



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

Appeal Number: HU/05963/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 6 April 2018**

**Decision & Reasons Promulgated
On 30 April 2018**

Before

UPPER TRIBUNAL JUDGE COKER

Between

AKHTAR ALI

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson, Direct Access

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. First-tier Tribunal Judge Parkes dismissed Mr Ali's appeal against the respondent's decision to refuse his human rights claim for reasons set out in a decision promulgated on 7th August 2017 following a hearing on 5th July 2017 (incorrectly recorded on the decision as 5th July 2016).
2. Mr Ali sought and was granted permission to appeal on the grounds that it was arguable that the finding that he had been complicit in ETS fraud was improperly made; that such a finding had adversely materially infected the proportionality assessment and the judge had failed to have adequate or any

regard to the respondent's policy as it impacted upon Mr Ali's relationship with his British Citizen children.

Background

3. Mr Ali, a Pakistani citizen date of birth 20 August 1975, arrived in the UK with entry clearance as a student on 24 October 2002, valid until 24 January 2004. He was subsequently granted further periods of leave to remain as a student until 17 July 2014. On 9 May 2013 he was granted indefinite leave to remain which was revoked on 13 October 2015.
4. On 14 December 2015 he made an application for leave to remain on human rights grounds, based upon his private and family life. He is married and lives with Uzma Bibi, a Pakistani citizen who at the date of his application had leave to remain until 16th January 2017 and at the date of hearing before the First-tier Tribunal had a pending, in time application to extend her leave to remain. They have 4 children, the oldest of whom (date of birth 1 January 2008) has leave in line with his mother and the three younger children (triplets with a date of birth of 24 December 2010) are British Citizens.
5. The application for leave to remain was refused by the respondent on the grounds, in essence, that he did not meet the suitability requirements of the Immigration Rules because, the respondent asserted, Mr Ali had submitted a TOEIC certificate of which there was significant evidence that it had been obtained by fraud; he did not meet the eligibility requirements because his partner had limited leave to remain in the UK, there were no very significant obstacles to his reintegration in Pakistan where he had spent his formative years and his British Citizen children can remain in the UK with their mother – his wife.

First-tier Tribunal decision

6. Relevant extracts from the First-tier Tribunal decision are as follows:
 12. The generic evidence has, in the context of judicial review proceedings, been held to justify a finding of the use of a proxy and the invalidation of an individual's test result. Relevant is the context of the results of the test centre in general, for the Premier Language Training Centre for 21st March 2012 these show that 32% of the tests undertaken were declared invalid. That means that following the procedure set out in the Secretary of State's evidence effectively one third of the tests taken that day were found to have been taken using a proxy. It cannot be said that these were isolated incidents and contrasts with Professor French's figure of possibly 2% false positives, there is no evidence to show that that figure is unreliable.
 13. ...evidence shows that even with 2% false positives there was a significant amount of malpractice at the test centre on the day something that the Appellant's account is entirely silent on and yet it is difficult to see how he could have been unaware of what was going on even if he was uninvolved. The fact that he attended the

test centre does not itself show that he actually took the test as evidence from the Panorama programme showed that individuals would put in their details and stand to one side.

14. Many of the Upper Tribunal cases refer to the availability of the individual's voice recording. I have not seen an offer to the Appellant of his voice recording but despite the time that he has had available he has not approached the Home Office or ETS directly for a copy of his own tests. His evidence that he went and spoke to a receptionist is a one off event and at best that is all he says he did, there is no evidence of correspondence from him to the test centre or other bodies and in the circumstances I do not accept that, even he attended, he was given a brush off or that he would have done nothing more about. Given the potential consequences and the overall circumstances the lack of effort on his part is very troubling.
15. In addition to that there is no independent evidence of the Appellant's English language ability. He has not, in the years since he was informed that the test result was declared invalid taken an English language test not subject to the concerns that surround ETS tests and at the hearing did not bring evidence of his degree from university in Pakistan.....
16.The Home Office's evidence has been bolstered by the evidence of Professor French and I have the printout from the Lookup Tool...
17. Given the observations above I find that the Appellant has not discharged the evidential burden and the evidence relied on by the Secretary of State and taken in the context of the evidence overall is sufficiently strong to show that the Appellant used a proxy in the ETS test that was properly declared invalid using the methods that are set out in the evidence and discussed at length in the various cases in the Upper Tribunal. In other words the Secretary of State has discharged the burden of proof by providing cogent evidence to show that the Appellant used deception in the test that he claimed to have taken.

Error of law

7. The First-tier Tribunal relied on three principal reasons for finding against Mr Ali. Firstly, First-tier Tribunal Judge Parkes held that there had been a significant level of cheating at the test centre and the appellant could not have been unaware of that. In reaching this finding, there is an underlying assumption by the First-tier Tribunal judge that the appellant was in the same room as that in which the cheating took place yet the appellant was not asked about the physical arrangements for the taking of the test in this context. That 1/3 of participants were cheating means that 2/3rds were not, yet this has not been factored in to the First-tier Tribunal judge's decision in the context of what would or could be seen by the appellant. There does not appear to be an objective basis upon which a finding could be made that the appellant would have been aware of cheating.

8. Secondly, First-tier Tribunal Parkes makes an adverse finding because the appellant did not approach the Home Office or ETS for a voice transcript in the years since he had been notified that the test result was declared invalid (November 2015). *Ahsan* [2017] EWCA Civ 2009 (see paragraph 25), heard on 5th December 2017, makes reference to the availability of voice files. It seems that at least by the beginning of August 2016 (paragraph 29 of *Ahsan*), it was known that voice files could be obtained, although it is not clear from *Ahsan* how easy that process was at that time or how that mechanism worked. Paragraph 22 of *SM and Qadir (ETS – Evidence – Burden of proof)* [2016] UKUT 229 (IAC), heard between 5 February and 7 March 2016, records

.....Mr Millington testified that to his knowledge the Home Office has at no time requested ETS to provide the voice recordings in respect of any individual. Nor, he added, has the Home Office ever asked for the software used by ETS. Mr Millington explained that during the one day meeting in the United States, ETS made clear its unwillingness to disclose the software on the ground that they considered it "confidential". We were informed mid-trial that ETS had communicated its unwillingness to provide any of the voice recordings, absent judicial compulsion to do so.

It seems apparent that at the date that Mr Ali's indefinite leave to remain was revoked and at the date he submitted his appeal against the refusal of his human rights claim (25th February 2016) it was either not possible (without judicial compulsion) or not known that voice tapes could be obtained. Between the date of filing of the appeal and the hearing of the appeal it seems likely that voice tapes may possibly have been obtained although it does not appear that there was any evidence to that effect put before First-tier Tribunal Judge Parkes by the Secretary of State. There was no evidence of any offer of tapes being made to the appellant. Likewise there was no evidence that, in the changed circumstances of the availability of voice tapes that the appellant made enquiries as to how to obtain it. But it is difficult to understand on what basis a failure to attempt to obtain something which was not available could be held adverse to the appellant.

9. Thirdly, First-tier Tribunal judge Parkes refers to the lack of independent evidence of the appellant's language ability, that he has not taken a test since his test was declared invalid and he has not produced his degree certificate.
10. The lack of a further language test certificate is at best, in the context of this appeal, a neutral factor. It did not form part of the grounds seeking permission to appeal and in any event has little bearing on whether the appellant cheated some five years earlier. The appellant gave his oral evidence in English and in any event the hearing was some five years after he claimed to have taken the language test.
11. The evidence therefore relied upon by First-tier Tribunal judge Parkes to reach an adverse finding is the lack of activity by the appellant to do something which it was not apparent was available until after the appeal had

been filed together with matters that were not put to him in cross examination and in any event amount to speculation that cheating by 1/3 of examinees would have been apparent.

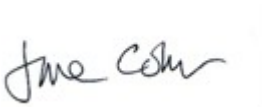
12. Although plainly the weight to be attached to the evidence before it is a matter for the First-tier Tribunal, the evidence has to be such as to be capable of the weight given to justify the findings. In this case the evidence does not reach a threshold that would enable the necessary weight to be attributed to justify a finding of deception. The generic evidence, although significantly bolstered since *SM and Qadir*, does not, in the context of this appellant's evidence justify the findings made by the First-tier Tribunal judge that he exercised deception.
13. The First-tier Tribunal judge materially erred in law in his finding that the appellant had exercised deception. I set aside that finding.
14. The findings with regard to family life and the proportionality of the decision to refuse Mr Ali's human rights claim with the consequent likely removal of him from the UK and separation from his children were significantly tainted by the finding that he had practiced deception. It follows those findings cannot stand and I set them aside.
15. This decision is set aside in its entirety with no findings preserved. Full consideration of evidence and fact finding is required which is a task appropriate for the First-tier Tribunal. This appeal is therefore remitted to the First-tier Tribunal.
16. Given the potential evidence available to the appellant I have no doubt that he will seek to submit further evidence but I make no directions in that regard.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision and remit the appeal to the First-tier Tribunal to be heard again.

Date 24th April 2018



Upper Tribunal Judge Coker