Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/16787/2019**
HU/16788/2019

THE IMMIGRATION ACTS

Heard at Manchester via Skype	**Decision & Reasons Promulgated**
On 21 October 2020	**On 10 November 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

GURVINDER SINGH
NAVDEEP KAUR
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Bellara instructed by Legend Solicitors
For the Respondent: Mr Tan, Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Swaniker ('the Judge') promulgated on the 27 February 2020 in which the Judge dismissed the appellants appeal on human rights grounds.

Background

2. The first appellant, Mr Singh, was born on the 2 October 1986. The second appellant, his wife was born on 6 July 1986 and is dependent upon his claim.

3. On 30 September 2019, the respondent refused their application for leave to remain in the United Kingdom on the basis of their family and private life.

4. Having considered the documentary and oral evidence the Judge sets out findings of fact from [15] of the decision challenge.

5. The Judge noted that the decision maker did not accept that the appellants satisfied the requirements of Appendix FM or paragraph 276 ADE of the Immigration Rules or that there were exceptional circumstances sufficient to outweigh the respondent's right to operate an effective system of immigration control on the basis that such circumstances would result in unjustifiably harsh consequences as per paragraph GEN.3.2 of Appendix FM.

6. The Judge noted an allegation that the first appellant had submitted a false document in relation to a previous application and had practised deception.

7. This is an ETS case.

8. The Judge sets out the correct legal self-direction that in the first instance there is an evidential burden the Secretary of State to establish the alleged deception. The Judge, having examined the evidence relied upon, which included the Look Up Tool, found at [18] that the respondent had discharged the initial burden to provide prima facie evidence of deception by the appellant in his previous application on 12 December 2012.

9. The Judge then correctly directed that the onus shifted to the appellant to rebut the allegation which the Judge, for the reasons set out between [19] – [24], found the first appellant had failed to do as he had not provided a plausible innocent explanation to the respondent's allegation and that the totality of the evidence and material before the Judge warranted a finding that the appellant had acted fraudulently in obtaining a TOEIC certificate; leading to it being found the appellant's application properly fell for refusal on suitable grounds under paragraph R-LTRP.1.1(d)(i).

10. The Judge records that Mr Bellara confirmed that the appellants were not relying on an insurmountable obstacles argument but were relying on exceptional circumstances outside the Immigration Rules, which the Judge finds was effectively a concession that the appellants could not meet the requirements of the Rules.

11. The Judge commenced the assessment of the merits of the appeal pursuant to article 8 ECHR having regard to the guidance set out in Razgar from [27] of the decision under challenge. At [30] the Judge finds the appellants can return to India and readily re-establish their lives there and that they can continue to peacefully enjoy their family life together in India. The Judge finds it reasonable to expect the appellants to leave the UK and that there will be no interruption to their family life if they were to return to India. The Judge then examines the question of

private life; finding such did exist and that the key question is whether the interference in such private life was proportionate to the respondent's legitimate aim of maintaining an effective system of immigration control [31].

12. The Judge examined the arguments relied upon by the appellant and respondent in relation to the proportionality question before recording at [36 – 39]:

> "36. I also find little if any reliable evidence going to the extent and quality of such private lives as the appellants have established in the UK. They did not have any friends attend the hearing to give evidence in support of appeals, there were no supporting witness statements submitted in this regard and, despite the appellant's account in his witness statement that he had deep social, family, economic and emotional ties in the UK, I find he provided little supporting evidence before me in this regard. I further consider that the appellants would be free to continue to maintain contact with any friends/associates in the UK by the various means of modern communications. I do not accept that the appellant's have demonstrated that they have established a private life in the UK of such significance as would be disproportionately interference with by their removal from the UK.
>
> 37. For all these reasons, I find the appellants have failed to establish that the respondent's decisions constitute or would constitute a disproportionate interference with their private lives established in the UK.
>
> 38. Given the fact as I have found them and my conclusions thereupon, I find the appellants have failed to establish that they qualify for leave to remain in the UK on human rights grounds, Article 8, within or without the Immigration Rules. I find no other human rights claim/s made out.
>
> 39. The appellant appeals are dismissed on human rights grounds, Article 8."

13. The appellants sought permission to appeal which was granted by another judge of the First-tier Tribunal on 16 April 2020, the operative part of the grant being in the following terms:

> "3. Amongst the extensive grounds however it is asserted that the Judge has erred when considering whether the appellant had discharged to the evidential burden upon him identified in SM and Qadir (ETS-Evidence-Burden of Proof) [2016] UKUT 00229. In respect of this ground it is arguable that the Judge's reasoning at [25] suggests the Judge applied the wrong standard of proof when considering this evidential burden and instead imposed a legal burden of establishing the truth of the explanation on the appellant. To this extent the application for permission to appeal is granted."

14. Mr Bellara in his submission to the Upper Tribunal accepted it was a narrow grant of permission but argued it related to an important point as the wrong standard of proof had been applied in placing the legal burden upon the appellant.

15. It was pointed out the first appellant gave his evidence in English and that none of the issues identified by the Tribunal in SM & Qadir in support of the appellant's case appeared to have been taken into account by the Judge.

16. When it was put to Mr Bellara that although the first appellant gave his evidence in English the Judge had difficulties in understanding him, he responded by claiming that the Judge did not set this out at [10] of the decision which he should have done and that it was not accepted the Judge had to clarify the first appellant's evidence with him.

17. This point was raised with Mr Bellara as a result of the Judges Record Proceedings being available to the Upper Tribunal recording the evidence given by the first appellant. The content of that document would have been known to Mr Bellara who represented the appellants before the First-tier Tribunal. That document shows the Judge recording that the Home Office Presenting Officer raised with the appellant that he was finding it difficult to understand the first appellant, that the Presenting Officer asked the first appellant to repeat some of his answers, that the Judge asked the first appellant to speak up and to speak slowly and clearly as a result and difficulty in understanding everything he was saying, and difficulty in understanding specific issues which the first appellant was asked to repeat on more than one occasion, which are not matters the Judge was require to set out in [10], the failure of which amounts to an error of law, but which were clearly matters which the Judge was entitled to take into account when assessing whether the first appelanst had demonstrated he had the required standard of English at the relevant time, such that he would not have needed to employ a proxy to undertake the English language test.

18. The appellant also asserts in addition to applying the wrong test, the Judge failed to give sufficient reasons in relation to findings concerning the use of deception in taking the English language test.

19. At [7 - 8] of the decision under challenge the Judge writes:

> "7. In human rights appeals the burden of proof rests on the appellant. It is for the appellant to show that there has been and/or would be an interference with a right s/he is entitled to enjoy under the ECHR. If that is established and the relevant Article permits, it is then for the respondent to establish that the interference is lawful, justified and proportionate in the pursuit of a legitimate objective. This applies except where the relevant Article relied upon permits no derogation. The burden of proving compliance with any relevant Immigration Rule or Rules is on the appellant.
>
> 8. Where the respondent makes an allegation against the appellant it is for the Respondent to make out the allegation to the civil standard of a balance of probabilities."

20. The Judge was therefore aware of the burden and standard of proof that applied as noted in addition at [15] in which the Judge state "*I have directed myself as to the requisite burden and standard of proof and have taken into account the whole of the evidence and material before me*". At [17] the Judge writes "*On the allegation that the appellant had*

submitted a false document in relation to his previous application and practised deception, the initial burden of course falls on the respondent to make out the allegation to the civil standard of a balance of probabilities".

21. The Judge considered the evidence that was available from the respondent which is set out at [18] of the decision under challenge. That material clearly supports the finding, to the requisite standard, that the respondent had discharged the initial burden of proof to establish deception by the appellant in the application of 12 December 2012.

22. The grant of permission specifically refers to [25] but it is necessary to consider the Judges findings from [19 – 25] in total to ascertain the Judges approach and findings in relation to this matter.

23. The evidential burden compels a party to produce evidence in support of an issue they seek to raise, i.e. in this appeal for the appellant to provide evidence establishing an innocent explanation.

24. The Judge clearly examined with the required degree of care the points relied upon by the appellant in support of his argument he had not used deception. The Judge noted that the appellant had sat an ETS in 2012 and that although he came to the UK to study he had not completed any courses and the only English certificate he has was the one in relation to which it is alleged he used a proxy. The Judge took into account the fact the appellant had studied to degree level in India which is specifically mentioned at [24].

25. The Judge attached the weight of the evidence that the Judge was entitled to do in relation to the key findings which are properly evidenced. These include finding that the appellant had not demonstrated that his standard of English at the time of his TOEIC test in 2012 was of such standard it would have made the use of a proxy at the test unlikely, that there was no reliable evidence of any further education which would or could go to demonstrate the appellant's level of proficiency in English at the time of the TOEIC test, especially in relation to a matter in which the appellant's results were not considered questionable but were declared invalid [20].

26. The Judge noted the appellant conducted an interview in 2016 in English, nearly 4 years after the TOEIC, during which time the appellant had remained in the United Kingdom before making a finding that "*I accordingly do not accept that weight can be attached to the appellant's English proficiency at this interview, such as it may have been, as a factor of itself demonstrating the appellant's English language ability at the time of his TOEIC test some years earlier*" [21].

27. The Judge also records the appellant having given what was found to be discrepant and/or unclear accounts of how he prepared for the test when it was reasonable to expect the appellant to address all of the methods of preparation; leading to a finding that "*I find the appellant's evidence as to his preparation for the TOEIC lacks clarity and consistency. I consider the lack of clarity in the appellant's account in this regard further undermines the reliability of his evidence on having sat the TOEIC test himself*".

28. The Judge rejects the appellant's argument that the 'Lookup Tool' software results were inaccurate and found it material the appellant's

results were ruled 'invalid' as opposed to 'questionable' and that out of the results from the London College of Media and Technology 82% were stated to be invalid with 18% found questionable, which was said to be indicative of widespread cheating in the tests.

29. The Judge noted the first appellant has a degree certificate taught in English but concludes the appellant had failed to provide a reasonable explanation for, or response to, the allegation of deception made by the respondent; having assessed the facts in the round and having applied the correct legal test [24].

30. At [25] the Judge writes: "*I find the appellant has failed to provide a plausible innocent explanation to the respondent's allegation. I conclude from the totality of the evidence and material before me that the respondent has discharged the burden to prove that the appellant used deception in his application of 12 December 2012 in his use/submission of a fraudulently obtained TOEIC certificate".*

31. I do not find the appellant has established an error of law material to the decision in the manner in which the Judge assessed the evidence made available in this appeal. The Grounds challenge the weight the Judge gave to the appellant's written and oral evidence, the interview process in relation to the ETS issue, the appellants previous qualifications, other issues, in a case in which I find the Judge considered the evidence with the required degree of anxious scrutiny and has made findings supported by adequate reasons. As such, the weight to be given to the evidence was a matter for the Judge. It has not been established that the Judge has attached a degree of weight that is in any way irrational or made findings outside the range of those available to the Judge on the evidence.

32. As noted, this is a human rights appeal. In his reply Mr Bellara raised no contention concerning the Judge's article 8 assessment nor challenge to the same; arguing the question of deception was the core question which may impact upon the article 8 assessment.

33. As noted above, I do not accept Judge erred in assessing the ETS issue on the evidence made available. The Judge clearly undertook a structured appraisal of the merits of the article 8 case, weighing carefully the competing arguments relied upon by the appellant and the respondent. The Judge's conclusion, having done so, that the respondent's decision is proportionate is within the range of those reasonably open to the Judge on the evidence and has not been shown to be infected by legal error material to the decision to dismiss the appeal on human rights grounds.

34. Whilst the appellants disagree with the outcome, expresses concern in relation to the impact of the finding of use of deception in relation to any future application, and wish to remain in the United Kingdom, the grounds fail to establish any basis for the Upper Tribunal interfering any further in this matter.

Decision

35. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

36. 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.

Signed…….
Upper Tribunal Judge Hanson

Dated the 5 November 2020