



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

**Appeal Number: IA/27680/2015**

**THE IMMIGRATION ACTS**

**Heard at Bradford  
On 13 April 2018**

**Decision and Reasons Promulgated  
On 11 May 2018**

**Before**

**UPPER TRIBUNAL JUDGE HEMINGWAY**

**Between**

**M W N**

**(ANONYMITY DIRECTION MADE)**

**Appellant**

**and**

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

**Respondent**

**Representation:**

For the Appellant: Mr S Ahmed (of A1 Immigration Services)  
For the Respondent: Mrs R Pettersen (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

**Introduction and relevant history**

1. The appellant (“claimant”) is a national of Pakistan. He was born on 6 March 1990. On 20 May 2011 he entered the United Kingdom (“UK”) having obtained entry clearance as a tier 4 student migrant and was given leave to enter until 30 May 2012. In order to successfully make an application to extend that leave as a student it was necessary for him to demonstrate that he possessed an ability to impart and receive information in the English language to a specified standard. It was also necessary for that ability to be evidenced in a prescribed manner. He says that, for those reasons, he went to the Premier Language Training Centre in London on both 15 May 2012 and 18 May 2012 in order to be examined as to his ability to read, write, listen to the spoken word and speak in the English language. The Secretary of State does not, however, accept that he did that and believes that the tests, on both days, were taken by a proxy test-taker. The claimant, those tests having taken place, was subsequently issued with a Test of English as a Foreign Language (“TOEFL”) certificate indicating the necessary standard as required under the

Immigration Rules had been attained. He used that certificate when he subsequently applied, on 29 May 2012, for further leave as a student. That application was, in fact, granted because at that stage no issue was taken concerning the validity of the test results. Indeed, further leave as a student was granted until 30 June 2013.

2. On 23 February 2013 the claimant married a female British citizen who, for reasons of confidentiality, I shall simply refer to as K. On 30 May 2013 the claimant applied for leave to remain as a spouse on the basis of his marriage. On 10 February 2014 the BBC screened a Panorama programme which made allegations regarding the fraudulent obtaining of English Language certificates for immigration purposes. On 15 May 2014 K gave birth to the couple's first child who I shall simply refer to as A. A is a British citizen. On 17 June 2014 the Secretary of State refused the claimant's application for leave to remain as a spouse. In a letter of 17 June 2014 it was explained on behalf of the Secretary of State that Educational Testing Services ("ETS"), the international entity which has provided the Home Office with services relating to English Language Testing in the UK, had advised that the claimant's test results had been obtained through the use of deception. It was said "an anomaly with your speaking test indicated the presence of a proxy test taker". So the Secretary of State concluded that the claimant did not meet the Suitability requirements of the Immigration Rules for consideration of limited leave to remain in the UK as a partner. On 23 June 2014 the claimant appealed but the appeal was subsequently withdrawn because the Secretary of State had agreed to reconsider her decision given the birth of A. But on 23 July 2015 the Secretary of State again refused the application deciding, in a nutshell, that there had indeed been deception such that the claimant could not satisfy the requirements of the Immigration Rules and that requiring him and his family (at that stage his wife and one child) to go to live in Pakistan would be reasonable such that reliance could not be successfully placed upon Article 8 of the European Convention on Human Rights (ECHR). The claimant appealed once again. On 26 May 2016 K gave birth to the couple's second child who I shall simply refer to as B. B is also a British citizen.

3. The claimant's appeal was heard by the First-tier Tribunal ("the tribunal") on 2 May 2017. The tribunal dismissed the appeal and sent its written reasons for doing so to the parties on 22 May 2017. In short the tribunal accepted that the claimant had deployed deception such that the requirements of the Immigration Rules were not met. As to Article 8 outside the rules, it said that it thought it would be reasonable for the family to go to live in Pakistan and, in particular, that it would be reasonable for both of the British citizen children to leave the UK. It also made findings, as part of its overall Article 8 assessment, to the effect that K had been born in Pakistan, had spent her formative years there and so would herself be able to successfully resettle there. It added that because of the ability of both parents to successfully relocate to Pakistan there would be no significant difficulty in either A or B doing so as well.

4. The claimant obtained permission to appeal to the Upper Tribunal and, after a hearing of 2 February 2018, I decided to set aside the tribunal's decision. I did so because I took the view that the tribunal had misunderstood the evidence as to K's immigration history and, in particular, had wrongly thought that she was from Pakistan and had spent her formative years in Pakistan in circumstances where the evidence, in fact, pointed to her having been born and brought up in the UK. I decided to set aside the tribunal's decision in whole so that matters could be reconsidered entirely afresh and I decided that the remaking of the decision should be undertaken in the Upper Tribunal.

## **Anonymity**

5. The tribunal granted the claimant anonymity because it was concerned that the identity of the two children ought to be protected. The question of anonymity was not revisited by me by either party. I am not wholly sure that there will be any detrimental impact upon the children if their identities become known but on reflection I have decided it would be proper to maintain the status quo. So I have myself directed anonymity.

## **The issues.**

6. In remaking the decision I must decide, first of all, whether it has been shown that the claimant did use deception in obtaining his TOEFL Certificate. If he did do that it follows (and such is not disputed) that he fails to meet what are referred to as the “Suitability” requirements within the Immigration Rules and that, in consequence, his appeal cannot succeed under the Rules. In considering that issue I bear in mind what has been said about the “generic evidence” relied upon by the Secretary of State in cases such as this and indeed in this particular case by the Upper Tribunal in *SM and Qadir v Secretary of State for the Home Department* (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC) and by the Court of Appeal hearing an appeal from the Upper Tribunal (Neutral Citation Number [2016] EWCA Civ 1167).

7. If I decide that the claimant does satisfy the suitability requirements (in other words that he did not employ deception) then I should allow the appeal under the Immigration Rules because it has not been asserted by the Secretary of State either before me or elsewhere that he fails to meet the relevant requirements of any of the other relevant Immigration Rules. Indeed it was expressly said in the Secretary of State’s “reasons for decision” of 23 July 2015 that had the suitability requirements been met “the Eligibility requirements would be met as you are married to a British citizen, and the criteria of Appendix FM EX.1 would have been met because you and your spouse have a British child”.

8. But if I am with the Secretary of State with respect to the deception allegation it will then be necessary, in order to dispose of the appeal, for me to consider whether notwithstanding that deception the claimant is able to succeed under Article 8 outside the Rules.

## **The evidence**

9. I had before me the various documents which had been before the tribunal when it heard the appeal. There were additional documents which had come into being as a result of the application and appeal to the Upper Tribunal. In particular, the claimant, through his representatives, had filed a further bundle of documents which included his witness statement of 29 May 2018 and K’s witness statement of the same date. I confirm that I have considered, with care, all of the documentation before me.

10. I also held a hearing of the appeal, for the purposes of the remaking of the decision, and I heard oral evidence from the claimant and from K. I then heard oral submissions from each representative. What was said at the hearing has been recorded by me in a Record of Proceedings and I have had careful regard to what was said when deciding this appeal.

## **My remaking of the decision**

11. The first and potentially only question is that of whether or not deception was deployed by the claimant as alleged. As was explained and clarified in *SM* cited above, the Secretary of State is

initially required to discharge an evidential burden although this represents quite a low hurdle to surmount. Put simply, there must be on the face of it, some evidence of deception. If the Secretary of State clears this hurdle then the claimant is required to offer what is on the face of it an innocent explanation. That too represents a low hurdle to surmount. If all of that is done then the Secretary of State is fixed with the legal burden of disproving the innocent explanation and establishing fraud based upon all of the evidence and that has to be done to a balance of probabilities (a somewhat higher hurdle).

12. I start with what the “generic evidence”. That is really comprised of two witness statements of Senior Home Employees one Rebecca Collings and one Peter Millington. The evidence concerns issues surrounding proxy test-taking and how it is said such has been detected. On the face of it the evidence might seem, at least on a superficial consideration, to be quite persuasive with respect to the ways in which ETS has identified fraud. But the Upper Tribunal pointed to a number of difficulties with the evidence. That included the lack of expertise or qualifications of the witnesses regarding voice recognition issues. Further, the Upper Tribunal heard expert evidence from one Dr Harrison who is an acknowledged expert in the science of voice recognition. His evidence was critical of that relied upon by the Secretary of State in a number of material respects. It is not necessary for me to go into particular detail for the purposes of this appeal but the overall view of the Upper Tribunal was clearly to the effect that the Secretary of State’s generic evidence was very frail. The Court of Appeal, in dealing with the appeal from the Upper Tribunal in *SM*, did not say anything different. But it has not been said that that generic evidence is entirely and utterly valueless and indeed with respect to the two appellants before it the Upper Tribunal concluded, albeit it seemingly with some hesitation, that it had been sufficient to enable the Secretary of State to discharge the evidential burden. It is also worth noting at this stage that both the Upper Tribunal and the Court of Appeal were essentially of the view that with respect to every case there would have to be a fact sensitive analysis.

13. Turning then to the explanation proffered by the claimant, his position is simply that he attended at the specified test centre on both days, that he undertook the tests himself, and that the results achieved are his results. He did not use a proxy or employ any dishonesty whatsoever.

14. There are, as I say, significant frailties in the generic evidence of the Secretary of State and had the claimant, for example, been able to give clear and entirely consistent evidence as to the circumstances surrounding his taking of the tests and had he been able to otherwise demonstrate a sufficiently significant command of English as at the time he had taken the test (such that it could be shown that he would not really need to even contemplate using a proxy) my task would have been significantly easier. But I do have some concerns about the claimant’s evidence which I will now address.

15. The claimant attended at a test centre in London. He accepts that, at the time he says he took his tests, he was living in Bradford. It is not immediately obvious why if living in Bradford he would undertake travel to London to take the tests. The Secretary of State has (although it does not seem to me to be clearly evidenced) always maintained that there are appropriate test centres in Bradford and the claimant has never asserted, either himself or through his representatives, to the contrary.

16. The claimant told me that when he decided to book his test there was, as he put it “no space in Bradford”. He said that he had applied on-line to take the test and he had been offered test space in London. That is why he had taken the test in London. The difficulty I have with that particular aspect of his evidence is that that does not appear to have been quite what he said to the tribunal at the hearing of 2 May 2017. I appreciate that I have set aside the tribunal’s decision but nevertheless

the written reasons produced by the tribunal stand as a record (although clearly not a complete record) of what was said. The tribunal noted at paragraph 35 that he had simply given evidence to the effect that the centre he attended to take the tests “was one that he found on the internet”. That seems to me to be a much more generalised explanation than the particular one he offered me to the effect that there was no space at the local test centre in Bradford. So there is reason to conclude that there is something of an inconsistency in his evidence.

17. Further, the claimant said in evidence in chief to me that his speaking test had taken 20 minutes, his writing test had taken 60 minutes, his listening test had taken 45 minutes and his reading test had taken 75 minutes. He was presenting that as his recollection based on what had happened on the days when the testing had taken place in 2012. By the time he was giving evidence before me almost five years had passed. I doubt that he would have remembered those timings so precisely. His memory was not so precise about other matters. I rather suspect he has checked the standard times for such tests and regurgitated them before me.

18. But there are also some matters which weigh in his favour. He said he had travelled from Bradford to London by train, that he had travelled into Victoria Station in London and that he had then taken a taxi, on both days, from Victoria Station to the test centre. He might of course be simply making all of that up but his evidence to me as to that was clear and was given with a lack of any hesitation. Mrs Pettersen did point out that it is her understanding (and indeed mine too) that the normal rail route from Bradford to London would take a traveller to Kings Cross Station. However, there was no evidence before me as to the availability of other possibly cheaper routes which might take a traveller elsewhere. So I do not take a point against the claimant in that regard and I give him a limited amount of credit for his answers as to his mode of travel.

19. The claimant has provided some evidence which tends to suggest he had some command of the English language as at the time he says he took the tests. There are some educational certificates from Pakistan demonstrating that, although he does not appear to have excelled in this by any means, English was a subject taught to him prior to his moving on to further education. He has provided a certificate issued by an organisation called the British Learning Centre which is based in Pakistan and which is dated 10 April 2011. On the face of it that certificate suggests a certain level of competence with respect to listening, reading, writing and speaking English. The reliability of that document was not challenged before me. The claimant has supplied an ESOL Level 1 Certificate in speaking and listening in the English language which is said to have been issued to him in January 2012. Again the validity or reliability of that particular document has not been challenged before me. I do not think the documents, of themselves, demonstrate any great capacity in the use of the English language but they do suggest a certain level of competence around the time the tests were taken. So, it might be thought that the claimant’s prospects of success in the test might not be so hopeless that he would seek to use the desperate ploy of using a proxy in the knowledge that, if such were discovered, it might have significant adverse implications for him.

20. The claimant gave evidence without an interpreter before the tribunal and again before me. Mr Ahmed suggested that that was a significant material factor which went to the question of whether or not he would have needed to use a proxy. Mrs Pattersen argued that the significant time gap between his taking the tests and his giving evidence before the tribunal and before me meant that the standard of English he demonstrated at those hearings was not relevant. I think the truth lies somewhere between the two. There was an extensive time gap between the taking of the tests and the giving of oral evidence before the tribunal but it does appear that the claimant was able to give his oral evidence previously, as he did before me, without any real difficulty. Answering questions and being cross-examined in a formal setting is probably quite a demanding test of a

person's ability to understand and speak English. In the circumstances I attach some but only a limited amount of weight to his ability to give oral evidence in English.

21. So, this is quite difficult because I am faced with weak evidence relied upon by the Secretary of State and an attempt to rebut that evidence by other evidence which is also relatively weak. Given the low hurdles set by the first two stages I am satisfied that the Secretary of State has discharged the evidential burden and I am satisfied that the claimant has offered what might be regarded if true as an innocent explanation. The key question then is whether the Secretary of State has discharged what is called the legal burden or, put more simply, whether she has demonstrated to a balance of probabilities that there was fraud. The position is marginal. It is not anything like as clear cut as Mr Ahmed urged me to conclude. But I have concluded that the Secretary of State has, in all the circumstances, failed to discharge the burden which does after all lie upon her. Her generic evidence has weaknesses and the claimant has, despite the weaknesses in his own evidence, offered something of some substance to support the proposition that he took the tests himself.

22. Accordingly I have concluded that the claimant does meet the suitability requirements within the Immigration Rules and that his appeal succeeds under those Rules.

23. I have, however, albeit briefly, gone on to explain what I would have decided had I concluded that there had been deception and that the requirements of the Immigration Rules were, in consequence, not met.

24. The genuineness of the relationship between the claimant and K was not doubted. The evidence each of them gave about their relationship and how it had developed was consistent. I accept K's evidence to the effect, and it seems to me she has always been consistent about this, that she was born in the UK and was brought up in the UK. Although it is difficult to read because the photocopied document provided is quite unclear and has unhelpful dark shading, her birth certificate does appear to indicate that she was in fact born in Bradford. But irrespective of that documentary evidence I would accept her straightforward oral evidence anyway.

25. Paternity of A and B has never been placed in issue. It has not been suggested that the claimant, K, A and B are not living together as a single family unit. These are all matters which would weigh in favour of the claimant with respect to an outside the rules Article 8 assessment.

26. But the real issue as to Article 8 it seems to me is the question of reasonableness concerning any relocation of the children. I have in mind sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002 but in particular 117B(6). Section 117A requires a tribunal when considering appeals brought under Article 8 to have regard to the matters set out in section 117B. Section 117B then lists a number of considerations whilst making it clear that the maintenance of effective immigration controls is in the public interest. But 117B (6) reads as follows:

- “ (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
- (a) the person has a genuine and subsisting parental relationship with a qualifying child,
  - (b) it would not be reasonable to expect the child to leave the United Kingdom.”

27. Section 117D makes it clear that a British citizen is a “qualifying child”.

28. In *MA (Pakistan) and Others v Secretary of State for the Home Department* [2016] EWCA Civ 705, it was said that the reasonableness test as contained within that section will include an assessment of all of the other considerations specified including those not relevant to the child. It was also stressed that it will not necessarily follow that if it is in the “best interests” of a child to remain in the UK it will be unreasonable to expect that child to follow a parent elsewhere.

29. As I say I have resolved this appeal on other grounds. But if I had not done that and if I had reached adverse conclusions from the claimant’s perspective with respect to the allegation of deception, I would have regarded that as a matter of real significance with respect to the reasonableness question. The maintenance of effective immigration controls is particularly in the public interest in the context of persons who seek to deliberately deceive immigration decision makers. But as to other considerations the claimant even if guilty of deception is clearly able to speak English as things stand to the extent that he is able to understand and deal with questions in the context of a court hearing. He is not financially independent but there is evidence that he has been supported financially by his wife who is in employment. But to focus upon regulation 117B(6) there are now two children to consider. Those children have rights as British citizens and if remaining in the UK, rather than leaving it, will have access to facilities (if needed) such as the National Health Service and Social Services. Those are significant considerations in the context of the alternative which would be having to live in Pakistan where, I think it is fair to say, services of that quality would not be so readily available. There is some reason to think that those sorts of considerations might be a factor with respect to A who according to documentary evidence before me is awaiting assessment in connection with speech and language difficulties although the evidence is not clear as to whether any sort of therapy will actually be required. Both A and B are of course very young and it is often said in the context of very young children that the most important consideration is that they remain with their parents wherever those parents are. But access to good quality health care and if needed social care and access to future good quality educational facilities are important considerations with respect to the reasonableness of expecting British citizen children to leave the UK. On the circumstances of this case I am narrowly persuaded that it would not be reasonable, as the word is used in its wide sense following *MA(Pakistan)* to expect the children to leave the UK. So, even if I had resolved the fraud issue against the claimant I would have still allowed his appeal on Article 8 grounds outside the Immigration Rules.

## **Conclusion**

30. This appeal then, in light of all of the above, succeeds under the Immigration Rules. Had it not succeeded under the Immigration Rules it would nevertheless have succeeded under Article 8 of the ECHR outside the Rules.

## **Decision**

The decision of the First-tier Tribunal has already been set aside. In remaking the decision I allow the claimant’s appeal from the Secretary of State’s decision of 23 July 2015.

## **Anonymity**

The claimant was previously granted anonymity by the First-tier Tribunal. That is continued pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 so unless and until a

tribunal or court directs otherwise the claimant continues to have anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to all parties of these proceedings. Failure to comply may lead to contempt of court proceedings.

Signed:

Date: 8 May 2018

Upper Tribunal Judge Hemingway

**TO THE REPENDENT  
FEE AWARD**

I make no fee award.

Signed:

Date: 8 May 2018

Upper Tribunal Judge Hemingway