



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

Appeal Number: IA/00729/2020
[HU/50304/2020]

THE IMMIGRATION ACTS

Heard at : Field House

On : 22 April 2022

**Decision & Reasons
Promulgated**

On: 06 May 2022

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SAHIL LAMBA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, instructed by Liberty Legal Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India, born on 19 April 1989. He has been given permission to appeal against the decision of First-tier Tribunal Judge Randall,

dismissing his appeal against the respondent's decision to refuse his application for leave to remain on human rights grounds.

2. The appellant entered the United Kingdom on 25 October 2010 with leave to enter as a Tier 4 (General) Student Migrant until 30 August 2012. Further to an application made on 28 August 2012, he was granted leave to remain as a Tier 4 (General) Student Migrant until 30 March 2014. His leave was extended further until 30 January 2016 on the same basis, but on 25 July 2014 he was served with removal papers on the basis of having obtained his leave by deception. He sought to challenge that decision on judicial review but was unsuccessful. On 13 November 2014 he made an application for leave to remain on human rights grounds. His human rights claim was refused and certified as clearly unfounded on 28 July 2015 and a subsequent request for reconsideration was rejected on 6 December 2016. The appellant made further unsuccessful applications, under the EU Zambrano Regulations and then as a stateless person and on 16 March 2020 he made further representations at the respondent's invitation, raising human rights grounds on the basis of his private life in the UK. Those representations were treated as a human rights claim and were refused in a decision of 19 August 2020, giving rise to an in-country right of appeal which he exercised.

3. The appellant's application was refused on suitability grounds, under section S-LTR.2.2 of Appendix FM of the immigration rules on the basis that he had fraudulently obtained a TOEIC certificate and had thus willingly participated in an organised and serious attempt to defraud the Home Office and others. The respondent noted that the appellant had submitted, with his application of 28 August 2012, a TOEIC certificate from the Educational Testing Service (ETS) in relation to an English language test he claimed to have taken at Colwell College on 18 July 2012. The respondent had been informed by ETS that a proxy test taker had been used and that they had therefore declared the appellant's test result as invalid and cancelled it. The appellant was therefore unable to meet the requirements in paragraph 276ADE(1). The respondent considered further, and in any event, that there were no significant obstacles to integration in India and that there were no exceptional circumstances justifying a grant of leave outside the immigration rules.

4. The appellant appealed against that decision. In support of the appeal, he submitted a statement of 20 December 2020 (dated 20 December 2019 in error) in which he stated that he had taken the test himself, he had not used a proxy test taker and he had not exercised deception. He gave details of how he got to the test centre and what happened on arrival and during the test. He submitted a supplementary statement on 6 May 2021 responding to the respondent's review and to the evidence relied upon by the respondent which included the look up tool, and attaching further documentary evidence including his educational certificates from India and the UK and a letter from ETS Global UK confirming that they did not retain test administration data beyond two years.

5. The appellant's appeal was heard on 12 May 2021 by First-tier Tribunal Judge Randall. The judge heard oral evidence from the appellant and submissions from both parties. He was satisfied that the respondent had discharged the initial evidential burden of proof to raise an issue as to the use of deception by the appellant, noting that the look up tool declared that his test result was invalid and that it also showed that 71% of tests taken at that college on that date were invalid and that none of the results were released. He found that the appellant's response to the allegation met the minimal level of plausibility as an explanation so as to shift the burden of proof back to the respondent to show reasons why the explanation should be rejected. Having noted the lack of independent evidence of the appellant's attendance at the test centre, the absence of evidence of any attempt to obtain the voice recordings for the test he had taken and the absence of an alternative explanation for the anomalous test result, and having considered the documentary material relied upon by the respondent and the appellant, the judge concluded that the respondent had discharged the burden of establishing that the appellant's explanation was to be rejected. He concluded that the respondent's decision to refuse his application on suitability grounds was justified and that the respondent's decision did not give rise to a breach of Article 8 outside the immigration rules.

6. The appellant then sought permission to appeal to the Upper Tribunal on four grounds. In the first ground it was asserted that the judge had erred by failing to consider and make findings on material factors as set out in SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 229 at [69], including why the appellant may cheat and how he performed under cross-examination and failed to make findings on the appellant's bachelor degree undertaken in English over the same period as the ETS test whilst in the UK and his previous IELTS test and studies in English in India. The second ground asserted procedural unfairness in that the judge had criticised the appellant for his failure to seek to obtain the voice recordings, but he was never asked about it and, had he been asked, he would have been able to produce correspondence with ETS from February 2020 seeking the audio recordings. The third ground asserted that the judge had made a number of erroneous and/or irrational findings, including his criticism of the appellant for the lack of detail in the information provided yet stating that the information was in the public domain, his failure to consider the appellant's evidence when stating that it was difficult to see why the appellant did not notice that there was cheating at the test centre and his questioning of the lack of challenge to the chain of custody when the voice recordings were not before him. The fourth ground challenged the judge's failure to consider the respondent's exercise of discretion under paragraph S-LTR.2.1.

7. With those grounds were attached a statement from the appellant dated 7 June 2021, email communication regarding the obtaining of the voice recordings, the appellant's TOEIC official score report, the appellant's IELTS test report form, the appellant's educational transcripts from India and the appellant's certificate and transcripts for his UK degree.

8. Permission was initially refused in the First-tier Tribunal, but was subsequently granted by the Upper Tribunal on a renewed application.

9. The matter was then listed for hearing and came before me. Both parties made submissions, with Mr Karim adopting and expanding upon the grounds of appeal. Mr Karim confirmed that, of the documents submitted with the permission application, the statement from the appellant dated 7 June 2021, the email communication regarding the obtaining of the voice recordings and the appellant's TOEIC official score report had not been produced before First-tier Tribunal Judge Randall, but the other documents had been before the judge.

Consideration and Findings

10. Contrary to the assertion made in the first ground, it seems to me that Judge Randall carefully followed and applied the guidance in SM and Qadir and undertook a very thorough consideration of all relevant circumstances, as consistent with the guidance set out at [69], namely *"the relevant factors to be weighed include (inexhaustively, we would add) what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated....how the Appellants performed under cross examination, whether the Tribunal's assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic achievements are such that it was unnecessary or illogical for them to have cheated."*

11. At [54] the judge gave consideration to the argument made on behalf of the appellant in regard to the three identical entries in the look-up tool and provided cogent reasons for according weight to the document. At [57] he analysed the appellant's own evidence about his attendance at the test centre and his choice of test centre (in Leicester rather than London, despite residing in London), and at [59] he considered his proficiency in English and his educational certificates and transcripts for courses taught in English. At [62] the judge considered how the appellant performed in cross-examination, noting the lack of detail he was able to give about what had occurred when he took the test notwithstanding the passage of time, and at [66] he gave consideration to his immigration history, concluding that it was a neutral matter. Given the very detailed consideration of all aspects of the appellant's evidence I find no merit whatsoever in the challenge made in the first ground.

12. Turning to the second ground, the assertion made is that the judge erred by giving significant weight to the fact that the appellant had not sought to obtain the voice recordings of his test from ETS when the matter was never put to him and when, if questioned about that, he could have confirmed that he had requested the voice recordings. The grounds refer to the appellant's statement and to the evidence submitted with the permission application confirming that he had corresponded with ETS in February 2020 to request the audio recordings. In fact the evidence went beyond that referred to at [18] of the grounds, as the appellant's statement of 7 June 2021 stated, and the email correspondence confirmed, that he had actually obtained the voice files from

ETS and that they were emailed to him by the respondent's solicitors Jones Day on 25 February 2020. However, I cannot see how Judge Randall can be criticised for making the finding that he did when none of that evidence was before him, either the appellant's statement of 7 June 2021, the email communication or the voice recordings. Although the burden of proving deception lay upon the respondent, the burden of proof was upon the appellant to make out his claim and, given the significance of the voice recordings there is simply no satisfactory explanation why he did not refer to them being in his possession, particularly as it was specifically put to him in cross-examination that his friend Eamon had taken the test for him (as recorded in the judge's decision at [20]). Whilst, at [2] of his statement, the appellant seeks to apportion blame to his former solicitors by stating that it was unfortunate that they did not produce the voice recordings for the appeal, there is no evidence to show that he gave the voice recordings to them. It would have been clear to the appellant and his solicitors, had they been aware of the voice recordings, that they were relevant and material evidence and the fact that they were not produced raises more questions than it answers. It certainly cannot be said, however, that Judge Randall erred by proceeding on the basis that he did and making the adverse findings that he did.

13. The same can be said for the TOEIC test certificates which the grounds assert, and the appellant stated in his statement, were in his possession but were not produced to the First-tier Tribunal. It can be seen from Judge Randall's decision at [21] that it was put to the appellant in cross-examination that he had not attended the test centre at all. If he considered that the test certificates with his photographs were evidence that he had attended, there is no explanation why he did not refer to them at that point. Judge Randall was only able to make a decision on the evidence produced before him and it cannot be said that he erred in law by failing to make findings on evidence which was not before him. I do not accept Mr Karim's suggestion that the certificates should now be considered as evidence of the appellant's attendance, as that is clearly not appropriate at this stage. I reject any assertion that they provide irrefutable evidence that the appellant attended the test centre in person and undertook the test himself. If they did, it is questionable why they were not produced before Judge Randall.

14. As for the third ground, it seems to me that Judge Randall was perfectly entitled, at [62], to draw the adverse conclusions that he did from the lack of detail the appellant was able to give about what actually occurred when he took the test. I fail to see anything inconsistent in such a finding with his subsequent finding that the limited details given by the appellant were within the public domain, and certainly nothing irrational in such a finding. The judge plainly gave full consideration to the appellant's evidence in his witness statement of 20 December 2020 in that regard but was also entitled to assess the evidence which the appellant gave before him under cross-examination. Indeed that was consistent with the guidance at [69] of SM and Qadir which the appellant relied upon in his first ground of challenge. Likewise, the judge's adverse finding at [64] in regard to the appellant's denial of knowledge of any cheating occurring at the test centre, was fully and properly open to him. As for

[18] of the grounds, the judge is criticised for drawing adverse inferences from the absence of any attack by the appellant on the chain of custody of the voice recordings when he did not have the voice recordings, but that clearly flies in the face of the assertion made in the second ground that he did have the voice recordings (and indeed Mr Karim's reference to the voice being different). For all of these reasons the assertions in the third ground fail to show that the judge made any erroneous or irrational findings and the ground of challenge is not made out.

15. Mr Karim made no separate submissions on ground four and indeed there is nothing to suggest that it was argued before Judge Randall that there was a basis for a grant of discretion in the appellant's favour should the deception allegation be made out. Clearly the judge gave full and detailed consideration to all the evidence and there was no evidence before him to suggest that discretion ought to have been exercised differently. The judge was perfectly entitled to conclude that the suitability provisions applied to the appellant's human rights claim and his decision to dismiss the appeal was fully and properly open to him on the evidence before him.

16. For all of these reasons I find no merit in the grounds and I uphold the decision of the First-tier Tribunal.

DECISION

17. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring it to be set aside. The decision to dismiss the appeal stands.

Signed S Kebede
Upper Tribunal Judge Kebede

Dated: 26 April 2022