



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/40662/2014

THE IMMIGRATION ACTS

Heard at Bradford
on 30 May 2018

Decision & Reasons promulgated
On 10 July 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

WAQAS HABIB
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Haq Solicitor with Harris & Green Solicitors
For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. On 27 June 2014 the respondent made a decision refusing an application for leave to remain on the grounds that removal would not place the United Kingdom in breach of its obligations under the Human Rights Act 1988, and to give directions under section 10 of the Immigration and Asylum Act 1999 for the appellant's removal from the United Kingdom.
2. The appellant appealed to the First-tier Tribunal. That appeal was heard by First-tier Tribunal Judge Ince sitting at Bradford on 31 December 2014 who, in a decision promulgated on 24 February 2015, allowed the appellant's appeal on the basis it was found the respondent had not discharged the burden of proof upon

her to establish that a proxy test taker attended on the appellant's behalf on 25 July 2012 when it is said the appellant took an English language test; later said to be invalid as a result of enquiries undertaken by ETS.

3. Permission to appeal was granted to the respondent on 17 April 2015 on the grounds it was said it was arguable the First-tier Tribunal Judge erred in allowing the appeal as he imposed too high a standard in relation to the voice recording analysis when the evidence produced showed the appellants English language test was considered by ETS to be invalid which meant a proxy was involved.
4. Deputy Upper Tribunal Judge Kelly, in a decision promulgated on 7 September 2015, dismissed the respondents appeal finding no arguable legal error material to the decision to allow the appeal had been made out.
5. Permission to appeal to the Court of Appeal was refused on 21 January 2016. The respondent renewed the application to the Court of Appeal who on 17 March 2018 sealed an order noting that, by consent, the respondents appeal was allowed, the decision of Deputy Upper Tribunal Judge Kelly set aside and replaced by finding that an error of law was made by the First-tier Tribunal in the treatment of the appellants (Secretary of States) evidence and the appeal was to be reheard by the Upper Tribunal. The agreed Statement of Reasons attached to the consent order is in the following terms:
 1. The relevant history of the proceedings is as follows. The Appellant made a decision to cancel the Respondents leave. The Respondent appealed to the First-tier Tribunal, who allowed the appeal. The Respondent appealed to the Upper Tribunal; where Deputy Upper Tribunal Judge Kelly refused to find an error of law. The Appellant sought leave to appeal to the Court of Appeal ("CA") against the decision of the Upper Tribunal ("UT"). Permission to appeal was refused in a letter sent by the UT on 21 August 2016. An Appellant's Notice ("AN") was filed in time with the Court of Appeal.
 2. The legal landscape has moved on significantly since permission to appeal was refused. The principal basis for pursuing second appeals, including this case, to the Court of Appeal was the repeated and erroneous treatment by the First-tier Tribunal and Upper Tribunal of the Appellants evidence, comprising to witness statements and a 'lookup tool' database spreadsheet, which was relied on to refuse or curtail leave to remain under the Immigration Rules in a number of cases. The issue has now been clarified by the Court of Appeal in both *Secretary of State for the Home Department v Shehzad and Chowdhury* [2016] EWCA Civ 615 and *Secretary of State for the Home Department v Majumder and Qadir* [2016] EWCA Civ 1167. In both cases, it was specifically confirmed that the initial evidential burden was discharged through the production of this evidence.
 3. The order is justified in this manner because that evidence was present before the First-tier and Upper Tribunal, and the Tribunal failed to weigh that evidence adequately. This had a material effect on the outcome.
 4. The draft order reflects agreement between the parties that the Upper Tribunal erred, and error of law should be found, and the Upper Tribunal should re-decide the appeal.
6. The reference to appellant and respondent set out in the Reasons is the capacity in which the parties appeared before the Court of Appeal. Hereinafter the

reference to appellant and respondent shall be as the parties appear in the header to this decision.

Background

7. The appellant, a citizen of Pakistan born on 18 December 1989, does not challenge his immigration history set out at [5] of the decision under challenge in the following terms:
5. Your immigration history can be summarised as follows:
- 06 June 2011 EC Visa until 02 August 2012
 - 21 June 2011 you entered the United Kingdom as a Tier 4 (General) Student
 - 8 May 2012 leave was curtailed with LTR until 7 July 2012
 - 2 August Application for Tier 4 General Student made
 - 24th October granted further LTR as a Tier 4 Student until 19 November 2014
 - 17 March 2013 leave curtailed with LTR until 20 May 2013
 - 17 May 2013 Application for a Tier 4 General Student made
 - 11 July 2013 Further LTR as a Tier 4 General Student until 30 October 2015
 - 3 March 2014 leave curtailed with LTR until 2 May 2014
 - 10 December 2013 married [AM] British citizen
 - 1 May 2014 application made for a spouse a settled person FLR(M).
8. In assessing the Suitability requirements of the Immigration Rules, the respondent wrote at [9 & 10] of the refusal letter:
9. Educational Testing Services (ETS) is obliged to report test scores that accurately reflect the performance of test takers. For that reason, ETS routinely reviews testing irregularities and questions test results believed to be earned under abnormal or non-standard circumstances. ETS's Score Cancellation Policy states that ETS reserves the right to cancel scores and/or take other action(s) deemed appropriate where ETS determines your test centre was not following established guidance set forth by the TOEIC Program. During an administrative review process, ETS have confirmed that your test score obtained was through deception. Because the validity of your test results could not be authenticated, your scores from the tests taken on 25 July 2012 have been cancelled. You are specifically considered a person who has sought leave to remain in the United Kingdom by deception following information provided to us by Educational Testing Services (ETS), that an anomaly with your speaking test indicated the presence of a proxy test taker.
10. Therefore, it is considered that you do not meet the Suitability requirements of S-LTR.2.2(a) for consideration of limited leave to remain in the United Kingdom as a partner under E-LTRP and parent under E-LTRPT and on the grounds of private life under Paragraph 276 ADE.
9. The decision-maker states at [16] that if the appellant met the suitability requirements the Eligibility requirements will be met as his spouse, Aneesha Mobeen, is a British citizen and evidence has been provided showing that the relationship is subsisting. According the decision-maker considered EX.1 of Appendix FM but concludes at [21]:
21. EX.1.(b) it is considered that they no evidence has been provided of any insurmountable obstacles to your family life continuing back in Pakistan although Aneesha Mobeen is a British citizen photographs of your wedding show your spouse wearing traditional

costume confirming that she embraces the social and cultural aspects of Pakistan. Additionally, on the FLR (M) application form dated 29 April 2014, page 19 question 6.31 confirms that she speaks English and Punjabi. Therefore, because evidence suggests your spouse does embrace the culture and speaks Punjabi it is considered that it would not be unjustifiably harsh for your spouse to reside in Pakistan.

10. Outside the Immigration Rules the decision maker noted the appellant has family members living in Pakistan with no evidence to suggest that they would not adequately support and assist him and his spouse on return. The decision-maker concludes that there were no exceptional circumstances in the case sufficient to warrant a grant of leave outside the Immigration Rules pursuant to article 8 ECHR.
11. The appellant seeks to rely to witness statements the first dated 22 December 2014 and a more recent statement dated 17 May 2018 which stood as the appellants evidence in chief as did that of the appellant's wife who also filed statements and who attended to give oral evidence. The parties were tended for cross examination and re-examination.
12. It was accepted during the course of preliminary discussions with the appellant's advocate that the evidence relied upon by the Secretary of State was sufficient to discharge the evidential burden of the use of a proxy to take the English language test.
13. There was also within the appeal bundle documents from the Family Court disclosing a Cafcass report in proceedings relating to another child with case number [.....]. Mr Haq was asked whether the appellant had obtained permission from the Family Court to disclose such information to this tribunal or the parties to these proceedings which, after checking with the solicitors involved in those proceedings, he confirmed had not been obtained. That evidence was therefore removed from the appeal bundle and returned to Mr Haq.
14. In relation to the issue of anonymity the Court of Appeal had ordered anonymity but the Upper Tribunal had not when this matter originally came before it. Mr Haq was asked to clarify his client's position on which he took instructions, thereafter returning to state that there was no application for anonymity in relation to these proceedings.

Grounds and submissions

15. On behalf of the Secretary of State it was argued that the appellant had employed the use of a proxy to take an English language test as a result of which the appellants test results had been declared invalid by ETS.
16. The appellant undertook the test at the Birmingham Institution of Education, Training and Technology on 27 July 2012. Evidence provided by the Secretary of State showed that the appellants test results had been declared invalid by ETS.
17. The appellant has always maintained that he attended the test which he took himself and that the results are valid.
18. It was submitted the appellant had failed to provide a reasonable explanation for why he would have taken the test at a college in Birmingham when at the relevant time he lived in Bradford; although the appellant had claimed he travelled to Birmingham two days a week. It was submitted on the evidence it was not

reasonably likely that the appellant would have taken the test and that no reasonable explanation has been provided by the appellant sufficient to discharge the burden of proof that had passed to him.

19. It was submitted the appellant did not take the test and the decision under the suitability requirements of the Rules is sustainable. It was also argued there are issues concerning maintenance and accommodation in the Rules and other issues, and that no evidence of the same or employment had been provided meaning the appellant could also not meet the suitability requirements.
20. It was submitted that on the appellant's behalf there were no insurmountable obstacles pursuant to paragraph EX.1 of Appendix FM.
21. In relation to article 8 ECHR, Mrs Petterson submitted the appellant and his wife are both of Pakistani origin by birth and that it was reasonable for them to return to Pakistan where they can continue their family life. If the appellant's wife chose not to return to Pakistan it was always open to the appellant to return and make a proper application for leave to remain which could be considered by an Entry Clearance Officer on its merits. It was submitted that any disruption to a protected right was not unreasonable. It was argued there was no adverse evidence with regard to medical matters or concerning children, and that family life can continue in Pakistan.
22. Mrs Petterson argued any interference with private life was wholly proportionate on the facts of this matter.
23. On behalf of the appellant Mr Haq accepted that the burden lay upon the appellant to establish his case that he had not participated in any fraudulent activity. In his 2014 witness statement he stated he had not used any deception in obtaining the test results as he attended and sat the assessment.
24. It was submitted it was necessary to consider that the college could participated in underhand activities but that did not mean that all in the college were complicit or that all the test results were invalid. The appellant maintains his claim that he sat the test and that he had no reason to use a proxy. It was submitted the appellant can converse in English and has done for some time and so there was no need to use another person.
25. It was submitted if the evidence of the appellant and submissions are accepted, then the appellant comes within the Rules making the assessment of article 8 straightforward. It was submitted that the respondent's position is the appellant only failed to meet the suitability requirements.
26. It was further submitted that if the appellant fails under the Immigration Rules he is only left with article 8 ECHR. The appellant asserts that his position has changed over the years as set out in his witness statement as there are three young children with the appellant and his wife and from a previous relationship, all British citizens; the appellant's wife and children are British citizens. It is argued the appellant has been in the United Kingdom some time and that his wife works on a part-time basis so the appellant helps with childcare duties. The appellant lives with his wife's father now as her mother died and there are insurmountable obstacles to family life continuing elsewhere.
27. The appellant submits relocation to Pakistan is unreasonable and will be unduly harsh as the property available in Pakistan is a three-bedroomed home occupied by the appellant's parents and siblings and it would be unreasonable to put

another five people in the property. It was argued it would be unduly harsh even for a short period of time.

28. Mr Haq submitted that if the appellant is returned to Pakistan to comply with the Rules, it was accepted this is a reasonable argument and he could do so to make the application to preserve the integrity of immigration control, but it was not considered appropriate as a result of the fact the appellant assisted in providing childcare whilst his wife works and to support an entry clearance application the wife would have to work on a full-time basis to meet the requirements of Appendix FM of £18,600 per annum minimum income. To do this she would require a person to care for the children. It is argued the appellant takes responsibility whilst his wife works and that if is returned to Pakistan there would have to be changes.
29. Mr Haq submitted the appellant has an adequate level of English and could secure employment but this has not happened. It was submitted the appellants presence in the United Kingdom is important as he has a young family and that article 8 rights are engaged given the family unit composed of the appellant, his spouse and children, and that it would not be proportionate to ask the appellant to leave.

Discussion

30. Mrs Petterson handed in on the day of the hearing an extract from Project Facade the criminal enquiry into abuse of the TOEIC relating to the Birmingham Institute of Education, Training and Technology (BIETTEC), the institution at which the appellant took the disputed test.
31. The document confirms the meaning of the terms 'invalid' and 'questionable'. 'Invalid' is a term used when evidence exists of a proxy test taker and/or impersonation. 'Questionable' is the term used where a test taker is required to take a re-test due to administrative irregularities.
32. The document confirms that statistics for the period 11 April 2011 to 9 February 2014 for test taken at a secure public test centre shows of 1039 TOEIC tests taken 3 were invalid, none were questionable, and 1036 were not withdrawn as there was no evidence of invalidity, giving a percentage invalid rate of 0.28%.
33. In relation to BIETTEC for the period 18 October 2011 to 5 February 2014, 680 TOEIC speaking and writing tests were taken of which ETS have identified 366 as 'invalid', 314 as 'questionable' with none withdrawn as there was no evidence of invalidity and a percentage invalid rate of 54%.
34. The extract states that the information referred to above provides support for and corroborates the analysis completed by ETS to show the "organised and widespread" abuse of the TOEIC that took place at that test centre.
35. It is also noted that documents relating to TOEIC exams were discovered during a search on 16 June 2014 relating to tests taken between 19 March 2013 and 5 February 2014 that list "pilot" (impostor) names alongside test candidates and test dates; 183 candidates are named. 10 "pilots" were identified two of whom were arrested by the police. The extract notes voice analysis showed evidence of widespread cheating; the voice of the two "pilots" arrested appeared on 15 tests relating to others.

36. It is important to bear in mind how the ETS voice analysis system works. It is not a case of taking the recording of the test taken at the date and time the appellant claimed he took the test and accepting that it is the appellants voice, but then seeing whether there is another example of that voice, but rather of establishing whether the voice that appears on the recording allegedly of the appellant is the same as that appearing in other recordings for tests taken by other non-associated individuals. It is the fact the same voice appears on a number of different recordings for different unrelated people that concerns have arisen relating to the widespread use of proxies, who are fluent and competent in English, to take tests on behalf of others who may not be so familiar to the required standard or who may employ the use of a proxy for other reasons.
37. The submission by Mr Haq that the appellants use of English would demonstrate no need to employ a proxy is noted but not determinative. The appellant gave his evidence in court through an interpreter although clearly had some knowledge and understanding of the English language. Whatever may be the situation in 2018 that does not establish the level of understanding that existed when the test was taken in 2012. The specific date of the disputed test was 25 July 2012 which fell between the decision on 8 May 2012 to curtail the appellants leaves so as to expire on 7 July 2012 and the 2 August application for further leave as a Tier 4 General Student. The appellant was required to demonstrate the required level of competence in the English language as part of his application which may arguably be good incentive for doing all in his power to enable him to demonstrate that he is able to meet the requirements under the Rules.
38. It is accepted during his oral evidence the appellant was asked for and provided the dates when he took the test and he tried to explain his hesitancy as the fact that the tests were taken some years ago, but the date the tests which were declared invalid by ETS were taken is clearly set out in the evidence provided for the purposes of this appeal.
39. Having had the opportunity of watching the appellant give his evidence I am not satisfied that his credibility is such as to warrant a finding in his favour without a detailed examination of all the elements of this appeal.
40. Mr Petterson referred to an issue that arose from the appellants own evidence in that he has provided with his latest bundle a copy letter from the Bradford Teaching Hospital NHS addressed to the appellants GP, dated 8 February 2018, relating to attendance by the appellant at the Emergency Department of the hospital at 1:22:00 hours on 8 February 2018. The letter records the appellant collapsed at 12 AM and fell to the floor without warning after which he felt groggy but took a few hours to recover and was back to normal when reviewed. The author of the letter records the following:

Presenting Complaint: had argument with his boss tonight, gone home and? had fits witness by crew, fallen facedown. no obvious wound lump on head? Collapsed, pupils equal and reactive.

41. This information would not have been known to the medical practitioners unless it came from the appellant as part of the information gathering process. Despite, it appearing the appellant telling the doctors he had an argument with his boss after which he had gone home, which is strongly indicative of a person recording an incident during the course of employment, when this was put to the appellant

his response, that he did not work and that the term “boss” referred to his uncle, was not at all convincing. The appellant does not have permission to work in the United Kingdom and indeed claims that his role is to care for the children whilst his wife, who works part-time, is not home.

42. In his 2014 witness statement the appellant’s makes the following comments in relation to the ETS aspect of the appeal:
2. I passed an A1 TOEIC test at Birmingham College where I attended in person for my test. I confirm that I undertook the test in a controlled environment and pass the test.
43. It is not disputed that the appellant received a certificate purportedly indicating that he did pass the test as it was only at a later stage, as a result of concerns highlighted by the Panorama programme, that the full extent of the problem was revealed. Many who have been proved to have used a proxy also claimed to have attended the test centre and to have taken the test and, in some cases, it has been noted that those who attended the centre were also present whilst the proxy undertook the test for them, although that specific point is not raised in this appeal.
44. The appellant claims not to have used deception and to have passed the test on his own merits and claims an official on behalf the Secretary of State is not able to verify the authenticity of the test results and has been made to apply a blanket refusal of any such applications.
45. It can be seen from the data available to the Tribunal in this matter, including the Operation Facade report, that wholesale fraud undertaken at the Birmingham College has been clearly established sufficient to enable the respondent to discharge the evidential burden.
46. Mrs Petterson referred to the fact that at the relevant time the appellant lived in Bradford, although was travelling to Birmingham, in relation to why a person would take a test at a place other than where they lived; but on the basis of the information before the tribunal this can be said to be no more than a neutral point.
47. The difficulty for the appellant in relation to this matter is that none of the tests taken at the college in Birmingham for the relevant period, including when the appellant claimed to have sat the test, are valid. His case is that notwithstanding such wholesale fraudulent conduct his was, and remains, a valid test.
48. It is accepted the appellant has passed a test since which he included within the current application to the Home Office demonstrating an ability to pass that test recently, where there is no suggestion of use of proxy or any untoward conduct, but that is not the relevant issue in this appeal.
49. I am not satisfied that the appellant has discharged the burden of proof upon him to the required standard to establish a plausible or satisfactory explanation for the fact it was found that he had used deception when taking his English language test on the 25 July 2012.
50. The refusal under the Immigration Rules, on the basis of the use of deception, has not been shown to be a conclusion contrary to the evidence or in any way perverse or irrational. This aspect the appellant’s appeal is dismissed.
51. As noted by Mr Haq, that leaves the issue of article 8 ECHR to be considered. The appellant is unable to succeed under the Immigration Rules meaning it is

necessary to consider article 8 ECHR. Adopting the structured approach set out in the case of Razgar:

(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

52. It is not disputed the appellant has established family life recognised by article 8 with both his wife, his two children, and his wife's previous child. These individuals live as a family unit within the appellant's wife's father's house in Bradford. It is also not disputed the appellant has established private life in the United Kingdom as a result of his time here. Although full details of the same were not provided it appears to be based upon aspects of home life, working life based upon the medical report referred to above, and any social or family involvement not amounting to family life within the United Kingdom.

53. (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

54. If the appellant his wife and children are removed from the United Kingdom there will be no interference with family life although if the appellant is removed with his wife and children remaining in the United Kingdom there will be interference of such gravity as to potentially engage the operation of article 8. If the appellant is removed from the United Kingdom his private life with other family members in this country will not be able to continue as it did before.

55. (3) If so, is such interference in accordance with the law?

56. It is not disputed the interference is in accordance with the law as no issue was raised so far as this matter is concerned on the appellant's behalf.

57. (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

58. The interests of immigration control are an accepted legitimate aim. The respondent's case is that the interference is necessary in a democratic society for the economic well-being of the United Kingdom and the effectiveness of provisions relating to effective immigration control.

59. (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

60. On the one hand the appellant lives in Bradford with his wife and children in a relative's property. The appellant has established family life and also private life during the time he has been in the United Kingdom. The appellant's wife and children referred to above are all British citizens who have established life within the United Kingdom. The children are therefore qualifying children. It has not been made out that it is reasonable in all the circumstances to expect the appellant's wife and children to leave the United Kingdom to go to live in Pakistan. Their life is within the United Kingdom where their home, schooling, friends, work and all other practical day-to-day commitments exist. It is not made out in relation to those individuals that disrupting the lives that they have is proportionate when weighing this against the respondent's position.

61. In relation to the appellant himself; if he was to be removed from the United Kingdom and the family members remain this would become a family splitting

case. That, per se, does not render the decision automatically disproportionate but it is necessary to consider all competing elements of the case. The primary element is the best interests of the children. It is not disputed in an ideal world the best interests of the children are to remain in a family unit with a supportive mother and father. If one parent is not available then it is best for the children to remain with the remaining parent; provided that parent is able to provide the required degree of love, protection, and support.

62. The children in this case appear fortunate in that they have a mother who meets their needs together with a father who plays a role in the children's lives. If the appellant was removed Pakistan the children will remain in the current accommodation with their mother. It is not made out there will be any disruption to the children's education or welfare in the physical sense or that any emotional effect on the children would have the such an impact so as to make the respondent's decision disproportionate.
63. Mr Haq in his submissions acknowledged that there is an argument for the appellant being returned to Pakistan, to make an application to re-enter lawfully, but that the same would have a detrimental effect on the children as the children's mother would have to make alternative arrangements for the children's care. The only evidence in this appeal of the impact upon the children of the appellants removal relates to the practical consequences of the same in terms of current day time care arrangements.
64. The appellant's wife works part-time with the appellant providing care and assistance when she is not there, according to the evidence, but the issues arising from the evidence regarding the letter from the hospital, which clearly supports a finding on the balance of probabilities that the appellant has been working, casts doubt upon the extent of the role the appellant claims to be taking. Even if the appellant does provide some care and assistance to his wife in relation to the children it is not made out that it is such a fundamental role that the appellants removal will have consequences sufficient to support a finding that the decision is not proportionate for this reason.
65. It is accepted that the children's mother may have to make alternative arrangements but many single parents, without family support, do so every day of the week to ensure that they can work and earn a reasonable living and yet still provide for their children. Sometimes this involves the use of after-school clubs or childcare or family members. Insufficient evidence was provided to establish that alternative arrangements could not be made in the appellant's absence sufficient to enable the appellant's wife to work on a full-time basis, if this was her intention to enable her to demonstrate that she earns the minimum required level to satisfy Appendix FM if the appellant applied to re-enter lawfully. It is not disputed this level cannot currently be met.
66. It is not made out that the appellant's wife and children will have to leave their current home indicating stability within a settled family environment.
67. It has not been made out the appellant will not be to maintain contact with other family members in the United Kingdom. They form part of the appellants private life as it was not established the necessary degree of dependency required between adult relatives exists sufficient to support a finding family life recognised by article 8 ECHR. It is also important to remember that this element of the

appellants private life, together with other aspects relied upon by the appellant, warren little weight being attached to them if they have been established during the time that the appellant's immigration status has been precarious. The appellant clearly does not have a right to settle in the United Kingdom which is why the application was made leading to the decision under challenge.

68. It is not made out that the appellant, if he returns to Pakistan, will not be able to re-establish himself within the community there and it is his evidence that there is three-bedroom accommodation occupied by his family members in that country. It was not made out the appellant would not have family assistance by way of accommodation or in meeting his other needs whilst he re-established himself or, if it was his intention, he made a formal application to enable him to re-enter the United Kingdom.
69. The appellant's case is therefore one of the desire to maintain the status quo and reference to disruption that would occur if the appellant was returned to Pakistan within the family unit until he was able to secure a right to re-enter, lawfully.
70. On behalf the Secretary of State it is argued the public interest is sufficient in this case to outweigh the matters relied upon by the appellant. Article 8 does not give a person the right to choose where they wish to live. It is a means of preventing unwarranted interference with a protected right by a Contracting State. The relevant issues in this case are the question of whether the appellant can satisfy the immigration rules which set out the respondent's view of how article 8 should be considered in applied, the reason the appellant cannot meet the requirements of the immigration rules (which is his inability to satisfy the suitability requirements), and the impact of his use of deception in 2012.
71. It is accepted the appellant cannot meet the requirements of the immigration rules as a result of his act of deception as identified by ETS. It is not made out there are any insurmountable obstacles to the appellant reintegrating into Pakistan if returned or that it would be unreasonable or unduly harsh for any member of his family who will remain in the United Kingdom for him to be removed. The appellant's submission that his removal will not be proportionate as the deception occurred some years ago ignores two fundamental points; the first of which is that this is a serious act of deception undertaken for the purposes of frustrating bona fides proceedings important for the maintenance of effective immigration control and the ability to only grant leave to those who can satisfy the relevant requirements who are deemed better able to integrate into the United Kingdom and, secondly, that the deception practised by the appellant in relation to the English language test is not limited to one specific period of time as the effect of the appellant being awarded the TOEIC certificate is that he succeeded in his application for leave to remain in the United Kingdom and has enjoyed all the benefits of what appears to be a period of lawful residence (including economic benefits of state financial support, medical care, protection of the police and services provided by the local authority) when he was not arguably entitled to do so. It appears that it was only as a result of the discovery of the use of proxy by ETS that the appellants deception came to light. The appellant has shown no remorse or contrition for his acts and indeed continues to maintain, even throughout these proceedings, that his test result is valid when none of the test results taken at that test centre for the relevant period were valid.

72. There is a strong public interest in removing the appellant from the United Kingdom. Individuals cannot be entitled to ignore such events and should face up to the consequences of the use of deception in these circumstances. The question as always in this appeal is whether the strong public interest in the appellants removal was outweighed by the issues he seeks to rely upon. For the above stated reasons, I do not find that it has been established that the balance in this appeal will come down in favour of the appellant. In *Mumu (paragraph 320; Article 8; scope) [2012] UKUT 00143(IAC)* the Tribunal said: “those who engage, or who might be tempted to engage, in dishonest attempts to deceive the United Kingdom authorities in relation to immigration control need to be aware that such actions will have disadvantageous consequences for those who are the intended beneficiaries of the dishonest conduct”.
73. The suggestion arose during the course of the evidence that the appellant returns to Pakistan with a view to making application to re-enter lawfully at some point in the future. The relevant case to be considered when looking at such a proposal is *In R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC)* in which it was held that (i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning *Chikwamba v SSHD [2008] UKHL 40*. (ii) Lord Brown was not laying down a legal test when he suggested in *Chikwamba* that requiring a claimant to make an application for entry clearance would only “comparatively rarely” be proportionate in a case involving children (per Burnett J, as he then was, in *R (Kotecha and Das) v SSHD [2011] EWHC 2070 (Admin)*). However, where a failure to comply in a particular capacity is the only issue so far as the Rules are concerned, that may well be an insufficient reason for refusing the case under Article 8 outside the rules.
74. It is not made out by the appellant, when applying the guidance that circumstances have been established showing that the decision to remove the appellant will have consequences sufficient to render the decision disproportionate.
75. It is not made out that the appellant will succeed in an application for entry clearance at this time on the facts is currently known. He is not likely to do so as he cannot meet the minimum income requirement. The appellant fails to make out any positive obligation upon the State to permit the appellant to remain in the United Kingdom at this time.
76. I find the respondent has discharged the burden upon her to the required standard to establish that removal of the appellant from the United Kingdom, in all the circumstances of this appeal, is proportionate.

Decision

77. **I remake the decision as follows. This appeal is dismissed.**

Anonymity.

78. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 – see paragraph 14 above.

Signed.....

Upper Tribunal Judge Hanson

Dated the 6 July 2018