



IAC-FH-CK-V1

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

**Appeal Numbers: HU/01726/2019 ('V')  
HU/01733/2019  
HU/01735/2019**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 19<sup>th</sup> March 2021**

**Decision & Reasons Promulgated  
On 01 April 2021**

**Before**

**UPPER TRIBUNAL JUDGE KEITH**

**Between**

**'JF' - FIRST APPELLANT  
'NE' - SECOND APPELLANT  
'AKF' - THIRD APPELLANT  
(ANONYMITY DIRECTION CONTINUED)**

Appellants

**and**

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

Respondent

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

*By virtue of the Third Appellant being a minor, unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. Failure to comply with this direction could lead to contempt of court proceedings.*

**Representation:**

For the appellant: Mr S Bellara, Counsel, instructed by Legend Solicitors  
For the respondent: Mr T Melvin, Senior Home Office Presenting Officer

**DECISION AND REASONS**

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1. Both representatives, the lead appellant, JF, who gave evidence, and I attended the hearing via Skype, while the hearing was also open to attend at Field House. The parties did not object to attending via Skype and I was satisfied that the representatives and the lead appellant were able to participate in the hearing.
2. This is the remaking of the decision in the appellants' appeal against the respondent's refusal of their application for leave to remain outside the Immigration Rules, on the basis of right to respect for their family and private lives (the appellants are a family, being a husband, wife and child, with the second and third appellants dependent on the lead appellant's appeal).
3. The appellants, citizens of Sri Lanka, sought leave to remain in the UK based on their human rights. As recorded in the error of law decision annexed to these reasons, Upper Tribunal Dawson had noted at §2, the lead appellant had entered the UK on 15th October 2009 with leave as a Tier 4 student and had been granted further periods of leave to remain until 9<sup>th</sup> May 2017, when he made a human rights claim based on right to respect for his private life. The respondent refused the lead appellant's application in a decision dated 13<sup>th</sup> January 2019, including on the basis that she was satisfied that the lead appellant had submitted a certificate of proficiency in English language, commonly referred to as a "TOEIC", which he had obtained by deception, specifically having used a proxy test taker. The application was therefore refused on grounds of suitability and because the respondent did not accept that there would be very significant obstacles to the appellants' integration into their country of origin, Sri Lanka.
4. The appellants appealed against that refusal, including on the basis that they had not been given the opportunity of an interview in which to address any concerns that the respondent had about the lead applicant's alleged participation in the TOEIC deception; that the respondent failed to consider the third appellant's best interests as a child; and the appellants had no longer any ties in Sri Lanka to help them integrate there.
5. On 18<sup>th</sup> July 2019, First-tier Tribunal Judge Morgan (the 'FtT') allowed the appellants' appeals, concluding that the respondent had discharged the initial evidential burden of proving deception in line with the authority of SM and Qadir v SSHD (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC) and SSHD v Shezad and Chowdhury [2016] EWCA Civ 615, but concluded that the respondent had failed to establish, on the balance of probabilities that the appellant's prima facie innocent explanation was to be rejected. The FtT indicated that it appeared the appropriate course would be for the lead appellant to be granted a period of leave, perhaps 60 days in which to make a further application (see the authority of Ahsan v SSHD [2017] EWCA Civ 2009).
6. The respondent appealed on the basis that the FtT's reason for concluding that the respondent had not shown that the prima facie explanation should be rejected be rejected was unclear and inadequately explained.

7. This Tribunal set aside the FtT's decision (UT Judge Dawson), allowing the appeal, without any preserved findings of fact, in an appeal which is in the Annex to this this decision. This Tribunal regarded it as appropriate to remake the decision.

*Further developments in the remaking of the appeal*

8. The remaking hearing was listed before Upper Tribunal Judge Blum and me on 19th February 2020, but adjourned because of difficulties in the appellants' representatives preparation for, and limited attendance at, that hearing, because of a bereavement. We gave our reasons as follows:

*"Reasons*

*We identified and agreed with the parties' representatives the issues in the case. It became apparent that the lead appellant had not adduced any written witness evidence in relation to the wider article 8 issues, as Mr Khan [the appellants' representative] had been instructed only a few days earlier and the appellants had not appreciated the need to consider evidence relating to article 8, as the appellants' representatives had been under the impression that the case was analogous to Ahsan, and an appeal by reference to human rights could be resolved by way of a grant if a 60-day period to obtain an alternative CAS, which Mr Khan accepted was incorrect; and because of the hope that the FtT's record of evidence would deal with these issues, when that manuscript record was not one we could read and no attempt had been made to agree a note of the evidence. We had been minded to refuse Mr Khan's adjournment application on the basis that the lead appellant could give live oral witness evidence, but there was insufficient time to do so as Mr Khan needed leave this Tribunal attend a funeral of a close relative just over an hour after live evidence would start. In the circumstances, we regarded it as appropriate to adjourn the hearing."*

9. Covid then intervened but a case management hearing took place on 10th December 2020, to ensure that the remaking could now progress, at which both parties confirmed that they had complied with relevant directions.

*The issues in this appeal*

10. The issues in remaking the FtT's decision, as identified and agreed between the representatives at the hearing are:
  - 10.1. (1) On the TOIEC issue, with the appellants accepting that the respondent has demonstrated a prima facie case, is whether the appellants have provided an innocent explanation meeting the minimum level of plausibility (see SM & Qadir)
  - 10.2. (2) Still on the TOEIC issue, should I reject any innocent explanation by the appellants, to be satisfied that the respondent has shown the alleged deception?
  - 10.3. (3) whether, on wider article 8 ECHR grounds outside the Immigration Rules, the appeal should be allowed.

11. In discussing and agreeing these issues with the representatives, I was grateful for their pragmatic approach in narrowing down the issues. Mr Bellara did not now seek to rely, in the appeal before me, on a potential new matter relating to claimed continuous lawful residence exceeding 10 years. He was clear that the appellants did not resile from this contention, but was not in a position to argue the matter today because of the absence of relevant documentation. Mr Melvin similarly agreed that whilst the respondent regarded there as having been a break in continuous lawful residence in 2012, he did not ask me to resolve that dispute today. Both parties were content that when assessing the appellant's appeal by reference to proportionality, I should not make any findings as to whether there was continuous lawful residence and instead would proceed on the basis that the lead appellant had merely been continuously present (the status of which remained contested) since his entry to the UK on 13 February 2010. Mr Bellara accepted on that basis that any private life developed in the UK would necessarily be treated as precarious for the purposes of section 117B of the Nationality, Immigration and Asylum Act 2002. Mr Bellara indicated that there was to be a separate application for settlement which would seek to resolve the issue of claimed long residence, once the issue of deception and associated suitability was resolved.
12. Mr Bellara similarly did not seek to rely on any argument that there were very significant obstacles to the appellants' integration into Sri Lanka, whether by reference to any health issues, or at all. The sole basis on which the appellants argued a lack of proportionality was as contained in §§17 and 18 of the lead appellant's second witness statement, dated 4th March 2020, namely that he had become settled in the UK; had invested a significant amount of time, money and energy in establishing himself and had worked tirelessly to gain Tier 1 status; was without assets or savings in Sri Lanka; his family and young daughter were settled here; and he was unable to start from scratch again in Sri Lanka.

#### *Documents*

13. I also identified and agreed with the representatives the documents which I was being asked to consider. They comprised the original bundle before the FtT; and two written witness statements of the appellant dated 12th July 2019 and 4th March 2020, which the lead appellant adopted and on which he was cross-examined by Mr Melvin. What was notable was that whilst there appeared to be an extensive immigration history, including reference to a previous First-tier Tribunal determination and a judicial review application, but those documents were not provided, despite there being previous directions that were there to be any documents which the parties' regarded me as needing to consider as part of the appeal that they should be produced before the Tribunal. As it was, I was reliant upon elements of the immigration history being agreed or least not disputed in making some findings.

*Witness evidence*

14. The gist of the lead appellant's two witness statements are as follows. He had entered the UK on 13th February 2010 on a Tier 4 Student visa, with valid leave to remain until 28th June 2012. His wife, the second appellant, arrived as his dependant and his daughter was born on 23rd April 2017 in the UK.
15. To gain his student visa, the lead appellant had relied upon his qualifications from Sri Lanka. He had completed all his schooling there in English and he relied upon that as part of his application. He then went on to study a BA (Hons) degree in gaming animation in the UK but unfortunately the college concerned, CTM College, lost its licence six months after he began the course in 2010. Therefore, he later applied for, and was granted, a Tier 1 Entrepreneur visa, with his successful application dated 12th December 2012 and the grant in 2014, valid until 9th May 2017 (an earlier Tier 1 application in 2012 had been refused). He later applied for leave to remain on an alternative basis, namely not on a Tier 1 basis but instead based on his private life in the UK, which was refused in the decision where the issue of his alleged participation in a TOEIC fraud was alleged.
16. The lead appellant asserted that he had genuinely taken the test and recalled doing so at the New College of Finance. He had chosen that location because of the availability of dates. He had made an appointment to go and visit the college to book the test and paid for it, in cash, in person. He had studied for it with sample papers. He recalled how he travelled to the test centre, which he elaborated on in oral evidence and he also remembered some of the topics, which he elaborated on in oral evidence. After taking the test, he recalled being telephoned by the college a few weeks later, was told to come and collect the certificate, which he did.
17. Upon learning of the claims made by the respondent that he had participated in a TOEIC fraud, he contacted the college but it had closed. He had instructed solicitors to contact ETS and ask them to provide the voice recording of the test, but nothing had been provided in response. He added that in the ETS records his passport number had been recorded wrongly. His passport number was an old passport number which was not valid at the time of his test and he had used his valid passport when providing identification for the test. The records confirmed that he had also repeated the test on 17th July 2012 to improve his marks.
18. In oral evidence, the lead appellant added that upon his degree course ceasing because of the CTM's college closure in 2010 he had not then enrolled on a new college course. The specialist nature of the course (gaming animation) meant that he could not find another course anywhere else in the UK. He accepted that he did not have any documentary evidence showing searches for alternative courses and he had given all of his documents to his lawyer. He decided instead to set up a photography business, focussing on editorial fashion and "elopement-style" wedding photographs. He had chosen the New College of Finance at which to take the TOEIC test because they were the only dates available which he wanted and the test centre location was

close to his home where he lived at the time in Dagenham. He described a journey where he had walked ten minutes to a station, caught an overground train from Goodmere to Stratford where he changed and took the DLR to Canary Wharf and then onwards to the college. He had paid in cash a fee of £150. The college had kept the receipt and handed him back his passport, which he had provided as identification. He recalled the topics on which he had been tested which related to London transport and the environment.

19. The lead appellant explained that he could not run his photography business in Sri Lanka because of all the money he had already spent in the UK and the fact that his camera equipment was in the UK.
20. He accepted that after his leave to remain as a Tier 1 entrepreneur had expired he had not sought to renew it because of the lack of financial documents that he had available which would be needed for such an application. Instead, he had applied for leave to remain outside the Rules.
21. The lead appellant accepted that he did not have any documentation for the degree course, for which he had studied in 2010, because of the short period in which he had been able to study (only a few months) before the college had closed down.
22. He further accepted that after the college had closed, he did not alert the respondent to the fact that he was no longer studying, and had waiting until 2012 before applying for the Tier 1 visa. He had not tried to obtain a CAS from another college or asked for help from the respondent. He had also not returned to Sri Lanka. He had instead wanted to develop his career in the UK.
23. The lead appellant acknowledged that his first application for leave to remain as a Tier 1 Entrepreneur in May 2012 had been rejected because he had not provided an English language test qualification certificate. He accepted then that he had appealed; his statutory appeal was considered and rejected by a First-tier Tribunal hearing in November 2012, which he had not attended. He applied for judicial review in July 2013 of a further rejection of a second Tier 1 application, which had not provided a right of appeal. He was then granted leave to remain in May 2014. His business partner had been a Mr Pransiskuge and they had jointly applied for leave to remain. Both relied upon a considerable investment of £200,000 from Sri Lanka which was a combination of money from both individuals' respective families and friends in Sri Lanka. However, Mr Pransiskuge himself had not pursued a judicial review application and they had split up as business partners in 2013.
24. The lead appellant added that he had qualifications in photography, having studied both in Sri Lanka and in Singapore for two and a half years. His photography business was registered as a limited company, called Enchanters Photography Limited.
25. The lead appellant reiterated that he had attempted to contact New College of Finance after learning of the allegations of deception but it had closed. He similarly

relied upon his solicitors to chase ETS. It was suggested to him that the respondent had attempted to contact him on two occasions in 2015 and 2016 for the purposes of interviewing him in relation to his English language proficiency, using the same email address that he had used since 2009. He disputed having received such invitations.

26. The lead appellant confirmed that his family were all healthy and there were no health issues which might prevent him from returning to Sri Lanka but that in terms of return there and setting up another business, those who had supported him previously now lived in different parts of the world. He explained that he had paid £2,500 for his course with CTM. No-one had ever suggested that his Tier 1 business was not genuine.

*The respondent's closing submissions*

27. Mr Melvin relied upon his three skeleton arguments and the refusal decision. I was invited to consider that the lead appellant was not a credible witness and that his innocent explanation should not be accepted and that I should find that he had been involved in the TOEIC deception as claimed. There was little by way of evidence to corroborate the lead appellant's claims to have tried to contact both the college and ETS in terms of any challenge to the deception allegations. I should also consider the lead appellant's background. He had entered the UK in 2010, but the sponsoring college had ceased the course six months later. It was a requirement of a student visa to continue to study and there had been no attempt by the lead appellant to obtain an alternative CAS or contact the respondent for alternative venues of study.
28. Instead, as the lead appellant candidly accepted, his main priority was to remain in the UK. There was no evidence of him attending the CTM College nor of taking any exams. I was invited to consider the gap in that evidence and whether the lead appellant therefore had a motive in procuring a proxy to take the TOEIC test. The New College of Finance had apparently continued to function until February 2020, according to the Home Office website and the lead appellant had not adduced any evidence of having paid for his test in cash as claimed. Similarly, his claim to have booked that particular college because of the need to arrange for specific dates was undermined by his acceptance now that he was not studying and therefore there was no time pressure to necessitate choosing that particular college, because of the availability of dates.
29. In relation to the lead appellant's subsequent business itself, there was little by way of documentation in terms of the business. It also did not make any sense that the partner had jointly invested £200,000 with the lead appellant but had not pursued a judicial review application.
30. Mr Bellara himself had, in terms, accepted that there was nothing in terms of exceptionality in the case beyond the family's evident desire to remain in the UK.

*The appellants' closing submissions*

31. I was invited to consider by Mr Bellara that the lead appellant was a candid witness. He had answered all the questions without reservation or hesitancy and he had expressed himself articulately and I should note the fluidity of his English today. He had qualifications from Sri Lanka, with education in English and so had arrived in the UK and presumably obtained his student visa because of his English language proficiency. There was no suggestion that he was complicit in the CTM College having its licence revoked. Moreover, I should also attach significant weight to the fact that he was eventually able to obtain a Tier 1 Entrepreneur visa, given the typically rigorous review of such visa applications by the respondent. The lead appellant had given specific evidence about an account about his journey to, and taking, the test, and I should attach weight to that recollection. Critically, there was no reason he should cheat. His command of English today was of a high standard and it had been at the time. Even though Mr Bellara did not and could not give evidence before me there was similarly no obligation to obtain voice recordings from ETS although he was instructed that his solicitors had attempted to engage with the ETS's lawyers.
32. Mr Bellara candidly accepted that he was not seeking to pursue what he regarded as any claim of exceptionality or any argument around proportionality with any 'bells and whistles', as he called it. The crucial focus here was the finding of deception but I was also asked to consider the period in which the lead appellant had been in the UK even though I was not being asked to find that there was continuous lawful residence.

*Findings and conclusions*

33. In any assessment of credibility, this is a nuanced assessment based on a variety of personal factors. As I have already indicated, there was a lack of documentary evidence which one normally might expect to be adduced, but this was an omission on both sides and not simply by the lead appellant. Although I am conscious that in giving evidence before me, this was many years after the alleged participation in the TOEIC fraud, I was impressed by his ease and fluency, lack of hesitancy or reservation in both the lead appellant's oral English and his willingness and candidness in answering questions. He was articulate and willing to concede points that were not necessarily in his favour, for example the fact that his CTM College had closed within six months of his arrival, but he had not found alternative studies and had nevertheless remained in the UK, because of his desire to stay here.
34. Although the lead appellant's first Tier 1 application had been refused in May 2012 because of the lack of an English language certificate and therefore there might be some motive in seeking to obtain a proxy to take the TOEIC, what was also clear was that the lead appellant had taken a second set of tests on 17th July 2012, the month after the impugned tests on 27<sup>th</sup> June 2012, to improve his scores, which is hardly consistent with someone who did not wish to take the test in the first place. Also, the lead appellant's academic achievements prior to entering the UK in Sri Lanka, whilst



not the subject of corroborating evidence, were not disputed. His education in both Sri Lanka and Singapore was in English and he had conducted his photograph business in the UK in English.

35. The lead appellant's account of his travel to the June 2012 test was also without hesitation and whilst Mr Melvin invited me to consider that there was no time pressure necessitating choice of a particular college, I noted that first that the college in question was nearby to his residence and second, the fact he had recently had a Tier 1 application refused because of the absence of an educational certificate made it plausible that he would want to obtain an English language certificate without delay. I do consider that there does not appear to be any documentary evidence that he had chased ETS, but I am prepared to accept his evidence that he asked his solicitors to do so, and Mr Bellara separately has a professional duty not to mislead this Tribunal and has confirmed these instructions from his solicitors.
36. I also consider the appellant's "look up" results (invalid for the June results, 'questionable' for the July results) and that for the test centre in question, namely New College of Finance, there was a high level of invalid results and none were deemed as reliable. Weighed against that, I conclude that the lead appellant's explanation was compelling. The explanation included his prior education in English; his fluency and ease in oral English before me, his ease in describing the day of his test, which was not challenged; the plausibility of why he chose that test centre; his desire to retake the TOEIC test on a second occasion, to improve his score, shortly after the first attempt; the scrutiny that would most likely have been applied to his Tier 1 application shortly afterwards, which was eventually granted; and his willingness to concede points not necessarily in his favour. I did not draw significant adverse inferences from the absence of documentary evidence, including relating to chasing ETS about the TOEIC recording, particularly where both parties referred to documents which were not before me.
37. In summary, I conclude that the respondent has not shown that the lead appellant engaged in deception when he took the TOEIC tests on 27th June 2012.
38. However, that is not an end of the matter in relation to the appellants' human rights appeal. Considering that appeal through the lens of the Immigration Rules, the lead appellant's application, which was refused, was for leave to remain based on his private life. I have been asked not to make a finding on whether he has continuous lawful residence in the UK. The appellants accept that there are not very significant obstacles to their integration in their country of origin, Sri Lanka. Considering the appellants' private lives in the UK (including the third appellant's best interests as a minor), the first appellant did not re-apply for leave to remain based on his business, based on the lack of documentation about that business. While there was an historic investment in that business, he has provided limited further detail about it, whether in terms of goodwill developed (in a financial sense) or the level of business in the past. In the absence of such detail or evidence, I place limited weight on the past development of that business, which would otherwise be lost in the event of a return to Sri Lanka, and I find that there is no reason that the appellant could not develop

such a business on his return to Sri Lanka (nor is there any reason for substantial further investment needed in a small, single-person business).

39. The family has no health issues. The third appellant was born on 24<sup>th</sup> April 2017, is a Sri Lankan citizen and at such a young age, will have her focus, her parents, with whom she can return to Sri Lanka as part of a family unit. The only claimed harsh consequences of refusal of leave to remain are the family's evident desire to remain in the UK. Considering the relevant factors set out in sections 117A and B of the 2002 Act, while I have found that the lead appellant has not engaged in deception, this is not a sufficient reason to apply little weight to the appellants' private life developed in the UK, when the rejected application was only ever on the basis of private life; and while the family have good English and appear financially independent (both being neutral factors), there remains the public interest in immigration control, which, I conclude, outweighs the private life developed in the UK. Put simply, absent continuous lawful residence (which I have been asked not to consider), the respondent's refusal of the appellants' applications for leave to remain is proportionate. Therefore the appellants' appeals fail and are dismissed.

Decision

40. The appellants' appeals on human rights grounds are dismissed.

Signed: *J Keith*

**Upper Tribunal Judge Keith**

Dated: **25<sup>th</sup> March 2021**

*TO THE RESPONDENT  
FEE AWARD*

The appeals have failed and so there can be no fee award.

Signed: *J Keith*

**Upper Tribunal Judge Keith**

Dated: **25<sup>th</sup> March 2021**

ANNEX: ERROR OF LAW DECISION



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/01726/2019  
HU/01733/2019  
HU/01735/2019

THE IMMIGRATION ACTS

Heard at Field House  
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Before

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JEF - FIRST RESPONDENT  
NE - SECOND RESPONDENT  
AKF - THIRD RESPONDENT  
(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Ms R Bassi, Home Office Presenting Officer

For the Respondents: Mr S Bellara, Counsel instructed by Legend Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission the decision of First-tier Tribunal Judge Morgan, who for reasons given in his decision dated 18 July 2019, allowed the appeals by the respondents (a family being husband, wife and

child) who are citizens of Sri Lanka, against refusal of their human rights claims as explained in a decision letter by the Secretary of State dated 13 January 2019.

2. The first respondent had entered the United Kingdom on 15 October 2009, with leave as a Tier 4 Student, and had been successfully granted further periods of leave to remain until 9 May 2017, when he made a human rights claim based on his private life in the United Kingdom.
3. The Secretary of State considered, by way of response, that the first respondent had submitted a TOEIC certificate with an application dated 12 December 2012 which he was satisfied had been fraudulently obtained using a proxy test taker and thus the first respondent had used deception in that application. The application was therefore refused under paragraph S-LTR.4.2 of the Immigration Rules with reference to the suitability requirements of S-LTR of paragraph R-LTRP.1.1.(d)(i) having regard to a failure to meet the requirements of S-LTR.4.2 of Appendix FM of the Immigration Rules.
4. Furthermore, the Secretary of State considered that having lived in the United Kingdom for eight years the first respondent had failed to meet the requirements of paragraph 276ADE(1)(iii), (iv), (v) or (vi). In respect of (vi), it was not accepted that the respondents had lost all social and cultural ties with their home country and it was not accepted that there would be very significant obstacles to their reintegration. It was not considered that there were exceptional circumstances that would assist the respondents in a consideration of the case on Article 8 grounds.
5. The judge summarised his decision in paragraph 8 as follows:
  - “8. In summary I find that the [Secretary of State] has not demonstrated to the requisite standard that the [respondent’s] English language test certificate, relied upon in the application student leave which was refused by the [Secretary of State], was fraudulently obtained by the use of proxy test taker. It appears in light of the jurisprudence of the Court of Appeal in **Ahsan [2017] EWCA Civ 2009**, per paragraph 120, that given that the [Secretary of State] has not discharged the legal burden, that the appropriate course would be for the [respondent] to be granted a period of leave, perhaps 60 days, in which to enable him to make a further application or alternatively to leave the country lawfully.”
6. The challenge by the Secretary of State is that the judge failed to give adequate reasons for his decision, which refers in part to paragraph 7 of the judge’s decision, for which his reasoning is in these terms:
  - “7. The difficulty for the [Secretary of State] is that whilst I have found that the [Secretary of State] has discharged the evidential burden I find in line with **SM**, that the [Secretary of State] has failed to establish, on the balance of probabilities, that the [respondent’s] prima facie innocent explanation is to be rejected. The jurisprudence of **SM** noted the multiple frailties with which the generic evidence was considered to suffer and I note in particular, in relation to the generic evidence of Professor French who confirmed at 3.2 of his report that the approach

used is extremely likely to produce some false positives. In conclusion I find the legal burden of proof falling on the [Secretary of State] has not been discharged.”

7. However, earlier in the decision the judge explained in paragraph [5]:

“5. In line with the decision of **SM**, see above, and the ETS evidence specific to the [respondent] confirming that the speaking test score for the test taken by the [respondent] on 27 June was **invalid**, I find that the [Secretary of State] has discharged the evidential burden of proving that the [respondent’s] TOEIC certificate had been procured by dishonesty (emphasis added). In line with the course advocated by the Court of Appeal in **Shezad**, see paragraph 22, I accept that it is incumbent on the [respondent] to provide evidence in response raising an innocent explanation. The [respondent’s] evidence, set out from paragraph 11 of his witness statement and reiterated in his oral evidence, is that he did not use a proxy test taker but sat the test himself. He gave detailed evidence about why he chose the test centre, how he travelled to the centre and what happened during the exam at the test centre. The [respondent] further states that he would not have needed to use a proxy test taker given his mastery of English. The [respondent] explained that when he first entered the United Kingdom as a student he had not had to provide a TOEIC certificate because he had been able to rely on his graduate level qualifications from Sri Lanka which he had completed in English. He had been unable to complete his BA honours degree in Gaming and Animation in the United Kingdom because his college has lost its licence which is why he switched to the tier 1 category. It appears that for this category he could not rely on his graduate level qualifications in Sri Lanka and as a consequence had to provide an English language certificate. His tier 1 leave was granted on the basis of his photography business which the [respondent] is still pursuing in the United Kingdom. It is not clear why his solicitors did not apply for indefinite leave to remain following the [respondent’s] completion of 5 years on the tier 1 programme given that the business appears to have continued.”

I am not persuaded that a negative is missing from that paragraph with reference to the text of paragraph 7, which I have cited above, referring to the Secretary of State having discharged the evidential burden in line with **SM**.

8. I am grateful to the parties for their submissions before me today. The grounds of challenge by the Secretary of State are that there had been a failure to give adequate reasoning. I am persuaded that that ground is made out in respect of the judge’s decision in relation to the issue of dishonesty and I reach a similar conclusion in respect of the judge’s treatment of Article 8. As to the former, the judge’s decision is unclear and contradictory. In respect of the second ground, Mr Bellara candidly accepted the deficiencies in the judge’s decision.
9. During his submissions Mr Bellara argued that the grant of permission could be construed as limited to the second ground relating to Article 8. I am not persuaded that is so. There is no restriction in the grant of permission in the heading or in the text of the grant and detail that follows limiting grant to the Article 8 issue.

10. I conclude that the errors identified in the grounds are material and require the decision to be set aside. In the light of my concern over the absence of adequate reasoning by the judge I am unable to preserve any of the findings of the decision. Nevertheless, the judge's decision stands as a record of the respondent's evidence. That being so I do not consider that it is necessary for the case to be remitted to the First-tier Tribunal. It can remain in the Upper Tribunal for re-making.

Signed

Date 23 December 2019

*UTJ Dawson*

Upper Tribunal Judge Dawson