Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03805/2020 (V)

THE IMMIGRATION ACTS

Heard by remote hearing	**Decision & Reasons Promulgated**
On the 18 June 2021	**On 29 June 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

AND

IZHAR UL HAQ

Respondent

Representation:
For the Appellant: Mr Diwnycz, Senior Presenting officer
For the Respondent: Mr Hussain of Counsel instructed on behalf of the respondent

DECISION AND REASONS

Introduction:

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Hillis) (hereinafter referred to as the "FtTJ") who allowed his appeal against the decision of the Respondent dated 23 February 2021 to refuse his human rights claim.

2. No anonymity direction was made by the First Tier-Tribunal and no application has been made on behalf of the Appellant or any grounds put forward to support such an application.

3. Whilst the Secretary of State is the appellant, for the sake of convenience I intend to refer to the parties as they were before the First-tier Tribunal.

4. The hearing took place on 18 June 2021, by means of *Microsoft teams* which has been consented to and not objected to by the parties. A face to face hearing was not held because it was not practicable and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the appellant and his wife. No technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means. I am grateful to Mr Diwnycz and Mr Hussain for their clear oral and written submissions.

The background:

5. The appellant's immigration history is summarised in the decision letter and the papers before the tribunal. The appellant is a citizen of Pakistan who entered the UK on 25 October 2008 with entry clearance as a student until 31 December 2009.

6. On 16 December 2009 he made an in time application for leave to remain as a Tier 4 general student which was granted on 23 June 2010 until 6 January 2011.

7. On 20 December 2010 he made an in time application for leave to remain as a Tier 4 general student which was granted on 20 January 2011 until 23 May 2013.

8. On 10 July 2012 curtailment consideration was raised and his leave was curtailed from 8 September 2012 when the sponsor licence was revoked.

9. On 8 September 2012 he made an in time application for leave to remain as a Tier 4 general student which has refused on 10 December 2012 and made an out of time appeal on 20 July 2013. This was dismissed on 17 December and he was declared appeal rights exhausted on 6 January 2014.

10. On 4 December 2013 he made an application for leave to remain as a Tier 4 general student which was granted on 31 December 2013 until 12 October 2015.

11. On 26 July 2014 he left the UK whilst holding valid leave and return to Pakistan. On 5 January 2015 curtailment consideration was raised; his leave is a Tier 4 student was set to be curtailed from 30 May 2015 with the sponsor licence revoked.

12. On 11 September 2014 he arrived in the UK and claimed asylum which was refused on 23 January 2015. He appealed and this was allowed on 19 June 2015. On 5 October 2015 he was granted humanitarian leave to remain until 4 October 2020.

13. On 19 April 2019 he made an application for indefinite leave to remain based on long residence grounds.

14. In a letter dated 7 February 2020 the respondent informed the appellant that she was minded to refuse his application on the grounds that false representations had been made. The purpose of the letter was to tell him why Secretary of State believed false representations had been made and to give him an opportunity to respond.

15. The appellant did respond to that letter and his replies were set out in the decision at page 3. The appellant stated that the respondent had assumed that he had acted dishonestly due to the act of others and that no voice recordings or other evidence been provided to show that he did not take part in the test. He stated he had no need to elect a proxy to sit the test as he had good knowledge in English prior to sitting the test as evidenced by the IELTS with an overall score of 5.0 and that on 29 October 2013 he achieved a first-class pass in level 1 reading, writing and listening in on 30 November 2013 he achieved a first-class pass in level I speaking city and Guilds and he had sat these tests on 9 October 2013 which was less than a year after he sat the ETS tests.

16. The Respondent refused the application on 19 April 2019. Consideration was given to his application for long residence and reference was made to the letter sent to him on the 7 February 2020. It set out that in February 2014 ETS was suspended as a provider of English language test for immigration purposes and that having analysed their test data they determined using voice recognition analysis that TOEIC tests at some test centres were taken by proxy sitters and that they had declared the test to be “invalid” and the scores cancelled. On the basis of the information provided by ETS the respondent set out that she was satisfied that the certificate was fraudulently obtained and that he had used deception in the application on the 8 September 2012.

17. The respondent therefore was satisfied that his presence in the UK was not conducive to the public good because his conduct made it undesirable to allow him to remain in the UK. The application was therefore refused under paragraph 276B(ii)(c) of the immigration rules and also under paragraph 322(2).

18. By reference to his application for indefinite leave to remain on the grounds of long residence the respondent refused it under paragraph 276B (i)(a) because there was a gap in his continuous leave from 16 January 2013 until 31 December 2013 when he was next granted leave to remain in that while he appealed against the refusal dated 10 December 2012, the refusal was not received until 30 July 2013 which is out of time.

Therefore the appellant could not meet the requirements for long residence under paragraph 276D with reference to paragraph276B(ii)(c) and 276B(iii).

19. It was set out that the respondent considered that the appellant had acted dishonestly because for the purposes of his application dated 8 September 2012 for leave to remain as a Tier 4 general student, he submitted a TOEIC certificate which was taken at Elizabeth College on 25 July 2012 and that ETS had declared the certificate as invalid.

20. The respondent considered the application under the private life rules under paragraph 276ADE but that his application fell for refusal under paragraph R-LTRP 1.1(d) (i) because he did not meet the suitability requirements under S-LTR 1.6 and 4.2 of the Immigration Rules on the basis that the Appellant had, in an earlier application for leave to remain as a student, submitted an English language test certificate from ETS which was false. The Respondent referred to the Appellant's test scores having been cancelled by ETS and in reliance on generic witness evidence about such fraudulent tests and was satisfied that the Appellant's certificate was fraudulently obtained and that he had used deception in his application on the 8 September 2012.

21. Separately, the Respondent considered the Appellant's circumstances on the basis of his private life established in United Kingdom. The application was refused on private life grounds under paragraph 276ADE(1) of the Immigration Rules on the same suitability grounds as above and on eligibility grounds that there were no very significant obstacles to his return to Pakistan where he has resided for the majority of his life and where he has retained knowledge of life, language and culture. There were no exceptional circumstances found to warrant a grant of leave to remain outside of the Immigration Rules.

22. The Appellant appealed that decision and on the 12 February his appeal was heard by the First-tier Tribunal. In a determination promulgated on the 23 February 2021 the judge allowed his appeal on human rights grounds.

23. In summary, the FtTJ considered the evidence advanced on behalf the respondent to demonstrate that the appellant had use deception, but for the reasons set out at paragraph [63] –[68] reached the conclusion that the respondent had discharged the evidential burden on her by reference to the generic evidence but having considered the specific individual evidence that related to this appellant and the evidence taken together, the FtTJ reached the conclusion that the respondent had not discharged the evidential burden to demonstrate on the balance of probabilities that the appellant had used deception in the way asserted. The FtTJ therefore allowed the appeal on human rights grounds.

24. The Secretary of State sought permission to appeal that decision and on the 16 March 2021 First-tier Tribunal Judge Parks granted permission for the following reasons:

> "The judge appears to have given insufficient weight to the generic evidence relied on by the Home Office which does discharge the initial burden and then place the onus on the secretary of state when the burden shifted to the appellant. The appellant's test was invalid which meant the different procedures followed. It is arguable that the judge erred in the approach to the evidence was actually presented."

The grounds:

25. Mr Diwncyz relied upon the written grounds. No oral submissions were made in support of the application. In those written grounds it is submitted that in allowing the appeal the judge erred in his consideration of the evidence before him for 3 reasons.

26. Firstly, the judge was wrong to criticise the SSHD and the failure to produce a recording to the appellant. It is for the appellant to request that from ETS and therefore his reasoning was flawed.

27. Secondly it is submitted that the FtTJ was wrong to criticise the respondent failing to call the appellant to undertake an interview and that when results are cancelled on what was considered to be conclusive evidence of fraud by ETS, there is no requirement for such an interview. Thus it was submitted it was unclear why the judge concluded that the evidence was weakened by the failure to allow him to have an interview. It is submitted that this reduced the weight that would have been given to the respondent's case and caused his reasoning to be further flawed.

28. The third ground asserts that the judge based his reasoning in part on conjecture and supposition and highlights paragraph 34 where the judge made reference to the college's conduct and that they may have substituted the appellant's voice recording for their own benefit. It is submitted that that reasoning "borders on the perverse".

29. Overall it is submitted that the FtTJ's reasoning is so unreliable that the determination as a whole is infected and should be set aside.

30. Mr Hussain on behalf of the appellant relied upon the rule 24 response that was filed on behalf of the appellant dated 1 June 2021. In that response it is submitted that the respondent is simply seeking to re-argue the points that were raised before the FtT and were rationally and adequately addressed in the determination at [23].

31. It is further submitted that the grounds are disingenuous and are no more than an attempt to reargue the points already made and that the judge undertook a careful evaluative assessment of all the evidence and properly directed himself in law. It is submitted that the judge found in the appellant's favour and rejected the respondent's arguments. The written submissions highlight that the grounds fail to make any reference to the

"innocent explanation" that the appellant gave and which the judge accepted.

32. Finally it is submitted that the Upper Tribunal should be mindful of the Court of Appeal's decision in KB (Jamaica) v SSHD [2020] EWCA Civ 1385 where the court should be reluctant to find an error of law "simply because it does not agree with it, or because it thinks it could make a better one."

33. In his oral submissions Mr Hussain submitted that the grounds really challenge the weight given to the evidence and that at paragraph 23, 25, 26, 27,28 the judge assessed the appellant's oral evidence and at paragraph 30 was entitled to conclude that there had been no specific deception put to the appellant in cross examination. He submitted that the judge had undertaken a well -reasoned assessment of the appellant's credibility.

34. As to the legal assessment of the issues, at paragraph 23 the judge accepted that the initial burden on the respondent had been satisfied and thereafter set out the correct legal test which had to apply and that in reality the grounds were an attempt to reargue the case before the upper Tribunal.

35. When asked to deal with the matters in the grounds and by reference to paragraph 34, Mr Hussain submitted that whilst the judge had made reference to other issues they did not demonstrate that the judge had failed to consider the central issues of the case and those were firmly addressed in his decision. Thus any complaints made in the grounds are not material to the outcome. Even if it could be said there was any conjecture at paragraph 33 or at paragraph 34 they did not undermine any other findings that were made. At paragraph 37 there was a clear analysis of the appellant's oral testimony and cross-examination and therefore the decision was based on the evidence before the FtTJ.

36. At the conclusion of the hearing I reserved my decision which I now give.

Decision on error of law:

37. I remind myself that the question whether the decision contains a material error of law is not whether another Judge could have reached the opposite conclusion but whether this Judge reached a conclusion by appropriately directing himself as to the relevant law and assessing the evidence on a rational and lawful basis.

38. I have carefully considered the grounds advanced on behalf of the respondent. The issue that forms the context of this appeal is that the respondent considered that the appellant had acted dishonestly because for the purposes of his application dated 8 September 2012 for leave to remain as a Tier 4 general student he submitted a TOEIC certificate which

was taken at Elizabeth College on 25 July 2012 and that ETS had declared the certificate as invalid.

39. I have given careful consideration to the overall decision of FtTJ Hillis. It has not been argued by respondent that the judge failed to apply the correct approach in determining the issue of whether deception had been used or that the FtTJ did not adequately address the "innocent explanation" given by the appellant.

40. In the decision of SM & Qadir [2016] EWCA Civ 1167 the three-stage approach was summarised. That involves considering, first, whether the Secretary of State has met the burden on her of identifying evidence that the TOEIC certificate was obtained by deception; second whether the claimant satisfies the evidential burden on her of raising an innocent explanation for the suggested deception; and third, if so, whether the Secretary of State can meet the legal burden of showing, on the balance of probabilities, that deception in fact took place.

41. I do not find that there is any error in the judge's assessment of the evidence. It is plain from reading the decision that the judge properly reached the conclusion at paragraph 23 that the respondent had discharged the initial evidential burden and that this was accepted on behalf of the appellant.

42. It is also plain from reading the evidence referred to in the decision that the appellant had offered an innocent explanation. After undertaking an assessment of that evidence, the FtTJ accepted it. I can see no error in the FtTJ's factual assessment. As set out at [24 – 26] of the FtTJ's decision, the judge recorded the evidence given by the appellant concerning the surrounding circumstances of the test including the cross examination undertaken by the presenting officer. At [24] the judge recorded that during cross-examination the appellant "gave a detailed account of the modes of transport and the route to travel to the test centre personally." The judge set out the evidence that was given, that he had taken his passport with him and produced it to the test centre who checked his details before permitting him to take the test. He gave evidence as to why he had gone to Elizabeth College (at [24]) and at [25] the judge set out the appellant's evidence concerning how the test was undertaken. The judge noted that he was not asked in cross-examination what the test questions were what the test involved. At [26] the judge records the appellant's evidence as to his efforts to contact the college to obtain evidence after receiving the refusal decision in February 2020 but that it had closed down. Further attempts to obtain information about his test results was undertaken with the company's office in France and Holland but he was advised they had no information about the college. The judge concluded "I conclude that this is a credible explanation taking into account that the Elizabeth College was removed from the approved list around 2014 as a result of the ETS report." Whilst the appellant not contacted ETS, the judge stated "there is no evidence before me that ETS are open to answering questions asked of them by people whose tests they have concluded were

taken by proxy test takers." Consequently the judge set out his conclusion on this issue "I accept that the appellant generally believed his first point of enquiry was with Elizabeth College and that was a reasonable stance for him to take."

43. The FtTJ had the opportunity to see and hear the appellant give oral evidence. As he stated at [27] "the appellant answered all the questions asked of him without hesitation or prevarication and I concluded that he was credible and reliable in his account in interview and oral testimony." After undertaking an overall assessment of the evidence, the FtTJ concluded that the appellant "is a credible witness who gave reliable evidence that he was totally unaware of any deception ..."(at [36]).

44. In Majumder and Qadir v SSHD [2016] EWCA Civ 1167 at paragraph 18 the court stated:

> "… in considering an allegation of dishonesty the relevant factors include the following: what the person accused had to gain from being dishonest; what he had to lose; what is known about his character; the culture environment in which he operated; how the individual accused of dishonesty performed under cross examination, and within the tribunal's assessment of that person's English language proficiency is commensurate with his or her TOEIC scores; and whether his or her academic achievements are such that it was unnecessary or illogical for them to have cheated."

45. Those were factors that the FtTJ had regard to set out above and at [31] where he concluded that the fact that the appellant and studied in English in the UK and passed examinations set out in the certificate submitted and in English prior to coming to the UK and after the disputed test certificate in July 2012 was "significant supporting evidence of the appellant's evidence that he was competent in English and did not need the use of a proxy". In reaching an overall conclusion, the judge was entitled to take into account the appellants English language ability.

46. The FtTJ therefore concluded from the evidence that "the appellant has provided an innocent explanation of his having taken the disputed test personally and not by way of a proxy test taker."

47. Having reached those factual findings, the judge was required to consider the evidence as a whole to consider whether the respondent discharged the burden on him to demonstrate that deception had taken place on the balance of probabilities. It is plain from reading paragraph [28] that the FtTJ was aware of the correct legal test and that he made a self-direction that "the burden of proof in proving deception is on the respondent show, on the balance of probabilities that the appellant was aware that the test certificate issued was fraudulent and that he deceived the Home Office into granting his leave to remain in his application dated 8 September 2012." I can see no error of law in the FtTJ's self-direction set out at [23] or at [28].

48. Grounds 1 and 2 assert that the judge erred in his consideration of the evidence based on 2 matters. Firstly that the judge criticised the respondent on the failure to produce the recording of the appellant and secondly that the judge criticised the respondent for failing to call the appellant for interview. It is submitted that in both cases, the judge reduced the weight that should have been afforded to the respondent's case and caused his reasoning to be flawed.

49. It is correct that the judge did observe at [32] that there was no evidence to show that the respondent had released the recording. However it is not clear whether the judge was referring to the recording being released to the appellant by the Secretary of State or that his observation was made on the basis that there was no evidence that the recording of this appellant had been sent to Prof French to analyse before refusing the application. If the judge was referring to the latter failure, it is common ground that Prof French would not have had the individual recording of this appellant. In any event I do not find that that observation at [32] carried any real weight in the FtTJ's decision. Nor do I consider that the FtTJ's observation that the appellant was never invited to an interview at [33] carried any weight in his decision.

50. Furthermore, when reading paragraph [33] the reference made to there being no interview was followed by the FtTJ's assessment of the evidence obtained from ETS where the judge stated that the documents produced by ETS did no more than show that the recording provided by Elizabeth College in respect of the appellant speaking test alone did not contain the voice of the appellant was of someone else and that "it provides no reliable and persuasive evidence that the appellant did not take the test as described by him in his oral testimony…". The judge does not seek to link the failure to interview the appellant with his assessment of the documents produced by ETS at paragraph [33]. Consequently I am not satisfied that those grounds demonstrate that the FtTJ's assessment of the evidence was flawed and the grounds fail to take into account the other factual findings made in favour of the appellant and the analysis of the evidence of the respondent.

51. Turning to the last ground, it is submitted on behalf of the respondent that at paragraph 34 the judge based his reasoning on "conjecture and supposition" and that this was reasoning which bordered on the perverse and thus his reasoning was so unreliable that the determination as a whole should be set aside.

52. At paragraph 34 the FtTJ stated as follows:

> "I conclude that the respondent has not shown on the balance of probabilities that Elizabeth College sent the appellant's actual test recording or, alternately, has not simply substituted all the speaking tests taken with a single recording by proxy examinee of the standard test texts and picture examinees are required to describe to enable them to charge all their clients for their test certificates irrespective of whether or not they passed the test. Such a course by the college

> would circumvent the need to mark each test and the costs involved in that process."

53. To consider that ground, it is important to consider paragraph [34] in the context of the relevant legal authorities. At paragraphs [2] and [21 the FtTJ made reference to the decision of SM and Qadir and reference is made to the general authorities in this area of law.

54. In the decision of SM and Qadir, the panel concluded that the respondent's generic evidence "suffices to discharge the evidential burden" of proving that the TOIEC certificates "had been procured by dishonesty". The panel in that case recognised that there were "multiple frailties for which this generic evidence was considered to suffer."

55. The decision in MA (ETS-TOEIC testing) [2016] UKUT 450 ("MA"), was a statutory appeal and the presidential panel reconsidered the generic evidence in light of the expert evidence which it heard from 3 experts. Evidence before the Upper Tribunal was more extensive than it had heard before in SM and Qadir. In particular, the ETS voice files of the appellant had been obtained and it was agreed that the voice was not his. However, he challenged whether the file was indeed a recording of the test he had taken and there was evidence from three experts exploring the issues of how the wrong file may have been supplied.

56. In that case the Upper Tribunal at paragraph 15 set out matters about which the joint experts had expressed concern. In particular the tribunal referred at paragraph 15 (x) to a "distinct lack of clarity relating to the processes described by ETS in (xi) above".

57. Also at paragraph 15 the tribunal expressed disquiet as to the evidence linking a particular set of records to a particular candidate. In short it seems procedures were lax and non-existent. Rather (15(xi), the integrity of the system depended heavily on the "reliability and probity of test centre staff".

58. Although not part of the guidance for which MA is reported, at paragraph 47 the Upper Tribunal acknowledged that there were "enduring unanswered questions and uncertainties relating in particular to the systems processes and procedures concerning TOEIC testing and in the subsequent allocation of scores in the later conduct and activities of ETS." Accordingly, much still turned on the Upper Tribunal's assessment of the appellant's oral evidence. They found his evidence to be a fabrication. It was emphasised that "the question of whether a person is engaged in fraud in procuring a TOEIC in this language proficiency qualification will invariably be intrinsically fact sensitive."

59. Based on those authorities, the criticisms made by the FtTJ set out at [33] and [34] cannot be described as "perverse" as the respondent' s grounds assert. It was open to the FtTJ to take into account that the documents produced by ETS provided no "reliable persuasive evidence that the appellant did not take the test as described by him his oral testimony and

that the test centre did not substitute a proxy test recording without his knowledge irrespective of whether he actually passed the test or not.".

60. Where at [33] the FtTJ stated "there is no evidence of continuity of storage and handling of the recording analysed by ETS" that conclusion was based on the earlier assessment of the ETS evidence set out by the panel in MA which I have summarised above. I satisfied that when reading the decision as a whole the reasoning of the FtTJ could not properly be described as "bordering on the perverse" nor did he rely on any conjecture or supposition as asserted and was entitled to have regard to the lack of evidence and the "frailties" identified in the ETS system as evidenced above.

61. As with any judicial decision, the decision of this FtTJ should be read as a whole. Ground 3 fails to take into account the assessment made by the judge as a whole, and pays no regard to the other parts of the FtTJ's reasoning which led to his overall conclusion that the respondent had not discharged the burden of proof that the appellant was complicit in any deception perpetrated against the Home Office (as set out at [36]).

62. In this context I remind myself of the words of Lord Justice Underhill in Ahsan (as cited) at paragraph 33 and that although it seems clear that deception took place on a wide scale it does not follow that every person who took the TOEIC test was engaging in deception.

63. Having considered the evidence that was before the Tribunal and in the light of the specific grounds of challenge made, I am not satisfied that the judge erred in law in reaching his decision.

64. For those reasons, I am not satisfied that it has been demonstrated that the decision of the FtTJ did involve the making of an error on a point of law. I therefore dismiss the appeal. The decision of the FtTJ shall stand.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision shall stand.

Signed Upper Tribunal Judge Reeds

Dated 21 June 2021

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the

appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email