



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/10366/2018**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons**

**On 4<sup>th</sup> February 2019**

**Promulgated**

**On 13<sup>th</sup> March 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**MR SIDHEEKH KUTTIKATTIL MEETHAL  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr. G. O'Ceallaigh (Counsel)

For the Respondent: Mr. E. Tufan (Senior HOPO)

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Mailer, promulgated on 6<sup>th</sup> December 2018, following a hearing at Hatton Cross on 12<sup>th</sup> November 2018. In the decision, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

## **The Appellant**

2. The Appellant is a male, a citizen of India, and was born on 6<sup>th</sup> April 1984. He appealed against the decision of the Respondent dated 20<sup>th</sup> April 2018, refusing his application for indefinite leave to remain in the UK, on the basis of his long residence in this country.

## **The Appellant's Claim**

3. The essence of the Appellant's claim is that he came to the UK on 26<sup>th</sup> February 2008 as a student and thereafter had his leave to remain extended on various occasions, which took him up to 2014. In India he had completed a Bachelor of Science Degree from the University of Calicut. He had completed his Degree in the English Medium Language from Malabar Christian College. His secondary school education was also in English. In 2014, having secured a number of extensions of leave to remain, he then applied for leave to remain as his wife's dependant. He was granted valid leave until 28<sup>th</sup> August 2015. When he applied to extend his leave thereafter on 27<sup>th</sup> August 2015, this was refused by the Respondent, on the basis that he had submitted false documents in one of his previous Tier 4 student applications.
4. The Appellant, however, denies that he obtained a TOEIC certificate by using a proxy on 19<sup>th</sup> June 2012, as alleged, and maintains that he did attend the test and he did obtain the certificate genuinely. In fact, his representative lodged an application for administrative review against a decision of 8<sup>th</sup> February 2016, and permission was granted by the Upper Tribunal. Subsequently, a consent order was entered into on 8<sup>th</sup> May 2017, when the Respondent agreed to reconsider the administrative review decision. The Appellant then submitted further representations. He provided his previous IELTS certificate, as well as his Bachelor of Physics Degree certificate from India. Moreover, he provided a NARIC certificate. Judge Mailer, in his decision of 6<sup>th</sup> December 2018, observes that "The level of English in the NARIC report is much higher than that required for the TOEIC for students" (paragraph 19). The Appellant's application for review was unsuccessful. The original decision was withdrawn. The application was sent back to the original case working team. However, the Appellant did not hear back from the Home Office for a very long time.
5. He considered it better to make an application for further leave to remain pending that decision. This he did. On 14<sup>th</sup> February 2018 the Home Office asked him to attend an interview to assess his application. At the interview on 23<sup>rd</sup> February 2018, the Appellant was asked for information about his TOEIC test. He explained that this took place nearly six years ago, and provided as much information as he could.
6. On 20<sup>th</sup> April 2018 the application was refused, that is the decision that is being appealed presently. The Appellant repeats that he has not used deception in obtaining his certificate. He contends that he has proved his

innocence on a previous occasion. The Respondent was forced to review her decision.

### **The Judge's Decision**

7. The judge applied the relevant case law in **SM and Qadir [2016] UKUT 229**, and in **MA (ETS - TOEIC testing) [2016] UKUT 450**. The judge also had regard to the more recent decision of **Majumder v. SSHD [2016] EWCA Civ 1167** (see paragraphs 48 to 49 of the decision). He heard submissions from the Appellant's Counsel that with regard to the TOEIC test on 23<sup>rd</sup> May 2018, the Appellant had only "narrowly failed" by 20 points, so that it was "absurd" that he would ask someone to take a test for him which resulted in a failing score. He had to pass a test in June.
8. However, two months earlier he had actually passed the much tougher IELTS test, and he was well-qualified, and had a good grasp of English when he gave evidence (see paragraph 50). Consideration was given by the judge to the submissions of the Respondent HOPO who relied upon the refusal letter, and who stated that none of the Appellant's family members had any status, and that his claim was based upon private life outside the Rules (see paragraph 43), and that his recorded result was judged to be invalid, and that the Respondent had met the evidential burden, but the legal burden had not been met by the Appellant (see paragraph 44).
9. The judge went on to specify that "The sole basis upon which his application was refused was the allegation that he used a proxy to take his English test and had therefore engaged in TOEIC fraud" (paragraph 59). The judge observed how, when the Appellant took the IELTS test, a month before his leave expired, "His overall assessment was high enough but he did not score highly enough in the reading module. He obtained a score of 6 in the speaking component" (paragraph 60). Reference was also made by the judge to the judicial review proceedings that followed and how "the respondent eventually withdrew the refusal of leave and reconsidered the application" (paragraph 64).
10. Finally, consideration was given by the judge to how the Appellant provided a fulsome description of how he had booked the English test with the London College of Social Studies, operating near Tower Bridge, and how he had travelled by underground and reached London Bridge underground station, and then taken ten minutes to walk to the centre, where there were some fifteen to twenty candidates present, and "the college verified his ID as well as took his photograph" (paragraph 74). The judge was impressed by the fact that the Appellant had "described in some detail what the listening test involved" and how it "took about 45 minutes" and that "the reading test took about 75 minutes" (paragraph 75).
11. The judge was satisfied that no dishonesty was involved and that the Appellant had not engaged in fraudulent conduct, so that the allegation

against him was unwarranted and that the Appellant had met the legal standard that was upon him. The judge allowed the appeal.

### **Grounds of Application**

12. The grounds of application state that the judge failed to explain properly why the evidence of the Appellant was sufficient and why it precludes the use of a proxy as alleged. The grounds also state that the matters relied upon by the Appellant have not been properly explained by the judge as to their acceptance.
13. On 19<sup>th</sup> December 2018, permission to appeal was granted on the basis that “the Judge’s reasoning it would seem, may amount to a simple acceptance of what the Appellant says without providing the reasons why”.

### **Submissions**

14. At the hearing before me on 4<sup>th</sup> February 2019, Mr Tufan, appearing as Senior Home Office Presenting Officer, submitted that the judge had failed to take into account Professor French’s report (at paragraphs 74 to 75). The Appellant had maintained that he had undertaken a Physics Degree in India, but if that was so, the UK NARIC exemptions which apply to those who have had their education in the English language, were not shown to have been applicable to the Appellant, and therefore he had to take the test.
15. This being so, Mr Tufan submitted, that the decision in **MA (ETS - TOEIC test) Nigeria [2016] UKUT 450** became relevant. What was said in this decision was that:-

“In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system” (paragraph 57).
16. Mr Tufan submitted that any one of these factors could have been applicable in the Appellant’s case. Even if the Appellant was versed in the English language this did not necessarily mean that there was no incentive for him to cheat. Accordingly, the judge could not have allowed this appeal without a proper engagement with Professor French’s report. The weight to be given to that report was well-established in the cases in this area. It had to be remembered that there was an ETS report to the effect that the Appellant’s results were invalid. Against the finding, the judge had to be particularly careful not to take the Appellant’s evidence at face value. In the case of **MA [2016] UKUT 450**, the Tribunal had made it clear that the “invalid” assessment is something which may be treated as reliable.
17. For his part, Mr O’Ceallaigh submitted that if the Respondent’s representative was today going to place reliance upon **Majumder**, then

this was the very reason why this appeal could not succeed, given what had been said at paragraph 18 of that decision. It was made clear there that:-

“in considering an allegation of dishonesty the relevant factors included the following: what the person accused had to gain from being dishonest; what he had to lose; what is known about his character; the cultural environment in which he operated; how the individual accused of dishonesty performed under cross-examination, and whether the Tribunal’s assessment of that person’s English language proficiency is commensurate with his or her TOEIC scores ...” (paragraph 18).

18. Mr O’Ceallaigh submitted that this was a case where the Appellant had actually performed successfully on a more stringent test only two months earlier, when he passed an IELTS test (see paragraph 50 of the decision). He had passed the much more demanding Pearson test. It was untrue to say that he was not exempted by UK NARIC standards, because at the time that he had decided to take the test, he was unaware that he was subject to an exemption. However, he admitted he had been able to get precisely this certificate which provided him with the necessary exemption. Therefore, the test was unnecessary for him to have taken. The decision recorded that “The NARIC certificate was produced. The level of English in the NARIC report is much higher than that required for the TOEIC for students” (paragraph 19 of the decision). He had a Physics Degree from India where his tuition had been in the English medium. Against this, the repeated reference to Professor French’s report was a red-herring, because Professor French had been unable to say whether test reports could accurately be correlated with the person taking them, which was to suggest, that errors of identification could take place.
19. Mr O’Ceallaigh also submitted that in the case of **MA [2016] UKUT 450**, the experts had jointly “highlighted the following matters” and these included that “The integrity of the test taking procedures and systems established by ETS in its manuals depends heavily on the reliability and probity of test centre staff” (paragraph 15(xi)). This was important because the staffing of the centres, by officials, in itself left much to be desired, and this was now a matter of recorded fact in a case such as **MA**. Mistakes were known to occur.
20. The person who had to bear the brunt of these mistakes would be a person such as the Appellant in this case. In the same way, it had been accepted that “The test centre seating plans which have been produced are incomplete” (paragraph 15(xiii)). Finally:-

“A study of the spreadsheets attached to the witness statements of the Home Office employee, Mr Sewell reveals a lack of any nexus between the data supplied to him by ETS and the unique ID of individual candidates” (paragraph 15(xiv)).

This, submitted Mr O’Ceallaigh, was nothing more than a disagreement with the decision of the judge below.

### **No Error of Law**

21. I am satisfied that the making of the decision by Judge Mailer did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007), such that I do set aside the decision and remake the decision. My reasons are as follows.
22. First, the judge has provided a comprehensive background to the events which transpired, which included the Appellant lodging an application for administrative review against a decision that he had obtained a TOEIC certificate by using a proxy on 19<sup>th</sup> June 2012, which led to a consent order, on the basis of which the application was withdrawn. The judge has set out the relevant case law meticulously (at paragraphs 48 to 49). He has had regard to the fact that the Appellant only “narrowly failed” his TOEIC test of 23<sup>rd</sup> May 2012, and that there was a submission before him that if the Appellant were to use a proxy, he would not use one which would lead to his failing the test. Reference was also made to how the Appellant provided a fulsome account of his going to the London College of Social Studies to take the test (paragraph 74 to 75).
23. Most importantly, however, the judge found that “The Appellant currently showed that he has the ability to speak English and understand it well. He gave his evidence in English without any difficulty”. Reference was made to the fact that “he had a Bachelors Degree in Physics which was also conducted in English”. Moreover, this was a case where, “he has a postgraduate certificate in Business Administration from the University of Wales”.
24. However, perhaps the most significant, was the judge’s finding that “in the month before the taking of the TOEIC test, he obtained a speaking score in an IELTS, commensurate with his TOEIC result – and higher than that required” (paragraph 77). This is important, because whereas it is the case that in **MA (ETS - TOEIC testing) [2016] UKUT 450**, reference is made to how “In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud” (paragraph 57), the judge was not here dealing with the position “in the abstract”.
25. What the judge was doing was having proper regard to the more recent decision of **Majumder [2016] EWCA Civ 1167**, which enjoins a decision maker to consider “an allegation of dishonesty” on the basis of “relevant factors”, which include “what is normal about this character” and include “whether his or her academic achievements are such that it was unnecessary or illogical for them to have cheated” (paragraph 18). In this case, the judge was firmly of the view that:-

“it is unlikely that he would have paid someone to fail an English test for him. Although there might be reasons why he would wish to pay a proxy to take the test for him, I consider the evidence as a whole,

including his unchallenged evidence that his ID and photograph was taken by the college” (paragraph 79)

to have been in his favour. The fact that the Appellant’s evidence that his ID and photograph was taken by the college was repeated earlier as well, when it was stated that “the college verified his ID as well as took his photograph” (paragraph 74). In short, the judge had ample grounds on which to reach the decision that he did. There is no error whatsoever.

**Notice of Decision**

26. There is no material error of law. The decision shall stand.

27. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

11<sup>th</sup> March 2019