Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07984/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 July 2017	**On 25 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RUBILLA [M]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Home Office Presenting Officer
For the Respondent: Mr A Chohan of Counsel instructed by Immigration Chambers
(Ilford)

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge R Scott promulgated on 30 November 2016.

2. Although before me the Secretary of State for the Home Department is the Appellant and Ms [M] is the Respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms [M] as the Appellant and the Secretary of State for the Home Department as the Respondent.

3. The Appellant is a citizen of Pakistan born on [ ] 1981. She entered the United Kingdom on 28 May 2005 pursuant to a student visa conferring leave until 31 October 2007. On 15 October 2007 she made an application for variation of leave to remain as a student, which in due course was granted until 31 December 2008. On 23 December 2008 the Appellant made an application as the dependent spouse of a Tier 1 Migrant. That application was refused on 3 February 2009. On 27 March 2009 the Appellant applied again in the capacity as a student and was granted leave to remain until 31 March 2010. A further application as a Tier 4 Student was granted conferring leave until 30 August 2011. On 30 August 2011 the Appellant made a further application as a Tier 4 Migrant which was refused with a right of appeal on 27 September 2011. The Appellant exercised her right of appeal and succeeded before Immigration Judge Fletcher-Hill in a decision promulgated on 18 November 2011 (reference IA/29107/2011). In consequence of succeeding on her appeal, which was allowed under the Immigration Rules with reference to paragraph 245ZX(c) of the Rules but dismissed under Article 8 of the ECHR, the Appellant was granted a further period of leave to remain until 30 January 2015. It may be seen that this leave took her to within approximately four months of the tenth anniversary of her first entry to the UK.

4. On 30 January 2015 the Appellant applied for leave to remain outside the Immigration Rules. On 1 May 2015 the Appellant made an application to vary her application for leave outside the Rules to seek indefinite leave to remain on the basis that she had completed ten years' lawful residence in the United Kingdom, with particular reference to paragraph 276B of the Immigration Rules. The Appellant's application was refused for reasons set out in a combined 'reasons for refusal' letter and notice of immigration decision dated 2 October 2015 ('the RFRL').

5. The Appellant appealed to the IAC. Her appeal was allowed by First-tier Tribunal Judge R Scott for reasons as set out in his Decision. The Respondent then sought permission to appeal which was granted by First-tier Tribunal Judge Parkes on 31 May 2017.

6. Before considering the particular issues that require deciding by this Tribunal, it is instructive to have regard to particular aspects of the Respondent's decision and the history of the Appellant's case and appeal.

7. The Respondent's decision to refuse the Appellant's application was primarily based on the invocation of paragraphs 322(2) and 322(5) of the Immigration Rules. The application was also refused under paragraph

276B of the Immigration Rules because the Respondent determined that there had been a break in the Appellant's continuity of residence by reference to the period between the rejection of an application on 3 February 2009 and the submission of a further application on 27 March 2009.

8. Paragraphs 322(2) and (5) were invoked because the Respondent concluded that the Appellant's "*presence in the UK is not conducive to the public good because [her] conduct made it undesirable to allow [her] to remain in the UK*". This decision was reached with reference to an allegation that the Appellant had practised deception by submitting in the context of a previous application a TOEIC certificate from Educational Testing Service ('ETS') which had been obtained by making use of a proxy sitter. The relevant passages of the RFRL are in material part in these terms:

> *"In support of the reconsideration of your application dated 30 August 2011 you submitted a TOEIC certificate from Educational Testing Service ('ETS').*
>
> *ETS has a record of your speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of your test and confirmed to the Secretary of State for the Home Department that there was significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker. Your scores from the test taken on 3 July 2013 at Stanfords College have now been cancelled by ETS. On the basis of the information provided to her by ETS, the Secretary of State for the Home Department is satisfied that your certificate was fraudulently obtained and that you used deception in your application of 30 August 2011."*

9. It may readily be seen from that passage that there is a dissonance in the chronology. The Respondent identifies, or alleges, the use of a test taken on 3 July 2013 in the context of an application made on 30 August 2011. For reasons that are unclear to me, it appears that nobody had noticed this chronological dissonance until I raised it at the commencement of proceedings this morning and sought clarification. It was in the context of seeking clarification that the decision of Immigration Judge Fletcher-Hill was produced identifying that the Appellant had been successful in her appeal in November 2011. In such circumstances, on the face of it, it is not apparent that the Appellant ever submitted the 3 July 2013 Stanfords College ETS test to the Respondent. Certainly, it could not have been submitted in the context of the application of 30 August 2011 or in the context of the subsequent successful appeal. Moreover, it is not suggested by the Respondent that it was submitted in the context of the current application initiated on 30 January 2015 and varied on 1 May 2015.

There were no apparently intervening applications. Mr Whitwell was not able to assist from the file papers available to him. In all such circumstances, in the premises it would seem that the Respondent's decision is at the very least not supported by any evidence that the Appellant submitted a false document in the context of a previous application for variation of leave (cf paragraph 322(2)), and quite possibly fundamentally flawed in fact.

10. There is a second element of the Appellant's case that requires some preliminary comment. The Appellant is a mother. She has two children, both born in the United Kingdom. Her eldest child was born on [ ] 2007 and her second child was born on [ ] 2015. I have been told today that the Appellant is divorced from the father of her children - who was the gentleman in respect of whom she applied as a dependent spouse in the Tier 1 application made in December 2008. I do note from the Appellant's application that she refers to herself as 'Miss' in the application form (at B1), and also identified her relationship status as being 'Divorced or dissolved civil partnership' (B10). I briefly interject that it is to be noted at paragraph 21 of the Appellant's witness statement of 5 October 2016 that she refers to *"my husband's case"*, which is described as pending with the Home Office. In context it would appear that that must be a reference to her ex-husband - unless there are other matters to be clarified in this regard. Be that as it may, it has been confirmed to me today, so far as Mr Chohan understands it, that the Appellant's ex-partner is a person with no current status in the UK but has an application pending.

11. As regards the Appellant's older child, it may be seen that he has been present in the United Kingdom (where he was born) in excess of seven years, and indeed in November of this year he will reach the age of 10, at which point he will be eligible to apply for British citizenship.

12. The fact of the Appellant being a single mother with the care of two children did not feature in her application. It has been suggested that this was because the long residence application pursuant to 276B which she was pursuing, did not require any information to be provided in respect of the circumstances of her children. That may well be the case, however it does not explain why no mention of the children was made in the Appellant's grounds of appeal to the First-tier Tribunal. The existence of the children was introduced into this case as late as the filing of the Appellant's bundle before the First-tier Tribunal. The Appellant's witness statement makes reference to the family circumstances in brief terms at paragraph 21, and there were also documents provided by way of the children's birth certificates and some school documents in respect of the older child.

13. The First-tier Tribunal Judge considered the hitherto not raised circumstance of the Appellant's children by way of a preliminary issue: see paragraph 23 of his Decision. The Judge noted that the Appellant made a preliminary application at the hearing to submit new evidence regarding her family situation, and that this was information that had not been disclosed to the decision-maker at any earlier stage in the proceedings. The Respondent's representative is recorded as having objected to the admission of such materials at such a late stage in the proceedings, noting that the Appellant had had ample time to provide the information and that it would be contrary to the interests of justice for her now to be permitted to do so at such a late stage. The First-tier Tribunal Judge ruled that he refused the application because the Appellant had given no reasonable explanation why she had not disclosed the information earlier in the proceedings and the Respondent should not be prejudiced by its late provision. In those circumstances the First-tier Tribunal Judge in due course went on to consider the human rights aspects of the case without reference to the circumstances of the children.

14. Although the First-tier Tribunal Judge appears to have dealt with this issue by way of consideration of the fairness or otherwise of admitting late evidence, in fact it was an issue that should properly have been considered by reference to section 85(5) and (6) of the Nationality, Immigration and Asylum Act 2002. Indeed, it is suggested to me today by Mr Whitwell that the Presenting Officer had actually sought to withhold consent rather than merely objecting to the late admission of evidence: to that end I have been provided with a copy of a letter dated 26 October 2016, that is to say the day after the hearing, written and signed by the Presenting Officer and addressed to the Appellant's representatives, indicating the circumstances, the provisions of section 85(5) and (6), and stating in terms that the Secretary of State did not consent to a new matter being raised. Mr Whitwell has indicated that it continues to be the case that the Respondent withholds the requisite consent.

15. Whether or not the Presenting Officer formally put the matter to the First-tier Tribunal by reference to section 85, plainly her objection to the admission of late evidence was in substance the withholding of the consent necessary to overcome the jurisdictional prohibition on the Tribunal by reason of section 85(5). I acknowledge that in such circumstances it is no part of the role of either the First-tier Tribunal, or in turn this Tribunal on a statutory appeal, to review or reach a different in respect of 'consent' once it is established as a precedent fact that a matter is indeed a 'new matter' within the meaning of section 85(6).

16. Whether or not the Judge properly addressed this question, any error in this regard is not material because it remains the case that in any event,

as I say, he proceeded to consider the human rights issues without reference to the circumstances of the Appellant's children.

17. I turn then to consideration of the Judge's substantive decision.

18. The judge addressed the Respondent's allegation of a break of continuity of lawful residence at paragraph 33 of his decision. He reached the conclusion that the Appellant had offered an explanation for why there had been a breakdown in communication during the relevant hiatus between refusal and new application with reference to the Respondent failing to take due regard of notification of a change of address, and in consequence "*that no breach of the continuous period of residence has occurred*". This aspect of the First-tier Tribunal Judge's decision has not been the subject of any challenge. Nonetheless, and without deciding the matter, for my own part I express a reservation that the fact that an explanation may be available for a break in a period of leave does not inevitably alter the fact that even so the continuity has been broken.

19. The Judge then gave consideration to the issue in respect of the ETS certificate. In light of **SM and Qadir v SSHD (ETS – Evidence – Burden of Proof) [2016] UKUT (IAC)** and the evidence that had been filed on behalf of the Respondent, the Judge considered that the burden had shifted to the Appellant to provide 'an innocent explanation': see paragraphs 39 and 40. The Judge addressed this in particular at paragraphs 41 and 42, which are in these terms:

> *"41. She claims that she had no reason to cheat by submitting a false test in 2013. This is because she was fluent in English, having taken her journalism degree in Pakistan part taught in English and having passed both a Pearson ESOL test and a Life in the UK test in April 2015. She did not require an interpreter at the hearing, but it is not for a judge to make any finding of fluency on that basis or any other. In any event, the TOEIC test was in 2013, over three years ago and her English may have improved since then. Further, even if she were then fluent in English, there are other motivations why someone might cheat, such as lack of time to prepare, or lack of confidence in passing. It is not relevant that she did not use the test certificate in her current application, under appeal here. The Respondent is entitled under the Rules to take account of false information or documents submitted in past applications.*
>
> *42. However I find that the Appellant gave a sound and plausible account of sitting the test, sufficient to suggest that she did in fact attend and sit the test herself. She explained her journey to the test centre, and the process for sitting the test, and what*

> *was involved and what time it took. I find her to be credible. The Respondent challenges her on her report that there were 10-15 people doing the test with her, as Annexe B says there were 33 who sat the test that day. However I do not think this undermines her credibility as it is not implausible for someone to honestly fail to remember this from three years ago, when she has sat several other tests since. It is also of course possible that not all those who sat the test that day sat it in the same room."*

20. It may be seen that the determinative aspect of the Judge's reasoning, given that for the main part he rejected the Appellant's arguments in this regard, was essentially the plausibility and credibility of the Appellant's account of attending the test centre with reference to her journey there and the procedures at the test centre. In my judgement that reasoning fails to reconcile itself with the contents of the substantial supporting evidence filed by the Respondent, and in particular paragraph 17 of the witness statement of Rebecca Collings dated 23 June 2014. In that witness statement Ms Collings describes circumstances at some test centres in the following terms:

> *"Registered candidates standing aside from the secure computer terminals, allowing other people ('fake sitters') with superior English language skills to take the oral and written parts of the exam on their behalf. The fake sitters were organised by the very staff who were supposed to ensure the proper conduct of the exam."*

21. This describes a scenario where the applicant attends the test centre, and indeed approaches the secure computer terminal at which his or her test is to be conducted, but then, as it were, 'steps aside' to allow the proxy sitter space to take over and complete the test. Inevitably, such an applicant has attended the test centre and inevitably such an applicant will be privy to, and witness to, the procedures of the test. It follows therefore that an ability to recall the journey to a test centre and the procedures at the test centre is not inevitably determinative of the credibility of an Appellant's claim to have genuinely sat their test. It seems to me that the First-tier Tribunal Judge has failed to engage with the substance of the Respondent's evidence and to attempt to reconcile the evidence with the Appellant's account. This is the primary focus of the Respondent's grounds of challenge and to that extent I find that they have substance.

22. The Judge, having set out the reasoning at paragraphs 41 and 42 went on to state at paragraph 43 his conclusion that he was "*not satisfied that the Respondent has proved [her] allegations against the Appellant to the required standard*", and "*has not proved dishonesty on the Appellant's*

part", before adding "*It follows that the Appellant's appeal succeeds*". Indeed, it may be seen at paragraph 46 that the appeal was *"allowed under the Immigration Rules"*.

23. I pause to interject that although I consider the Judge erred in his approach to the evidence in failing to reconcile the Appellant's account with the evidence to the effect that attendance at a test centre was not inconsistent with use of a proxy sitter and therefore familiarity as to journey and process was not a signifier of 'an innocent explanation', such an error is arguably immaterial if it be the case that in the premises the Respondent is unable to identify that the Appellant ever made us of the ETS test results in the context of any particular application.

24. Be that as it may, the Judge having found in the Appellant's favour in respect of the Rules, went on to consider in the alternative the human rights aspect of the Appellant's appeal, setting out his reasons at paragraphs 44 and 45. The Judge concluded, notwithstanding the favourable outcome in respect of the Immigration Rules (i.e. that he was satisfied that the Appellant had completed ten years' continuous lawful residence and had not engaged in any dishonesty in relation to any earlier applications), that the Appellant had not established that the impact of the Respondent's decision would constitute a disproportionate interference with the Appellant's Article 8 rights. (I pause to observe yet again that this was without reference to the circumstances of the Appellant's children.) Accordingly, the Judge concluded that whilst the appeal was allowed under the Immigration Rules, the appeal was "dismissed on human rights grounds" (paragraph 47).

25. The fundamental difficulty with all of this is that the First-tier Tribunal Judge was in error as to his jurisdiction. It is abundantly clear from the RFRL that the decision under appeal was subject to the appeal regime introduced by way of amendment to the Nationality, Immigration and Asylum Act 2002 by virtue of the Immigration Act 2014, such that the Appellant's ground of appeal was limited to the ground that the decision was unlawful under section 6 of the Human Rights Act 1998: see sections 82(1)(b) and 84(2). Accordingly, it mattered not whether the Appellant could succeed under the Immigration Rules. What was required was for her to establish a case with reference to the ECHR which, in practical terms on the facts of this case, meant by reference to Article 8.

26. In the circumstances I find that the Judge had no jurisdiction to allow the appeal under the Immigration Rules, and that aspect of his decision must be set aside. That is the case irrespective of my view that the Judge, in any event, erred in his approach to the evidence in respect of the ETS test, and more particularly, irrespective of my view that the Respondent could

not seemingly demonstrate that the Appellant had submitted the 2013 ETS test in respect of any application - and certainly there was no evidence to that effect before the First-tier Tribunal.

27. There has been no cross-appeal or challenge raised by the Respondent in respect of the human rights decision that the Judge reached to the effect that the Appellant failed on human rights grounds in her appeal. Mr Chohan has argued before me this morning that the Judge potentially fell into error because he seemingly failed to give weight to his own conclusions in respect of paragraph 276B, that is to say the ten year Rule pursuant to which it is, whilst not explicit, apparent that the Judge allowed the appeal under the Immigration Rules.

28. I note that paragraph 276B of the Rules is not a provision designed expressly to give effect to the UK's obligations under the ECHR. The relevant paragraph in respect of private life in this regard is paragraph 276ADE which sets quite a different regime in respect of required periods of time present in the UK, and indeed in respect of other matters. In my judgement it cannot be argued that success under paragraph 276B inevitably equates to establishing that a person is entitled to remain on human rights grounds, albeit that there will be a considerable overlap in respect of facts and indeed merits; Indeed when I put it to Mr Chohan, he did not seek to argue that success under 276B was determinative of an Article 8 case.

29. In any event it seems to me from the wording of paragraph 44 of the First-tier Tribunal's Decision that the Judge had very much in mind the analogous provisions of paragraph 276ADE, even though he was not expressly considering the case with reference to the Immigration Rules. He refers to the failure to show that there would be very significant obstacles if the Appellant were to return to Pakistan; the Judge also makes express reference to the *"number of years"* in which the Appellant has been living in the UK and acknowledges that she *"must therefore have some private life"*. However, perhaps mindful of the provision of section 117B(5) of the 2002 Act the Judge notes that the Appellant's presence in the UK was on a temporary basis with no expectation of remaining.

30. Pursuant to discussion, it seems to me that Mr Chohan was in substance really seeking to have the decision in respect of the human rights grounds remitted to the First-tier Tribunal in the hope that the Secretary of State for the Home Department would change her view on consent to raise the issue of the Appellant's children. I am not persuaded that that is a sound basis upon which I should find error of law on the part of the First-tier Tribunal Judge or should otherwise consider remittal of the human rights issue. It seems to me, in any event, it is always open to the Appellant to

raise Article 8 by way of a fresh application and indeed, as I say, it is difficult to see why this was not done at some point well prior to the filing of the materials before the First-tier Tribunal.

31. Accordingly, in all of the circumstances I find that the First-tier Tribunal Judge fell into error of law by assuming a jurisdiction in respect of the Immigration Rules that the Tribunal did not possess. To that extent the decision allowing the appeal under the Immigration Rules must be set aside. There is no challenge to the decision to dismiss the appeal under human rights grounds, and notwithstanding Mr Chohan's able submissions, I can identify no sound basis to interfere with the Judge's conclusions in this regard. Accordingly, the decision of the First-tier Tribunal Judge in respect of human rights grounds stands. The overall effect is that the Appellant's appeal stands dismissed.

Notice of Decision

32. The decision of the First-tier Tribunal contained a material error of law. The Tribunal had no jurisdiction to allow the appeal under the Immigration Rules and accordingly that aspect of the decision is set aside and does not require to be remade.

33. Ms [M]'s appeal remains dismissed on human rights grounds.

34. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed: Date: **22 July 2017**

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

The appeal has been dismissed and therefore there can be no fee award.

Signed: Date: **22 July 2017**

Deputy Upper Tribunal Judge I A Lewis
(*qua* Judge of the First-tier Tribunal)