

IMMIGRATION LAW UPDATE

Educational Testing Service (ETS)



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Introduction

- Background to the scandal
- It's effects
- The Secretary of State's evidence
- The case law
- Top tips

BACKGROUND

<https://www.bbc.co.uk/news/uk-26024375>



The screenshot shows the BBC News website interface. At the top, there is a navigation bar with the BBC logo, a 'Your account' link, and a menu with categories: News, Sport, Weather, iPlayer, TV, and Radios. Below this is a red banner with the word 'NEWS' in white. Underneath the banner is a secondary navigation bar with links for Home, UK, World, Business, Politics, Tech, Science, Health, and Family & Education. The 'UK' link is highlighted. Below this is a third navigation bar with links for UK, England, N. Ireland, Scotland, Alba, Wales, Cymru, and Local News. The main headline is 'Student visa system fraud exposed in BBC investigation' in a large, bold, black font. Below the headline, it says 'By Richard Watson' and 'BBC Panorama'. To the right of the byline are social media sharing icons for Facebook, Messenger, Twitter, Email, and a 'Share' button. Below the sharing icons is a timestamp: '10 February 2014'. The main content area features a video player with a play button icon in the bottom left corner. Below the video player is a caption: 'Undercover footage filmed by Panorama uncovered systematic fraud in the student visa system'. The video itself shows a person in a purple hoodie sitting at a desk in a classroom or office setting, writing on a piece of paper. In the background, there are whiteboards and other people.

The Home Office has suspended English language tests run by a major firm after BBC Panorama uncovered systematic fraud in the student visa system.



EFFECTS



- Submission of false documents is a ground for refusal in a range of circumstances: visas; entry clearance; leave to remain.
- Today, ETS issues often arise in relation to historic applications, and particularly in the context of applications to remain.
- Appendix FM suitability requirements (S-LTR/S-ILR)

EFFECTS



S-LTR 1.6 “undesirable to allow them to remain in the UK

S-LTR.2.1. The applicant will normally be refused on grounds of suitability if any of paragraphs S-LTR.2.2. to 2.5. apply.

S-LTR.2.2. Whether or not to the applicant’s knowledge –

(a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or

S-LTR.4.1. The applicant may be refused on grounds of suitability if any of paragraphs S-LTR.4.2. to S-LTR.4.5. apply.

S-LTR.4.2. The applicant has made false representations or failed to disclose any material fact in a previous application for entry clearance, leave to enter, leave to remain or a variation of leave, or in a previous human rights claim; or did so in order to obtain from the Secretary of State or a third party a document required to support such an application or claim (whether or not the application or claim was successful).

THE SECRETARY OF STATE'S EVIDENCE



- Stage 1: Decision letter.
 - Will record date and location of test
 - Scores from disputed results
 - “ETS has a record of your speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple test. ETS undertook a check of your test and confirmed to the Secretary of State that there was significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker”
- Stage 2 (following issue of appeal): “Generic witness statements” AND “ETS lookup”
- Stage 3 (following appellant’s evidence): Bespoke rebuttal evidence

THE SECRETARY OF STATE'S EVIDENCE – “Generic evidence”



- Witness statement of Rebecca Collings
 - Background to English language testing and engagement of ETS
 - BBC Panorama and subsequent investigation
 - Home Office decision making
- Witness statement of Peter Millington
 - ETS marking process
 - How ETS identifies fraudulent applications and proxy test takers
- Expert witness statement of Prof. French (forensic speech analyst)
 - Likelihood of false positives

THE SECRETARY OF STATE'S EVIDENCE – Identifying fraud



- Audio files sent to US for marking.
- Voice recognition software deployed – same voice on different tests
- Flagged results subject to human verification
- Possible fraud marked as:
 - “Questionable” - i.e where irregularity (usually because test taken at centre where significant fraud
 - “Invalid” – where ETS confirm that the voice matches more than one candidate



THE SECRETARY OF STATE'S EVIDENCE – “Lookup tool”



ETS SELT SOURCE DATA

Record	Inv / Quest	Certificate No	Given Name	Family Name	DoB	Nationality	UK/Int
●	Invalid	●	●	●	01/01/19●	Bangladesh	UK

Test Centre	Test Date	Speaking Score	Writing Score	ETS Batch
Colwell College	16/10/20●	200	190	Original Inv List 14-04-14

CASE LAW – Key principles

Standard of Proof

Balance of probabilities with anxious scrutiny. “Evidence of sufficient cogency” **SM & Qadir v SSHD** [2016] UKUT 229 (IAC) at §58

Burden of Proof

- “ A veritable burden of proof boomerang!” **Qadir** §57
- SSHD must satisfy “evidential burden”: *prima facie* case
- A must then raise innocent explanation which satisfies “minimum level of plausibility”
- SSHD must then satisfy Tribunal/Court to BoP that this explanation should be rejected.



CASE LAW – “The evidential burden”

- The “generic evidence” will (just!) satisfy the “evidential burden”: ***Qadir*** [2016] EWCA Civ 1167
- BUT probably not where SSHD fails to include the lookup tool naming the Appellant and describing the results as “invalid”: ***SSHD v Shehzad*** [2016] EWCA Civ 615 and ***R (Iqbal) v SSHD*** [2017] EWHC 79



CASE LAW – “A plausible explanation” (1)

- Is it the Appellant’s voice? Voice recordings can be requested by Appellants from Jones Day – solicitors representing ETS
- “Chain of custody” issues (i.e. “it’s not my voice because it wasn’t my test”): **MA (ETS TOEIC Testing)** [2016] UKUT 450, §§15 & 47; **R (Saha) v SSHD** [2-17] UKUT 17 (IAC), §40
 - No password protection on test computers
 - No audit logs showing storage, handling and transmission of test data
 - No metadata attached to voice files (showing time and location of recording)
 - Problems where test centre staff manually entered candidate details
 - Not clear how candidate name linked to ETS unique ID

CASE LAW – “A plausible explanation” (2)

- Evidence of existing competence in English language is persuasive, but not decisive:
 - **MA** §57 “*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*”
 - **R (Gaogalawe) v SSHD** [2017] EWHC 1709 (Admin): Weak evidence of proficiency sufficient to rebut SSHD’s evidential burden, but not to defeat SSHD’s overall case
- Recollection of the details of the test:
 - When, where, journey, seating, test format/questions, how you paid for the test
 - Detail (cf **Gaogalawe**); Consistency (cf **MA**)

CASE LAW – Rebuttal evidence

- Not always rebuttal, but commonly so.
- Can include statistical evidence: ***R (Abbas) v SSHD*** [2017]
- Evidence in relation to particular test centres
- Specific rebuttal evidence: e.g. seating plans: ***MA***

CASE LAW – Out of country appeals

- ***R (Ahsan) v SSHD*** [2017] EWCA Civ 2009:
 - C found to have cheated on TOEIC test and s.10 notice removal notice served.
 - Only out of country right of appeal
 - C seeks to JR removal. Question is whether the OOC constituted an fair and effective procedure to challenge

CASE LAW – Out of country appeals (2)

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(1) *In deciding by what route a decision to remove someone on the basis that they cheated in a TOEIC test can be challenged, the starting-point is to establish whether the decision was made under the 2014 Act regime or its successor. (If it was made prior to 20 October 2014 it will fall under the old regime, and if it was made after 5 April 2015 it will fall under the new regime; in between those dates the position depends on the effect of the applicable commencement and transitional provisions.)*

(2) *If the decision falls under the old regime it will have been taken under [s.10](#) of the 1999 Act in its unamended form. The person affected by the decision will generally have a right only to an out-of-country appeal, under [s.82](#) of the 2002 Act, read with [s.92\(1\)](#): they will not, except by unusual chance, have a right to an in-country appeal under the “human rights claim” provision of [s.92\(4\)](#), because they will not typically have made such a claim prior to the removal decision: see [15].*

(3) *What the Court holds in part (A)—see in particular at [72]–[98]—is that an out-of-country appeal is not an effective remedy where: (a) it would be necessary for the appellant to give oral evidence on such an appeal; and (b) facilities for him or her to do so by video-link from the country to which they will be removed are not realistically available. It accordingly holds, subject to (4) below, that persons against whom such a decision is made will be entitled to challenge the decision by way of judicial review; that is so whether or not their art.8 rights are engaged. In reaching that conclusion the Court follows the approach of the Supreme Court in [Kiarie and Byndloss](#) to what are substantially similar circumstances and distinguishes its previous decisions in [Mehmood](#) and [Ali](#) and [Sood](#). The Court finds that both conditions were satisfied in the present cases and observes that condition (a) is likely to be satisfied in TOEIC cases generally (see [91]) and that in typical cases condition (b) is likely to be satisfied also (see [90]).*

(4) *Notwithstanding (3), the court at [99]–[27] accepts that in principle permission to proceed by way of judicial review could be refused if the person in question could achieve an equivalent remedy by an in-country human rights appeal under the 2014 Act regime, subject to the Home Secretary’s power to certify the claim as wholly unfounded. But such a remedy would only be equivalent if the three conditions identified at [116] above are satisfied, which they were not in these cases. **

(5) *Part (B) of the judgment concerns a challenge to the certification of a human rights claim in a particular case to which the 2014 Act regime applies. The Court finds that the certificate is liable to be quashed. The decision does not directly depend on the issue of whether the appellant cheated in his TOEIC test, but the Court makes some observations about the appropriateness of certification where that is the determinative issue: see [156].*

(6) *The judgment also discusses the authorities on the extent to which the art.8 rights of students may be engaged by their removal prior to completion of their studies (see at [84]–[88]) and the obligations of the Secretary of State to facilitate return in cases where a person who has been removed is successful in an out-of-country appeal (see [133]).*

CASE LAW – Out of country appeals (3)



- ***Khan v SSHD*** [2018] EWCA Civ 1684. CA approves compromise position for all decisions made after 5 April 2015
 - (i) the Appellant would submit full particulars of why it would be incompatible with Article 8 for him to be required to leave the UK, within 28 days;*
 - (ii) the Respondent would either rescind her decision of 20 July 2016, refuse the human rights claim or certify it within a further 28 days;*
 - (iii) both parties are of the understanding that, in any human rights appeal, the FTT would be able to determine whether or not the Appellant committed a TOEIC fraud;*
 - (iv) if the Appellant succeeds on his appeal, on the basis that he did not commit such a fraud, then in the absence of some new factor justifying a different course, the Secretary of State would rescind her decision of 20 July 2016 and afford the Appellant a reasonable opportunity of securing further leave to remain.*

TOP TIPS

- Obtain voice recordings;
- Check whether ETS lookup tool provided
- Obtain as much detail about the test as possible from client
- Check the test centre – is it associated with other fraud
- Be prepared for late evidence from SSHD

