



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

Appeal Number: HU/11647/2018

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 7 March 2019**

**Decision & Reasons  
Promulgated  
On 20 March 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FROMM**

**Between**

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

Appellant

**and**

**PUNITKUMAR DASHRATHLAL NAYEE  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer  
For the Respondent: Mr M West, Counsel

**DECISION AND REASONS ON ERROR OF LAW**

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 L K Gibbs, in which she allowed the appeal of Mr Nayee against a decision of the Secretary of State, dated 11 May 2018, 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 Nayee as “the appellant” and the Secretary of State as “the respondent”.

The appellant came to the UK to study. On 11 May 2018 he made a human rights application seeking further leave on the grounds of his private life and family life with his partner, Ms [CN], who is a British citizen (“the sponsor”). The

appellant married the sponsor on 29 October 2012 and had twice been granted leave as a spouse.

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 test-taker at his speaking test held at Portsmouth International College on 17 April 2012. It was noted that, at his interview on 11 May 2018, the appellant had been unable to recall where he took the test and said it had been "in the London area". The appellant's presence in the UK was not considered conducive to the public good. Additionally, there were no insurmountable obstacles to family life continuing in India.

Judge Gibbs noted that the ETS SELT Source Data document submitted by the respondent recorded that the appellant's test was "questionable". She considered this was very significant because, as explained in the generic witness statements relied on by the respondent, this categorisation is not evidence that the test-taker used a proxy. It means the test was "inconclusive" due to "administrative irregularities" at the test centre, where numerous other tests had been invalidated.

At paragraph 13 of her decision, Judge Gibbs noted that Beatson LJ said in *SSHD v Shehzad and Chowdhury* [2016] EWCA Civ 615 that, where the generic evidence was not accompanied by evidence showing that the individual under consideration's test had been invalid, as opposed to questionable, the respondent faced a difficulty in respect of the evidential burden at the initial stage<sup>2</sup>.

Judge Gibbs went on in any event to consider whether the interview record could assist the respondent to discharge the initial burden but she considered it did not. She noted the respondent had not relied on it in the refusal letter other than that the appellant could not remember the exact location of the test. She said,

"I am however satisfied that, some six years later, this is not unreasonable (he knew it was in London) and I am not satisfied that the respondent has discharged the evidential burden that is on him."

She added that she found the appellant to be "a credible witness" because his evidence was consistent with the interview record. She found it "plausible" that he chose the test centre on the advice of his college and she found he was able to describe the nature of the tests taken. She did not give weight to the

---

<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. The former reads that leave to remain will be refused if: "[t]he presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK."

<sup>2</sup> See paragraph 30 of the judgment.

suggestion it was damaging to his credibility that he had been unable to estimate the number of people taking tests that day because it is tricky to estimate numbers and the appellant would have been focused on his test.

The respondent raised a single ground in his application seeking permission to appeal which was that Judge Gibbs arguably made a material error of fact in her assessment of the appellant's credibility because she had assumed the test had been taken in London, failing to notice it had been taken in Portsmouth. The respondent had relied on the test being taken in Portsmouth in the reasons for refusal letter. The First-tier Tribunal granted permission to appeal on this basis.

I heard submissions from the representatives on the question of whether Judge Gibbs's decision should be set aside as a result of the error identified.

Mr Tarlow relied on the grounds summarised above. He said the refusal letter clearly stated the test had been taken in Portsmouth and it was damaging to the appellant's credibility that he suggested he took the test in the London area or "around London".

Mr West replied at length but it is not necessary to set out his submissions in full because I largely agree with them. In my judgment, there is no error of law in Judge Gibbs's decision.

The only error suggested is one of fact. However, there is no evidence to show that Portsmouth International College is in Portsmouth or, at least, not in the London area. The appellant said in his witness statement he took a train from Crawley to London. In other words, he maintained the test was taken in London, albeit he could not remember exactly where in London. It is a simple point that, absent evidence of the college's whereabouts, it has not been shown that Judge Gibbs made a mistake of fact.

In any event, I read the decision of Judge Gibbs as showing that she found no evidence capable of taking the respondent over the initial burden because the test taken by the appellant had not been invalidated by ETS. Rather, the results had been cancelled because it was deemed "questionable". As she noted, that is not sufficient.

It is not entirely clear whether she then considered whether the interview record was sufficiently damaging to the appellant that it was evidence capable of placing a burden on him to provide an innocent explanation. This seems to me doubtful given the absence of accompanying evidence of the college's location. It is clear that her findings in the ensuing paragraphs about the appellant's credibility were made in the alternative and her primary finding was that there was no burden on the appellant.

Even if I were wrong in that analysis and the judge did err by not regarding the interview record as sufficient to place the burden on the appellant, it is clear the judge gave a number of cogent reasons for finding the appellant credible such that he could be considered to have provided a plausible explanation (see

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)). Those findings have not been challenged save for the same point about the whereabouts of the college. For the reason already given, that is a bad point.

Having made sustainable findings on the deception allegation, the judge found the rules were met and that, absent any other considerations, removing the appellant would breach Article 8. In effect, the public interest had been removed. There is no material error in her decision, which is upheld. The appeal of the respondent is dismissed.

### **Notice of Decision**

The Judge of the First-tier Tribunal did not make a material error of law and her decision allowing the appeal on human rights grounds shall stand.

No anonymity direction is made.

Signed

Date 7 March 2019



**Deputy Upper Tribunal Judge Froom**