



# information sheet

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**Vishal Misra, ILPA Legal Officer** [vishal.misra@ilpa.org.uk](mailto:vishal.misra@ilpa.org.uk)

**Immigration Law Practitioners' Association** [www.ilpa.org.uk](http://www.ilpa.org.uk) 020-7251 8383 (t) 020-7251 8384 (f)

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## Effectiveness of out of country rights of appeal

This information sheet discusses the recent judgment of the Court of Appeal in *Ahsan & Others v Secretary of State for the Home Department* [2017] EWCA Civ 2009 and considers how it will affect the position of claimants accused of deception for the purposes of obtaining leave to remain who cannot bring appeals from within the United Kingdom.

### The case before the Court of Appeal

The Appellants had all been accused of cheating on their English tests run by a US business called Educational Testing Service ('ETS'). ETS provided an approved test known as the Test of English for International Communication ('TOEIC'), which demonstrated proficiency in written and spoken English for certain kinds of leave e.g. student leave. In February 2014, the BBC's *Panorama* programme revealed that widespread cheating had occurred in a number of ETS centres. Responding to the scandal, ETS employed voice recognition software to analyse the tests at the centres to identify where one person had taken multiple tests. Relying on ETS's findings, the Secretary of State cancelled or refused leave in over 40,000 cases.

All of the Appellants denied the allegation that they had obtained their TOEIC certificates by way of deception. Resultantly, the question that they raised at the Court of Appeal was whether they could challenge the Secretary of State's findings – either via a judicial review claim or an appeal – within the United Kingdom, or whether they had to pursue their challenges once they had left the United Kingdom; an 'out-of-country' right of appeal.

The Appellants fell in 2 discrete categories. Decisions made by the Secretary of State before 20 October 2014 were dealt with by the Court using "the old regime", and decisions made by the Secretary of State after 5 April 2015 were dealt with by the Court using "the new regime".

### The old regime

The old regime functioned pursuant to section 10 of the Immigration and Asylum Act 1999. In this instance, the relevant Appellants had been served with a notice that they were liable to removal under section 10 of the 1999 Act on the basis of having

used deception to obtain leave. The Appellants sought judicial review of the section 10 decision. They were initially refused permission as the out-of-country right of appeal was deemed an appropriate alternative remedy, but they were granted permission to appeal to the Court of Appeal.

### **The new regime**

The relevant Appellant had applied for leave to remain on human rights grounds. Usually, any refusal of a human rights application would carry an in-country right of appeal. However, in this instance, the Secretary of State certified the Appellant's claim as "clearly unfounded" and so any appeal could only be brought out-of-country. The Appellant sought judicial review of the certification which was refused, but he was granted permission to appeal to the Court of Appeal.

### **The approach of the Court of Appeal**

The Appellants were all nationals of Bangladesh, India and/or Pakistan. The Court was presented with evidence, in the form of reports and witness statements, from relevant professionals in these countries that there was simply not the necessary infrastructure in place for the Appellants to give video-link evidence in order to orally rebut the accusation of deception levied against them. The Court of Appeal, therefore, found that an out-of-country right of appeal would not be a fair and effective procedure to challenge the decisions to remove them. Although, the Court also stated:

*"I emphasise that the conclusion depends on the particular features of the Appellants' cases, namely that the nature of the issues raised by their appeal was such that they could not be fairly decided without hearing their oral evidence, and also that facilities for giving such evidence by video-link were not realistically available. Even if those features are shared by the great majority of TOEIC cheating cases, it does not follow that they will be present in all cases where the legislation provides for an out-of-country appeal: in particular, whether it is necessary for the appellant to give oral evidence will depend on the nature of the issues."*

Further, in regards to the new regime, the Court stressed that whilst cases may support certification in certain instances the Secretary of State will have to recognise that certification is fact-sensitive and must state why a human rights claim has no prospect of being successful rebuttal by the appellant's oral evidence.

### **What this means for Appellants**

People accused of cheating in TOEIC exams may be able to rely on the necessity of giving oral evidence to rebut the Secretary of State's claim. Where the State that they are being removed to cannot provide the necessary infrastructure to accommodate this, an out-of-country right of appeal is unlikely to be effective, and Appellants should be able to seek judicial review, unless they can secure an in-country right of appeal arising from a human rights claim.

This information sheet provides a limited analysis of the judgment. For further information please see full text of the documents referenced and summaries at:

<https://www.gardencourtchambers.co.uk/migrants-accused-of-cheating-in-english-language-test-have-in-country-right-of-challenge-rules-court-of-appeal/>