



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/12796/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 4<sup>th</sup> October 2018

Decision & Reasons Promulgated  
On 19<sup>th</sup> October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR A K  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr B Malik (Counsel) instructed by Immigration Legal Services

For the Respondent: Mr E Tufan (Home Office Presenting Officer)

**DECISION AND REASONS**

1. The Appellant is a national of Pakistan born on 10 December 1973. He arrived in the United Kingdom as a visitor on 10 August 2009. He thereafter overstayed and on 15 October 2013 applied for leave to remain on the basis of his private and family life, which was granted. This leave was subsequently cancelled but then reinstated. On 10 May 2016, the day prior to the expiry of leave, the Appellant made a further application for leave to remain on the basis of his family and private life in the UK. This application was refused in a decision dated 4 October 2017 on the basis that it

was found that the Appellant did not meet the suitability requirements under S-LTR of Appendix FM on the following basis:

*“ETS has a record of your TOEIC speaking test taken on 28 November 2012 at the Universal Training centre. ETS undertook a check of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker. Your scores from the test taken on 28 November 2012 at the Universal Training Centre have now been cancelled by ETS. On the basis of the information provided to her by ETS, the SSHD is satisfied that your certificate was fraudulently obtained and you showed an intention to use deception.*

*Furthermore on 7 September 2014 you underwent a returning leave to enter interview. During the interview you admitted that you paid someone to sit with you during your English test at this test centre and that they answered at least half of the questions on your behalf. Furthermore you admitted to paying £270/280 for someone to answer the questions for you.”*

2. The Appellant appealed against this decision and his appeal was listed for hearing on 10 May 2018. On 8 May 2018 the Appellant’s representatives, Immigration Legal Services, wrote to the Tribunal requesting that the appeal be adjourned on the basis that the Appellant’s wife wished to attend in order to give evidence. However the Appellant’s four children were at that time subject to child protection plans with the local authority under the category of emotional abuse and the local authority had refused permission for the children and the Appellant’s wife to attend the hearing by travelling there together. The local authority offered day care for the children with a foster carer on the day of the hearing in order that the Appellant’s wife might attend the hearing. However the Appellant’s wife instructed that her children would not stay with strangers and someone who does not know them and thus she was in a very difficult position.
3. A letter from Elaine Hughes, team manager of Family Safeguarding Team South, dated 3 May 2018 was attached which provides, *inter alia*, as follows:

*“The Local Authority felt that it is not appropriate for the children to be taken out of school for the day and to travel with both parents in the car together as this places them at risk of harm. The Local Authority offered day care with a foster carer, however Ms B made the decision not to attend Court as she did not want her children going to strangers and the Local Authority support this decision.”*

4. The application for an adjournment was refused in a decision dated 9 May 2018. It was refused by a Tribunal caseworker, on the basis that the application did not establish what other alternatives for childcare Ms B had considered or explored or whether the costs of any alternative childcare arrangements was prohibitive. It was found:

*“Although it was for Ms B to decide, reasonable attempts were made by the local authority to allow her to attend the hearing, which she has refused. There is no guarantee that the situation will have resolved itself after the meeting (that is a reference to the meeting with social services as to the Appellant’s continued*

exclusion from the family home) in June or whether within any reasonable timeframe thereafter. The appeal has already been ongoing for almost seven months.

*The application can be renewed if further information can be provided to support it."*

5. The Appellant's representatives, it would appear on receipt of this decision, then wrote to the Tribunal on 9 May in the following terms:

*"Our client instructs that he would like his appeal to be considered on paper and will not be attending the hearing tomorrow. We are in the process of drafting written submissions and will be posting these today via special next day delivery."*

6. The appeal then came before First-tier Tribunal Judge Robertson on 10 May 2018 with no attendance by or on behalf of the Appellant. However the Respondent was represented by a Presenting Officer, Miss Simbi. At [5] the judge held as follows:

*"The Appellant did not attend the hearing. Although initially requesting an oral hearing he notified HMCTS through his solicitors that he wished his appeal to be decided on the papers. I am satisfied that there is sufficient evidence before me to reach a fair and just decision."*

7. The Presenting Officer at the hearing provided a copy of the summary of the interview notes that took place between the Appellant and an Immigration Officer on his return from Pakistan on 7 September 2014. This is recorded by the judge at [11] which provides as follows, recorded at 20:27 with the use of an Urdu interpreter:

*"The passenger stated he had submitted an English test certificate as part of the documents required for his most recent LTR application as a spouse.*

*He stated that he could not remember the date of the test or where he took the test but that he knew he had taken one.*

*From memory he thought that the test was several years ago, possible 2012 and that it took place at a College about 30 mins outside of Luton but he did not know the name.*

*When I put to him that we had information that he did not take the test, he admitted that he had attended a test centre but that somebody had helped him.*

*He stated that an Indian male who was the examiner had helped him, completing about half of the questions for him and that he had paid him about £270/280 to do this. He did not know his name.*

*He stated that he realised what he had done was wrong but that he had done it in order to be able to stay in the UK with his family."*

8. The judge went on to find that he was satisfied on the evidence that the Appellant had fraudulently obtained his English test certificate, that his statements to the Immigration Officer were clear and unambiguous and that consequently he was unable to meet the suitability criteria S-LTR.4.2 of Appendix FM of the Rules.
9. The judge then went on to consider the appeal outside the Rules noting that the Appellant and his wife have four children, all of whom are British citizens, but finding that removal of the Appellant would not be disproportionate.

10. Whilst the Appellant did not attend the hearing, written submissions were made on his behalf by his solicitors and there was also a bundle of evidence including a witness statement from the Appellant where he states at [4]:

*"4. I did not cheat or use any fraud in the English test. I did the test myself and did not cheat. The test was done with headphones on and on a computer. I did the test myself. This issue was not brought up when I got my last leave to remain. I am settled now and have a family life with children. The Home Office allegation is wrong.*

*5. The Home Office are putting false allegations on me. In September 2014 I was coming back from a very upsetting trip to Pakistan. My father passed away and I went for his funeral in Pakistan. The weather was very bad in Pakistan and it was raining heavy with floods. It took me a few days to reach from Kashmir to get to the airport in Islamabad because of the bad weather. I missed my flight and paid about £270 to £280 to re book another flight to come back to the UK. I was also stressed to get back to the UK as my wife U was pregnant then. Having traveled for a continuous few days after my fathers funeral, I was absolutely tired, stressed and exhausted. I do remember a little of the interview at the airport but I would not have said that I paid someone to do test as this is not true. I actually remember I told the officer that I had to pay for another flight and that this cost about £270 - £280 as I missed my first flight due to bad weather. I did not say that I paid someone to do a test. I was very tired and exhausted they should not be interviewing me in that state as I just came back after my fathers death."*

11. The decision and reasons dismissing the appeal were promulgated on 2 July 2018. Permission to appeal was sought on the basis that the judge had erred in failing to consider certain facts of the case, failing to consider the evidence, failing to consider the exceptional circumstances of the case and Article 8 and failing to consider the law, the Home Office policy documents and the case law. The grounds are rather loosely drafted but notably raised the point that the judge has made reference to interview notes passed to him by the Respondent, however, this evidence had not been served on the Appellant or his representatives as it had been served at the hearing and that the judge had failed to make a proper assessment of Article 8, in particular Section 117B(6) and the best interests of the children.

12. Permission to appeal was granted by First-tier Tribunal Judge Simpson in a decision dated 20 August 2018 in the following terms:

*"Permission to appeal is granted because:*

- (i) there was disclosed arguable error concerning the Judge's admission of evidence from the respondent on the day of the hearing of which in the light of the appellant's election for a determination on the papers and thereby being absent on the day, there did not appear to have been raised with the respondent, as a matter of fairness, whether the said evidence had been served on the appellant's representatives in due time or at all, of which evidence the appellant's papers did not disclose there having been prior sight by the appellant and/or his representatives, and the Judge having treated that evidence as materially*

*contributory to the conclusion that the appellant had used fraud to obtain an English-language certificate (paras 10–14);*

- (ii) *judicial assessment of Art 8 proportionality arguably erred with respect to S.55 best interests of the child with inter alia the exercise of arguably unsupported assumptions concerning, firstly, the ‘resilience’ of children, all four children herein British with a British mother, the children aged between 7 and 3 having already faced a crisis in the family, and secondly, that close family ties can be reasonably maintained ‘via modern means of communication and visit’ (paras 16vi, 21);*
- (iii) *equally the proportionality assessment arguably erred with respect to a lack of incisive assessment of a mandatory statutory consideration, S.117B(6);*
- (iv) *there appeared arguably overall an inadequacy of Art 8 proportionality reasoning. All grounds arguable.”*

### *Hearing*

13. At the hearing before the Upper Tribunal, the Appellant attended with his wife and was represented by Mr Billal Malik, who sought to rely on a skeleton argument which explored two of the issues raised in more detail. The first of these was the issue of procedural unfairness with reference to Rule 25 of the First-tier Tribunal Procedure Rules. It was asserted that the Appellant had elected a paper hearing under Rule 25(1)(a) and it was plainly unfair to permit the Home Office representative to participate in the hearing, and in particular to admit further materials, i.e. the interview summary notes, that the Appellant had never seen before and had not had the chance to respond to. It was submitted that these documents were clearly material to the judge’s assessment and the only fair course of procedure would have been to adjourn the appeal. Secondly, that the judge had erred in respect of his consideration of Article 8 outside the Rules and in particular Section 117B(6), and the judge had failed to apply the correct law, i.e. MA (Pakistan) [2016] EWCA Civ 705 at [46] and in particular at [49] per Lord Justice Elias:

*“The fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child’s best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.”*

14. Reference was also made to the decision in MT and ET (Child’s best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 (IAC) at [26] to [34] and it was submitted the judge had made baseless findings that the children were resilient and that the links between the Appellant and his children could be maintained by modern methods of communication.
15. At the hearing before the Upper Tribunal, the procedural history of the appeal was explored and documents obtained from the Upper Tribunal file and copied for the parties as to the history of the adjournment requests and a copy of the interview summary notes.

16. Mr Malik made detailed submissions in line with his skeleton argument, submitting that the judge's decision was procedurally unfair and was thus fundamentally flawed and that the judge had further erred materially in law in his Article 8 proportionality assessment.
17. In his submissions, Mr Tufan submitted that it appears at the eleventh hour the Appellant wanted his case considered on the paper evidence available and made written submissions. He submitted that the Appellant had been put on notice of the fact that the Appellant had been interviewed on return from Pakistan and this was clearly set out at [3] of the refusal decision (see above). Given the Appellant was put on notice of the allegation, he could have sought disclosure, but in any event Mr Tufan submitted that it would not have made any material difference to the outcome, the Appellant's response being contained at [5] of his witness statement which he submitted did not take the matter much further. It was clear the Appellant had made an admission and was now denying it.
18. Mr Tufan submitted that the evidential burden remained on the Appellant, even on the generic evidence, to provide an innocent explanation as to how his TOEIC test result had been found to be invalid. Given that the Appellant did not turn up to make his case at the hearing he failed to provide an innocent explanation and thus the judge was justified in upholding the Respondent's decision in that respect.
19. Lastly in relation to proportionality and Section 117B(6) Mr Tufan submitted that the decision in MA (Pakistan) is quite clear that the immigration history and conduct of a parent can be taken into consideration. It is further clear from Lord Justice Elias's judgment in AM (Pakistan) that a blatant disregard for immigration control is sufficient to make it reasonable for children to leave the United Kingdom. In this particular case it was a matter for them: the children were not required to leave the UK as they could remain with their mother who is British and so they were not obliged to leave. Mr Tufan further noted the serious allegations made against the Appellant by his wife which are set out at [5] of her witness statement dated 3 May 2018. Mr Tufan also noted that the social services had not deemed it in the best interests of the children to travel to court with their parents.
20. In reply, Mr Malik submitted that he accepted that AM (Pakistan) is authority for the proposition that an Appellant's immigration history can be looked at in the assessment of the reasonableness of removal. However one must take into account the judgment in MT and ET. He submitted that the evidence before the judge was that this was a family in transition with an aspiration to be reunited. He reminded the Upper Tribunal that the judge did not find that the Appellant, his wife and children and his wife's daughter from the former marriage were not a family unit, even taking into account the intervention by social services. He submitted that to maintain family unity the children would be obliged to follow their father back to Pakistan and it was necessary to apply the judgment in MA (Pakistan) as to whether or not this was justifiable.
21. I reserved my decision which I now give with my reasons.

### *Findings*

22. I find material errors of law in the decision of the First-tier Tribunal Judge for the following reasons. Firstly, whilst the Appellant had very late in the day elected to have his appeal heard on the papers, for reasons which are unclear as there appears to be no prohibition on his attendance at the Tribunal, I find the judge erred in taking account of additional evidence from the Respondent in the absence of the Appellant or a representative on his behalf and without such evidence having been served on the Appellant. Whilst it is the case that the allegation that the Appellant admitted in interview on return from Pakistan on 7 September 2014 that he had paid somebody to assist him in his English language test, that assertion was not evidenced or corroborated. The notes submitted by Miss Simbi at the appeal hearing are somewhat fuller than the version contained in the refusal letter and I find it was procedurally unfair for the judge to have continued with the appeal and made findings without the matters being put to the Appellant and without the opportunity of hearing the Appellant give oral evidence on the issue. I make this finding somewhat reluctantly given that the Appellant chose not to attend the hearing and give the judge the opportunity to assess his evidence on this key issue in light of the established jurisprudence on TOEIC cases. However as a matter of principle it is not appropriate for a judge to proceed in the absence of a party where new evidence has been served which has a material bearing on the credibility of the Appellant and the outcome of the appeal.
23. In relation to the second ground I further find that the judge erred materially in law in his assessment of the proportionality of the removal of the Appellant considered outside the Immigration Rules, in that nowhere in his decision is there a clear and fully reasoned assessment of the children's best interests nor is the test set out in MA (Pakistan) (op. cit.) applied. The judge assumed that the children would remain in the UK with their mother, all of whom are British, without grappling with the issue of whether that will be reasonable in all the circumstances, in that if they wished family life to continue that would invariably mean that the children would have to leave the UK and whether there were very strong reasons to justify that decision. There is also no consideration of Section 117B(6) apart from the merest passing reference at [20] and whether it would be reasonable to expect the children to leave. Therefore given that this appeal will impact on the lives of four British children I find a material error in this aspect of the decision and reasons as well.

### **Notice of Decision**

24. I find material errors of law in the decision of First tier Tribunal Judge Robertson. I set that decision aside and remit the appeal for a hearing *de novo* before the First-tier Tribunal. However, the Appellant and his wife are on notice that if they do not attend that hearing in order to give oral evidence that the appeal is likely to be determined summarily in light of the history.

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DIRECTIONS

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1. The appeal should be listed for 3 hours.
2. An Urdu interpreter is required.
3. The Appellant and his wife should use their best endeavours to obtain up-to-date evidence from social services as to the current position in relation to whether the Appellant is permitted to live in the same household with his children.

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Rebecca Chapman*

Date 16 October 2018

Deputy Upper Tribunal Judge Chapman