that time been remitted back to the First-tier Tribunal and thus come before Judge Adio. Counsel also took issue with my findings of a material error of law and noted that voice recordings from ETS had now been obtained. I pause to note here that I had directed the Respondent to use his best endeavours to obtain such recordings.

20. It transpired that the voice recordings from Eden college were not the Appellant's voice. It was argued that the Appellant would need time to consider the implications of this development. This was said to be a very exceptional case justifying the setting aside of an error of law decision. The Appellant had satisfied the evidential burden in this case of producing some evidence in support of the fact in issue. There was said to be no legal error in the First-tier Tribunal's determination.

21. In oral submissions counsel accepted that there was no good reason why the application to adjourn and set my decision aside was made so late in the day. The Presenting Officer argued that retaining the case in the Upper Tribunal did not deprive the Appellant of a fair hearing. Two sets of voice recordings had now been obtained one of which was the Appellant's voice and the other which was not.

22. I indicated that I was not prepared to adjourn the case or set aside my decision that found a material error of law. I indicated that I would proceed with the rehearing. The argument that I had given inadequate reasons for finding a material error of law was a mere disagreement with my decision. There were unfortunately certain errors in the decision of the First-tier Tribunal particularly the comment that the Project Façade investigation related to a period after the Appellant had taken his test. It did not, the Project Façade investigation covered the period when the Appellant was said to have taken the test at Eden college. This error had infected the Judge's assessment of the Appellant's innocent explanation. The arrangements made for the test and what the test consisted of had not been adequately assessed in the First-tier decision.

23. In relation to the decision to keep the case in the Upper Tribunal and not remit it, the matter was adequately covered by the decision of the Upper Tribunal lawyer. There was nothing exceptional in this case that meant that the normal rule should not be followed, the normal rule being that following the finding of an error of law, the case should be retained in the Upper Tribunal. The directions that were sent out to the parties prior to the error of law hearing before me specifically stated at paragraph 4 "there is a presumption that in the event of the Tribunal deciding that the decision of the First-tier Tribunal is to be

set aside as erroneous in law, the remaking of the decision will take place at the same hearing."

24. In this case in order to be fair to both parties I gave directions for further evidence, the voice recordings, to be obtained. These could not have been provided at the hearing before me in any event and even if I had made my error of law decision at the conclusion of that hearing, it would have required a further hearing. The standard directions sent out by the Principal Resident Judge also reminded both parties that they should, at least five working days prior to the scheduled hearing, contact the Tribunal for the purpose of confirming that all bundles and any other materials were available for distribution to the Judge. That had clearly not been done in this case (the written submissions requesting an adjournment being sent the day before the hearing). There was no good reason why the standard directions had not been followed, this was a matter of some importance, despite counsel's submissions that the delay was not important. To adjourn the case very much at the last moment would not have furthered the overriding objective as substantial public resources would have been wasted. Neither party had made representations to me at the close of the error of law hearing when I indicated that if I found an error of law I would make direction for the rehearing. Several weeks had elapsed since my previous decision and nothing further had been said.

25. After the indication that I was proceeding with the case, counsel invited me to adjourn the hearing for the Appellant to review the position regarding the Eden College voice recordings which were not the Appellant's voice. These had been obtained by the Appellant's representatives not the Respondent. The Presenting Officer explained that it was not possible for the Respondent to obtain voice recordings from ETS because of data protection requirements. I indicated that since it was not in dispute that one set of voice recordings, the test taken by the Appellant at South Quay College, was of the Appellant and the other voice recordings were not, there was no point in instructing a joint expert to listen to the voice recordings since the result of such investigation was already known.

26. The test of whether to adjourn is one of fairness but in this case, fairness did not require an adjournment since no useful purpose would be served by an adjournment. Both the Appellant and the Respondent had the South Quay voice recordings and the Appellant had the Eden College recordings and was aware that they were not his voice. The issue was still as summarised by Judge Latter, whether there was prima facie evidence that the Appellant had employed a proxy test taker, whether he had an innocent explanation and whether in all the circumstances the Respondent had proved fraud. The case thereafter proceeded.

The Hearing before Me

27. I first heard the evidence of the Appellant who adopted both his witness statements in this case. He said that he had chosen to take the second test at

Eden college because he needed to obtain a language certificate quickly and Eden College had dates available. It was the only date received. He said his visa expired in November 2012 and he had to pass an English language test by then. His friend Mr Joshi had made the booking. When the Appellant arrived there for the test, he saw a small room with computers around the wall and there were about 10 candidates. He could not now recall the pictures he was shown that he had to describe because it was so long ago. He had taken a further test two years later in 2014. The arrangements had again been made by his friend Mr Joshi. The result of that test was enclosed in his bundle of evidence and was dated 15 May 2014. It showed that the Appellant was awarded 6.0 in each of the categories.

28. In cross examination it was put to the Appellant that he had taken a test in August 2012 at South Quay College scoring 150 for speaking in 130 for writing. By contrast by the time he came to take the test at Eden college his score had improved to 200 for speaking and 180 for writing. This improvement was in the course of 15 days and he was asked how it could be that his scores would have improved so much in such a short space of time unless he had in fact used a proxy for the second test. The Appellant replied that there were different ways of taking the test but the reason why he had improved so much in two weeks was by practising.

29. The 150 score he received at South Quay College was equivalent to a band 6 but when he took the test at Eden college his score had increased to band 8. When he took the test in 2014 his score had gone back down again to band 6. The Appellant repeated that he had practised between the South Quay College test and the Eden college test. The results of the Project Façade report into Eden college were put to the Appellant by the Presenting Officer that there were almost 2000 tests that were not genuine. The Appellant replied that that only came out when the BBC had exposed the scandal, before that no one knew about what was happening at Eden college.

30. He had let Mr Joshi book the test because it was more convenient. He paid Mr Joshi £150 in cash but did not ask for a receipt. Nor did he ask Mr Joshi for any documentation that he might need to take to the test with him although he remembered taking his passport. He assumed that the second test at Eden college had been booked online by Mr Joshi as that was the only way one could book the test. He did not know how in those circumstances Mr Joshi would have paid for the test.

31. He proposed to call a witness at the hearing, Mr Bhuie, who was a family friend he had known since childhood. Mr Bhuie had gone with the Appellant to the test centre at Eden college. The Appellant had driven to the test centre and coming back Mr Bhuie had driven. They went by car because Mr Bhuie was off work that day and to use public transport they would have had to have gone via Ealing Broadway. He confirmed that the second set of recordings in relation

to Eden college was not his voice. The voice recordings of the test at South Quay were his voice.

32. In answer to questions from me the Appellant clarified that in November 2012 it was not that his visa was due to expire as it had been curtailed by the Respondent who had given him 60 days to find another college. Mr Joshi had left the United Kingdom in 2016. Mr Bhuie had been present at the hearing at first instance before Judge Adio who was told that Mr Bhuie was the Appellant's cousin when he was in fact a family friend. The Appellant said he had told the Judge that Mr Bhuie was a family friend. In re-examination the Appellant said that after the test at Eden college they had taken a photograph of him which was in the bundle.

33. I next heard evidence from the witness Mr Bhuie who said that at the time of the Eden college test he and the Appellant were living at the same address. He drove the car back home from the test. His witness statement was wrong at paragraph 11 where it said that the Appellant decided to drive the car back home. He attended the hearing in front of Judge Adio although his name had been misspelt in the determination. He was not the Appellant's cousin he looked on the Appellant as more like a younger brother. Judge Adio was told that Mr Bhuie was the Appellant's cousin because of the way he treated the Appellant.

34. Mr Bhuie had made his statement in support of the Appellant a week ago. He had never met Mr Joshi. They had travelled over to the other side of London for the test because the Appellant's visa was expiring. He had not heard of Eden college before then. In re-examination he confirmed that it was Judge Adio who had asked if there was anyone with the Appellant when he went to take the test.

35. That concluded the oral testimony, but counsel indicated that he wished to play to the Tribunal the audio recording of the South Quay test which the Appellant acknowledged he had taken. This was played through the Presenting Officers laptop. After hearing those recordings, I queried whether there was any point in hearing the Eden college voice recordings (contained on the Appellant's mobile telephone) which it was agreed were not of the Appellant. At that stage counsel agreed with that but later on changed his position and indicated to me that he did wish me to hear the Eden college voice recordings. Subsequently these were forwarded to me and I confirm that I heard them. I agree that the voice on those recordings is not the same as the Appellant's.

Closing submissions

36. In closing for the Respondent reliance was placed on the refusal letter but matters had moved on since then. The Appellant was not credible in his evidence. He had employed a proxy. It was not plausible that the Appellant could have had such a dramatic improvement in his language skills between the

South Quay College test on 21 August and the Eden college test 15 days later on 5 September 2012. That represented a jump of 2 levels.

37. The Appellant was now seeking to argue that his English had in fact been good enough for him to pass the test at South Quay College and he should not have been failed on that day. ETS had responded to that in correspondence passing between ETS and the Appellant's solicitors. ETS had said that the listening and reading test taken by the Appellant at South Quay College was not the kind of test that a test taker could pass or fail. The proficiency that the Appellant had obtained in relation to that particular test was set out in the relevant report that had been provided.

38. What was important was that the TOEIC result in 2014 showed that the Appellant was a competent user of the English language which the South Quay College test two years earlier had showed. The two tests were comparable in the way they were assessed. In any event the Appellant's English language even at the hearing today still betrayed a thick accent, there had for example been difficulties over the Appellant's use of the word availability in oral evidence.

39. If one looked at the Project Façade document the report into Eden college showed that the period March 2012 to February 2014 had examples of widespread fraud and that was the time when the Appellant took his test. None of the tests taken during that period has been assessed as genuine and the same could be said of the Appellant's. Cheating had been widespread at Eden college during that period. No supporting evidence had been given in relation to Mr Joshi who had apparently gone to India in 2016. There had been no attempt to contact him or take a witness statement from him and there was nothing to confirm that he had made the booking arrangements. It was not plausible that the Appellant would accept confirmation of his test on the say-so of a friend.

40. Although the test was booked online the Appellant had paid in cash to his friend not at the test centre. Cash could often be said to be an indication of underhand and fraudulent transactions to avoid a paper trail in a case such as this. No adequate reason has been given why the test had not been paid for online. What was more likely than not was that having failed to get sufficient marks at South Quay College the Appellant had sought to obtain a perfect score at Eden college 2 weeks later. Mr Bhuie had only made his witness statement recently. There was some doubt as to his true relationship to the Appellant whether he was a friend or a cousin. That the Appellant was able to describe the college did not mean that he had been there to take the test. The photograph simply placed the Appellant at the test centre at most. One had to look at credibility in the round when deciding whether the Appellant had used a proxy.

41. The Appellant accepted that the voice recording from Eden college was not his voice. The reason was because it was the voice of his proxy. The Appellant's

case now was that in supplying this voice recording ETS must have muddled the Appellant's case up with someone else. It was correct that in the case of **MA** the President of the Upper Tribunal had highlighted what the experts said about being able to link an applicant with a voice file. There was a no inherent data in the voice file that could link it to the Appellant. Nonetheless the veracity of the recording was not ruled out. On the balance of probabilities ETS had provided the Appellant's voice recording. When it suited the Appellant that the voice on a recording was his he accepted that and said that the voice recording from South Quay College was genuine. However, when it did not suit him he said that ETS must have muddled up his voice with someone else's.

42. In closing for the Appellant it was argued that the evidential burden was that the Respondent should put forward sufficient evidence to the appropriate standard of proof that could persuade the Tribunal. At paragraph 57 of **MA** the Upper Tribunal had made it clear it was not necessary to prove motive, that is why an Appellant would want to cheat and the Upper Tribunal did not decide that an absence of a reason to cheat would tell in favour of the Appellant.

43. At paragraph 15 the Upper Tribunal had considered the issue of the continuity of the evidence and the position had been authoritatively stated there. There was no evidence in this case of continuity and no evidence to link the Appellant to the allegation of a proxy test taker. There was a gap in the evidence of how the frauds were perpetrated. Test centres were entirely responsible for the transmission of data and they were very vulnerable to fraud.

44. In response to the submissions made by the Presenting Officer, counsel argued that the reason why there was such a dramatic improvement in the 2 test scores between South Quay College and Eden college was because it was not the Appellant's voice in the Eden college tests and not the Appellant's test. The scores were infected by this error. At this point counsel indicated that he did wish me to listen to the recordings of the Eden college test. I pointed out that I was not in a position to decide what the correct mark should have been either for the South Quay College test which I had listened to during the course of the hearing or the Eden college test which was going to be sent on to me. Counsel agreed that the matter could be dealt with on the basis that I would listen to the Eden college test at a later date although he accepted that this was not the strongest point he could make.

45. The Appellant had given his evidence why he had paid Mr Joshi in cash. The Respondent's submission about payments in cash being a sign of fraud came from a decided case. Mr Bhuie was credible and consistent and the challenge to the timing of his statement was not a good point. He had explained that he only realised his evidence was significant when Judge Adio had asked whether anyone had accompanied the Appellant. In any event a witness statement should only be prepared shortly before the hearing. There was no need to have

prepared the witness statement before that it was only after the decision on the error of law was made.

46. The evidential burden had to be discharged by the Respondent. There was no evidence in this case linking the voice recording to the Appellant. There was no evidence supporting evidence of fraud. The Appellant explained why he had chosen TOEIC, it was because he was under pressure after the South Quay test. It was not a proper basis to reject the Appellant's account on how Mr Joshi had made arrangements for the test. The Appellant had provided a lot of detail about the test centre and had been consistent about who drove the car to and from the test. He described the number of invigilators and the type of questions. It was his photograph taken after the test. He had provided an identity document to prove who he was. The test centres made mistakes but the fact that the photograph was taken after the test showed that it was the Appellant. The Appellant's photograph indicated there was some mix-up in the data.

47. Both the Appellant and his witness were credible and were trying to do the best they could. The Appellant had obtained a certificate before he came to the United Kingdom and had obtained academic qualifications for his studies here. The Appellant's voice recordings at South Quay were of an English speaker who had read out a test perfectly. That was plainly indicative of a high level of English and it raised the question why he had only got a score of 150 from South Quay. Something had gone wrong with the marking. The Appellant had taken all reasonable steps to respond to the Home Office allegations. He had gone out of his way to do the Respondent's job for him. He acknowledged when it was not his voice because he was an honest witness. This was an Appellant of good character who had done nothing wrong. He should have been given a second 60-day period to find another college. It was not being suggested he was not a genuine student. The appeal should be allowed.

The Authority of MA

48. In this case the Upper Tribunal held that the question of whether a person engaged in fraud in procuring a TOEIC proficiency qualification would invariably be intrinsically fact sensitive. The Tribunal received evidence from three expert witnesses and at paragraph 15 highlighted certain matters arising from this evidence. The experts said they did not know the processes by which the candidate's name was linked to each test. If file responses were stored on a server this would create an opportunity for alteration by test centre staff but two of the experts thought this was unlikely. An opportunity for a mistake might arise if the registration on the ETS system was carried out by test centre staff and not by the candidates themselves creating the risk of the data provided by the test centre to ETS mismatching the candidate and their tests. The naming conventions for the digital files of the voice recordings produced did not provide an explicit link between the candidate and the recording. The system

assumed that the unique registration code was reliably linked to the real candidate. There was no embedded meta data which might assist the enquiries.

49. At paragraph 44 the Tribunal noted that on a general level there was evidence of corruption at the test centre and at the specific level the Tribunal had the certificates and documentary records linked to the Appellant. In that case the Appellant had failed to provide even the most basic description of the car journey which he claimed to have undertaken to the college. At paragraph 51 the Tribunal stated that the questions and doubts expressed by the experts focussed more on the ETS and test centre methodologies rather than the ETS mechanisms and processes for the analysis of the computerised files holding suspect speaking tests. The Tribunal later went on to consider aspects of the Appellant's evidence as to whether he could offer an innocent explanation for what had happened.

Findings

50. The allegation made against the Appellant in this case is that he employed a proxy test taker on 5 September 2012 at Eden college. The burden of proof of establishing this rests upon the Respondent and while the standard is the normal civil standard of balance of probabilities, because this is an allegation of fraud the more serious the allegation the more cogent the evidence must be to prove it.

51. The authorities establish that there is a 3-stage test. First of all, the Respondent must discharge the evidential burden of showing that the Appellant has a case to answer. Secondly the Appellant must show that there is an innocent explanation for what has happened. Thirdly the Respondent must then discharge the legal burden of proving that the Appellant's innocent explanation cannot be relied upon and that there is cogent evidence to show that the Appellant has indeed employed a proxy test taker.

52. The Respondent's evidence to discharge the evidential burden was in two main parts. The first was that the location and time of the Appellant's test meant that it was a case which fell within the ambit of Project Façade. I pause to note here that the error of Judge Adio in not recognising that the Appellant's case fell within the ambit of Project Façade meant that he made a material error of law in his assessment of whether the Respondent had discharged the evidential burden. The Appellant's test taken at Eden college fell within the period investigated by Project façade which reported that 77% of the tests taken during the period in question were invalid or questionable, the invalid outnumbering the questionable by more than three to one.

53. The second limb of the Respondent's argument was that the look up tool in this case produced by ETS showed that the Appellant's tests at South Quay College were questionable but the test at Eden college was invalid. The issue of look up

tools and their use was discussed at some length in **MA**. For the reasons given in that case I accept that the existence of an invalid test coupled with the Project Façade evidence meant that the Respondent had discharge the initial evidential burden and thus the Appellant was required to provide an innocent explanation.

54. The Appellant's argument breaks down into the following points. Firstly, he says that the South Quay test which was taken by him was wrongly marked by ETS who only gave him a score of 154 speaking and 134 writing. He says his English was much better than that and therefore there should have been no need for him to have taken a second test. This point appears to have been raised after the Appellant obtained the voice recordings from South Quay College. The difficulty for the Appellant with this argument is that the Appellant has been unable to show that ETS diverged from the normal marking scheme in his particular case. In paragraph 51 of **MA** the Upper Tribunal noted that the experts focussed more on test centre methodology than the mechanisms and processes for an analysis of the voice recordings. That the Appellant might have been disappointed with his mark does not mean that ETS assessed him incorrectly.

55. Secondly, the Appellant says that he is now able to give a description of the centre and details of his journey to and from the centre. He also says that there is a photograph of him taken after he took the test at Eden college. The Appellant gave very little indication to Judge Adio of the layout of the test centre. The Appellant's description of the journey and what happened at the test centre was summarised by Judge Adio at [7] and [8] of the Judge's determination. The Appellant did not say who drove to and from the test centre and this was a point on which the Appellant and his witness disagreed in their statements. In oral testimony to me Mr Bhuie corrected his statement thus bringing it into line with the Appellant's statement.

56. The further evidence given by the Appellant about the layout of the test centre (apparently not given to Judge Adio) sought to contrast the layout of South Quay College with the layout of Eden college. As the Respondent observed in closing submissions that evidence and the evidence of the photograph potentially place the Appellant at Eden college but still had to be looked at in the round with all the other evidence to decide whether the Appellant had in fact taken a test on that day as opposed to merely been at the centre.

57. I remind myself that the assessment of these cases is intrinsically fact sensitive and I have to look at all the evidence in the round. The Respondent's argument that the Appellant's innocent explanation cannot be accepted is to point to the extraordinary improvement in the Appellant's scores between the South Quay test and the Eden college test taken 15 days later. The Appellant argues that that this discrepancy strengthens his case rather than undermines it because the Eden college recordings are now shown not to be him. The Appellant argues

through his counsel that there must have been a mistake somewhere by ETS who have analysed somebody else's file voice recording and that is why the mark is so different two weeks later.

58. The problem with this argument is that that is not what the Appellant himself said to me when he was being cross-examined. What he told me was that the reason for the dramatic improvement between the two tests in the course of two weeks was because he had practised. If the tests have been muddled up and what has been described as his test was not in fact his test at all then the issue of whether he had or had not practised intensely enough to raise himself by two levels would not arise. It is not plausible that an individual would improve so dramatically in such a short period of time and I have seen no evidence to indicate that it would be possible. If the Appellant seeks to argue that his mark from South Quay should have been higher and therefore there is not such a jump from that to the Eden college mark, that is still not the same as saying that the Eden college mark should be disregarded because it has been muddled up by ETS who have sent somebody else's mark.

59. The Appellant in short is attempting to argue two contradictory points at the same time. The principal argument made by the Appellant is that the Eden college mark cannot be linked to the Appellant because of poor record-keeping by ETS as outlined in the case of **MA** which I have summarised above. However, this is a different situation to the one which the Upper Tribunal faced in **MA** for one important reason. ETS have provided the Appellant with two sets of voice recordings. The first set is indeed of the Appellant, he accepts it, I heard it played in court and whilst I do not put myself forward as an expert in voice recognition, I have seen nothing to indicate that it was not the Appellant's voice for the South Quay tests. It is however straining credulity to find that ETS have successfully linked the Appellant's South Quay test with the Appellant but the Eden test (which is not conducive to the Appellant's case) has somehow been muddled up with someone else's test. That is simply a coincidence too far.

60. The Upper Tribunal in **MA** were not laying down a rule that the Respondent could never prove fraud in an English language testing case because of problems with the continuity issue and the linking of voice recordings to individual Appellants. They were pointing out the reservations expressed by experts in the evidence to them. In this particular case there is powerful evidence to suggest that it was indeed the Appellant's test at Eden college which was taken by someone other than the Appellant and whose voice is on the voice recordings produced by ETS.

61. The Appellant argues that he has done the Respondent's job for him by locating these voice recordings. It is correct that I indicated at the end of my determination on the error of law issue that the Respondent should make efforts to obtain the voice recordings. It was explained at the hearing before me that there were severe difficulties for the Respondent to do this and in those

circumstances, it was appropriate that the Appellant should obtain the recordings since he was the one who could authorise the disclosure of data relating to him.

62. My understanding of the timeline is that the voice recordings which showed that it was not the Appellant's voice for the Eden college test arrived late in the day but before the application was made to the Tribunal to adjourn the hearing and/or set aside my decision. There was no good reason for the very late application for an adjournment which was made after the Appellant was aware that the Eden college voice recordings were not his. There were other evidential difficulties in this case including the involvement of Mr Joshi which has not been satisfactorily explained by the Appellant. Mr Bhuie appeared to know very little indeed about Mr Joshi. Since it was Mr Joshi's arrangements that led to the Appellant taking two tests and being driving to and from the Eden college test it is extremely surprising that the witness knew as little as he did about the man who apparently instigated the test arrangements.

63. The Appellant's evidence of the test arrangements was noticeably vague. The Appellant paid Mr Joshi a sum in cash and no paper trail was produced to show the booking made for the Eden college test. Mr Joshi I am told left the United Kingdom in 2016. I note that the decision of Judge Aziz was 30 November 2016 and the refusal letter was the previous year. The Appellant and his advisers would have had ample opportunity to take a statement in confirmation from Mr Joshi of the unusual arrangements made for the tests. That was not done and in my view the Respondent was quite right in closing submissions to point to that.

64. I have to look at all the evidence in the round when assessing the credibility of the evidence given by the parties in this case. I am satisfied that the Respondent has discharged the evidential and legal burden upon him of establishing that the Appellant's test taken at Eden college was taken by a proxy test taker and not by the Appellant himself. That explains why the mark increased significantly in the short space of 2 weeks. The proxy test taker was evidently too good and was out of line with the Appellant's English language skills which have remained remarkably consistent otherwise between the South Quay test in 2012 and the TOEIC test in 2014. I do not accept the Appellant's argument that there is insufficient evidence of continuity to link the Appellant with the Eden college test. I dismiss the Appellant's appeal.

Notice of Decision

I dismiss the appeal

I make no anonymity order as there is no public policy reason for so doing.

Signed this 29 November 2018

…….

Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

The First-tier Tribunal made a full fee award £140. I have set aside the decision of the First-tier Tribunal including the fee award. As I have dismissed the Appellant's appeal I make no fee award in this case.

Signed this 29 November 2018
…….
Judge Woodcraft
Deputy Upper Tribunal Judge

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26549/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 5 September 2018	
Prepared on 17 September 2018	……

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR HARMINDER SINGH
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Rehman, Solicitor
For the Respondent: Mr C Howells, Home Office Presenting Officer

REASONS FOR FINDING AN ERROR OF LAW

The Appellant

1. The Appellant is a citizen of India born 12 December 1984. He appealed against a decision of the Respondent dated 8 July 2015 to refuse him leave to remain in

the United Kingdom and to remove him by way of directions under section 47 of the Asylum and Immigration Act 2006. His appeal was allowed by Judge of the First-tier Tribunal Adio sitting at Hatton Cross on 9 April 2018. The Respondent appeals with leave against that decision.

2. The Appellant came to the United Kingdom in 2006 and studied an English course for one year in 2008. At [3] to [5] of his determination the Judge set out the reasons why the Respondent had refused the Appellant's application for further leave. The Appellant applied to vary leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant. Prior to submitting that application, the Appellant had applied for leave to remain as a Tier 4 student and a Tier 1 entrepreneur. For these applications the Appellant had submitted a TOEIC certificate from Education Testing Services (ETS).

3. The Respondent was satisfied that the Appellant had obtained that certificate fraudulently. There was significant evidence that the certificate was obtained by the use of a proxy test taker and the Appellant's test was invalid. The scores were cancelled by ETS and the Respondent refused the application on the general grounds contained in paragraph 322(2) of the Immigration Rules. The Appellant's sponsor had withdrawn the Confirmation of Acceptance for Studies (CAS) and the Appellant did not therefore obtain any points under appendix A of the Rules.

The Decision at First Instance

4. The Appellant told the Judge that a friend, Kushan Joshi, had booked the test for the Appellant as well as for himself. The Appellant did not have the proof of booking. Kushan Joshi had since gone back to India and the Appellant was not in much contact with him. There was no statement from Mr Joshi who had taken the Appellant to the test centre on 5 September 2012 by car. The Appellant described the outside of the building and stated he had had his speaking test on a computer for which he had to use a microphone. He could not recall all the questions. Around 15 days later after the test at South Quay College he got his result. He was later sent a letter saying the test was not valid, but he could attend another test which he booked at Eden college. The Appellant did not know why his friend Mr Joshi had chosen the Eden college for the second test. The Appellant did not do any research himself to look for a college. The Appellant described the speaking and writing test he took at Eden college.

5. The Judge noted at [18] of the determination that the issue he had to decide was whether the Appellant was one of the students who had employed a proxy test taker. The one aspect of the Appellant's evidence which was slightly worrying was that he had asked Mr Joshi to book the test but did not get the confirmation back from his test. It was reasonable to expect the Appellant to have the paperwork sent to him before he went to the test centre. On the other hand, the

Judge noted the Appellant would have needed some form of identity before he could take the test.

6. The Appellant had taken his test before a period covered by the Respondent's investigation "Project Façade" which in the Judge's view raised doubts about the evidence against the Appellant. Project Façade was a criminal enquiry into abuse of the English language certificate test at South Quay College and Eden college. The Appellant's command of English was now very good. The Judge noted the Appellant's qualifications and was willing to give the Appellant the benefit of the doubt. The lack of documents sent to the Appellant did not necessarily mean that the Appellant had not presented himself to take the examinations.

7. The burden of proof had not been discharged by the Respondent with regard to the allegation of deception. The ETS certificate was not obtained by fraud. There was no voice evidence to compare with the Appellant's voice. The Judge allowed the appeal.

The Onward Appeal

8. The Respondent appealed against that decision arguing that the evidential burden fell upon the Appellant to offer an innocent explanation which had not been adequately addressed by the Judge. It was not clear why the evidence from the Appellant would preclude the use of a proxy test taker during the test. The Appellant had not offered an explanation why his test was deemed invalid he simply denied the allegation. This was insufficient to displace the accepted evidence of the Respondent. The Tribunal had relied on the Appellant's English language ability and other qualifications. The test was not whether the Appellant spoke English but whether on the balance of probabilities the Appellant had employed deception. A person who was able to speak English could nonetheless use a proxy candidate.

9. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Pickup on 17 July 2018. In granting permission to appeal he wrote that it was arguable that the Judge had failed to provide adequate reasons why the Appellant's account was sufficient to discharge the evidential burden to offer an innocent explanation. The Judge unduly relied on the Appellant's English language ability and qualifications rather than assessing whether he had employed deception. The Judge failed to appreciate that an account of attending the test centre was not inconsistent with having employed a proxy test taker.

10. The Appellant responded to the grant of permission to appeal arguing that Judge Adio's determination was well reasoned. The Appellant was simply required to provide an innocent explanation which satisfied the minimum level of plausibility. The Judge had noted the Appellant's demeanour as a witness

and considered the Appellant's explanation. The Judge considered whether there existed any direct evidence involving the Appellant and employing deception. The Appellant's account sufficiently discharged the evidential burden of offering an innocent explanation.

The Hearing Before Me

11. As a result of the grant of permission to appeal the matter came before me to determine in the first place whether there was a material error of law such that the determination fell to be set aside. If there was not the decision of the First-tier Tribunal would stand.

12. In oral submissions the Presenting Officer relied on the Upper Tribunal decision of **MA [2016] UKUT 450**. The First-tier Tribunal Judge had failed to give adequate reasons. Once the Respondent had established a prima facie case of deception the burden shifted onto the Appellant to give an innocent explanation. It was not in dispute in this case that the Respondent had established a prima facie case. The error of law arose in the Judge's consideration of the Appellant's explanation. The Judge relied on the Appellant's present command of English and previous qualifications. At no point did the Judge consider the evidence of how the Appellant travelled to the test centres or the evidence of the test itself. This approach was contrary to the approach of the Upper Tribunal in **MA** where the Upper Tribunal had considered the Appellant's explanation how that Appellant had journeyed to the test centre and the knowledge of the test itself as well as how the Appellant had performed in giving evidence to the Upper Tribunal.

13. In response the Appellant's solicitor relied on his rule 24 response. The Judge had taken evidence from the Appellant about how the Appellant had booked the test centre and details of the building where the test took place. The Judge's observations at [20], that the Appellant was able to understand questions very well and engage with the cross examination distinguished the instant case from the facts of **MA**. In that case the Appellant had been unable to raise an innocent explanation because he had been completely unaware of the test centre whereas in this case the Appellant had provided full details. The question of whether there was fraud would invariably be fact sensitive. The Tribunal could consider whether it would be illogical for the Appellant to have cheated. The Respondent had argued in his grounds of onward appeal that the Appellant's denial of the allegation and description of the process was insufficient. That was not the test which the Appellant had to meet. The Appellant had to provide the minimum level of plausibility. The Appellant had given more than sufficient explanation. The burden of proof moved back onto the Respondent. This was not an article 8 appeal.

14. In conclusion the Presenting Officer noted that at the hearing at first instance the Respondent had raised issues relating to the credibility of the Appellant's

explanation. The Appellant failed to give evidence about the booking of the test and there was no explanation or statement from his friend Mr Joshi. The most important point was the lack of knowledge of the contents of the test which was a clear challenge to the explanation offered by the Appellant. In reply the Appellant's solicitor noted that the Judge had considered the Respondent's submissions at [18] on whether the Appellant should have the paperwork for the test but went on to perform a balancing exercise considering the evidence from the Appellant.

Findings

15. The issue in this case was a straightforward one. Had the Appellant discharged the burden upon him of showing that there was an innocent explanation for the complaint that he had used a proxy test taker when he obtained his English language test certificate in September 2012? The Judge heard the Appellant give evidence and noted the Appellant's present command of English together with previous qualifications. The Respondent complains that the Judge did not sufficiently take into account the Appellant's inability to explain how he got to the test centre or what actually happened when he took the test. The case of **MA** relied upon by the Respondent was something of an extreme case given that the Appellant knew very little about the solicitors who would arrange the test for him and was inconsistent about where he had actually taken the test. He was vague about photographs taken after the test and there were significant gaps in the Appellant's witness statements which were detailed in the Upper Tribunal Judgement. It is also worth noting that at paragraph 54 of their determination the up Tribunal referred to hearing and observing the Appellant studiously during some 2 ½ hours.

16. They found the Appellant surprisingly hesitant. They would have expected greater spontaneity in his evidence. The Appellant had dealt with a repeated question in a wholly unsatisfactory way and they came to a radically different view of the Appellant's credibility to the view formed by the First-tier Tribunal Judge. The Appellant had manifestly failed to raise an innocent explanation of any element of the case of deception established against him.

17. The relevance of **MA** for this appeal lies in the illustration it gives of the sort of issues that need to be considered by the Tribunal when assessing an Appellant's innocent explanation. Undoubtedly the Upper Tribunal in **MA** considered the issues in great detail. It was not necessary for the Judge in the instant case to set out each and every piece of evidence upon which he relied in coming to his conclusions. He was clearly influenced by three factors. The first was the Appellant's ability to speak English in the court room. The second was the Appellant's previous academic record and the third was that the Project Façade investigation into the two colleges where the Appellant had taken English language tests related to a period after the Appellant had taken his test. This last point was somewhat undermined by the Judge's reference at [17] that the

complaint about invalid tests at Eden College did cover the period when the Appellant was said to have taken his test.

18. At [18] the Judge indicated that he considered the submissions made by the Presenting Officer and referred to one aspect of the Appellant's evidence as being "slightly worrying". This related to the arrangements the Appellant made with Mr Joshi about booking the test. It is not entirely clear from the determination whether the Judge was referring to a submission by the Presenting Officer that this was slightly worrying or whether the Judge himself found it slightly worrying. What I find of concern is that the Judge did not appear to engage with the evidence relating to the arrangements that were made for the test and what the test actually consisted of. These are the crucial pieces of evidence for an Appellant to explain when putting forward his innocent explanation. The fact that the Appellant can now speak English very well does not indicate what his level of English would have been in September 2012 when a proxy test taker, it is alleged, was employed.

19. In giving reasons for a decision a Tribunal has to be able to show to the losing party why they have lost. I can understand the Respondent's concern in this case that they do not fully appreciate the reason why the Judge has decided as he has. Some explanation needed to be given by the Appellant of what the arrangements were on the day of the test. The Judge's reference to the Appellant describing the outside of the building did not take the matter significantly further. The Appellant has given an explanation why he could not obtain supporting evidence from Mr Joshi but that does not absolve the Appellant from the requirement that he must explain what did happen both in arranging the test and in sitting it.

20. The Appellant's statement made for the First-tier hearing and dated 15 November 2016 was brief on details of the test. Some weight could be attached to an Appellant's ability to speak English now but in the context of this case the absence of other evidence leaves a gap. I find that there is a material error of law in this determination because of the inadequacy of the reasoning for the Judge's conclusion that the Appellant had not employed a proxy test taker.

21. In the case of **Ahsan [2017] EWCA Civ 2009** it was said: "The evidence adduced by individual appellants in rebuttal will obviously vary from case to case. At a minimum they can be expected to give evidence that they did indeed attend the centre on the day recorded and took the spoken English test in person." I would expect for the rehearing of this appeal that the Appellant will provide further and more detailed evidence of the arrangements that were made for the English language test and what he recalls of the test itself. The burden of proof rests on the Appellant to provide an innocent explanation. It is not sufficient to say that the Appellant now speaks English well to indicate that he has provided a minimum level of plausibility as indicated in the case of **SM [2016] UKUT 229** and see paragraph 57 of **MA**.

22. I bear in mind the detailed scrutiny given by the Upper Tribunal to the Appellant's explanation in the case of **MA** as an indication of the type of issues which need to be considered before it can be said that the burden once again shifts back onto the Respondent. It is for the Appellant on advice to consider these issues and address them in a further statement which should be filed and served at least 14 days before the rehearing of the appeal. The Respondent should use his best endeavours to obtain any original voice recordings of the test(s) which the Appellant says he took. If these are available, they should be disclosed to the Appellant's solicitors at least 21 days before the rehearing, to enable the Appellant to comment on them in a statement if so advised.

23. This case has been remitted once before to the First-tier Tribunal and I do not propose that it should be remitted again. I set the decision of the First-tier Tribunal aside and direct that the appeal will be reheard before me on a date to be arranged.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I direct that the appeal be reheard on a date to be fixed before me with a time estimate two hours.

Respondent's appeal allowed to that limited extent.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 17 September 2018

…….
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

The First-tier Tribunal made a fee award against the Respondent in the sum of £140. As I set that decision aside, I also set aside the fee award which will need to be further addressed at the resumed hearing before me.

Signed this 17 September 2018

…….
Judge Woodcraft
Deputy Upper Tribunal Judge