



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: HU/27694/2016**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 19 September 2018**

**Decision & Reasons Promulgated  
On 25 March 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BAGRAL**

**Between**

**SHAKEELA [N]  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr S Akhtar, Solicitor

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. The appellant appeals against the decision of First-tier Tribunal Judge Freer, promulgated on 28 March 2018, dismissing her appeal against a decision of the respondent dated 7 December 2016. By that decision the respondent refused to grant the appellant leave to remain as the spouse of a person settled in the United Kingdom.

## **Background**

2. To put this case in context, it falls within the category of cases that are commonly known as “ETS cases”. The respondent concluded that the appellant’s presence in the UK was not conducive to the public good due to cheating by using a proxy to take an English language test and, by her failure to declare in the application that she received a caution on 3 September 2012 in relation to using an automated scanning machine when paying for goods.
3. The background to the appellant’s immigration history is as follows. The appellant entered the UK lawfully as a student on 5 April 2011. She had leave in that capacity through successful applications/and an appeal until 24 August 2014. The appellant’s last application for further leave to remain as a student was however refused on 7 September 2015 and her appeal against that decision was unsuccessful before First-tier Tribunal Judge Lingham. The appellant’s appeal rights had been exhausted by 10 November 2016.
4. On 27 October 2016 the appellant applied for leave to remain as a spouse of a settled person. The appellant’s spouse is a British citizen and they have three children. In refusing this application the respondent made reference to the appellant’s previous use of a TOEIC English language certificate issued by ETS which was said to have been fraudulently obtained.
5. The appellant appealed against that decision and the appeal came before First-tier Tribunal Judge Freer (“the judge”). The judge heard evidence from the appellant and her husband. The judge was clearly not impressed by the evidence [48]. She observed that the appellant “sounded very rehearsed” and noted that she had “a lot of help” from the interpreter, which should not have been needed had her account been true. While the judge gave some allowance for the fact that the appellant was “probably tired from looking after three children with a working husband”, her evidence clearly struck a cord with the judge who was left “struck by a strong air of helplessness and worry” [48]. The judge noted the appellant’s failure to understand direction from her own representative during the course of her evidence when invited to examine the documentary evidence. The judge noted this was not indicative of a “seasoned student at degree level with good understanding of spoken English” [49] and of a student who “claimed to be studying numbers of degree courses at the same time” [50] and, noted the trajectory of her studies in business and education did not relate to her activities in the UK. The judge further noted that various paragraphs of her witness statement were careless in expression.
6. The judge noted the chronology of the appellant’s claimed academic achievements in Pakistan and did not accept the appellant could have completed two Bachelor degrees at different campuses in 2003. The judge concluded having taken into account the background evidence of the endemic nature of document fraud in Pakistan that the appellant had

produced unreliable documentation in order to enter the UK as a student [58] to [62]. The judge further found that she could place no reliance on the IELTS certificate of 2014 and the CAS letters as evidence of English language ability at [63] to [65].

7. The judge recorded that she had directed the Presenting Officer to obtain copies of two previous appeal decisions promulgated by Judge Hodgkinson and Judge Lingham in 2014 and 2016 respectively and concluded that the appellant's failure to disclose them demonstrated a lack of candour. Judge Hodgkinson allowed the appellant's application for further leave as a student in 2014. It does not appear that an ETS allegation of fraud was made before him. Such an allegation was however made before Judge Lingham. While the appeal was dismissed under the Rules, Judge Lingham concluded that the respondent had failed to discharge the evidential burden and accordingly found that the allegation of deception had not been made out.
8. The judge then proceeded to consider the relevant factors identified by the case-law in such cases and, whilst noting that most of the respondent's evidence was generic, the appellant had not given a wholly satisfactory account as to why and how she took the test; concluded that she had plenty to gain from being dishonest, she had stopped studying and not used her accomplishments, had started a family and gained entitlements to Child Benefit and Tax Credits, she had no professional reputation to lose, her character was unknown, she did not do well in cross-examination, she was inarticulate, her proficiency in English was far short of excellent, she could not follow instructions during evidence and her academic achievements were dubious. The judge did not believe the appellant wanted to finish her Master's and concluded that she wanted to be a full-time mother of three and a housewife. For substantially these reasons the judge concluded the appellant's innocent explanation was to be rejected.
9. The judge proceeded to consider the appellant's human rights contrary to Article 8 of the ECHR and concluded that it was reasonable to expect the children and husband to leave the UK and go to Pakistan. The appellant had entered the UK under false pretences and her status had been precarious throughout. The judge referred to her earlier findings and concluded that there were no exceptional circumstances that would warrant a grant of leave outside of the immigration rules. Accordingly, the appeal was dismissed.
10. Permission to appeal was granted to the appellant on the basis that it was arguable the judge erred in her assessment of the evidence and that she set too high a standard in examining the question of whether an innocent explanation had been put forward.

## **Discussion**

11. The representatives both made submissions which I have considered. I have concluded that while the judge clearly endeavoured to analyse the evidence in a balanced way, that she erred in law.
12. Miss Isherwood said everything she could say to oppose the appeal and submitted that whilst some of the “phraseology” used by the judge was “inappropriate”, she contended the findings challenged were not material. While I agree with her in relation to some of the grounds, I am troubled by other considerations that are intrinsically linked to the judge’s adverse conclusions.
13. That is not to say that I accept all that was said by Mr Akhtar in his amplification of the grounds of appeal. There is no merit for instance in the submission that the ETS issue was settled by Judge Lingham and the respondent was thus not entitled to raise it before the judge. First, there are procedural difficulties with this submission as Mr Akhtar, who did not represent the appellant below, was unable to confirm whether this was argued before the judge. Nevertheless, it seems clear from the judge’s summary of the representatives’ submissions that it was not. Second, Miss Isherwood rightly pointed out that further evidence was adduced before the judge that was not before Judge Lingham. There was nothing inappropriate or unlawful in that approach. As the Tribunal recognised in SM Qadir there may be cases in the future where a “new ingredient” may come to pass. I am satisfied that the additional evidence adduced before the judge, which included expert evidence, fell into this category. The judge in reliance on the further evidence was entitled to conclude that the evidential burden had been discharged and that it passed to the appellant to provide an innocent explanation.
14. Nor do I accept that the judge’s conclusion that she was “not content to accept that the oral evidence is impressive in any way” [48] demonstrates that she applied a higher standard of proof. While this conclusion could have been expressed differently, I am not satisfied that in so doing this indicates the judge was applying a higher standard of proof. It is apparent from a holistic reading of the decision that the judge appropriately directed herself in law and was aware of the relevant case-law and applied it accordingly.
15. However, while the judge took many factors into account, I agree with Mr Akhtar that there are difficulties with the judge’s assessment of the evidence in other respects. The first is at [66] where the judge refers to a lack of candour by the appellant having been shown by the failure to produce the previous determinations of Judge Hodgkinson and Judge Lingham and exhibit them in the appeal bundle. That I find is an error because the previous decisions favoured the appellant in its findings and so there was no reason to believe that the non-disclosure was deliberate or that the appellant was fully responsible for what was included in the bundle by her then representatives. In describing the failure as a “lack of candour” by the appellant it is difficult not to conclude that this had no adverse impact on the judge’s view of the appellant’s character and her assessment of the evidence. It is clear in my judgement that it did.

16. I also accept the submission of Mr Akhtar that there was unfairness in the judge's approach to the evidence of the appellant's overseas academic qualifications. While the judge gave reasons for rejecting the reliability of that evidence and was particularly concerned about the various dates on the certificates to such an extent that she was satisfied that there had probably been "academic qualification cheating", I am not satisfied that the appellant had sufficient opportunity to deal with judge's concerns which significantly informed her assessment of credibility. The reliability of the appellant's academic qualifications did not form part of the respondent's refusal and whilst the appellant was cross-examined briefly about the certificates at [29] it was not suggested to her that the respondent challenged the reliability of the certificates and nor was such a challenge raised in submissions or indeed by the judge of her own motion at the hearing. I am thus satisfied that the appellant was not given an adequate opportunity to address the many concerns raised by the judge and given that this subject matter formed a considerable part of the judge's reasoning, I am satisfied that there was unfairness in the approach adopted which impacted significantly on the assessment of credibility.
17. Thus, in summary, whilst I acknowledge that the judge gave a number of reasons for her adverse findings, I cannot safely conclude that these findings were not infected by irrelevant considerations or unfairness. These matters in my judgement cannot readily be divorced from other adverse findings that the judge was clearly entitled to make on the evidence. I am satisfied that these errors affected the assessment of credibility and in turn the question of proportionality and are material.
18. In my conclusion, and for the reasons given above, I find that the judge erred in law and as a consequence, I set aside the First-tier Tribunal's decision.
19. I now turn to what I should do next. Both parties sought to persuade me that the correct approach should be to remit this appeal to the First-tier Tribunal to be considered afresh. I see no reason why that should not be the appropriate order. I therefore remit the matter to the First-tier Tribunal for reconsideration afresh. The appeal is to be heard by a judge other than Judge Hodgkinson, Judge Lingham and Judge Freer.

Signed:

Deputy Upper Tribunal Judge Bagral  
10 March 2019

Date