



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/02124/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 26 February 2018**

**Decision & Reasons
Promulgated
26 March 2018**

Before

**DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL**

Between

**GAURAV BHAKHRI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Pipe, Counsel instructed by Connaughts

For the Respondent: Ms I Ahmed, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of India, brings a challenge to the decision of Judge G Clarke of the First-tier Tribunal sent on 7 June 2017 dismissing his appeal against the decision made by the respondent on 11 January 2016 refusing him leave to remain.
2. There are two aspects to this appeal, one concerning where the judge erred in deciding that the appellant had used deception in a TOEIC speaking test through ETS on 17 April 2012 at Elizabeth College, the other

concerning the judge's assessment of the appellant's circumstances under Article 8 ECHR outside the Rules.

3. It is convenient to take the second aspect first because Ms Ahmed concedes that the judge's decision as regards Article 8 is legally flawed. Despite noting that the appellant has a British citizen child, the judge did not apply the guidance set out in **SF and Others (Guidance, post-2014 Act) Albania [2017] UKUT 120 (IAC)** and indeed wrongly concluded that it was reasonable to expect a British citizen child to leave the UK. The judge did seek to qualify this by adding "that it will be a practical choice for the Appellant and his wife" (paragraph 68), but such qualification could not redeem the fact that the judge was reversing the established principle set out in Home Office IDIs.
4. The judge's error in this regard suffices as a reason for me to set aside his decision. Nevertheless it is necessary for me to address the first aspect of the appeal because it has a potential impact for my later decision on disposal of the appeal.
5. The challenge to the judge's finding of deception is brought under three heads.
6. First it is contended that the judge erred in respect of the burden upon the appellant in respect of the ETS allegation, applying a legal burden rather than an evidential burden of raising an innocent explanation. I reject this contention. Not only did the judge cite and apply established case law on ETS cases, but he expressly stated (i) that the initial evidential burden to prove deception rested on the respondent (paragraph 33); (ii) and that the burden then shifted to the appellant to provide an innocent explanation (paragraph 46). If the judge introduced confusion by citing a passage from **SM & Qadir [2016] EWCA 615** dealing with the legal burden, it remains that his focus thereafter was solely on whether the appellant had provided an innocent explanation evidentially. Mr Pipe takes issue with the judge's statement at paragraph 43 that "I find that the Appellant had failed to prove that there has been a system error on the part of the Home Office" rightly observing that one cannot expect an applicant to establish something as generic as that. However, this statement refers to the one immediately before in which the judge addresses the appellant's attempted explanation for how it was that there was an ETS, SELT Source Date document naming the appellant with his correct date of birth as sitting the test at Elizabeth College on 17 April and recording his result as "invalid". The references to system error was simply to the appellant's own proffered explanation ("maybe a system error, that's all I can think of"). Thus the judge's statement at paragraph 43, read in context, simply operates to find that explanation unsatisfactory. Paragraph 43 reads in full:

“(43)We are conscious that the only TOEIC invalidated is the second one and, further, that the impugned decision of the Secretary of State is founded on the speaking element of the second certificate. However, given the run of the hearing we consider

that the main factual issue to be determined by the Tribunal in this appeal is whether the Appellant underwent the four English language proficiency tests on the separate dates and occasions to which the two TOEIC certificates relate. We deduce from the submissions of both parties' counsel that there is no disagreement about this approach. The discrete factual issues upon which we have focused above are those which emerged as the most important during the hearing and received most attention. All of them have a bearing, directly or indirectly, on the central issue."

7. The second head of challenge to the deception finding alleges a failure to give adequate reasons; it being argued that at paragraph 41 the judge failed to properly give reasons for rejecting the account of the appellant's wife. Issue is taken with the judge's finding that the appellant's wife's statement that the appellant would never use deception was "not objective evidence." Whilst it is arguable that "objective" was the incorrect term to use here, read in context it is quite clear why the judge decided to attach little weight to her evidence. First of all, she had not been able to provide any specific details about where the appellant was on 17 April 2012; she was simply asking the judge to accept her view that the appellant was a truthful person. Second, she being his wife, she was not an independent witness nor had she and the appellant been able to adduce any independent evidence of his movements that day (e.g. such as a work rota: see paragraph 38).
8. The final head of the challenge to the deception finding asserts a failure to consider material matters, namely the fact that the appellant's possession of a City and Guilds Certificate "lends credence to his account and shows that he had no reasons to use a proxy taker in an ETS test and the fact that he had taken an IELTS test before coming to the UK showing proficiency in English". The judge addressed both those matters at paragraphs 40 and 45

"40. First, there is the landing card completed by the Appellant. This also contains notes made by a Border Force official. These document the Appellant stating that he had undergone an English language proficiency test for the purpose of securing an Entrepreneur visa. The record continues:

'[He] had to ring home to get details of his test date and place ... [and] ... provided name of the test centre as Claudon College in 3/2013.'

It is convenient to interpose here the Appellant's evidence to the Tribunal concerning the issue. The Appellant testified that his driver was waiting to collect him at Heathrow Airport. He telephoned the driver for the purpose of ascertaining where he had taken the test (singular). The driver was unable to provide him with this information, but stated that he would have to park the car and would then call the Appellant. According to the Appellant, he then remembered the text that had been sent to him by his friend Ahmed. He produced this text to the Tribunal. It is dated 19 March 2013 and timed 14.26 hours. Its contents

consist of the name Cauldon College and its address, including the postcode. The Appellant did not provide any satisfactory explanation of why, on 19 March 2013, he needed this information having regard to his claim that he had been to Cauldon College and had spent some time there just three weeks previously.

45. In SM and Qadir, the following was stated by this Tribunal, at [102]:

'We take this opportunity to re-emphasise that every case belonging to the ETS/TOEIC stable will invariably be fact sensitive. To this we add that every appeal will be determined on the basis of the evidence adduced by the parties.'

This is echoed in the statement of Beatson LJ in Secretary of State for the Home Department v Shehzad and Chowdhury [2016] EWCA Civ 615, at [23]:

'I do not address the question of what evidence will be sufficient to enable a Tribunal to conclude that there has been no deception. That is likely to be an intensely fact-specific matter.'

We draw attention to two further statements in SM and Qadir. First, the tentative prediction in [103]:

'We take note of the indications in the conduct of these appeals that, in some future case, the Secretary of State may seek to adduce further evidence, likely to be expert in nature.'

This type of *'entirely new ingredient'* has materialised in these three conjoined cases, in the shape of three experts' reports. Finally, this Tribunal stated at [80]:

'In some of the FtT decisions in this field one finds observations concerning the appellant's apparent fluency in, and command of, the English language. We consider that Judges should be cautious in adopting his approach for at least three reasons. The first is the passage of time. The second is that Judges are not language testing or linguistics experts. The third is that, to date, there has been no expert linguistic evidence in any of these cases.'

This head amounts to a mere disagreement with the judge's findings of fact. The judge took cognisance of both these matters and her assessment of them was entirely within the range of reasonable responses.

Re-making of the Decision

9. I consider I am in a position to re-make the decision without further ado. The question arises whether the appellant's is a case in which he is entitled to succeed in his appeal against the respondent's decision on the basis of a straightforward application of the guidance given by the UT in

SF and Others. Ms Ahmed does not dispute that it would be right for me to apply the respondent's guidance but with the caveat

- (1) that I must now apply the updated guidance dated 22 February 2018; and
- (2) that there remains the question whether the appellant's use of deception would exclude the appellant.

10. Having considered the matter I note first of all that Ms Ahmed must be right that the policy I have to have regard to now is the latest version dated 22 February 2018.

11. I am satisfied that the appellant is not caught by the exclusion limits set out in the latest version where under the subheading "Where the child is a British citizen" it is stated that

"In particular circumstances it may be appropriate to refuse to grant leave where [the conduct of the parent or primary carer] gives rise to considerations of such weight as to justify their removal...

The IDI's go on to state that the circumstances envisaged include 'those in which to grant leave could undermine our immigration controls, for example, the applicant has committed significant or persistent criminal offences.... or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules.'

12. Clearly the appellant's use of deception is an action undermining of UK immigration controls and its seriousness cannot be minimised. On the other hand there are three factors of particular relevance of in this case. First, the appellant has never been an overstayer (this was expressly conceded by Ms Ahmed). He came to the UK as a student in October 2009 and received extensions before being granted (following appeal) Tier 1 Entrepreneur leave in April 2014. Apart from the ETS deception there is no suggestion of any failure on his part to comply with conditions or to observe the substantive requirements of the student and the Tier 1 Rules. Second, whilst if the ETS deception had come to light sooner he would not have received further leave after April 2012, it arose out of one act. There was no pattern of repeated acts in disregard of immigration control. Third, another factor I have to take into account is whether the appellant is entitled to succeed under s.117B(6) by virtue of being a parent of a British citizen child when it is not reasonable to expect the child to leave the UK. In assessing reasonableness I am obliged to take into account public interest factors, which include the appellant's use of deception in 2012. However, in this context there is no suggestion that there has been any other misconduct and it occurred nearly six years ago. As regards s117B considerations, the appellant speaks English; whilst not financially independent his wife works as a Head of Chemistry in a school and ensures the couple are not a burden on public funds; weighing against the appellant is the fact that the appellant and his wife met when his immigration status was precarious in the sense that he did not have settled status, but his ETS misconduct took place after their marriage.

13. In short, the balancing exercise I have to make when assessing s.117B(6) leads me to conclude that it would not be reasonable to expect the child to leave the UK.
14. For the above reasons I consider that the appellant benefits from the respondent's aforementioned guidance and accordingly I allow his appeal leaving it for the respondent to determine the period of leave.
15. To conclude:

The FtT judge materially erred in law.

The decision I re-make is to allow the appellant's appeal on human right (Article 8) grounds

No anonymity direction is made.

Signed

Date: 22 March 2018

A handwritten signature in black ink that reads "H H Storey". The signature is written in a cursive style with a large, looped 'S' at the end.

Dr H H Storey
Judge of the Upper Tribunal