



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11086/2019

THE IMMIGRATION ACTS

Heard remotely at Field House
On 13 January 2021 *via Skype for Business*

Decision & Reasons Promulgated
On 28 January 2021

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MRS JASVIR KAUR BRAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R. Rai, Counsel, instructed by Robinson Ravani & Co.
Solicitors
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that I was referred to were the original bundles prepared for the hearing before the First-tier Tribunal, a supplementary authorities bundle submitted by Mr Rai on the day of the hearing, and the Report of the [All Party Parliamentary Group] on TOEIC dated 18 July 2019, the contents of which I have recorded.

The order made is described at the end of these reasons.

The parties said this about the process: they were content that the proceedings had been conducted fairly in remote form.

1. This is an appeal against a decision of the Secretary of State dated 12 June 2019 to refuse a human rights claim made by the appellant, a citizen of India born in 1989.
2. The appeal was originally heard by First-tier Tribunal Judge Page who, in a decision promulgated on 9 December 2019, dismissed the appeal. On 9 October 2020, I found that the decision of Judge Page involved the making of an error of law, and set it aside, with certain findings of fact preserved. I set aside the judge's decision to the extent that it concerned findings that the appellant had relied on a proxy test taker in an English language test. The judge found that the appellant did not meet the requirements of the private life provisions in the Immigration Rules and that there were no reasons outside the rules for the appeal to be allowed, as matters stood at the time of the hearing before the First-tier Tribunal on 19 November 2019. I preserved those findings, observing at [15] that a contemporary assessment of the Article 8 rights would be required.
3. As I directed at [14] of my earlier decision, the primary focus of the resumed hearing was to determine whether the appellant engaged in the alleged use of a proxy test taker at her English speaking and writing tests on 1 May 2013.
4. The respondent's case is based upon the generic evidence regularly relied upon by the Secretary of State when seeking to establish allegations of deception in the context of English language tests, and evidence specific to this appellant said to demonstrate that she engaged in the alleged deception. The specific evidence is in the form of what is often termed the "ETS lookup tool". ETS is the acronym for *Educational Testing Services*, an organisation contracted by the respondent to provide secure English language testing services for immigration purposes.
5. The appellant's case is that she attended the tests and did not use a proxy test taker. Mr Rai submits that if I find the appellant to be innocent of the allegations, she should be returned to the position she would have been in had the allegations not been made. Although Judge Page's findings that there were no Article 8-based reasons for the appellant to succeed were preserved, Mr Rai submits that those findings were reached against the backdrop of the judge being satisfied that the appellant engaged in the alleged deception, and would need to be revisited in the event that I accept the appellant's account. Mr Rai accepts that the tribunal no longer has the power to direct the Secretary of State to take particular steps consequential to an allowed appeal, but nevertheless submits that the appeal should be allowed on human rights grounds.

Documentary evidence

6. The appellant relied on the bundle prepared for the proceedings before the First-tier Tribunal, and the report of the All Party Parliamentary Group on TOEIC [Test of English for International Communication] dated 18 July 2019 ("the APPG Report").

Although Mr Rai had not complied with the direction at [19] of my error of law decision to make an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 within 14 days of being sent that decision, Mr Tufan did not object to the admission of that document. Mr Tufan observed that he was familiar with the APPG Report, and would be able to respond to any submissions advanced in relation to it.

Legal framework

7. This appeal is brought under Article 8 of the European Convention on Human Rights. The essential issue for my consideration is whether it would be proportionate under the terms of Article 8(2) of the Convention for the appellant to be removed, in the light of the family and private life she claims to have established here. This issue is to be addressed primarily through the lens of the respondent's Immigration Rules and by reference to the requirements of Article 8 directly, see Razgar [2004] UKHL 27 at [17]. The relevant rules are contained in paragraph 276ADE.

Burden and standard of proof

8. The burden of proof is on the appellant to establish that, at the date of the hearing, she has established private or family life in the United Kingdom. The appellant would then have to demonstrate that her removal from the United Kingdom would interfere with her rights under Article 8 of the ECHR. The appellant would have to establish these matters to the balance of probabilities standard. It is then for the respondent to justify any interference to those rights within the terms of Article 8(2) of the ECHR.
9. In the present matter, the respondent alleges deception. The burden is on the respondent to establish deception, to the balance of probabilities standard. There is an evidential burden on the respondent in the first instance; if he provides evidence demonstrating there are reasonable grounds to conclude that the appellant used deception, the burden shifts onto the appellant to provide a plausible innocent explanation. If the appellant does so, the burden "shifts back" to the respondent to demonstrate how, in light of that explanation, the allegation of deception is made out, to the balance of probabilities standard. See Secretary of State for the Home Department v Shehzad and Chowdury [2016] EWCA Civ 615 at [3].
10. The Secretary of State's decision quotes the summary of this position given by William Davis J in Abbas v Secretary of State for the Home Department [2017] EWHC 78 (Admin) at [7]: it does not differ from the Shehzad and Chowdury approach in any material respect. It is merely a case-specific example of the Court of Appeal's approach in action.
11. In view of the gravity and consequences of an allegation of deception, stronger evidence is likely to be required to meet the balance of probabilities standard that the allegation is made out. But there is only one standard of proof, and that is to the balance of probabilities.

The hearing

12. The appellant gave evidence in English and adopted her statements dated 18 August 2018 and 2 October 2019. She was cross-examined. I will outline the salient aspects of her evidence to the extent necessary to give reasons for my findings.

Findings

13. I reached the following findings having considered the entirety of the evidence, in the round, and the submissions made by each applicant.

ETS allegations

14. First, I will address the respondent's allegations that the appellant engaged in deception at her speaking and writing tests on 1 May 2013.
15. I find that the generic evidence, when taken with the "ETS Lookup Tool" which records the appellant's ETS certificate as "invalid", is sufficient for the respondent to discharge the initial evidential burden necessary when seeking to establish a charge of deception. The respondent relies on a December 2016 internal report into New London College, which records at [4] that voice analysis of speaking tests suggest that 74% of such test results were obtained by the use of a proxy test-taker. Candidates at the New London College, opines the report, demonstrated English language abilities that were significantly greater than candidates assessed under secure conditions. On the day the appellant took her test, 93% of the results were classed as invalid.
16. In Majumder and Qadir v Secretary of State for the Home Department [2016] EWCA Civ 1167 Beatson LJ considered whether the Secretary of State's evidence adduced in cases of this nature was capable of discharging the legal burden for deception. At [27] His Lordship endorsed the decision of this Tribunal in the same case at [102] that each case will be fact-sensitive, with the outcome determined on the basis of the evidence adduced by the parties. In practical terms, I find that that means the Secretary of State's generic evidence, combined with the specific material said to link that generic evidence to the conduct of an appellant, will rarely, if ever, *automatically* be able to lead to a finding of deception regardless of the innocent explanation proffered by the appellant. In human rights cases a case-specific assessment will always be required.
17. I approach the reported high incidence of "invalid" test results on the 1 May 2013 with a degree of caution. According to the respondent, 93% of tests were invalid, namely 52 out of 56. None was valid. I recall that the allegations against ETS have demonstrated that many test centres' operations were corrupt to the core. Many staff were clearly complicit. On conventional credibility grounds, it is difficult to have any degree of confidence that corrupt staff facilitating the use of proxy test takers may be trusted to perform the remainder of their functions well, such that the 93% figure is accurate, especially when one bears in mind the extensive criticisms in, for example, SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229. There, the Upper Tribunal considered a report from a Dr Harrison which concluded that the

generic evidence relied upon by the Secretary of State was flawed in a number of material respects. The Upper Tribunal summarised its concerns at [63]: neither of her witnesses had any special qualifications or expertise in the matters they purported to give evidence about; the Respondent was entirely dependent on information provided by ETS; the Respondent had accepted everything reported by ETS “uncritically”; The decision featured a number of other criticisms of the Secretary of State’s evidence. The Upper Tribunal held at [102] that every ETS case will invariably be fact sensitive; every appeal falls to be determined on the basis of the evidence adduced by the parties.

18. In this respect, nothing turns on the APPG report; my task is to assess the credibility of the appellant’s account on the evidence before me.
19. By way of a preliminary observation, I note that the test took place almost eight years ago. The appellant is being asked to recall events which, at the time, she would have had no reason to suspect she would be challenged about in 2021.
20. In response to the respondent’s allegations, the appellant’s evidence is simply that she attended the test, took it herself without the use of a proxy test-taker, and that she did not notice any unlawful or otherwise irregular activity at the test centre. In her written and oral evidence she provided an account of paying for the test in cash, paying approximately £120-£150, and the process she was taken through on the day itself in order to sit the tests. She describes how her ID documents were checked at different points on the day itself. The accounts she provided in her written statements were consistent with the account she provided in her evidence before me.
21. The appellant also relies on her general proficiency in the English language. She gave evidence in fluent English before me. The evidence suggests that she has been competent in the language for some time. In May 2009, she obtained an International English Language Testing System (IELTS”) certificate. IELTS tests have not been impugned by the respondent. The certificate records the appellant as having scored 5.0 overall. In August 2014, the appellant scored 6.0 on a further IELTS test. I know from my special expertise in this tribunal that IELTS tests are usually scored out of 9. A score of 6 usually denotes a competent grasp of English; by August 2014, the appellant was assessed by IELTS as having a competent grasp of English. That was a marginal improvement from her score some of 5 some five years earlier. The higher score is broadly commensurate with a high scoring level B2 under the Common European Framework of Reference for Languages; the lower score, in 2009, is on the cusp between B1 and B2. Although the appellant’s claimed ETS scores are high, they are consistent with her IELTS-assessed proficiency the next year. While it could be said that the appellant had enjoyed, by August 2014, some 15 months in which to improve her linguistic skills, the 2009 test demonstrates that she was proficient, albeit to a slightly lower level, five years earlier. This is not a case of a marked increase in competence in the years that followed the exam.
22. In addition, in 2016 the appellant obtained an MBA from Angela Ruskin University. The course was taught in English.

23. That the appellant spoke good English at the time is a factor in her favour. Mr Tufan submits that people cheat for a variety of reasons, as noted by this tribunal in MA (ETS - TOEIC testing) [2016] UKUT 450 (IAC). That is, of course, correct. However, in MA, the Upper Tribunal set out many paragraphs of detailed credibility concerns in relation to the appellant in those proceedings before dismissing the possibility that the credibility concerns that had been outlined in extensive depth could be undermined by virtue of the simple fact that the appellant would be able to speak English, and therefore had no basis to cheat. It does not necessarily follow that competence in the English language is an irrelevant factor. In contrast to the tribunal in MA, I have no separate credibility concerns about the appellant and found her to be a credible and honest witness.
24. Under cross-examination, Mr Tufan asked the appellant about how she booked and paid for the test. She said she had been informed by friends that there were vacant slots at the test centre, and was able to check online. She did not need to book the test online, nor pay for it electronically, she said, as she was aware that payment could be made on the day if there were vacant slots, and she was able simply to arrive at 8 AM. Mr Tufan put it to the appellant, and highlighted during submissions, that it was not plausible or realistic for the appellant simply to have turned up at the test centre in that way, rather than having booked in advance. Further, he contends, paying in cash as described by the appellant is at odds with how one would expect an important test to be booked and arranged.
25. Mr Tufan also highlights the fact that the appellant has not provided the voice recordings of the speaking test to the tribunal. The appellant writes in her second statement at [12] that she had obtained the recordings, but that they had not been analysed by a professional. Under cross examination, she explained that she received a quote from Professor French, the expert engaged by the respondent, for over £3,000 and she was unable to afford the fees.
26. Drawing the above factors together, I find that the appellant has provided an “innocent explanation” which satisfies the “minimum level of plausibility” (see, for example, Muhandiramge (section S-LTR.1.7) [2015] UKUT 675 (IAC) at [10.b]). While the appellant’s payment in cash and arrival at the test centre without a pre-booked slot may raise some eyebrows in 2021, I recall that systems in place in 2013 were not necessarily as advanced as they are today. There is no evidence from the Secretary of State that the New London College did not accept bookings on the day in cash.
27. Thus the evidential pendulum swings back to the Secretary of State to refute the “innocent explanation”. The strongest point Mr Tufan has in response is that the appellant has not made the voice recordings available to the tribunal. He described the omission as “curious” in submissions, although he did not directly put to her in cross-examination the allegation that she had not produced the recordings because they would reveal that she did not take the tests herself, which was the implication of his submission. He left unchallenged the appellant’s response that she could not commission Professor French because he was too costly, at around £3,200. That figure accords with a written estimate from French and Associates dated 18 November 2019.

28. Correctly understood, Mr Tufan's submission concerning the absence of the voice recordings fails to engage with the fact the burden lies on the Secretary of State to prove deception, not on the appellant to *disprove* deception. The absence of evidence on this point from the appellant does not amount to positive proof in the hands of the Secretary of State, especially considering the fact that Mr Tufan did not put to the appellant the allegation that the reason she had not brought the recordings was because they would reveal that she had not taken the test herself. Inferences arising from unchallenged evidence are not a basis for concluding the appellant has engaged in deception.
29. Considering the allegations in the round, I find that the Secretary of State has not established deception to the balance of probabilities standard. I find the appellant did not use a proxy test-taker in the speaking and writing test she took on 1 May 2013.
30. The appellant therefore presents no suitability-based concerns.

Private life

31. In my error of law decision, I preserved Judge Page's findings relating to the appellant's Article 8 private life rights, in so far as they represented the position at the date of the hearing on 25 November 2019. They were brief, but there was no reason to interfere with them at that stage. The relevant findings were at [25]:

“[The presenting officer] was correct to say that regardless of the refusal made on suitability grounds the appellant has been in the UK without leave to remain since 2014 and has no basis to remain and that there are no exceptional circumstances to consider outside the rules.”
32. Judge Page's summary finding that the appellant “has no basis to remain” was shorthand for his findings that there was no basis under the Immigration Rules' private life provisions for the appellant to remain here. The appellant did not challenge those findings in her original appeal against the First-tier Tribunal's decision. As the appellant confirmed under cross-examination, there has been no change to her circumstances since that decision. She writes in her statement of the tragic loss of an unborn child, but that is a matter pre-dating the judge's findings. The appellant is married to another Indian national, whose leave is dependent upon hers, and they would be able to return to India together. Mr Rai did not submit that the appellant should now be viewed as facing very significant obstacles to her integration in India, or that there would be insurmountable obstacles to the marital relationship continuing in India.
33. Mr Rai's focus was on the impact of the Secretary of State having incorrectly accused the appellant of relying on a proxy test taker. His submission in this respect was twofold.
34. First, he submitted that Judge Page's findings that there were no exceptional circumstances in the appellant's private life were reached in the context of his findings that the appellant had relied upon a proxy test taker. If I accepted the

appellant's evidence that she took the test herself, he submitted, a different approach was called for. What may not necessarily be exceptional in the case of a migrant who relied on deception should be revisited in the event the allegation of deception was wrongly made. In addition, submits Mr Rai, the appellant's immigration trajectory was wrongly forced onto the incorrect course as a result of the unsubstantiated allegations. Although he did not use the term, I understand Mr Rai to refer to what was termed "historical injustice" in Patel (historic injustice; NIAA Part 5A) [2020] UKUT 00351 (IAC).

35. There is some force to this limb of Mr Rai's submission, and I will return to it when conducting my overall proportionality assessment.
36. Secondly, Mr Rai relied on the approach of the Secretary of State to implementing appeals where, as here, an appellant has been found not to have cheated in an English language test, having refuted allegations to the contrary. He relied upon Khan & Others v Secretary of State for the Home Department [2018] EWCA Civ 1684 at [37], where the Secretary of State's undertaking to the Court of Appeal in relation to ETS matters was set out. The judgment outlines part of a note to the court provided by the Secretary of State, which provided, where relevant:

"(ii) For those whose leave has been curtailed, and where the leave would in any event have expired without any further application being made, the Respondent will provide a further opportunity for the individuals to obtain leave with the safeguards in paragraph (iii) below.

For those whose leave had expired, and who had made an in time application for further leave to remain which was refused on ETS grounds, the effect of an FTT determination that there was no deception would be that the refusal would be withdrawn. The applicant in question would still have an outstanding application for leave to remain and the Respondent will provide them with a reasonable opportunity to make any further changes to their application which would be considered on the basis of them not having employed any deception in the obtaining of their TOEIC certificate, and they would in no way be disadvantaged in any future application they chose to make.

(iii) In all cases, the Respondent confirms that in making any future decision he will not hold any previous gap in leave caused by any erroneous decision in relation to ETS against the relevant applicant, and will have to take into account all the circumstances of each case."

37. The difficulty with Mr Rai's reliance on [37] of Khan arises from the fact that this tribunal has no power to direct the Secretary of State to adopt a particular course of action. It is for the Secretary of State to implement appeals from this tribunal, which may either be allowed or dismissed. The passages in Khan relied upon by Mr Rai concern the way the Secretary of State undertook to the Court of Appeal to resolve cases, and does not directly affect the proportionality assessment conducted by this Tribunal. However, that the Secretary of State seeks to return those wrongly accused of ETS fraud to the position they would have been in, had the allegations not been raised, is a factor which attracts weight.

38. Factors in favour of the removal of the appellant include:
- a. The public interest in the maintenance of effective immigration controls.
 - b. The appellant does not meet any of the requirements of the Immigration Rules.
 - c. The appellant last held leave to remain over five years ago.
39. Factors militating in favour of the appellant not being removed are as follows:
- a. She was wrongly accused of using a proxy test taker, and has been unable to regularise her position since.
 - b. The ETS allegations resulted in an effective in-country prohibition on the appellant ever regularising her status, thereby contributing significantly to, if not being the predominant cause of, her status as an overstayer, thereby reducing the weight to be ascribed to the public interest in the maintenance of immigration controls on the facts of this matter.
 - c. The appellant attributes the stress arising from the allegations and the consequential uncertainty of her immigration status to being the cause of a miscarriage.
40. I find it would be disproportionate for the appellant to be removed, at least until she has had the opportunity to attempt to regularise her status with the benefit of having had her name cleared. The respondent incorrectly accused the appellant of deception, resulting in the curtailment of her leave and her subsequent inability to attempt to secure extensions to her leave or residence in another capacity. The appellant has suffered as a result of the wrongful operation by the respondent of her immigration functions. It follows that the appellant should enjoy a period of leave, to be determined by the respondent in accordance with her undertakings to the Court of Appeal in Khan and her published policy, in which she can attempt to regularise her status. Until the appellant has enjoyed at least that opportunity, it would be disproportionate for her to be removed.

41. This appeal is allowed.

Notice of Decision

The appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed *Stephen H Smith*
Upper Tribunal Judge Stephen Smith

Date 18 January 2021

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of £140. The appellant was successful in the proceedings, having refuted the allegations of deception.

Signed *Stephen H Smith*
Upper Tribunal Judge Stephen Smith

Date 18 January 2021

ANNEX - Error of Law decision



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11086/2019

THE IMMIGRATION ACTS

Heard remotely at Field House
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Decision & Reasons Promulgated

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Before

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Between

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(ANONYMITY DIRECTION NOT MADE)

Appellant

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THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R. Rai, Counsel, instructed by Robinson Ravani & Co. Solicitors
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that I was referred to were the appellant's and respondent's bundles from the First-tier Tribunal, the grounds of appeal, and the decision of the First-tier Tribunal under appeal, the contents of which I have recorded.

The order made is described at the end of these reasons.

The parties said this about the process: they were content that it had been conducted fairly in its remote form.

1. This is an appeal against the decision of First-tier Tribunal Judge Page promulgated on 9 December 2019, dismissing an appeal brought by the appellant against a decision of the respondent dated 12 June 2019, refusing her application for leave to remain on the basis of her private life.

Factual background

2. The appellant is Jasvir Kaur Brar, a citizen of India, born in 1989. She arrived in the United Kingdom in October 2010 as a student, and had her leave extended until 6 April 2015. However, on 11 September 2014, she was served with enforcement papers requiring her to leave the country. Her leave had been curtailed on the basis that she had used a proxy test taker in an English language test at New College, London, conducted on 1 May 2013. Although she attempted to appeal against that decision at the time, her appeal was struck out. Thereafter, she made a number of EEA residence documentation applications, all of which were unsuccessful. On 21 March 2019, she applied for leave to remain based on her private life. That application was refused, and it was that refusal decision which was under appeal before Judge Page.
3. Judge Page found that the appellant was unable to satisfy any of the private life provisions of the rules, and there has been no challenge to those findings.
4. The focus of this appeal lies in the findings reached by the judge concerning the respondent's allegations that the appellant had relied on a proxy test taker at a New College, London on 1 May 2013. The judge rejected the appellant's account of having taken the test in her own capacity.
5. The appellant contends that the judge's credibility analysis was flawed, and that she has not had a fair assessment of whether she did, in fact, use a proxy for the English language test. Her case is that she did not use a proxy, and wishes to challenge the judicial finding of dishonesty which has been made against her.
6. The judge's reasoning concerning the appellant's account of having attended the test may be found at [23]. The judge noted that, of the 56 people who attended the test centre that day, only four had not had their test cancelled as "invalid" by Educational Testing Service ("ETS"), the company to which the respondent had outsourced some English language testing. The judge was concerned that the appellant purported not to have seen anyone else cheating that day. He rejected that aspect of her case as not being credible. The judge then made the following observation about the fact the appellant's case was that she paid for the test in cash:

"Cash payments on arrival were more likely to be required from all those who are to use a proxy test taker, as cash would be untraceable in any criminal investigation of bank statements etc."

Later in the same paragraph, the judge accepted that the appellant had attended the test centre on 1 May 2013, but that she had paid in cash for a proxy to take the test on her behalf.

Permission to appeal

7. Permission to appeal was granted by Upper Tribunal Judge Sheridan on the basis that it was arguable that there was no logical reason, or reason that could be discerned from any of the evidence that had been before the judge, as to why an individual cheating in the test would not want their payment to the test centre to be traced, in contrast to the likely position in relation to the person or organisation responsible for the fraud. Secondly, it was arguable that the judge failed to consider, when finding it damaging to the appellant's credibility that she did not observe suspicious activity on the day, that a person who had no reason to be interested in the conduct of test takers may not have noticed, or paid attention, to what they were doing.

Discussion

8. This is a case which concerns allegations of widespread fraud at English language testing centres administered by or on behalf of ETS. A considerable amount of jurisprudence has developed concerning the respondent's approach to such allegations. For present purposes, the relevant principles are not in issue. It is common ground that the respondent provided the appellant with sufficient evidence so as to shift the evidential burden to her, such that she was expected to provide an "innocent explanation" in response to refute the allegations. This case concerns the judge's factual analysis of the "innocent explanation" proffered by the appellant.
9. It was common ground at the Upper Tribunal hearing that the judge had no evidential basis upon which to conclude that the appellant's payment in cash for the test was more likely to have meant that she had deployed, or relied upon, a proxy test taker. While there were a number of summaries of the criminal investigations conducted on behalf of the respondent into the allegations of widespread teaching at ETS test centres that had been provided to the judge, none of those summaries said anything concerning the link between cash payments made by a test taker and the use of proxy test takers. The supposed link was speculation on the part of the judge.
10. Accordingly, the judge gave weight to an immaterial matter. The judge's analysis concerning the use of cash was also irrational. The appellant herself would, by definition, have no desire for her payment to the test centre or identity to be concealed. The test certificate was issued to her, in her name. The judge also accepted the appellant's account that she attended the test centre on the day in question, meaning that the judge could not have been attempting to refer to a situation where he found that the appellant had not attended at all, and had sent an impostor on her behalf.
11. Mr Tufan realistically conceded that the judge fell into error on the above issue, and that the entire credibility assessment was flawed. That was an appropriate

concession. While appeals to the Upper Tribunal lie only on a point of fact rather than a point of law, pursuant to R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982 at [9] certain errors of fact are capable of amounting to an error of law. The errors identified above are such errors, in that the judge reached a perverse finding, not supported by the evidence.

12. Although the unchallenged findings of the judge relating to the appellant's private life mean that this was an appeal which would always fall to be dismissed, the appellant has been found to have engaged in dishonest conduct on the basis of a flawed assessment by the First-tier Tribunal. Such a finding has the potential to carry with it profound consequences, affecting the appellant for many years to come. It is necessary, therefore, for this tribunal to rehear the appellant's evidence concerning her claimed "innocent explanation" in response to the respondent's evidence that she cheated, in order for a fresh assessment to take place.
13. I preserve the judge's unchallenged findings that the appellant did not meet the requirements of the private life provisions of the Immigration Rules, nor that there were any reasons outside the rules for the appeal to be allowed, at the time of the hearing before the First-tier Tribunal on 19 November 2019.
14. The matter will be re-determined in the Upper Tribunal in order for a fresh assessment to be conducted of the respondent's allegations that the appellant used a proxy test taker in a test at New College, London on 1 May 2013.
15. In GM (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1630 at [7], the Court of Appeal said:

"...if an appellate court finds that a lower court or tribunal acted lawfully by reference to the evidence before it but that based upon the facts now known to the appeal court to uphold the decision would violate fundamental norms, then the appellate court must ensure that the decision it takes is compliant with the law."

Although Judge Page's findings concerning the applicability of the private life provisions of the Immigration Rules to the appellant have not been challenged, it will still be necessary at the resumed hearing to perform a contemporary assessment of those issues.

Postscript

16. Ideally, the appellant's evidence concerning the test on 1 May 2013 would have been re-heard at the hearing on 22 September 2020. However, the appellant was not in attendance. Mr Rai informed me that he had advised the appellant that it was not necessary to attend. That is surprising, as the Directions issued by the Upper Tribunal upon this matter being listed stated, at [4]:

"There is a presumption that, in the event of the Tribunal deciding that the decision of the FTT is to be set aside as erroneous in law, the re-making of the decision will take place at the same hearing. The fresh decision will normally be based on the evidence before the FTT and any further evidence admitted (see [5] below [concerning rule

15(2A)], together with the parties' arguments. The parties must be prepared accordingly in every case."

17. At my direction, efforts were made during the hearing to see if the appellant would be able to participate via a remote video link. She was unable to do so. I was told that, understandably, she was taken by surprise at the suggestion that she would have to give evidence. By the time her solicitors managed to speak to her, she was travelling in a car. She had not had the opportunity to read her statement, or otherwise prepare for the appeal. I decided that it would not be fair to attempt to secure the appellant's participation under those conditions, and as such directed that the matter be resumed on another occasion to hear her evidence.
18. My provisional view is that the hearing will be suitable to be conducted remotely. **Either party may make reasoned submissions to the contrary within 14 days of being sent this decision.**
19. There has been no application to reduce further evidence under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. If the appellant wishes to make such an application, **she must do so within 14 days of being sent this decision.**

Notice of Decision

The decision of Judge Page involved the making of an error of law and is set aside. His findings at [25] that "the appellant has been in the UK without leave to remain since 2014 and has no basis to remain and that there are no exceptional circumstances to consider outside the rules" are preserved, in so far as that finding related to the position as at the date of the hearing before the First-tier Tribunal on 25 November 2019.

The decision will be remade in the Upper Tribunal. The appellant must attend.

My provisional view is that the hearing will be suitable to be conducted remotely. Either party may make reasoned submissions to the contrary within 14 days of being sent this decision.

Any application for further evidence under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 must be made within 14 days of being sent this decision.

No anonymity direction is made.

Signed *Stephen H Smith*

Date 1 October 2020

Upper Tribunal Judge Stephen Smith