**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/07350/2015**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **on 12 October 2017** | **on 23 October 2017** |

**Before**

**UPPER TRIBUNAL JUDGE BLUM**

**Between**

**AHSAN ZIA**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms A Vatish, Counsel, instructed by Law Lane Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of Judge of the First-tier Tribunal Flynn (the judge), promulgated on 6 December 2016, dismissing the Appellant's appeal against the Respondent's decision of 23 September 2015 refusing his human rights (article 8) claim.

**Factual Background**

2. The Appellant is a male national of Pakistan, date of birth 22 October 1974. Despite a brief immigration chronology appearing in the

Reasons for Refusal Letter and the judge's determination and although a manuscript chronology was provided by Ms Vatish on my request at the error of law hearing, the Appellant's full immigration history remains unclear. He entered the United Kingdom on 1 January 2012 with entry clearance to study valid until 30 January 2015. According to the manuscript chronology the Appellant applied to the Respondent to study at Northam College on the 27 September 2013. In support of this application he submitted a TOEIC English language certificate obtained via ETS following a test taken on 20 March 2013 at Cauldon College. The college at which the Appellant was studying lost its licence on 11 November 2013 and the Appellant's leave was curtailed so that it expired on 14 March 2014. It does not appear that the Appellant made any further in-time application (I note however that a letter from Law Lane solicitors dated 22 April 2014 stated that the Appellant submitted an application for leave to remain as a student on 27 March 2013, a claim repeated by the judge in her determination, and that on 3 March 2015 he received a letter from the Home Office stating that the application was still under consideration, and that on 9 March 2015 the Appellant was served with a notice indicating that he was liable to removal because he submitted a fraudulent English language certificate).

3. On 23 April 2015, the Appellant applied for leave to remain based on family and private life considerations. By this stage he was the partner of Ms AZ, a Pakistani national who, according to the manuscript chronology, entered the UK on 15 March 2009 as a visitor accompanied by her 2 children, Y (DOB September 2001) and S ( DOB May 2005). Ms AZ made an application for asylum on 15 June 2009 with both children as dependents. Although her asylum claim was refused she and her two children were granted Discretionary Leave to Remain (DL) outside the immigration rules on 20 May 2014, valid until 23 October 2016. It is not clear what prompted the grant of DL to Ms AZ and her children. According to the manuscript chronology the Appellant and Ms AZ underwent a religious marriage ceremony on 27 September 2014.

4. The Respondent refused the Appellant's application for leave to remain on 23 September 2015. ETS records confirmed that there was considerable evidence that the Appellant used a proxy test taker in respect of the TOEIC test obtained on 20 March 2013 and which he used in his application dated 27 September 2013. The Respondent consequently refused the application under paragraph S-LTR.1.6 of Appendix FM of the immigration rules (because the Appellant's presence in the UK was not conducive to the public good as a result of his conduct, character, associations, or other reasons, making it undesirable to allow him to remain in the UK). The Respondent additionally held that Ms AZ did not meet the definition of partner contained in Appendix FM. Nor could the Appellant meet the definition of parent in respect of Ms AZ's two children. After concluding that the Appellant did not meet the requirements of paragraph 276ADE of the immigration rules relating to private life, the Respondent considered

whether there were any exceptional circumstances outside the immigration rules which, consistent with the right to respect for private and family life in article 8, might warrant a grant of leave to remain. Although noting the Appellant's claimed relationship with Y and S, the Respondent was satisfied that returning the Appellant to Pakistan would have minimal effect on the children who could continue to live with and be cared for by the mother.

**The decision of the First-tier Tribunal**

5. The judge heard oral evidence from the Appellant and Ms AZ. The Appellant explained how and why chose to undertake his TOEIC test at Cauldon College, and described what happened when he took the test. The judge heard evidence about the Appellant's studies in the UK and that his partner gave birth to their child on 15 December 2015. The Appellant said he could not return to Pakistan because his partner was still studying in the UK and wanted a better future. He stated that his stepchildren were aged 15 and 11 and that it would be impossible for them to adjust to life in Pakistan. He stated in re-examination that his stepchildren had been in the UK for about 7 years.

6. In her oral evidence Ms AZ explained that her leave to remain had expired and she had submitted a new application to the Home Office which had not yet been decided. She claimed she was granted leave to remain on human rights grounds because of her children. They had been 7 and 4 or 5 years old when they came to the UK. She was previously married in Pakistan but had divorced and the children had no contact with their biological father. She claimed they could not return to Pakistan because her ex-husband had threatened them. Her two oldest children were used to life in the UK and were happy at school. Neither child had been back to Pakistan since arriving in the UK. She did not believe the Appellant would use a proxy tester.

7. The judge first considered the allegation that a proxy tester had been used to obtain the Appellants TOEIC test. At [47] the judge indicated that she was following the guidance on the Court of Appeal in *Shehzad and Chowdhury* [2016] EWCA Civ 615 and of the Upper Tribunal in *SM and* Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 229 (IAC). The judge correctly stated that the Respondent had to discharge the burden of proof to the normal civil standard to show that the Appellant had used deception in seeking to rely on an English language test obtained via a proxy tester. At [48] the judge stated,

> In *SM* the Upper Tribunal concluded that the ETS SELT Source Data extract and the test centre Look Up Tool, together with the witness statements from Ms Collings and Mr Millington, was sufficient to discharge the evidential burden and that it would then be for an Appellant to demonstrate on a balance of probabilities that they had not used deception. The Respondent provided these documents and I am accordingly satisfied that she has discharge the evidential burden of proof. The burden of proof has

accordingly shifted to the Appellant to show that he did not used deception when he submitted the ETS certificate.

8. From [51] to [54] the judge considered the evidence provided by the Appellant and concluded, with supporting reasons, that the Appellant had submitted a false document. At [55] the judge stated,

> Looking at the evidence in the round, I find the Appellant has failed to demonstrate on a balance of probabilities that he genuinely undertook the TOEIC English test in March 2013. I agree with the Respondent's conclusion that she has provided sufficient evidence to show that the Appellant submitted a false document.

9. The judge went on to consider article 8 outside of the immigration rules. At [57] she found there were strong grounds for doing so because the Appellant had established family life with his partner, their child and his stepchildren. The judge referred to s.117B of the Nationality, Immigration and Asylum Act 2002, attached little weight to the Appellant's private life and noted his use of deception in a previous application. At [66] the judge noted the submission made by the Appellant's representative that the children had lived in the UK for more than 7 years, but stated that there was no evidence to confirm that. Other than a letter from each of the children they provided no further evidence. Whilst accepting that the children had a relationship with their stepfather the judge was not satisfied that it would have a serious and long-lasting negative impact on them if he was unable to continue living with them. The judge concluded that the interference with article 8 was neither unjustified nor disproportionate and dismissed the appeal on human rights grounds.

**The grounds of appeal and the error of law hearing**

10. The grounds essentially contend that the judge misdirected herself in respect of the applicable legal burden of proof when concluding that the Appellant had used a proxy tester, and that it had not been in dispute that the Appellant's stepchildren lived in the UK more than 7 years and, as such, the judge was required to consider whether it was reasonable to expect them to leave the UK pursuant to s.117B(6).

11. Permission was granted on the basis that the judge may not have fully appreciated the shifting burden in ETS cases. However, as the judge stated at paragraph 66 of her decision that there was no evidence to confirm that each of the partners children had lived in the UK for more than 7 years, permission was not granted on the 2nd ground.

12. At the outset of the error of law hearing I indicated my concern that, if the partner's oldest two children had in fact resided in the UK for 7 years prior to the date of the First-tier Tribunal hearing, the judge may have made a mistake of fact which was potentially capable of amounting to an error of law. I put the matter back to enable Mr

Bramble to obtain information relating to the immigration history of the partner's two children.

13. At the resumption of the hearing Ms Vatish provided newly issued Pakistan passports in respect of Ms AZ, Y and S, biometric residence cards confirming that all 3 had been granted further leave to remain until 2020, and photocopies of previous Pakistani passports relating to Ms AZ, Y and S, issued in June 2008 and expiring in June 2013, containing visitor visas issued to them on 11 February 2009 and valid until 11 August 2009. Mr Bramble additionally confirmed after his enquiries that Ms AZ had claimed asylum on 16 June 2009, and that she and the children were granted discretionary leave on 20 May 2014.

14. In light of this further information I indicated to the parties my preliminary view that there was a 'Robinson obvious' issue (*Robinson* [1998] QB 929) relating to the judge's failure to consider, in the context of s.117B(6) of the Nationality, Immigration and Asylum Act 2002, whether it would be reasonable for Y and S to leave the UK in light of what appears to have been a mistake of fact as to their length of residence. I drew the parties' attention to the authority of *E & R v Secretary of State for the Home Department* [2004] EWCA Civ 49 which identifies the circumstances in which a mistake of fact may amount to a mistake of law.

15. I heard submissions from Mr Bramble inviting me to find that there was no 'Robinson obvious' point and that there had been no application to amend the grounds of appeal. Having considered his submissions I expressed my satisfaction that the judge's mistake of fact may amount to a material error of law, that in light of the accepted facts this constituted a 'Robinson obvious' point, and that I would therefore proceed to hear submissions in respect of this further ground. Mr Bramble did not seek an adjournment of the hearing and he did not indicate that he was in any way prejudiced in continuing with the hearing. I heard further submissions from both Ms Vatish and Mr Bramble. Having satisfied myself that the judge did materially misdirect herself in law as to the applicable burden of proof in respect of the ETS proxy tester allegation, I indicated that I would allow the appeal and that the matter would be remitted back to the First-tier Tribunal for an entirely fresh hearing.

## Discussion

16. In *E & R* the Court of Appeal concluded that an error of law may arise in circumstances where an important part of a judge's reasoning was based on ignorance or mistake as to the facts. Their Lordships identified four factors relevant to determining whether an error of fact could amount to an error of law. There had to be an erroneous impression created by a mistake as to, or in ignorance of, a relevant fact, including the availability of reliable evidence in respect of a material matter. The fact must be 'established', in the sense that, if

attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence. The Appellant (or his advisors) must not have been responsible for the mistake. And the mistake must have played a material (although not necessarily decisive) part in the Tribunal's reasoning. The Court stated that it is in the interests of all parties that decisions should be made on the best available information.

17. Having cumulative regard to the evidence given by the Appellant and his partner at the First-tier Tribunal hearing, the representations made by his solicitors to the Respondent in support of his application, the photocopies of the Pakistan passports provided by Ms AZ and the original new passports and residence cards at the hearing, and the information provided by Mr Bramble, I am entirely satisfied that Ms AZ and her 2 children entered the United Kingdom in March 2009 and that the children have resided in this country ever since. The First-tier Tribunal hearing occurred on 28 October 2016. By that time both children had resided in the UK for over 7 years. Although noting that submissions were made on the Appellant's behalf that the children had lived in the UK for more than 7 years, the judge found the submission to be without evidential support.

18. The judge cannot be criticised for concluding that there was insufficient evidence before her to confirm the children's length of residence. The fact remains however that the judge was mistaken in respect of the length of the children's residence and, by implication, the availability of evidence confirming that residence. I am satisfied that the children's residence for more than 7 years is an established fact. Although the written and oral submissions before the judge stated that the children had resided in the UK for more than 7 years, and although copies of their residence permits issued in May 2014 were before the judge, it is surprising that the Appellant's representatives did not provide documentary evidence confirming the children's entry to the UK, or the application made to the Home Office by their mother (with them as dependents). In the Grounds of Appeal to the Upper Tribunal the Appellant's legal representatives presumed that this was an issue beyond contention. They were perhaps overly presumptive in their belief. There is some basis however for this presumption given that the Presenting Officer at the First-tier Tribunal hearing did not appear to make any submissions to the contrary. It was, moreover, a point that could very easily have been confirmed by the Presenting Officer at the First-tier hearing after making short enquiries, and indeed a point in respect of which that the judge could have directed both parties to supply documentary evidence. Having carefully weighed these matters I am satisfied that the mistake was not caused by the Appellant or his representatives.

19. I must finally consider whether the mistake played a material, although not decisive, part of the judge's reasoning. The judge's reasoning in respect of the relationship between the Appellant and his partner's two children is short and devoid of detail. This may however

be due to the limited evidence of the relationship presented by the Appellant's representatives. Nevertheless, the judge, on the erroneous assumption that there was no evidence that the children had resided in the UK for at least 7 years, did not then consider whether, having established a parental relationship with qualifying children, it was unreasonable to expect the children to leave the UK. I am satisfied this amounts to a material error of law.

20. I am additionally, and quite independently, satisfied that the judge misdirected herself by placing the burden of proving that a proxy tester was used on the Appellant rather than the Respondent, and that this also amounts to a material legal error. It is apparent from both [48] and [55], replicated above at paragraphs 7 and 8 above, that the judge believed once there was sufficient evidence to discharge the evidential burden, the legal burden thereafter shifted to the Appellant to demonstrate, on the balance of probabilities, that he had not used deception. This is incorrect. Once the initial evidential burden has been discharged, the Appellant then has the evidential burden of raising an innocent explanation. The legal burden remains at all times with the Respondent (see, for example, *Qadir v Secretary of State for the Home Department* [2016] EWCA Civ 1167 at [18] and [19]). The Appellant does not have to prove, on the balance of probabilities, that he did not use a proxy in his English language test. Although the judge gave rational reasons for rejecting the Appellant's claim that he didn't use a proxy tester, it is inescapably clear that the judge wrongly assigned the legal burden of proof to the Appellant and that this materially undermined the sustainability of this aspect of the judge's conclusion.

21. For all these reasons, I consider it appropriate to remit this matter back to the First-tier Tribunal to be considered *de novo* before a judge other than judge of the First-tier Tribunal Flynn.

**Notice of Decision**

**The First-tier Tribunal's decision contains a material legal error.**
**The matter is remitted back to the First-tier Tribunal for a complete fresh hearing, before a judge other than judge of the First-tier Tribunal Flynn.**

Signed Date 19 October 2017
Upper Tribunal Judge Blum