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**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/16745/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 3 July 2018

Decision & Reasons Promulgated  
On 6 July 2018

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FROMM**

**Between**

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

Appellant

**and**

**RADHASHYAM BISWAL  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer

For the Respondent: Mr Z Malik, Counsel

**DECISION AND REASONS**

1. The appellant in this appeal is the Secretary of State for the Home Department, who appeals with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Farmer, promulgated on 12 December 2017, in which she allowed the appeal of Mr Biswal against a decision of the Secretary of State, dated 17 May 2016, refusing him leave to remain on human rights grounds. It is more convenient to refer to the parties as they were before the First-tier Tribunal. From now on I shall refer to Mr Biswal as “the appellant” and the Secretary of State as “the respondent”.

2. The appellant had sought further leave on the grounds of his private life and family life with his partner, Ms Alpana Kumari Mansingh (“the sponsor”), whom he had married on 5 April 2012. The respondent refused the appellant’s application by reference to suitability grounds<sup>1</sup> because, following information provided by Educational Testing Service (“ETS”), the appellant was considered to have used deception in a previous application by employing a proxy to take his speaking test on 18 July 2012. The letter also noted that the sponsor was an Indian citizen who held leave to remain only until 6 November 2017.
3. Judge Farmer heard oral evidence from both the appellant and the sponsor and found them “both truthful and credible witnesses”. She noted the appellant spoke English at a good level although the fact he was alleged to have used a proxy five years earlier meant that his current level of proficiency was not necessarily indicative of historic proficiency. She accepted his evidence that he had taken an English test prior to coming to the UK, which was in December 2007, and that he had obtained a score of 5.5 in his IELTS test. He had also studied in English at university. One of the modules he studied on his course was English.
4. The judge reminded herself of the discussion in *Majumder and Qadir* [2016] EWCA Civ 1167 and the finding that the generic evidence provided by the respondent was sufficient to discharge the evidential burden such that the burden moved the appellant to raise an innocent explanation. She noted the factors discussed in that case. She noted that, at the time of the alleged deception, the appellant had been applying to extend his student visa. She accepted his evidence that he had in fact failed part of the test taken on 18 July 2012 and reasoned that, if he had used a proxy, he would not have failed. She found this highly persuasive that he had not used a proxy. Looking at the evidence, she found the appellant had established he did not use deception in his English test.
5. The judge moved on to consider whether there was a genuine relationship between the appellant and the sponsor. Again, she found in favour of the appellant. She found the appellant’s was a genuine marriage which was subsisting. She concluded that the appeal should be allowed.
6. The respondent sought permission to appeal on two grounds. Firstly, the grounds argued the judge had failed to provide adequate reasoning in relation to her conclusion that the appellant had not used a proxy. The fact the appellant could recall details of the examination did not show he had taken it personally because the BBC Panorama programme showed students standing next to terminals while proxy test takers took the test for them. The judge had not given adequate reasons for holding that a person who spoke English would have no reason to secure a test certificate by deception. Had the judge properly considered the evidence of deception, she would have reached a different conclusion.

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<sup>1</sup> Paragraph S-LTR.1.6 of Appendix FM of the rules in respect of family life and paragraph 276ADE(1)(i) of the rules in respect of private life.

7. Secondly, the grounds argued that the judge failed to identify compelling circumstances justifying consideration of whether there was a breach of article 8. The judge's proportionality assessment had been coloured by her error in respect of her finding on the use of deception. In any event, there was nothing to prevent the appellant returning to India to apply for the correct entry clearance.
8. Permission to appeal was granted by the First-tier Tribunal in relation to both grounds. A rule 24 response has been provided by the appellant. This argues that the judge's decision was adequately reasoned.
9. In this appeal it was appropriate to deal with the two discrete challenges separately. With respect to the judge's decision that the appellant had not used deception and was therefore not caught by the suitability provisions of the rules, Mr Melvin argued that she had erred in law. In short, he argued that the findings made by the judge and the reasons given were not sufficient. The judge erred by treating the appellant's ability to speak English as determinative.
10. Mr Malik argued that the grounds seeking permission to appeal contained a misstatement of the law. The appellant was not required to put forward an innocent explanation but only to provide a plausible explanation, as explained in paragraph 57 of *SM and Qadir (ETS – Evidence – Burden of Proof)* [2016] UKUT 229 (IAC), citing the earlier decision of *Muhandiramge (Section S-LTR.1.7)* [2015] UKUT 00675 (IAC). In fact, what is stated in that case is that, if there is sufficient evidence to raise an issue as to the existence or non-existence of dishonesty or deception, the spotlight switches to the appellant to see whether he discharges the evidential burden of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility.
11. Mr Malik argued that, in any event, the judge had directed herself correctly in this respect. Furthermore, she had had express regard to the seven factors set out in paragraph 69 of *SM and Qadir*. The Upper Tribunal's approach was approved by the Court of Appeal in *Majumder and Qadir* at paragraph 18.
12. Having considered the matter carefully and having had the assistance of the thoughtful submissions of both representatives, I concluded that the judge's assessment contains no material error of law. She began, in paragraph 8, by noting that it had been established that the generic evidence provided by the Secretary of State in ETS cases was sufficient to discharge the evidential burden so as to require the appellant to establish an innocent explanation. She then carefully analysed the evidence put forward on behalf of the appellant. In doing so, the judge correctly directed herself to have regard to the factors listed by the Court of Appeal, which were drawn from the Upper Tribunal's decision.
13. The judge was plainly entitled to make a positive credibility finding. She recognised the need for caution in relying on the appellant's current level of English as an indicator of whether he had used a proxy five years ago. Nonetheless, when taken in conjunction with the evidence that the appellant had succeeded in English tests prior to coming to the UK and had also studied in the medium of English during his

university career in India, the judge was entitled to ask herself why the appellant have needed to employ a proxy. In the circumstances, she was also entitled to regard the fact that one of the tests had been failed as reducing the likelihood that the appellant had employed proxy.

14. I see no error at all in the judge's assessment that the combination of these matters was more than enough to satisfy the minimum level of plausibility in order to transfer the burden of proof back to the Secretary of State. I am inclined to agree with Mr Malik that, in large part, the grounds seeking permission to appeal amount to a classic disagreement with the decision and fail to show any material error of law.
15. The decision of the First-tier Tribunal that the appellant did not use deception so as to engage the suitability requirements of the rules is preserved.
16. However, the parties were in agreement that the judge's conclusion that, following her finding that the appellant's relationship with the sponsor was genuine and subsisting, the appeal should be allowed under the Immigration Rules was erroneous. It follows that the decision of the First-tier Tribunal to allow the appeal must be set aside.
17. The error appears to have arisen because the judge overlooked the fact that, at the date of application, the sponsor only had limited leave to remain. According to the reasons for refusal letter, her leave to remain as a Tier 1 Entrepreneur expired on 6 November 2017, around one month before the hearing. It is not clear from the decision what the judge found regarding the sponsor's leave. I was told that the sponsor has subsequently obtained an extension of leave "on human rights grounds". Mr Malik was good enough to accept that a grant of discretionary leave would not entitle the appellant in this appeal to succeed under any route provided by the rules.
18. It follows from the above that there is no purpose in remitting the case to the First-tier Tribunal for further findings of fact to be made. There is no reason to disturb the judge's finding that the relationship is genuine and subsisting. However, the sponsor does not have leave which could enable the appellant to satisfy the rules.
19. The focus would then move to whether there were exceptional circumstances such that removing the appellant as a consequence of the decision would amount to a breach of article 8 of the Human Rights Convention notwithstanding the inability of the appellant to satisfy the rules. After taking instructions from his clients, Mr Malik confirmed that there were no exceptional circumstances of this nature. The appeal must fail on article 8 grounds.
20. I therefore substitute a decision dismissing the appellant's appeal on human rights grounds.

### **Notice of Decision**

The Judge of the First-tier Tribunal made a material error of law and her decision allowing the appeal is set aside. The following decision is substituted:

The appellant's appeal is dismissed on human rights grounds.

No anonymity direction is made.

Signed

Date 4 July 2018

**Deputy Upper Tribunal Judge Froom**