



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/23081/2016 (V)

THE IMMIGRATION ACTS

Heard by Skype for Business at Field House
On 8th January 2021

Decision & Reasons Promulgated
On 4th March 2021

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MS SAOVANEE KULTHUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Lawrence Youssefian, instructed by Paul John & Co Solicitors

For the Respondent: Mr Chris Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a national of Thailand born on 1st January 1982, appeals with permission against the decision of First-tier Tribunal Judge Hoffman promulgated on 31st December 2019.
2. The appellant had appealed against the respondent's decision dated 20th September 2016 refusing her application for leave to remain in the United Kingdom as the spouse of a settled person. She argued that the decision breached her family and

private life in the UK in accordance with Article 8 of the European Convention on Human Rights.

3. The contested issue centres on the Test of English and International Communication ("TOEIC") from Education Testing Services ("ETS") said to be taken by the appellant on 29th August 2012 for speaking and writing, (she took a further test in different components on 31st August 2012). First-tier Tribunal Judge Flynn allowed the appeal on 2nd March 2018 but that determination, challenged by the Secretary of State, was set aside and the matter was remitted to the First-tier Tribunal. A further decision of First-tier Tribunal Cohen dismissed the appeal on 26th April 2019 and this time was challenged by the appellant. Again, an error of law was found, and the matter was remitted to the First-tier Tribunal and heard by First-tier Tribunal Hoffman who produced the determination now under challenge. The First-tier Tribunal has now considered this appeal three times.
4. By way of immigration history, the appellant arrived in the UK on 12th January 2010 with entry clearance as a Tier 4 (General) Student and her visa was valid until 20th July 2011.
5. The appellant explained in her statements dated 22nd January 2018, 1st April 2019, and 15th December 2019, the background to her applications at that time. She came to the United Kingdom to learn English. She entered an English course at Malvern House College where she studied a 'pre-intermediate English course' from January 2010 to December 2010 and an 'intermediate course' from December 2010 to March 2011.
6. On 10th April 2011 she submitted an application for leave to remain as a Tier 4 (General) Student which was granted until 24th September 2013. She was accepted into a 2-year programme consisting of a 'pre-sessional English Preparation Programme' followed by an MBA at Cavendish College. After the second term the college closed unexpectedly, and she was transferred to St Patrick's College. By 18th September 2012 she had completed a Diploma in Strategic Management and Leadership but St Patrick's College no longer offered the MBA programme and so she was forced to find an MBA top up programme at a different college.
7. She stated in her witness statements that despite having a year left on her visa, she was advised by a student agency that she had to find a new college (and a new college meant a new application and an English test), that offered an MBA as soon as possible as her visa could be cancelled because

'if I did not have an attendance record to show my study as there was still another year until my visa expires. The agency has then (sic) found me a college that would offer an MBA programme I was looking for British Institute of Technology and E-Commerce (BITE) starting in January 2013 which requires an English test result of no less than 6.5 grade'.

8. Having taken the TOIEC test in August 2012, she submitted an application to extend her leave on 22nd January 2013 and that was granted and extended to 29th December 2014.
9. In September 2013 she met her wife to be.
10. On 4th December 2014 she was awarded an MBA from the University of Wales and prior to the expiry of her visa she returned to Thailand.
11. She then returned to the UK on 16th April 2016 with leave to enter as a fiancée valid until 16th October 2016. On 9th July 2016 she married her fiancée, a British national, and following her marriage, on 20th September 2016, applied for leave to remain as the spouse of a settled person.
12. The respondent refused that application because, it was stated, that in support of the appellant's application for further leave to remain as a student dated 22nd January 2013, she had submitted a TOEIC certificate from ETS. The respondent asserted that she had used a proxy test taker to sit a test at Synergy Business College on 29th August 2012 and as a result her ETS certificate had been fraudulently obtained. ETS had therefore cancelled the certificate and although she had not sought to rely on that certificate for her current application for leave to remain, it was asserted that,

“the fraud nonetheless contributed to an extremely serious attack on the maintenance of effective immigration controls and the public interest more generally”.

It was considered that her presence in the United Kingdom was not conducive to the public good and her application refused under paragraph 276D with reference to paragraph 322(2) of the Rules. First-tier Tribunal Judge Hoffman noted that the 276D reference must have been a mistake as that referred to refusal on grounds of long residence. The respondent also refused the application on suitability grounds in accordance with paragraphs R-LTRP.1.1(d)(i) with reference to paragraphs S-LTR.1.1 and S-LTR.1.6 of the Immigration Rules (family life) and paragraphs 276ADE(1)(i) with reference to paragraphs S-LTR.1.1 and S-LTR.1.6 (private life).

13. First-tier Tribunal Judge Hoffman set out the various provisions referred to above and also set out the documents that the appellant relied on at the hearing which included the appellant's bundle (“AB”), an undated supplementary bundle (“ASB”) which included a recent witness statement and additional documents, the respondent's bundle dated 14th September and the respondent's supplementary bundle. He proceeded to dismiss the appeal.
14. The grounds for permission to appeal submitted the following.
 - (1) After the Secretary of State had satisfied the initial evidential burden the judge considered the appellant's evidence, and it was arguable that he had applied an incorrect test and therefore misunderstood both the weight to be attached to such a finding and the nature of the exercise. **SM and Qadir v SSHD (ETS - Burden of Proof)** [2016] UKUT 229 (IAC) made clear at paragraph 88, that it was not a question of whether a plausible explanation has been put forward to

show her character and qualifications cast doubt on her motive but whether there was a “satisfactory explanation for the various matters which are advanced by the Secretary of State as constituting dishonesty on his part”. The judge had plainly misunderstood at paragraph 36 that this was his task.

- (2) In any event the approach to the evidence and the judge’s findings were unreasonable. The appellant gave a detailed account of the examinations she took, and the Home Office did not challenge her evidence on this by way of cross-examination. Indeed, the judge accepted that the Home Office Presenting Officer gave him “no reason to doubt the appellant’s version of events”. In such circumstances it was difficult to see how the judge did not accept she had taken the exam. The judge noted that the appellant’s claim that she took two TOEIC tests on different days which was contrary to the evidence before him, i.e., he stated that all were taken on 29th August 2012. That was simply not the case from the TOEIC test, the evidence clearly showed there were two test dates, one on 29th August and the other on 31st August. This fatally flawed his findings because of the adverse inference drawn.
- (3) Secondly, the judge found the appellant did not notice anything strange or abnormal going on that her failure to notice was incredible if 92% were using a proxy. Indeed, it was clear at paragraph 45 that this was one of the two central reasons the judge gave for dismissing the appeal. This observation was manifestly unreasonable. There was not a shred of evidence to support the contention that anything out of the ordinary should have been noted and the grounds advanced that *“a person attends an exam, shows their ID and gets placed in a hall. They are then set a test. Why on earth should they have any idea that the other people in the room are anything other than genuine”* (sic). The judge’s observation was unsupported by evidence of any sort and this had never been part of the Secretary of State’s case and was not part of the Home Office cross-examination and not relied on in the refusal letter. There was no indication from the judge as to how this strange and abnormal behaviour manifested itself.
- (4) In any event, at paragraph 45 the judge stated that he found the appellant’s claims of not noting anything out of the ordinary as unconvincing and that indicated a wrong application of the standard of proof.
- (5) The other principal point taken against the appellant at paragraph 45 was that her failure to “more doggedly pursue ETS” for a copy of the audio recording. The appellant did pursue ETS as evidence for the emails and letters in 2016. The question was not whether she had doggedly pursued and the fact that this was not chased up in the years that followed was not the central/important point. Tribunals have often found someone had not cheated despite the audio being of someone else and it was reasonable for the appellant to rely on the ETS letter which was in reply to her letter requesting any relevant information. The appellant had asked for evidence three years ago and ETS had failed to provide it.
- (6) The above errors taken with the positive findings made by the judge about the appellant’s English qualifications, good character and lack of motive to cheat

could have well led to a different conclusion and the judge himself acknowledged this was a finely balanced case.

- (7) In assessing proportionality, the judge failed reasonably and fairly to consider that at the time, the appellant entered the UK for the purpose of marriage that the Secretary of State had already had evidence in respect of the claim that she had cheated, and it was unfair and disproportionate to now not only rely on this assertion but to require the appellant's removal after she had entered, got married and settled down. The judge's observation appeared to show bias in favour of the Secretary of State. It was pure speculation on the part of the judge that he did not and could not have reasonably been aware of the evidence from ETS.

Submissions

15. At the hearing before me Mr Youssefian relied on the written grounds and expanded upon them. He submitted that the judge's approach was flawed and that the judge accepted that the appellant had discharged an innocent explanation, there were no adverse credibility findings made against her, through the cross examination or lack of it, and there was no basis for the First-tier Tribunal to doubt the appellant's version of events. That should be an end to the matter. The judge had also erred in fact. The listening and reading were taken on 31st August 2012 whilst the speaking and writing was taken on 29th August 2012. That is what the appellant had stated, and the judge erred in finding contrary to the appellant's evidence. There was no evidence to suggest the test was taken on the same day. The judge proceeded on a mistaken basis.
16. Moreover, the judge stated that she had not identified anything strange at the test centre. That finding was manifestly wrong and there was no evidential basis to draw that conclusion. The appellant was focussed on her own examinations and even if there was something odd the fact of her knowledge would be entirely circumstantial. That was a material error.
17. Further the finding that she had not doggedly pursued the voice recording was flawed. She wrote to ETS and ETS responded and informed her of the cancellation. Her conduct of contacting ETS was consistent with someone aggrieved by the allegation of deception. The judge, where the burden was on the Secretary of State, relied on two circumstantial matters and the approach was fundamentally wrong. The appellant sent an email on 16th November 2016 stating that she took the tests on 29th and 31st August 2012 and there was a reply from ETS dated 1st December 2016. There was an email chain of correspondence.
18. Additionally, the approach to paragraph 322, which was discretionary, and in relation to article 8, was flawed. There was no evidence that she had breached the rules since 2012 and that should not be a permanent bar. She had left in 2014 and made an entry clearance application. The Secretary of State had been aware of the deception since 2014 but that had not been taken into account. The judge should properly consider relevant matters. Even if the allegation was proved, it happened

in 2012, some time ago, and the Secretary of State was aware in 2014. She made a voluntary departure before her visa expired, got engaged, and applied for a visa as a fiancée and in that application, there were no issues made regarding an allegation of deception.

19. Even if she did cheat, she had not benefitted from that deception. The departure would have cleaned the slate. The judge considered that at paragraph 47, but there was no evidential basis for the judge to refer to the Secretary of State reviewing many cases. This was a case where it was all the more compelling to consider the exercise of discretion and the judge failed to meaningfully engage with this and based his findings on speculation and conjecture that the Secretary of State was overwhelmed.
20. The Project Façade report was published on 5th May 2015 by which time the Secretary of State would have been aware of the problem when the fiancée visa was granted.
21. By way of response Mr Avery submitted that the point on taking exams on different days did not take the matter further. The contact with ETS was reflected in the email chain but the content did assist in view of the judge's findings. Virtually all the tests taken at that centre were false and it was entirely reasonable for the judge, with fraud on this scale, to conclude that it would be obvious, and the judge was entitled to take that into account. There was a failure to pursue the audio evidence which could have conclusively proved it was the appellant and the judge was entitled to make that point.
22. The contentions by the appellant were a disagreement with the findings and not in effect a legal challenge.
23. The judge adequately considered the matter of the exercise of the Secretary of State's discretion with regards paragraph 322. In view of the massive attempt to defraud and undermine the immigration system of the United Kingdom, which was a very significant factor, it was hard to see how the Secretary of State could exercise discretion in the appellant's favour. If the appellant did engage in deception that was a very serious matter. In view of the bureaucratic nature of the system it was entirely appropriate and reasonable inference for the judge to make. It was inconceivable, had the Entry Clearance Officer been aware of deception that the visa would have been granted and it should be borne in mind that it was at that stage an application for limited leave to remain.

Analysis

24. The first ground criticises the test applied by the judge and the weight attached to the evidence.
25. The approach to be adopted in such cases is set out in **SM and Qadir** at paragraph 57:

“57. Both the applicable principles and the jurisprudence were reviewed by this Tribunal in its recent decision in Muhandiramge (Section S-LTR.1.7) [2015] UKUT 00675 (IAC), at [9] – [11]:

- ‘9. Burdens and standard of proof have progressively, and almost with stealth, become an established feature of decision making in the field of immigration and asylum law. Their emergence may properly be described as organic. They have featured particularly in cases where it is alleged by the Secretary of State that the applicant has engaged in deception or dishonesty with the result that the application in question should be refused. This discrete line of authority is not recent, being traceable to the decision of the Immigration Appeal Tribunal in Olufosoye [1992] IMM AR 141. In tribunal jurisprudence, the origins of this particular lineage can be traced to the decision of the House of Lords in R v Secretary of State for the Home Department, ex parte Khawaja [1984] AC 74, which concerned the inter-related issues of procuring entry to the United Kingdom by deception and precedent fact in the Secretary of State's ensuing decision making process. It is well established that in such cases the burden of proof rests on the Secretary of State and the standard of proof belongs to the higher end of the balance of probabilities spectrum.
10. One of the more recent reported decisions belonging to this stable is that of Shen (Paper Appeals: Proving Dishonesty) [2014] UKUT 236 (IAC). This decision is illustrative of the moderately complex exercise required of tribunals from time to time. Here the Upper Tribunal held, in harmony with established principle, that in certain contexts the evidential pendulum swings three times and in three different directions:
- (a) First, where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue: for example, by producing the completed application which is prima facie deceitful in some material fashion.
 - (b) The spotlight thereby switches to the applicant. If he discharges the burden - again, an evidential one - of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.
 - (c) Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's prima facie innocent explanation is to be rejected.

26. The citation from **Muhandiramge** at paragraph 10 (b) above, shows that if the applicant discharges the burden of raising an innocent explanation 'a further transfer of the burden of proof occurs'. The explanation by the appellant is not necessarily the end of the matter.
27. At paragraph 17 the judge directed himself entirely properly as follows:
- 'where an allegation is made that an appellant has acted dishonestly, the evidential burden is on the respondent. If met, the evidential burden then switches to the appellant, who must raise an innocent explanation which satisfies the minimum level of plausibility. If the appellant achieves that, the, finally the burden rests on the respondent to establish on balance of probabilities, that the appellant's prima facie innocent explanation is to be rejected: see Muhandiramge (Section S-LTR.1.7) [2015] UKUT 00675 (IAC'*
28. The judge manifestly directed himself appropriately as to the correct test, both with regards the shifting burden of proof and further the standard of proof. From a careful reading of the determination it can be seen that the judge also applied the relevant test. At paragraph 20, he cited **SM and Qadir**. At paragraphs 23-26 the judge considered the evidence that the Secretary of State provided, and which included the statements of Collins, Millington and Professor French, a Home Office Project Façade report and data showing how many tests were said to be invalid on the date the appellant took the test on 29th August 2012. Also included was a witness statement of Kelvin Hibbs with an excerpt from a spreadsheet showing that the Home Office was notified by ETS that the appellant's test result had been obtained through the use of a proxy test taker.
29. When considering the nature of the task of assessing the appellant's case, **Majumder v the Secretary of State for the Home Department [2016] EWCA Civ 1167** at paragraphs 18 sets out the relevant factors which include
- 'what the person accused had to gain from being dishonest; what he had to lose; what is known about his character; the cultural environment in which he operated; how the individual accused of dishonesty performed under cross-examination, and whether 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'.*
30. The judge considered those relevant factors throughout and specifically from paragraph 28 onwards. He considered inter alia, the appellant's account of the test day, her English, what was said during cross examination and her wife's evidence. He referred to the submissions made on her behalf, considered her character and identified her immigration history and noted there was nothing in her background 'that suggests she is a dishonest person'. He also considered her educational achievements.

31. At paragraph 36 the judge accepted that the appellant had discharged the evidential burden of providing a plausible innocent explanation, but he then turned to the question of whether the respondent had established on the balance of probabilities whether the appellant's explanation should be rejected. Nothing in the findings of the judge at paragraph 36 indicates that the judge did not understand the relevant process and indeed his findings show a balanced approach and understanding of the factors he needed to take into account. He proceeded to consider the legal burden placed on the respondent as he was required to do.
32. He stated at paragraph 37
- 'the evidential boomerang therefore returns to the respondent to establish, on [the] balance of probabilities, whether the appellant's explanation should be rejected'.*
33. At paragraph 44, the judge referred to the fact sensitive nature of the exercise, and that he had carefully considered the evidence and the submissions of each party and specifically stated at paragraph 45, towards the close of his findings on deception, that the respondent had succeeded in explaining why the appellant's innocent explanation should be rejected. The determination did not reflect a misunderstanding or misapplication of the standard or burden of proof. The judge adopted the relevant staged approach.
34. It was asserted that the judge's approach was also unreasonable. As the Court of Appeal said at paragraph 18 of Herrera v SSHD [2018] EWCA Civ 412, it is necessary to guard against the temptation to characterise as errors of law what are in reality no more than disagreements about the weight to be given to different factors. The weight to be given to the various factors is a matter for the judge.
35. The judge was criticised for not finding in the appellant's favour because, it was asserted, the cross-examination gave no basis to doubt her version of events. The judge merely recorded at paragraph 38 that the Home Office Presenting Officer
- 'did not cross examine the appellant about the detail of her recollection of the exam as set out in paragraph 12 of her witness statement and he did not raise the issue during his closing submissions. He therefore gave me no basis to doubt the appellant's version of events'.*

The judge was obliged to consider the point in relation to cross examination, as highlighted above [28] and was referring to the Presenting Officer's own submissions on cross-examination. It does not mean that the judge could not form his own views or had to make the determination on the basis of that fact alone as suggested by the grounds. He clearly took the matter into account when making his assessment.

36. Turning to the criticism of the judge's finding in relation to the two TOEIC tests, it is correct to state that the appellant took tests on 29th August and 31st August in relation to the various components of the TOEIC test. Amongst the myriad of findings, however, the judge merely 'noted' that *'in cross examination, the appellant claimed that she had taken the two TOEIC tests on different days while the evidence from ETS says that both were taken on 29 August 2012'*. Notwithstanding this finding, I consider the

tribunal's decision would have been the same on the basis of the reasons which have survived scrutiny and are set out below. Further, to illustrate that the 'two exam' point was merely an observation, rather than a central tenet to his findings, the judge stated in the next sentence '*Moreover, I also take into account that during cross-examination the appellant 'denied that she saw anything 'strange or abnormal' during her exams*' [my underlining]. That approach was also criticised.

37. The judge specifically stated that during cross-examination the Home Office Presenting Officer did not ask the appellant any questions regarding the details of the test although he, the judge, did ask her, as he was entitled to do, whether she noticed anything strange or abnormal, when she took the test, to which she replied, "no". The judge ultimately did not accept that she would not have witnessed anything out of the ordinary on the day of the test. The grounds advanced that there was not a 'shred of evidence' to support that contention.
38. Placing that in context, the judge identified that the Project Façade report on Synergy College, which had been adduced in evidence by the Secretary of State and clearly part of the respondent's case, stated that between 24th November 2011 and 15th January 2013, the college undertook 4,894 TOEIC speaking and writing tests of which 2,410 (or 49%) were found by ETS to be invalid and 2,484 found to be questionable. He found at paragraph 38:

"There is no dispute that certain colleges including Synergy Business College were carrying out large-scale fraud and, in my view, the respondent has provided sufficient evidence in the SRB (sic) [respondent's bundle] that fraud did take place on 29th August 2012."

39. More tellingly, the judge also noted at paragraph 39 that,

"the respondent has provided convincing evidence in the RSB (sic) that, at the very least, 92% of exams on 29th August 2012 were taken by proxy test takers with the rest being deemed to be questionable".

and critically at [39]:

"On balance, I find it unlikely that the appellant would have been the sole, or one of the few, [genuine] students in a room in which large-scale cheating was taking place. The only other explanation therefore would be that all of the students sitting the exam on that day have been erroneously flagged up by ETS as having used a proxy test taker. However, I reject that hypothesis because that it would require a significantly higher rate of false positives than Professor French says is likely, and the appellant has provided no expert evidence of her own to rebut his conclusion."

40. In the instant case, the tests were either invalid or questionable, which means there were no validated tests at that test centre on the day the appellant was said to have legitimately taken the test, and as stated in **The Queen (On the application of) Abbas v the Secretary of State for the Home Department** [2017] EWHC 78 at paragraph 14

'it is of evidential significance that there were no apparently genuine candidates on the day in question'.

41. The judge considered the various options as to the cheating but stated:

"Finally, if the appellant was not cheating herself, it is incredible that she would not have noticed anything strange or abnormal going on if at least 92% of those present were using a proxy and that her denial about witnessing anything out of the ordinary undermines her credibility."
42. The determination demonstrates after careful reasoning that the judge considered but rejected counsel's submission on the unlikelihood of no genuine students on the day of the test and noted there was no evidence which undermined Dr French's report of the false positive rate. Bearing in mind the extent of the invalid results determined by ETS on that day, as evidenced by the Project Façade report, and Annex AA in the respondent's bundle showing the extent of the results from Synergy Business College on the day, it was open to the judge to find the conditions would have led the appellant to have noticed something out of place when she took the test; she states that she attended the centre.
43. Turning to the point that there was not a shred of evidence to support the contention that there was anything out of the ordinary, the judge thus found that 'largescale cheating was taking place' and accepted that there were no valid tests on the day. The Project Façade report on Synergy Business College itself records at paragraph 13 that during an audit 'the ETS auditors observed 'pilots' (imposters) taking the test on behalf of candidates who were located in a separate room'. This was evidence from an observation. Further when two candidates were interviewed under caution, they admitted that 'pilots' sat the test on their behalf'. The judge clearly took into account Annex AA (the results on the day) and the Project Façade report dated May 2015, and, on the evidence, it was open to him to make the findings he did.
44. As stated in Abbas at paragraph 16

'Overall I conclude that Mr Sewell's evidence provides significant circumstantial support for the proposition that anyone who supposedly took the TOEIC test at Thames Education Centre on 21 and 26 March 2012 was party to a fraud. As Mr Thomann put it, it would be an odd state of affairs if the Claimant had been the only genuine candidate on those days'.
45. The judge was also criticised for his approach to the attempts by the appellant to obtain information from ETS. Notably, it was asserted, the judge erred when taking against the appellant her failure to 'doggedly' pursue the ETS recording and her attempts to contact ETS: which she had done. Mr Avery submitted it was open to the judge to find, in the particular circumstances, of her very strong Thai accent, that this issue was determinative.
46. At paragraph 29 of the determination, the judge recorded that the appellant advanced in her statement she had "done everything in her power and more to prove [that she] took the test that day".

47. In **Abbas** Mr Justice Davis observed at paragraph 23 that

'No steps were taken by the Claimant to obtain the recording'

and at paragraph 24 held

"The Claimant had no sensible explanation for his failure to obtain the voice recording. Mr Malik made the point that it is not for the Claimant to prove his case and that the Secretary of State could also have obtained the recording. That would not have got her very far in the absence of a sample of the Claimant's voice with which to compare it".

48. At paragraph 40 the judge noted that despite three years having elapsed since the refusal decision the appellant had not sought a copy of the exam audio recording from ETS and had failed to provide sufficient evidence to rebut the allegations made against her. This was raised before Counsel, who submitted that the appellant had contacted ETS to obtain a voice recording and had provided an email she sent on 14th November 2016. The judge at paragraph 41 acknowledged that *"it does therefore appear that the appellant did take some steps to obtain information from ETS although she did not expressly ask for the audio recording"*. That is correct.

49. Nonetheless the judge continued with his findings. Despite the reference to ETS only retaining information on tests for two years, the judge referenced paragraph 25 of the judgment in **Ahsan v SSHD [2017]** EWCA Civ 2009, which held that,

"ETS has retained copies of the individual voice recordings which it has identified as showing the use of a proxy, and that a copy can be obtained (without charge) on application".

50. Further, the appellant confirmed in her oral evidence (as can be seen from the record of proceedings), that she had not taken any steps to contact ETS since 2016 and as found by the judge. That is the critical point. This issue was a live issue and had been raised to the appellant previously and at least in April 2019; the judge also noted that the appellant had been legally represented throughout the entire statutory appeal process and he found it weighed against the appellant that no further steps were taken to obtain the audio recording. The judge was entitled to take that approach.

51. In summary, the judge acknowledged the steps taken, noted she did not ask for the recording and noted she was cross examined. It was clear there was no indication that she had specifically requested the recording or that there had been further emails since 2016. She herself confirmed she had taken no steps since 2016 even though she was legally represented.

52. As explained by the judge, in the light of her very strong Thai accent, it would prove determinative of the appeal and if ETS no longer held the audio recording the judge would have expected to see clear evidence from them confirming that. Thus, the judge did not accept, as the appellant claimed, at paragraph 20 for sound reasons that she had done *"everything in her power to obtain the evidence from ETS"*. That

finding was indeed open to him on the evidence. In other words, the appellant had had ample time to secure evidence to demonstrate her innocence and she had failed to do so. That is not mere circumstantial evidence.

53. That other appeals may have been allowed without ETS evidence, in my view does not assist. It is the fact sensitive analysis in this particular case which is relevant.
54. At paragraph 43, the judge considered the point that the appellant had obtained an MBA from a British university and observed that it was obvious that a student did need to have a good understanding of English but that her overall award was only 49%, which suggested that she struggled with the course and that it served to weaken any “motive the appellant might have to cheat on the TOEIC exam on the basis that she could not speak English”.
55. However, the judge found:

“That is only one possible motive. For example, the appellant could have lacked confidence of her own abilities (as possibly evidenced by the low scores on her MBA course and her own admission to speaking with a thick accent); or perhaps wanted to take an easy route to obtaining the certificate. Therefore, whilst I found this point does weigh in the appellant’s favour it is not determinative of the appeal and it must be taken in the round with the rest of the evidence.”

56. The judge noted that two decisions beforehand had been set aside by the Upper Tribunal and he carefully considered the evidence before him and the submissions of the parties, reminding himself that the question of whether a person has engaged in fraud was fact-sensitive and that he needed to take into account relevant factors including what the person had to gain from being dishonest, what was known about their character and the culture and environment in which they operated. The judge noted that the appellant spoke with a very strong Thai accent but accepted that her English may have deteriorated since she had taken the test (albeit she was in the UK she and her wife spoke in Thai), and he factored in the educational certificates and her studies. The judge also took into account her impeccable immigration history and that there was nothing in the background to suggest she was a dishonest person. The wife was found to be an honest witness. They had met, however, at the close of 2013 and after the test in 2012.
57. The judge summed up at paragraph 45 that on the one hand the respondent had provided strong evidence that widespread cheating was taking place at Synergy Business College on the date the appellant took her TOEIC exams but on the other hand the appellant had provided evidence about her character generally but especially in relation to her past studies which undermined the suggestion that she was unable to speak English at the time in question. He took into account relevant factors and although the grounds stated that he ‘could have well led to a different conclusion’, that is not the test. Weighing all the evidence the judge found against the appellant. There was no assertion of perversity and even if a different conclusion could have been made on the facts that does not indicate a legal error or mean another decision should be substituted.

58. As the judge stated:

“But taking all of the above-mentioned evidence and points in the round, I find that the respondent has succeeded in explaining why the appellant’s innocent explanation should be rejected. Ultimately, I was swayed by (i) the unlikelihood of the appellant being permitted by Synergy Business College to take the English speaking test in a room full of people using proxies along with her unconvincing claim not to have witnessed anything out of the ordinary and (ii) the appellant’s failure to more doggedly pursue ETS for a copy of the audio recording of her test.”

59. The reference to ‘unconvincing’ at paragraph 45 towards the conclusion was merely a shorthand could have been more elegantly phrased, but I am not persuaded this is material because the judge gave himself a clear direction at paragraph 17, at the outset, that the burden of proof was the civil standard of the balance of probabilities.

60. The weight to be attached to the evidence is a matter for the judge and in this instance, it was open to the judge to make the findings he did. Bias was also attributed to the judge, but the judge took a careful and balanced approach to the evidence and acknowledged that it was finely balanced but gave reasoned findings. The ultimate question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased **Porter v Magill** [2002] 2 AC 357, [2001] UKHL 67. The decision does not reflect bias and that the judge found against the appellant on the evidence does not indicate bias.

61. The Court of Appeal in **Lowe v SSHD** [2021] EWCA 62 referred to and repeated the judgment of Lewison LJ in *Fage UK Ltd. v Chobani UK Ltd.* [2014] EWCA Civ 5 at paragraph 114 as follows:

“Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC1; Piglowska v Piglowski [1999] 1 WLR 1360; Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23 [2007] 1 WLR 1325; Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively McGraddie v McGraddie [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include.

i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

ii) The trial is not a dress rehearsal. It is the first and last night of the show.

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court and will seldom lead to a different outcome in an individual case.

iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done”.

62. The judge had the benefit of hearing live evidence from the appellant and her wife and being able to clarify issues as they arose. He heard all the submissions on the evidence and weighed the evidence. Ultimately, for sound reasoning the judge found the respondent had discharged the legal burden of proof.
63. It was against that background that the judge found that the appellant’s Article 8 claim should be dismissed. The grounds submitted that even if deception was found, the discretion of the Secretary of State should have been made in favour of the appellant and that paragraph 322 was not mandatory. The judge did not accept that the departure of the appellant from the UK should ‘wipe the slate clean’ and as Mr Avery pointed out, had the Entry Clearance Officer known of deception the visa would not have been granted.
64. The judge made a careful assessment on proportionality and it was entirely open to him to conclude that there had been no abuse of process albeit the respondent did not raise the issue of deception with the appellant until 2016. It is for the Secretary of State to determine how she will exercise her discretion under the Rules, the ETS deception having come to her attention; the appeal was on human rights grounds. It was open to the judge to conclude the exercise had been undertaken correctly because
- ‘if the appellant had sought to deceive the Home Office, the public interest in maintaining an effective immigration control entitled the respondent to hold this against her in 2016’.*
65. A further point was taken that as the Secretary of State had evidence in respect of the claim that she had cheated before the grant of the fiancée visa, it was now unfair and disproportionate to rely on the assertion and require her removal after she had entered, married, and was settled. It was asserted the judge’s observation showed bias.
66. As the judge, however, came to a reasoned finding that the appellant had been involved in TOEIC deception and noted the widespread scale of that fraud and the potential to undermine the immigration system, using that finding with respect to the appellant, that can hardly be described as evincing a bias. The judge considered the submissions from counsel that there was a belated allegation of deception and the subsequent entry clearance visa but at paragraph 48, reasoned cogently that the deception was brought to the respondent’s attention on 30th May 2014, a matter of months before she returned to Thailand and that *‘given the tens of thousands of cases of*

potential deception that ETS had alerted the Home Office to , it is likely that it would have taken the respondent some time to review her records'. As the judge recorded, he did not have the application before him and thus would not have identified the representations therein. The inference as to the bureaucratic burden placed on the Secretary of State was appreciable, reasonable and appropriate bearing in mind the evidence of widespread fraud cited in the Project Façade report at paragraph 4; overall 33,725 test scores were found to be invalid and 22,694 questionable as at 5th May 2015.

67. Finally, the judge noted at [48] that

'the respondent would in any event have been compelled to refuse the appellant's application for leave to remain as a spouse given that paragraphs S-LTR.1.1 and 1.6 are mandatory. The appellant's application was therefore bound to be refused under the Rules'.

68. The judge approached the evidence without bias and made findings which were reasoned and open to him having directed himself legally appropriately. I find there was no material error of law in the decision of the First-tier Tribunal and the decision will stand.

Notice of Decision

The appeal remains dismissed.

Signed *Helen Rimington*
Upper Tribunal Judge Rimington

Date 26th February 2021