**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/23492/2018

**THE IMMIGRATION ACTS**

| **Heard at Bradford** | **Decision & Reasons Promulgated** |
|---|---|
| **On 18 December 2019** | **On 9 January 2020** |

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**YK**
**(anonymity direction made)**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Ms Mair instructed by Prolegis Solicitors LLP
For the Respondent: Mr A McVeety Senior Home Office Presenting Officer.

**ERROR OF LAW FINDING AND REASONS**

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge Arullendran promulgated on 8 February 2019 in which the Judge dismissed the appeal.

## Background

2. The appellant is a citizen of Pakistan born on 2 November 1989. The appellant is married to a British citizen. They have two children who, at the date of the hearing before the First-Tier Tribunal, were aged approximately 3 and 1 year of age and who are British citizens.
3. The appellant applied for leave to remain as the spouse of his wife which was refused on 14 November 2018.
4. One of the issues that arose in the appeal was whether the appellant had practice deception when taking an earlier English language test. At [39] and [44] the Judge records the following:

> 39. Mr Ahmed accepts that the Respondent has discharge the initial burden in Abbas however the Appellant has provided an explanation for why he chose the particular test centre and he was startled at the interview and could not remember all the details due to the passage of time. The Appellant also submits that he speaks very good English and that appropriate weight should be given to this and the fact that his wife says the Appellant does not lie to her. He also submits that he did not use the TOEIC certificate in the 2015 application as it was due to expire and received very good results in the subsequent tests at Trinity College.
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> …
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> 44. Given the concession made by Mr Ahmed in closing submissions that the Respondent had proved the first stage of the relevant test, as set out in the case of Abbas, I am satisfied that the Respondent has adduced sufficient evidence in this case that the Appellant used a proxy test taker in the English language test which took place at the Innovative Learning Centre on 23 January 2013.

5. It is not disputed that in ETS cases a threefold test is required the first of which is consideration of whether the respondent has discharged the evidential burden upon her to adduced sufficient evidence to raise the issue of fraud.
6. In this appeal what appears to have been a concession made by the appellant's barrister that the classification of the appellant's English test results as 'questionable' was sufficient for the respondent to meet the initial evidential burden is clearly wrong. ETS test results will ordinarily fall within one of three classifications being 'valid/pass', 'invalid' or 'questionable'. It is only those classed as invalid, with appropriate supporting material, that can be found to have established the existence of fraud. A result found to be 'questionable' indicates that it is not 'invalid' and the test taker should be offered an opportunity to enable the person to demonstrate their ability to meet the requirements in light of issues that have arisen, which are insufficient to warrant the more damning result.
7. In relation to the Innovative Learning Centre in Manchester the evidence provided by the respondent in the refusal letter [23] showed that 55% of the tests at the relevant period had been cancelled on the basis of being 'questionable' because 45% of the results at the centre had been declared 'invalid' and that those deemed questionable could

not be relied upon due to the general practice of fraud at that test centre.

8. It does not appear from the determination that the Judge did anything other than accept the appellant's representative's acceptance that the initial burden had been discharged without more. I find in doing so the Judge erred in law in a manner material to this aspect of the appeal. A concession that an individual's test results have been found to be questionable does not, without more, discharge the initial evidential burden upon the Secretary of State. Indeed in light of the respondent's own evidence it is clear that there was nothing before the Judge to allow such a finding to be made. The concession was both wrong in fact and in law.

9. As there was no arguable basis for concluding on the evidence that the respondent had discharged the initial evidential burden the Judge's findings in relation to that aspect are affected by material error and cannot stand. Similarly any findings that the appellant could not satisfy the suitability requirements of the Immigration Rules based upon the ETS findings are also infected by similar legal error.

10. The second element of the appeal related to the Judge's treatment of the appellant's children both of whom are British citizens. At [51] the Judge writes:

> 51. For the purposes of GEN.3.2 of Appendix FM to the Immigration Rules, I am required to consider the best interests of the children as a primary consideration. Section 55 of the Borders, Citizenship and Immigration Act 2009 also requires that the best interests of the child or children are a primary consideration. Therefore, I have considered the best interests of the children in isolation from other factors and I find that their best interests are to remain with their mother on a day-to-day basis and this extends to them being with both parents, where possible, given their young age. Neither child is in school and, therefore, they are young enough to adapt to life in Pakistan and start school in Pakistan along with other children of their age. The children would have the assistance of the Appellant and his family in order to integrate into life in Pakistan and no evidence has been presented that the children cannot speak or understand the language. In the circumstances, I am satisfied that it would be reasonable to expect the children to leave the UK with their parents. Alternatively, as no evidence has been presented that it will cause unjustifiably harsh consequences, the children can remain in the UK with [their mother] and keep in touch with the Appellant through the use of modern communication and there is nothing to prevent the children from visiting the Appellant in Pakistan from time to time.

11. The children are qualifying children. The respondent's policy to be found in Family Migration: Appendix FM Section 1.0b - Family Life (as a Partner or Parent) and Private Life: 10-Year Routes'. Version 2.0, 19.12.18, was that in force at the date of the hearing. The respondent's policy is that the starting point is that the respondent would not normally expect a qualifying child to leave the UK and that if the child is not expected to leave neither the parent or parents or primary carer of the child will be expected to leave the UK.

12. The Judge is criticised for failing to approach the question of whether it was reasonable to expect the children to leave the UK from the

starting point that the respondent would not normally expect a qualifying child to leave. There is merit in the submission the Judge erred in law in failing to apply the respondent's policy. Even if, as indicated in the grant of permission to appeal, the policy may not have been brought to the Judge's attention, the Judge is expected to have knowledge of such an important policy which is commonly referred to in cases involving qualifying children.

13. The children were born on 7 May 2015 and 28 August 2017 after the applicant had been granted further leave to remain on family life grounds in August 2015.

14. Having considered the evidence before the Judge and in light of the allegation regarding use of fraud, which is not made out, I find the Judge erred in law in concluding that it was reasonable for the children to leave the United Kingdom as set out at [51] of the decision under challenge. It is not made out it is reasonable for his British national children to leave the United Kingdom to return to Pakistan. The best interests are to be with both their parents in the United Kingdom.

15. In light of the above I set aside the decision of the Judge. I substitute a decision to allow the appeal on human rights grounds. There was no challenge to the indication I intended to do so by Mr McVeety following detailed discussion of relevant issues as noted above.

## Decision

16. **The First-Tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

17. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 19 December 2019