Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/04563/2019
HU/04566/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th September 2021	**On 05th May 2022**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

AMARVEERPAL KAUR
SUMANDEEP SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr J A Trussler of Counsel, instructed by JML Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. In a decision promulgated on 15 July 2021 (annexed to this decision), I found an error of law in the decision of First-tier Tribunal Judge Fox promulgated on 5 September 2019 in which the Appellants' appeals against the Respondent's decision to refuse their human rights claims dated 31 January 2019 were dismissed. This is the re-making of the Appellants' appeals on a de novo basis.

2. The Appellants are Indian nationals who are husband and wife. The First Appellant, born on 15 July 1988, entered the United Kingdom on 23 January 2011 with leave to enter and remain as a Tier 4 (General) Student to 30 May 2012 and extended to 31 August 2014. An application was made on the same basis on 29 May 2014 which was withdrawn, with a further application being made on 19 August 2014. The Respondent refused that application on 14 September 2015 and the appeal against that refusal was ultimately unsuccessful. On 5 March 2018, the Appellants' applied for leave to remain on the basis of their private and family life in the United Kingdom.

3. The Second Appellant is a dependent of the First Appellant, with essentially the same immigration history as such. Although it was initially accepted that the outcome of his appeal was dependent on the outcome of the First Appellant's appeal; at the hearing before me it was submitted that there is now separate reliance on his right to respect for private and family life pursuant to Article 8 of the European Convention on Human Rights and in particular his relationship with his daughter who is now a British Citizen.

Respondent's reasons for refusal

4. The Respondent refused the application for the following reasons. First, the Appellants did not meet any of the requirements of Appendix FM of the Immigration Rules for a grant of leave to remain on the basis of family life as the whole family are Indian nationals. Secondly, the First Appellant's application was refused on suitability grounds on the basis that she had previously submitted a false TOIEC English language test certificate from ETS with her application for leave to remain on 19 May 2012. The First Appellant's test results had been invalidated on the basis that a proxy test taker had been used. The Respondent noted that of the tests taken on 28 March 2012, the Premier Language Training Centre had 52% of the results invalidated and the remainder were questionable; and overall at that test centre, 75% of over 5000 tests taken were deemed invalid. The Respondent did not consider that the Premier Language Training Centre was operating under genuine test conditions at the date of the First Appellant's test. The Respondent concluded that the First Appellant had used deception in her application dated 19 May 2012 and refused the application under paragraph S-LTR 4.2 of the Immigration Rules.

5. In support of the decision, the Respondent in this appeal relies on generic information as to ETS testing as well as specific reports in relation to the Premier Language Training Centre.

6. Thirdly, the requirements of paragraph 276ADE of the Immigration Rules for a grant of leave to remain on private life grounds were not met as the Appellants had not lived in the United Kingdom for the required period, nor were there very significant obstacles to their reintegration in India where they had spent the majority of their lives, where they have family and

where they have retained familiarity with language, environment and culture.

7. Finally, the Respondent considered whether there were any exceptional circumstances to warrant a grant of leave to remain but concluded that there were not. This included consideration of the Appellants' daughter who was born in the United Kingdom on 15 December 2015.

The Appellants' evidence

8. In her written statement signed and dated 17 April 2019, the First Appellant set out her immigration history, including her application for further leave to remain made on 19 August 2014 to study at the London College of Finance and Accounting, who had a Highly Trusted Sponsor Licence. However, the First Appellant's CAS had been withdrawn by the college before the application was decided because the college had been bullied by the Home Office to terminate her admission. The First Appellant had commenced her studies on the basis of the Home Office guidance that if she switched to studying at a Tier 4 sponsor that held Highly Trusted status, study could be commenced pending the outcome of the further application for leave to remain submitted at the time a person had extant leave. The First Appellant states that in these circumstances she had a legitimate expectation of being granted further leave and should have been given an opportunity to vary her application to find another suitable college. The Respondent's refusal letter only stated that the college's status was checked and it was not licensed at that date, but the First Appellant was given no warning of this beforehand. At the date of the statement, the First Appellant was unable to enrol at any other college due to her immigration status.

9. The First Appellant's entry clearance was to study at Ethames College, with leave valid to 30 May 2012. To extend her studies and leave to remain, the First Appellant needed a new CAS, for which an English language test certificate was required. There were no available dates for the IELTS test. The First Appellant's principal at Citizen College advised her of available dates for the test at the Premier Language Training Centre, which they would book for her, give her training and the fees for this would be included in tuition fees for her future course. The test was booked for 28 March 2012 and the First Appellant was advised to be present on this date at the college venue, the Premium Language Training Centre.

10. On arrival, the First Appellant's photograph was taken and details registered. She was held in a waiting area and then taken to one test room and assigned a desk amongst many other students. Each test was 30-45 minutes, with a 10-15 minute break between each one; with the speaking test lasting for 20-30 minutes. There was a centre examiner supervising all the tests. The First Appellant undertook the tests herself, without using a proxy test taker, at an approved test centre.

11. The First Appellant subsequently took and passed an IELTS test, which shows her competence in English.

12. In her written statement signed and dated 17 August 2021, the First Appellant maintained that she did not use deception in her English language test and that she still wishes to pursue a post-graduate qualification in the United Kingdom and work to support herself and pay back the losses her family has incurred for her education and litigation in the United Kingdom.

13. The First Appellant attended the oral hearing, adopted her written statements and gave evidence initially in English but then in Punjabi using a court appointed interpreter. The First Appellant confirmed that she has two children in the United Kingdom, the eldest of whom is a British Citizen.

14. Prior to her TOIEC test, the First Appellant had undertaken a diploma in Strategic Leadership and Management but had not completed the course as the college had lost its sponsor's licence. Her qualifications in English in India included a PGDC, a post-graduate diploma in computing or computer application.

15. The First Appellant did not complete her original course started in the United Kingdom because her visa was due to expire when she still had two assignments outstanding but the fees for her first college were high so she switched to a second college with lower fees and started the same course again from the beginning, unable to use the assignments already completed. The First Appellant did not complete this course as the college's sponsor licence was revoked, a matter she knew of because when she returned after the Easter break, the college was no longer there. The First Appellant did not speak to the Respondent about this at the time as she still had leave to remain for a few months and instead started to look for another college. She was not aware that she should have contacted the Respondent about her change of circumstances, she learned things from friends and was frightened and anxious at the time.

16. The First Appellant confirmed her details on the look up tool in relation to her English language test and those were the results she submitted to the Respondent with an earlier application for leave to remain. The First Appellant went to the test centre herself, attending once to do all of the tests on the same day in March 2014. She could not remember how long the journey to the test centre took, but she travelled there with one bus and two tubes.

17. The Premier Language Test Centre was chosen with assistance from the principal at the second college the Appellant attended, Citizen 2000, who made the arrangements. There was some link or connection between Citizen 2000 and the Premier Language Test Centre but the First Appellant did not know precisely what it was and did not ask about it at the time. The First Appellant studied at Citizen 2000 from May 2012 to April 2014 when the college closed, during which time she completed one semester

and had started the second semester with a few remaining assignments to complete.

18. The First Appellant was asked about the specific language tests taken. She stated that the speaking test was maybe 20-30 minutes, the reading one hour, the writing one hour and listening 40-45 minutes, possibly 50 minutes long. The speaking test involved the teacher asking questions for the First Appellant to answer but she could not remember the topics or questions asked. All the preparation for the tests was undertaken at home, the First Appellant came from an educated family and did not have to do a lot of preparation, it was not that challenging for her. She did some mock tests on the internet. The First Appellant's English was good in India and her speaking and listening improved in the United Kingdom.

19. In the future, the First Appellant wishes to complete her last study. To do so she needs to sit a fresh English language test and find a new college. The First Appellant had previously taken a test in India for her entry clearance and an IELTS test in the United Kingdom with good results, but that has expired.

20. The Appellants are in touch with their family in India. The First Appellant's father has property in India and she did not have to work there, he did all the work although is now retired. The Second Appellant worked as a farmer in India, he has a BA degree and financial support from his family in India as the need arises.

21. The Appellants' children understand Punjabi when explained to them, but not normal Punjabi. The children have not yet met their family in India but communicate with them through *whatsapp*. The eldest child is now in year 2 at primary school and was home schooled during the pandemic.

22. In re-examination, the First Appellant confirmed details of her two children and in relation to the English language test, stated that she was scanned on arrival, there was a long queue and she had to produce her passport and ID. People were called in one by one with one teacher in a room who checked their ID, in India, people working in such centres are called teachers. In the room, there was a chair and table with gaps between the tables, sometimes with ten or twelve students in each line, all facing the same way. The speaking test was in a small room with one person and one teacher.

23. There was no written statement from the Second Appellant and he did not attend the oral hearing or give oral evidence in support of the appeals.

24. The documentary evidence relied upon by the Appellants included the following. A CAS which was assigned for the First Appellant on 6 December 2010 by Ethames Graduate School to study an Extended Diploma in Strategic Management and Leadership between 24 January 2011 and 30 January 2012. A letter confirmed the First Appellant's enrolment.

25. There are two TOIEC test official score reports for the First Appellant, one with a test date of 28 March 2012 showing a speaking score of 200 and a writing score of 190; and one with a test date of 30 March 2012 showing a listening score of 455 and a reading score of 420.

26. A CAS which was assigned for the First Appellant on 18 May 2012 by Citizen 2000 Education Institute for a NQF level 7 course in Strategic Leadership and Management which referred to an ETS language test and prior education in India as well as a level 6 Advanced Diploma in Business Management from Regent International Graduate School. A letter from Citizen 2000 confirms that the First Appellant commenced studying there on 18 May 2012 with the course due to end on 30 April 2014 and two invoices for course fees are available.

27. An IELTS test certificate dated 30 July 2014, confirming the First Appellant's overall score of 5.5 in a test taken on 19 July 2014.

28. The Appellants' daughters certificate of registration as a British Citizen dated 7 May 2021 and a copy of her British passport. There is letter from the Appellants' daughter's school confirming her attendance since September 2019 and details from her early years book.

Submissions on behalf of the Respondent

29. On behalf of the Respondent, Ms Cunha relied on the reasons for refusal letter dated 31 January 2019, maintaining that the TOIEC test taken by the First Appellant on 28 March 2012 and submitted with her application for leave to remain on 19 May 2012 was completed by a proxy test taker and not the First Appellant which amounts to deception and was material to the application made. On the facts, the Respondent has discharged the evidential burden by reference to the generic evidence on ETS and the look up tool showing the First Appellant's results have been invalidated as well as the overall number of tests invalidated at the Premier Language Training Centre.

30. The First Appellant has not provided an innocent explanation in response to the allegation and has not shown that she undertook the test rather than a proxy being used. The First Appellant has failed to explain why she did the test based on advice from the principal of a college where she later studied when already studying at a college and discrepancies in her evidence mean that it should be given little weight. No proper reason has been given for choosing that test centre and there is a lack of detail in the First Appellant's evidence about the test centre itself and what happened on the day. Her evidence was confused as to whether there were other people in the room or a single person with a teacher. Further, it was submitted that the First Appellant's unwillingness to interact with the Home Office about the revocation of a sponsor's licence damages her credibility and shows a propensity to not be completely honest or forthcoming in her dealings with the Respondent.

31. For these reasons, it is submitted that the First Appellant can not meet the suitability requirement for a grant of leave to remain and her evidence that her English was sufficient is not enough to show that she undertook the test herself, given that even those fluent in English may still have reason to use a proxy test taker.

32. The First Appellant has never completed a course of study in the United Kingdom and her current intention to study is vague at best, stating that she wanted to study computer science but also to finish her original studies in Strategic and Business Management. Ms Cunha submitted that the First Appellant had not demonstrated any commitment to studying and simply wanted to remain in the United Kingdom.

33. In relation to the Appellants' private and family life, although the First Appellant asserted that they have no assets or support in India, she confirmed in evidence that both her and the Second Appellant have family support in India. Further, the Appellants have accessed education and health services in the United Kingdom without entitlement to do so. The Appellants have been living in the United Kingdom precariously since 2011. The Appellants' two children can access education in India and whilst it is acknowledged that one child is a British Citizen, it would be in the children's best interests to return to India with their parents and wider family support. Overall, there is a strong interest in immigration control and the removal of the family would not be disproportionate.

Submissions on behalf of the Appellants

34. On behalf of the Appellants, Mr Trussler submitted that the First Appellant did give evidence to explain her choice of test centre and there were no inconsistencies in her evidence about what happened at the test centre, her evidence was simply on different parts of the test. The evidence was in relation to events that happened around nine years ago and there has been no real challenge in cross-examination to the account given. The First Appellant was not required to tell the Respondent of her own decision about revocation which of course the Respondent was already aware of.

35. Overall, it is accepted that the Respondent just satisfies the initial evidential burden in relation to deception; but that the First Appellant has provided an innocent explanation and the overall legal burden has not been satisfied. Mr Trussler accepted that the First Appellant's English language ability at the time is not determinative of whether she took the test herself, but there is evidence of her background and studies in English that are relevant to take into account.

36. The focus of the Appellants' human rights claim is now on the basis that their eldest child is a British Citizen and even if the First Appellant used deception in her earlier application relying on a false TOIEC test; removal would be disproportionate as it cannot be proportionate to compel a British Citizen child to leave the United Kingdom or to split the family.

Findings and reasons

37. The first issue to determine in this appeal is whether the First Appellant used deception in her English language test as relevant to the suitability criteria in the Immigration Rules. The relevant burden and standard of proof is set out in such cases in Shen (Paper Appeals: Proving Dishonesty) [2014] UKUT 236 (IAC), albeit as clarified in DK & RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 IAC (that it is inaccurate to describe the legal burden as shifting, as it remains throughout on the Respondent), as follows:

> *(a) First, where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue: for example, by producing the completed application which is prima facie deceitful in some fashion.*
>
> *(b) The spotlight thereby switches to the applicant. If he discharges the burden – again, an evidential one – of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.*
>
> *(c) Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's prima facie innocent explanation is to be rejected.*

38. In the present appeal, there is no dispute by the Appellants that the Respondent has met the first evidential issue, establishing a *prima facie* case of deception. That is consistent with the findings in the test cases on ETS English language tests (including the latest assessment in DK and RK and the generic evidence relied upon by the Respondent. The focus then switches to the First Appellant in this case, whose innocent explanation is in essence that she attended the tests and undertook them herself, without using a proxy test taker and had no need to cheat when she had sufficient English language skills.

39. A significant part of the First Appellant's evidence is internally consistent as to the taking of the English language test and the level of detail available is what one may expect a significant number of years after the event. There are minor inconsistencies in the First Appellant's evidence as to what happened at the tests themselves, for example, how long the test for each component was, but not significant enough of itself to undermine the explanation given as a whole. The First Appellant's evidence of other English language tests, either in India before her arrival in the United Kingdom or the IELTS test later in the United Kingdom are relatively neutral factors in determining whether deception was used in the ETS test.

40. There is however one part of the First Appellant's evidence to which I give significant weight and which fundamentally undermines the innocent explanation she has given in support of her appeal. In her evidence, in both of the two written statements and orally, the First Appellant repeatedly stated that she attended the Premier Language Test Centre on a single date in March 2014 and undertook all four components of the English language test on that date. However, the First Appellant's test certificate clearly shows two separate test dates (as was normal for ETS tests), 28 and 30 March 2014, with speaking and writing being assessed on the first date and listening and reading being assessed on the second date. The First Appellant's evidence that she attended only once is wholly inconsistent with the documentary evidence of the test and undermines her assertion that she undertook all of the tests herself. If she was only there on one occasion as consistently claimed, she can not possibly have undertaken all four components herself as two were tested on one date and the other two on a separate date. This is sufficient to find that the First Appellant has not given credible evidence about taking her English language test and has not met the requirement to give an innocent explanation to the minimum level of plausibility.

41. In these circumstances, there is no strict need for the final question to be established by the Respondent for deception. I find that the First Appellant used deception in her English language test in 2014 and relied upon a false ETS language certificate in her application for leave to remain. In any event, for the reasons already given, the Respondent would have satisfied the legal burden to establish deception in this case on the balance of probabilities.

42. The second issue to determine in this appeal is whether the Appellants' removal from the United Kingdom would be a disproportionate interference with their right to respect for family and private life contrary to Article 8 of the European Convention on Human Rights. The appeal has been determined in accordance with the five stage approach set out in Razgar v Secretary of State for the Home Department [2004] UKHL 27. There has been no submission on behalf of the Appellants that either of them satisfy any of the requirements of the Immigration Rules, either under paragraph 276ADE (for example, no very significant obstacles to reintegration have been identified or relied upon by the Appellants) or Appendix FM for a grant of leave to remain and additionally, the First Appellant would fall for refusal on suitability grounds due to her use of deception.

43. In terms of family life, the Appellants would be removed to India with their children as a family unit and there would therefore be no interference with their family life per se. On behalf of the Appellants, Counsel suggested that there was a risk in this case of the family being split, but no basis for the assertion was given and it was not identified what split between family members could occur beyond the suggestion that the Appellants' daughter could not be compelled to leave the United Kingdom.

44. In terms of private life, the Appellants have submitted very little evidence of any substantive private life established in the United Kingdom. It can be inferred that the First Appellant has established some degree of private life here through her studies up until 2014 and generally in living here for many years, but no reliance has been placed on any specific private life in the United Kingdom. The Second Appellant has not submitted any evidence at all in support of his appeal, there is no written statement, no documentary evidence and he did not attend the appeal or give oral evidence. There is therefore absolutely nothing supporting his claim to have established any significant private life in the United Kingdom.

45. Although not appellants in this appeal, it is relevant that the Appellants have two children in the United Kingdom whose best interests need to be taken into account as a primary consideration. In so doing, I take into account the factors set out, *inter alia,* in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4; Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 and EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 854.

46. The eldest child, born in 2015, is a British citizen (on account of an application for the same by the Appellants on the basis that she was stateless, having not been registered with the Indian authorities and contrary to the statement that she was an Indian national in the latest application for leave to remain) and in primary education in the United Kingdom. In the Appellants' application form for leave to remain it was said that she is familiar with English and Punjabi, albeit in oral evidence the First Appellant stated that sometimes she understands Punjabi when explained but not normal Punjabi. There is nothing to suggest any medical problems. The Appellants' daughter has not been to India but is in contact with extended family members there through her parents.

47. I find that the best interests of the Appellants' daughter are, in the first instance, to remain with her parents within the family unit. On balance, it is also in her best interests to remain in the United Kingdom where she can take full advantage of her British citizenship and to continue her education, albeit so far only at primary level. However, there is nothing to suggest that the Appellants' daughter would not continue to be properly cared for and educated in India with her parents, and where she has extended family members.

48. The First Appellant stated in oral evidence only that the Appellants also have a son, but no other information about him was submitted at all, documentary or from the witnesses. There is no evidence about how old he is (other than that he is the younger sibling and presumably born after the latest application for leave to remain as he was not referred to in it), his date of birth, let alone a birth certificate; his nationality; familiarity with languages or any other information at all. On such limited evidence that is before me, it can only be found that this child's best interests are to remain with his parents as a family unit and there is no basis to suggest

that his best interests are to remain with them in the United Kingdom as opposed to returning with them to India.

49. The Appellants' removal to India would constitute a significant interference with their right to respect for private life established in the United Kingdom but would be in accordance with the law as they do not meet any of the requirements for a grant of leave to remain and in the interests of maintaining immigration control, particularly where the First Appellant has used deception when seeking to remain in the United Kingdom. The final question is whether the Appellants' removal would be a disproportionate interference with their right to respect for private and family life.

50. In undertaking the proportionality assessment, I take into account the public interest considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002. In relation to the public interest, the maintenance of immigration control is in the public interest and of particular importance in the First Appellant's case given her use of deception in a previous application for leave to remain based on a false English language test. I accept that despite the First Appellant's deception, she does have some familiarity with English having given her evidence in part in English and therefore for her, this is a neutral factor. There is no evidence of the Second Appellant being able to speak English. Also in relation to the public interest, little weight is to be given to the Appellants' private life established initially at a time when their immigration status was precarious (with leave to remain as a student/dependent up to 2014) and to any private life established since their leave to remain expired when they were both here unlawfully. Overall, there is a very strong public interest in the Appellants' removal from the United Kingdom, particularly in relation to the First Appellant.

51. Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 however states that the public interest does not require a person's removal where they have a genuine and subsisting relation with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. In the present case, both Appellants have a genuine and subsisting relationship with their daughter who is a qualifying child by reason of her British citizenship. The question is whether it would be reasonable to expect her to leave the United Kingdom, in circumstances where neither parent has any right to remain in the United Kingdom.

52. The test is as set out by the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 as follows:

> *"16. It is natural to begin with a first in time, that is paragraph 276ADE(1)(iv). This paragraph is directed solely to the position of the child. Unlike its predecessor DB 5/96 it contains no requirement to consider the criminality or misconduct of a parent of the balancing factor. It is impossible my view to read it is importing such a requirement by implication.*

17. As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I refer that it was intended have the same effect. The question again is what is "reasonable" for the child. As Eliza LJ said in MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705, [2016] one WLR 5093, Paris 36, there is nothing in this subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Subsection 117B(6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. List of relevant factors set out in the IDI guidance (para 10 above) seems to be wholly appropriate and sounding law, in the context of section 117B(6) as of paragraph 276ADE(1) (iv).

18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider whether parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to there ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well expressed by Lord Boyd in SA (Bangladesh) v Secretary of State for the Home Department 2017 SLT 1245:

> *"22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this second only be one answer: 'because the parents have no right to remain in the UK'. To approach the question any other way strips away the context in which the assessment of reasonableness is being made …"*

19. He noted (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 854, para 58:

> *"58. In my judgement, therefore, the assessment of the best interests of the children must be made on the basis of the facts as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child*

> *to follow parent with no right to remain to the country of origin?"*
>
> *To the extent that Elias LJ may have suggested otherwise in MA (Pakistan) para 40, I would respectfully disagree. There is nothing in the section to suggest that "reasonableness" is to be considered otherwise than in the real world in which the children find themselves."*

53. In the present case, Counsel for the Appellants suggested that their daughters' British citizenship was essentially a trump card and it would not for that reason alone be reasonable to expect their daughter to leave the United Kingdom. However, whilst the Appellants' daughters' British citizenship is a weighty factor, it is not a determinative one in the assessment of what is reasonable to expect. In all of the circumstances of this case, I find that it is reasonable to expect the Appellants' daughter (and their son, albeit there is nothing to suggest that he is a qualifying child for these purposes) to return to India with them, such that section 117B(6) of the Nationality, Immigration and Asylum Act 2002 does not assist them in their appeals. I have given significant weight to the Appellants' daughters' British citizenship in reaching this conclusion but have also taken into account the real world background of this case, which includes that the Appellants have no right to remain in the United Kingdom; and that there is nothing to indicate that they could not return to India as a family unit and provide for their daughters' education and welfare there, a country in which she understands local languages and where she has extended family.

54. In the final balancing exercise, I take into account on the one hand the very significant public interest in the Appellants' removal from the United Kingdom, neither of whom have had any leave to remain in the United Kingdom since 2014 and one of whom has been found to have used deception in a previous application for leave to remain. One the Appellants' side of the balancing exercise, little weight can be attached to their private life established in the United Kingdom, which in any event there is little, if any evidence of anything significant or of substance here that could not be re-established on their return to India, where they have extended family who have supported them in the past and where they continue to have cultural and linguistic ties. The best interests of the Appellants' daughter are primarily to remain within the family unit and as a secondary matter, are better served in the United Kingdom to allow the full benefits of her citizenship and their son's interests are to remain with the family. Overall in this case, the public interest very clearly outweighs Appellants' private life established in the United Kingdom and their removal is not a disproportionate interference with their Article 8 rights. For these reasons, the appeals are dismissed.

Notice of Decision

For the reasons set out previously, the making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it was necessary to set aside the decision.

The appeals are remade as follows:

The appeals are dismissed on human rights grounds.

No anonymity direction is made.

Signed G Jackson Date 26th April 2022

Upper Tribunal Judge Jackson

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/04563/2019(V)
HU/04566/2019(V)

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THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

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Representation:
For the Appellants: Mr J Trussler of Counsel, instructed by JML Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. A face to face hearing was not held to take precautions against the spread of Covid-19 and as all issues could be determined by remote means. There were no technical difficulties and the file contained all the documents in paper format.

2. The Appellants appeal with permission against the decision of First-tier Tribunal Judge Fox promulgated on 5 September 2019, in which the Appellants' appeals against the decision to refuse their human rights claims dated 31 January 2019 were dismissed.

3. The First Appellant is a national of India, born on 15 July 1988 who first entered the United Kingdom as a Tier 4 (General) student on 23 January 2011 with leave to remain as such to 30 May 2012 and then to 31 August 2014. A further application was made on the same basis on 29 May 2014 which was withdrawn and a further application made on 19 August 2014. The Respondent refused that application on 14 September 2015 and the First Appellants' appeal against that was ultimately unsuccessful; albeit the decision of Upper Tribunal Judge Perkins upheld a finding that she had not relied on a fraudulent CAS certificate in her application and no findings were made on whether she had used deception in an English language test. The Second Appellant has essentially the same immigration history as the First Appellant's dependent and the outcome of his appeal is accepted to be entirely dependent on the outcome of First Appellant's appeal.

4. The First Appellant, with the Second Appellant and their daughter as dependents, applied for leave to remain on human rights grounds on 5 March 2018, which was refused by the Respondent on 31 January 2019. The First Appellant's application as refused on suitability grounds on the basis that she had used deception by relying on a false TOIEC English language test certificate with her application on 12 May 2012. The applications for both Appellants were refused on the basis that none of the requirements of either Appendix FM or paragraph 276ADE of the Immigration Rules were met and there were no exceptional circumstances to warrant a grant of leave to remain.

5. Judge Fox dismissed the appeal in a decision promulgated on 5 September 2019 on all grounds. In summary, it was found that the Respondent had discharged the initial burden of proof that the First Appellant had used deception in her English language test and the final burden of proof for the same, rejecting the First Appellant's explanation of having taken a legitimate test on the basis that the test centre had been entirely discredited on the available evidence. It was further found that the First Appellant did not have the relevant English language ability to study on her course in 2011, nor that she was an innocent party in the fraud. The appeals were ultimately dismissed on human rights grounds on the basis that the First Appellant has never been a legitimate student in the United Kingdom; that there are extended family members in India and where the First Appellant had previously been employed and it was in the child's best interests to return to India with her parents.

The appeal

6. The Appellants appeal on two grounds. First, that the First-tier Tribunal's finding that the First Appellant had used deception in her English language test was substantially or wholly predicated on the elevation of a concern

by a previous Judge about the First Appellant's ability to give oral evidence in English to a finding that she was unable to speak English either in 2011 or later; and secondly, that the First-tier Tribunal failed to make any proper assessment of the First Appellant's evidence about her English language ability and taking her test and instead summarily dismissing her claim.

7. At the oral hearing, although Ms Cunha initially indicated that the appeal on the grounds relied upon by the Appellant were opposed, during the course of the hearing she conceded that the decision on the deception point was in part unclear and in part lacked the required detailed findings on the evidence. Further, Ms Cunha indicated on behalf of the Appellant that there were concerns about the adequacy of the best interests assessment for the Appellant's daughter, albeit Mr Trussler accepted that this did not form any part of the grounds of appeal before the Upper Tribunal.

Findings and reasons

8. The Respondent's position at the hearing in relation to whether there was a material error of law in the First-tier Tribunal's decision was entirely proper and appropriate and I find that there was such a material error of law in the First-tier Tribunal's assessment of whether the First Appellant used deception in her English language test for the following reasons.

9. Although the First-tier Tribunal set out in summary form the First Appellant's evidence in relation to her English language test, the decision fails to include any express consideration of the same when it comes to the reasons and findings. There is no assessment, for example, of whether the First Appellant's explanation meets the minimum level of plausibility, nor any express findings as to her credibility. At its highest, the decision contains only three points of substance in relation to deception, first, in paragraph 37 in which the First Appellant's evidence is summarily dismissed because the test centre has been entirely discredited by the available evidence (with an earlier reference to the test centre having had 100% of its results revoked). Secondly, that the First Appellant was unable to communicate in English effectively at the earlier hearing on 1 August 2019, albeit without any assessment of this at the hearing on 5 September 2019. Thirdly, that the First Appellant was not an innocent party to the fraud for the reasons given by the Respondent in her report on the Premier Language Training Centre. Neither the first nor third point contains any assessment of the conflicting evidence given by the First Appellant and Respondent, nor are any clear reasons given for rejecting the First Appellant's evidence.

10. The second point above is of particular concern given that not only was there no assessment of the Appellant's English language ability at the hearing before the Judge making the decision, nor any assessment or reference to the First Appellant's evidence on what had happened at the earlier hearing; but there was not even a reference anywhere in the decision to the more contemporaneous assessment of the First Appellant's English ability in a test taken in 2014. In any event, the weight to be

attached to a person's ability to speak English many years after the test in question is likely to be limited when assessing all of the evidence in the round.

11. The First-tier Tribunal has failed to engage with the First Appellant's evidence, drawing very broad conclusions from limited points without any balanced consideration of the evidence nor reasoned explanation for the findings made. The decision is wholly inadequate, particularly in circumstances where an individual has been accused of deception, which if accepted is relevant to the proportionality balancing exercise required and potentially has very serious and long term consequences for that person and in this case, their family.

12. For these reasons, the First-tier Tribunal contains a material error of law and as such must be set aside and relisted for a de novo hearing, which will include consideration of whether the First Appellant used deception in her English language test and a fresh assessment of whether the Appellants' removal from the United Kingdom would be a disproportionate interference with their right to respect for private and family life contrary to Article 8 of the European Convention on Human Rights. It is noted that since the last hearing, the Appellants' daughter has been granted British citizenship (evidence for which has been submitted) and as accepted by the Respondent, this will necessarily form part of the evidence and assessment on the next occasion.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

No anonymity direction is made.

Listing Directions

(i) The appeal to be listed for a face to face hearing before any UTJ on the first available date, with a time estimate of 2 hours. A Punjabi interpreter is required.

(ii) Any further evidence the Appellant wishes to rely on is to be filed and served no later than 14 days prior to the relisted hearing.

(iii) Any further evidence the Respondent wishes to rely on is to be filed and served no later than 14 days prior to the relisted hearing.

(iv) The parties are at liberty to file a skeleton argument, no later than 7 days prior to the relisted hearing.

Signed G Jackson Date 13th July 2021

Upper Tribunal Judge Jackson