



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/33194/2015

THE IMMIGRATION ACTS

Heard at Field House, London  
On 6 March 2018

Decision & Reasons Promulgated  
On 22 March 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

MUSAMIL HUSSAIN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms S Iqbal, instructed by ATM Law Solicitors

For the Respondent: Ms S Kotas, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant was born on 26 December 1988 and is a citizen of Pakistan.
2. The appellant arrived in the UK on 17 February 2011 and held varying periods of leave to study. His last application for leave to remain was made on 9 August 2014. It was made whilst his leave was current, and therefore his leave to remain was statutorily extended by operation of s.3C of the Immigration Act 1971. His application was refused on 11 September 2015 but his leave continues because he gave notice of appeal within the required period.

3. The appeal against the decision of 11 September 2015 was dismissed by First-tier Tribunal Judge Gurung-Thapa in her decision and reasons statement that was promulgated on 25 September 2017. It is against that decision the appellant appeals to the Upper Tribunal, with permission granted by First-tier Tribunal Judge CA Parker.
4. The focus of this appeal is whether Judge Gurung-Thapa properly assessed if the respondent had discharged the legal burden of proof regarding the allegation the appellant had obtained his English language qualification by deception.
5. Judge Gurung-Thapa's finding that the respondent discharged the initial evidential burden in relation to the three speaking tests the appellant claimed to have taken on 15 January, 6 February and 27 March 2013 is not challenged. In any event, applying the relevant case law, this finding is sound. The respondent provided the look-up tool results which showed that ETS had recorded the first and last as invalid and the middle one as questionable. The respondent also provided the results of all who took the speaking test on the dates indicated. The overall results showed that all who took the speaking tests had had their results retained by ETS as being either questionable or invalid. Judge Gurung-Thapa also recognised that the information provided had been verified by a senior caseworker.
6. The appellant alleges that Judge Gurung-Thapa failed to assess whether he had provided an innocent explanation and that failure meant she had not properly assessed the case. The appellant says he had an innocent explanation but his only explanation was to describe the test centre, how he booked tests, how he travelled and how the tests were conducted. Considering that the case law categorises an innocent explanation as "an account which satisfies the minimum level of plausibility", nothing in what the appellant described goes to explaining why his results were retained as questionable and invalid.
7. I acknowledge that the judge does not make a discrete finding on this issue but that in context it is clear she rejected the appellant's explanation. In the context of the overwhelming evidence provided by the respondent that there was significant doubt about the reliability of all the tests taken at the test centre on the days in question, the appellant had more to prove than he might if the respondent had provided only limited evidence, such as only the look up tool results.
8. Judge Gurung-Thapa recognised the limited nature of the appellant's account and that it did not provide a sufficient or innocent explanation. This is clear from her reliance on the Court of Appeal's guidance in *MA (ETS-TOEIC testing) Nigeria* [2016] UKUT 450. She noted that the appellant had not sought an explanation from ETS and had not tried to obtain a copy of his recordings for an independent assessment. This approach to the evidence is correct in law, as more recently clarified by the Court of Appeal in *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009, where at paragraph 33 Underhill LJ accepted:

"The observations of the UT in *SM and Qadir* should not be regarded as the last word. Where the impugned test was taken at an established fraud factory such

as Elizabeth College, and also where the voice-file does not record the applicant's voice (or no attempt has been made to obtain it), the case that he or she cheated will be hard to resist."

9. I find it was open to the Judge to make the adverse finding she did because the explanation and submissions provided were no more than an assertion the respondent had not discharged the burden. The fact the appellant could describe events on the day of the tests does not provide an innocent explanation.
10. Although this disposes of the substantive issues in this appeal, I mention that at the start of the hearing I heard and rejected an application from Ms Iqbal to amend the grounds. She wished to argue that the respondent had failed to comply with her own policies and therefore the decision was unlawful irrespective of any allegation of deception. She relied on the Upper Tribunal's decision *Kaur (Patel fairness: respondent's policy)* [2013] UKUT 344.
11. After hearing from both representatives, I decided it was not appropriate to amend the grounds because to do so would have been to permit a wholly new issue to be ventilated. The grounds were settled by experienced counsel, who did raise the issue. There has been plenty of time between the grant of permission for a written application to have been made. There was no good reason for the delay in making the application, other than Ms Iqbal had only recently been instructed. That was not a sufficient reason to amend grounds in the circumstances, particularly as admitting the argument at this very late stage would result in unnecessary delay.
12. As identified in the First-tier Tribunal, the issue of whether the respondent should have granted the appellant 60-days to find a replacement because the sponsorship licence of his college was withdrawn is immaterial because Judge Gurung-Thapa's finding that the respondent has shown it was more likely than not that the appellant had used fraud to obtain his English language qualifications. I agree.
13. As there is no legal error in the decision and reasons statement, I uphold the decision.

### **Notice of Decision**

The appeal to the Upper Tribunal is dismissed because there is no legal error in the decision and reasons statement of First-tier Tribunal Judge Gurung-Thapa.

No anonymity order has been requested and there is no reason for one to be made.

Signed

Date 21 March 2018

Judge McCarthy  
Deputy Judge of the Upper Tribunal