Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/13407/2016**

THE IMMIGRATION ACTS

Heard at Bradford
On 30 November 2018

Decision & Reasons Promulgated
On 30 January 2019

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE ENTRY CLEARANCE OFFICER

Appellant

and

ASIF ILYAS
(ANONYMITY NOT DIRECTED)

Respondent

Representation:
For the Appellant: Mr R Diwnycz (Senior Home Office Presenting Officer)
For the Respondent: Ms Hashmi (Counsel)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal brought on behalf of the Entry Clearance Officer by the Secretary of State for the Home Department. The appeal is from a decision of First-tier Tribunal Judge Cox (hereinafter "the tribunal") which it made after a hearing of 11 January 2018 and which it sent to the parties on 25 January 2018; whereupon it allowed the claimant's appeal from a decision of the Entry Clearance Officer of 20 April 2016 to refuse to grant him entry clearance to come to the United Kingdom ("UK") with a view to settlement. The appeal is brought with the permission of a Judge of the Upper Tribunal.

2. The claimant, who was born on 28 March 1988, is a national of Pakistan. He is married to his UK based sponsor who is a British citizen. The two are related outside of the marriage in that they are first cousins. The claimant entered the UK lawfully as a student. His leave was due to expire on 18 February 2013. However, he made an application for further leave as a student which was granted up to 25 November 2014. As part of the process of applying for that latter period of leave he had to sit a TOEIC English language test. It is said that he did so in February of 2013. No issue was taken at the time regarding his contention that he took the test himself in accordance with normal rules and formalities. During the period of the claimant's further leave as a student the educational institution he was attending closed down. That prompted him to leave the UK and return to Pakistan which he did on 16 July 2014. On 20 August 2014 the claimant and the sponsor married in Pakistan. On 24 August 2014 the sponsor returned to the UK although the couple spent some further time together in Pakistan between 8 December 2015 and 15 December 2015. The claimant sought entry clearance in order to join his UK based sponsor with a view to settlement but, as noted, such was refused on 20 April 2016.

3. One of the bases for refusal was that the Entry Clearance Officer was satisfied that the claimant had contrived in a significant way to undermine the intentions of the Immigration Rules (see paragraph 320 (11) of the Immigration Rules. The Entry Clearance Officer took that view because of evidence he thought to be persuasive to the effect that in taking his TOEIC English language test in the UK, the claimant had used a proxy test-taker. Additionally, and because of what was thought to be the claimant's dishonesty in that respect, the Entry Clearance Officer also decided that he should be excluded under the suitability requirements of the Immigration Rules contained within section S-EC of Appendix FM; that his relationship with his sponsor was not a genuine and subsisting one; and they did not intend to live together as a couple. The Entry Clearance Officer also decided that the financial eligibility requirements within the Immigration Rules were not met either.

4. As indicated, the appeal was heard by the tribunal on 11 January 2018. Both parties were represented. The claimant, being out of the country, could not attend but his sponsor did do and she gave oral evidence.

5. It is clear from the tribunal's careful written reasons that it recognised a need to consider the situation under the Immigration Rules even though the appeal before it had been brought on human rights grounds under Article 8 of the European Convention on Human Rights (ECHR). As to that, an integral consideration was whether or not the claimant had used a proxy test-taker and, hence, contrived in a significant way to undermine the intentions of the Immigration Rules. As to that discrete but important issue, the tribunal said this:

> "39. The ECO noted that the Appellant had submitted I support of his application for leave to remain in the UK TOEIC certificate from educational testing service (ETS).
>
> The ECO stated:
>
> > "ETS has a record of [the Appellant's] speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of [the Appellant's] test and confirmed to the SSHD that there was significant evidence to conclude

> that [the Appellants] certificate was fraudulently obtained by use of a proxy test taker. [The Appellant's] scores have now been cancelled by ETS"

40. Accordingly, the ECO was satisfied that the Appellant obtained his English language test certificate fraudulently and that he used deception in his application.

41. As to the aggravating factors, the ECO stated

> "In fraudulently obtaining a TOEIC certificate in the manner outlined above, the Appellant willingly participated in what was clearly an organised and serious attempt, given the complicity of the test centre itself, to defraud the SSHD and others."

42. This appeal is one of many that challenges the Respondent's reliance on ETS evidence that test certificates were fraudulently obtained. The background to the litigation is summarised in **SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof [2016] UKUT 229 (IAC)**. I have also considered **SSHD v Shehzad and Chowdhury [2016] EWCA Civ 615**. These cases establish the following principles:

> (i) The Secretary of State must show that there is, on the face of it, evidence of deception (otherwise known as discharging the evidential burden);
>
> (ii) If the Secretary of State clears this hurdle, the burden shifts to the individual to provide a plausible innocent explanation (again, on the face of it);
>
> (iii) If the individual provides such an explanation, then the burden shifts back to the Secretary of State to disprove (aka the legal burden of proving fraud);
>
> (iv) The standard of proof is on balance of probabilities (ie. It must be more likely than not that fraud has taken place); and
>
> (v) Stronger and better quality evidence is required to prove a more serious allegation (see §§ 57 to 60 in Qadir).

43. In support of this appeal, the Respondent provided witness statements from Rebecca Collings and Peter Millington (known as the Respondent's 'generic data evidence' in respect of ETS cases), and extract from the ETS Selt Source data and from the ETS TOEIC test centre Look Up Tool.

44. The Respondent's generic evidence was summarised in **SM & Qadir** at paragraphs 11 and 20 of the upper tribunal [sic] determination. I do not intend to rehearse those passages here, suffice to say that following a panorama programme in February 2014, ETS analysed test results from numerous test centres. ETS devised two categories for those results that they identified as being flawed. Firstly, *ETS described that any test categorised as **cancelled** (which is now known as **invalid**) had the same voice for multiple test takers. ETS were **certain** there was evidence of proxy test taking of impersonation in those cases.* Secondly, there were tests categorised as 'questionable'. In either case, ETS cancelled the test result.

45. I note that in **SM & Qadir**, Dr Harrison identified numerous shortcomings in the voice analysis procedure adopted by ETS (see paragraph 36 of the upper tribunal determination).

46. In **Shehzad**, the Court of Appeal were critical of the Respondent's evidence (paragraph 30 of LJ Beatson's judgment). In particular, LJ Beatson stated that there did not appear to have been any material before the tribunal to show that

Mr Shehzad's TOEIC speaking English test had been adjudged to be "invalid" as opposed to "questionable".

47. In my view, the Respondent's evidence in the present case is different. The Respondent has provided the ETS SELT Source Data extract, which states that the Appellant's speaking test taken at Cauldon College on 20 February 2013 is invalid (annex B of the Respondent's ETS bundle). I also note that in judicial review proceedings, the upper tribunal held that such evidence was sufficient to discharge the respondent's initial burden: **R (app. Nawaz v SSHD (ETS: review standard evidential basis) [2017 UKUT 288**.

48. I am satisfied on the basis of the above evidence that the necessary evidential threshold to require the Appellant to explain the circumstances surrounding the test has been met.

49. The Appellant asserted that he had properly obtained the TOEIC test certificate. He said that he had sat the test in February 2013 and received the certificate a few weeks later. He also stated that he had no reason to obtain a certificate fraudulently as his level of English was sufficient (paragraph 12 of his witness statement). He noted that the degree he had obtained in Pakistan had been taught in both Urdu and English and that when he arrived in the UK, he had no difficulty in conversing and reading and writing in English.

50. However, the presenting officer has not been able to cross examine the Appellant and the Appellant's account lacks detail. For example, he has not explained why he sat the test at Cauldon College. The presenting officer noted that it would have been open to the Appellant to give evidence via Skype or another social media site.

51. On the other hand, the Appellant had been living and studying in the UK for two years before sitting the TOEIC test. He had also obtained a level 5 HND Diploma.

52. In any event, the respondent has not provided me with a statement of report specifically relating to the Appellant explaining in detail why the person listening to the interview and those against which it has been compared believes the recordings to be of the same person rather than different people. I have not been provided with the recordings of the interview or the interviews against which it was recorded. The respondent's generic evidence states that the test is kept for 999 days. As the Appellant's test was taken in February 2013, it would have been destroyed prior to 20 April 2016. The Appellant has therefore never had the chance to have the test assessed.

53. In addition, the statements of Rebecca Collings and Peter Millington do not relate specifically to the Appellant. Professor French does not rule out that the listening assessment could be flawed.

54. Further, the Project Façade report does not relate specifically to the Appellant. Significantly the repost stated that there is an ongoing criminal investigation, but the report is over two years old and there is nothing to suggest that anyone from the college has been charged, let alone convicted of an offence.

55. In my view, the final factor that tips the balance in the Appellant's favour is his good immigration history. The Appellant returned to Pakistan after his college closed, and this was before the Home Office decided to revoke his leave to remain in the UK. In my view, this goes to the Appellant credit [sic] and is indicative of a good character.

> 56. On the totality of the evidence and, on balance, I find that the Respondent failed to discharge the burden of proof. The Respondent has not satisfied me that the Appellant did not attend the test centre of that he fraudulently obtained a TOEIC test certificate. Accordingly, I am not satisfied that the Appellant's general credibility has been undermined."

6. The tribunal then went on to explain why it thought all the other relevant requirements of the Immigration Rules had been met. It then conducted an assessment of the Article 8 position, applying the 5-fold test set out in the well-known case of *Razgar v SSHD* (2004) UKHL 27. That assessment was informed by its view that the Immigration Rules were met. The tribunal said this:

> "69. On the totality of the evidence, I am satisfied that there is a potential family life between the Appellant and the Sponsor that ought to be respected.
>
> 70. Moreover, given the low threshold, I am satisfied in response to question (2) that the interference arising from the decision to refuse the Appellant leave to enter the UK will potentially have consequences of such gravity as to engage the operation of Article 8. In my view, the decision may interfere with the development of their family life.
>
> 71. The refusals are in accordance with the law (question (3)). In relation to questions 4 & 5, I believe that they ought to be considered together and I have to consider whether an interference with the person's right to respect for private and family life is justified under Article 8(2) (the public interest question, s117A(3) of the 2002 Act). In considering the public interest it is for me to balance the Respondent's interests in maintaining the economic wellbeing of the country against the Appellant and the Sponsor's right to respect of their family life.
>
> 72. Ultimately, the question for me to determine is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test: paragraph 60 of **R (Agyarko v SSHD; R (Ikuga) v SSHD [2017] UKSC 11**.
>
> 73. When assessing proportionality, my starting point is whether the Appellant meets the immigration rules: Lord Reed's paragraphs 39 to 43 of **Hesham Ali v SSHD [2016] UKSC 60 [2016 1 WLR 4799**.
>
> 74. Accordingly, I now consider whether the Appellant meets the requirements of the rules. For the reasons set out above, I have concluded that the Respondent has not satisfied me that the Appellant falls to be refused under paragraph 320(11) of the immigration rules of the suitability requirements of Appendix FM.
>
> 75. I have also found that there is a family life between the Appellant and the Sponsor. Accordingly, I also find that thee couple are in a genuine and subsisting relationship and that they intend to live together as husband and wife. I am satisfied that the Appellant meets the relationship requirements of Appendix FM.
>
> 76. Therefore, the outstanding issue is whether the Appellant meets the financial eligibility requirements of the rules. The ECO accepted that the Sponsor is exempt from meeting the requirement of paragraph E-ECP.3.1. Instead the Appellant must show that the couple can be maintained and accommodated adequately without recourse to public funds: E-ECP.3.3(b).
>
> 77. The ECO noted that the level of income support for a couple over the age of 18 is £114.85 per week. The ECO also noted that the Sponsor was receiving £62.10 per week in Carers Allowance and that the Appellant stated that the Sponsor earned £80.40 per week working part time for Salaam Foods.

78. The ECO stated that a search on Google Street View highlighted that the business at the stated address is a convenience store named Nisa Local. Further, an officer had attempted to contact the Sponsor's employer by telephone several times on the number provided in the employer's letter, but nobody answered the telephone.

79. The ECO acknowledged that the Sponsor's Santander bank statement shows payments consistent with the standard format payslips provided under reference 'SALAAM FOODS'. However, the ECO asserted that it is not difficult with an online banking for someone to allocate a reference when making a payment, especially as the payments are "faster payments" which are simply online transfers, rather than BACS.

80. The ECO also acknowledged that Home Office checks with HMRC confirmed that income tax is being paid at the rate of pay stated in the visa application, but also stated this is not difficult to arrange. The ECO concluded that in light of the Appellant's general credibility and the issues identified above, the Appellant had failed to demonstrate that the Sponsor was employed as claimed by Salaam Foods and was not satisfied that the couple were able to maintain and accommodate themselves adequately in the UK without recourse to public funds.

81. The Appellant provided a letter from the owner of Salaam Foods, dated 16 December 2015 (page 271 of the Appellant's bundle). The business address recoded on the letter is 660 Huddersfield Road, whereas the ECO searched for 7 Fir Road. The Sponsor noted that here is a Nisa Local convenience store at 708 Huddersfield Road, which is 200 metres away from Salaam Foods. She provided extracts from Google maps which show the respective addresses. The presenting officer did not challenge this aspect of the Sponsor's evidence.

82. The Sponsor also noted that it was not unusual for the shop to ignore phone calls. She explained that when they were busy dealing with customers, they would simply not have time to pick up the telephone.

83. As noted by the ECO, the Appellant provided payslips and bank statements that were consistent with each other and that checks with HMRC confirmed that the Sponsor was paying tax on the income. Overall, I have no reason to doubt the Sponsor's account of her employment at the date of the application.

84. However, the Sponsor's circumstances have changed. Since 1 March 2016 the Sponsor has been employed as a cleaner for A1 Osset and Amber Cars. The Sponsor told me that she works for the company Monday to Saturday from 6 to 8 am. The Sponsor told me that whilst she is working, her grandmother is usually asleep. If she does wake, the Sponsor's mother will help until the Sponsor returns from work.

85. The Sponsor provided wage slips for the company (pages 285 to 300 of the Appellant's original bundle and pages 7 to 12 of the Appellant supplementary bundle). The Sponsor also provided her P60 for the tax year ending March 2017 (page 301 of the Appellant's original bundle).

86. In addition, the Sponsor's bank statements show credits of "A1 OSSETT HORBU" of £390 at the end of every month (for example on 30/11/2017 at page 22 of the Appellant's supplementary bundle).

87. On the totality of the evidence I am satisfied that since May 2015 the Sponsor has been in receipt of a total weekly income of between £140 and £150. Her income is more than a couple would receive on benefit. Accordingly, I am satisfied that the couple can be maintained and accommodate adequately without recourse to public funds. I find that the Appellant met the financial

> requirements of Appendix FM and that he met all the requirement s for entry clearance as a partner.
>
> 88. However, this is not determinative of the appeal. In **Secretary of State for the Home Department v SS (Congo) [2015] EWCA Civ 387** the Court of Appeal drew a distinction between in -country cases and overseas cases. The Court stated that the immigration rules are more than a mere starting point (paragraph 32), but in overseas cases there is a greater margin of appreciation afforded to the Respondent.
>
> 89. In accordance with section 117A of the 2002 Act, I confirm that, when considering the public interest question, I have also had regard to the factors listed in section 117B (2) – (5) of the Act. I am satisfied that none of the factors apply to the Appellant.
>
> 90. I am also satisfied that as the Sponsor is her grandmother's primary carer, she cannot reasonably be expected to live in Pakistan.
>
> 91. Further, section 117B (1) of the 2002 Act as amended states that the maintenance of effective immigration control is in the public interest. In my view 'effective immigration control' includes recognising that those individuals who meet the requirements of the rules ought to be allowed to enter the UK. Especially as *"the rules are statements of the practice to be followed, which are approved by Parliament, and are based on the Secretary of State's policy as to how individual rights under article 8 should be balanced against the competing public interests" (paragraph 46 of* **R (Agyarko)**).
>
> 92. On balance, I am satisfied that the proposed interference with the Appellant and the Sponsor's family life is unnecessary and disproportionate. Their rights outweigh the Respondent's legitimate interests in ensuring economic and social order, whilst maintaining a coherent system of immigration control. I have attached significant weight to my finding that the Appellant meets the requirements for entry clearance as a partner".

7. That is why the appeal succeeded. However, that was not the end of the matter because the Secretary of State on behalf of the Entry Clearance Officer applied for and obtained permission to appeal to the Upper Tribunal. The primary contention made in the grounds of appeal was that the tribunal had failed to adequately explain its view that the claimant had not used a proxy test-taker and in particular, with respect to that assessment, had failed to remind itself that even a person who has no need to rely upon fraud because his level of English is sufficient, might still have other reasons for using a proxy. As to the Article 8 assessment, it was contended that it was an unsafe assessment because the fraud finding which had informed it had been unsafe; that the tribunal had wrongly directed itself that Article 8 was concerned with the "development" of family life rather than with protecting existing family life; and that the tribunal had failed to identify "adequately compelling circumstances" such as to justify its conclusion that the decision under appeal before it constituted a disproportionate interference with Article 8 rights.

8. The Judge who granted permission to appeal said this:

> "Arguably, following *MA (ETS-TOEIC testing)* [2016] UKUT 450 (IAC), the judge needed to consider other reasons why someone might choose to take a test by proxy, before accepting that his English language skills made this unnecessary".

9. Permission having been granted, the matter was listed for a hearing before the Upper Tribunal (before me) so that consideration could be given as to whether or not the tribunal had erred in law and, if so, what should flow from that. Representation at that hearing was as stated above and I am grateful to each representative.

10. Mr Diwnycz relied upon the written grounds and did not seek to materially add to them. Having heard from him I was able to indicate to Miss Hashmi that I need not trouble her. I have decided that the tribunal did not err in law. That has the consequence that its decision shall stand. I shall now explain why I have decided that there was no error of law.

11. As to the tribunal's assessment with respect to the fraud issue, I have set it out above. It is, in my judgment, a careful and comprehensive assessment encompassing, as it does, an evaluation of the evidence relied upon by the Secretary of State and a view, which was relevant, as to the claimant's general credibility (see paragraph 55 of the written reasons). It is true that the tribunal did not specifically remind itself, as was indeed noted in *MA* cited above, that even a person who is competent in English might have a motive unrelated to that competence for using a proxy. But the view that the claimant had sufficient competence in English not to use a proxy was not a matter which the tribunal relied upon or, at least, one which it relied upon to a significant extent. It is true that is said, at paragraph 49 of its written reasons, that it was part of the claimant's case that, for that reason, he would not have to use a proxy but it did not then go on to indicate that that had been a factor in its actual conclusion that one had not been used. Once that is realised then it seems to me that the point loses all force. Additionally and in any event, it is really a matter of common sense that even a competent claimant might wish to use a proxy, and there is nothing in the tribunal's reasoning to suggest that it lost sight of that or overlooked it. But the key point is that this whole issue was not a significant one with respect to its reasoning.

12. Turning then to the various other contentions in the grounds with regard to the Article 8 assessment, since I have decided the tribunal did not err with respect to its paragraph 320(11) conclusions, it cannot be said that its Article 8 assessment was tainted in the manner suggested in the grounds. As to the question of Article 8 being engaged at all, I did find it odd that the tribunal talked in terms of "potential family life" (see paragraph 69 of the written reasons) but I think it must have been deciding, in context, that given the fact of the marriage and subsequent visit to Pakistan on the part of the Sponsor, there was actual family life. That finding and its related conclusion that Article 8 was engaged was, on the facts and in the circumstances of the case, open to it. As to the tribunal's proportionality assessment, it was a significant consideration that it had concluded that the requirements of the Immigration Rules were met. Its ultimate conclusion as to proportionality was, again, open to it. I did wonder whether I should be concerned about the tribunal's comment at paragraph 70 of its written reasons to the effect that the threshold for the engagement of Article 8 is "low". In *AG Eritrea v SSHD (2007) EWCA Civ 801* it was said that the threshold was not a "specially high one". That does not necessarily mean that it is low. So, it is possible that the tribunal was setting the bar too low but it is, nevertheless, apparent that it would have reached the same view as to engagement had it not done so given all of its other findings.

13. For the above reasons this appeal to the Upper Tribunal is dismissed.

Decision

14. The decision of the First-tier Tribunal did not involve the making of an error of law. It follows that that decision shall stand.

    I may make no anonymity direction. None was sought.

M R Hemingway
Judge of the Upper Tribunal
16 January 2019

To the Respondent
Fee award

I make no fee award.

M R Hemingway
Judge of the Upper Tribunal
16 January 2019