



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/05976/2020  
(UI-2021-000823)

**THE IMMIGRATION ACTS**

Heard at: Field House  
On the 25 February 2022

Decision & Reasons Promulgated  
On the 25 April 2022

Before

UPPER TRIBUNAL JUDGE ALLEN  
DEPUTY UPPER TRIBUNAL JUDGE COTTON

Between

MOHAMMED ASIM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Ms M Malhotra, Counsel instructed by Abbot & Harris  
Solicitors

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

**DECISION AND REASONS**

1. The appellant is a citizen of Pakistan, born on 9 March 1983. He appeals against the decision of Judge Buckwell ('the Judge') of the First-tier Tribunal (FtT) promulgated on the 8 September 2021

**Background**

2. The appellant entered the UK lawfully as a student on 7 August 2011. His entry clearance expired on 7 January 2013 and an application to extend leave was

refused on 14 March 2013. On 25 September 2014 the appellant made a further application to remain, asking the respondent to consider his Human Rights outside the Immigration Rules. On 5 November 2014 this application was refused and on 12 February 2015 the appellant was served with notice as an overstayer. A further application for leave outside the rules was submitted on 14 February 2015.

3. On 13 June 2015 the appellant married his wife (a British Citizen). In May 2015 a further application for leave outside the rules was refused and was certified as clearly unfounded.
4. The appellant and his wife registered their marriage in October 2015
5. The appellant made further submissions to the Home Office on 17 February 2016, which were rejected. He made further submissions in July 2019, which were accepted as a fresh claim, which was refused on 28 May 2020. An appeal to the FtT led to the Judge's determination which is now appealed to us.

### **The decision of the First-tier Tribunal**

6. The appellant's case (outlined in grounds dated 3 June 2020) was that the respondent's refusal of leave was an unlawful interference with his family life. His case was that he had been successful in his TOIEC examination conducted by ETS and that he has an established family life in the UK. If he were to be returned to Pakistan, he would face insurmountable obstacles.
7. The appellant had the benefit of representation by Ms Malhotra in the FtT. Through her, the appellant accepted that six voice recordings recovered from ETS were not of him. It was also accepted that the appellant could not satisfy the minimum financial earnings requirement contained in the Immigration Rules.
8. The FtT heard evidence from the appellant in addition to the written evidence. The judge outlines his evidence at [30] to [66] and then outlines the live evidence of the appellant's wife from [67] to [83].
9. Having outlined the evidence in detail, the judge finds at [111] that the respondent had adduced sufficient evidence of the appellant not sitting the relevant examinations that the appellant was required to provide an innocent explanation.
10. The judge then analyses the evidence relevant to an innocent explanation in a single paragraph. We repeat it here because of the role it plays in the appeal to us:  
*112. The evidence against the Appellant is significant. He does not persuade me that he booked his test at a college situated on the borders between East London and Essex or that he would have travelled such a distance from Southampton to have sat the examination anywhere in London or on its outskirts. In addition the Appellant is not able to bring forward any positive evidence in that respect. Weighed against that is the evidence provided by or on behalf of the Respondent. The recordings provided are not the voice of the Appellant. There is no innocent explanation here which I find should be accepted on the balance of probabilities.*
11. The FtT found that the appellant could not meet the financial requirements of the Immigration Rules. The FtT considered section EX to Appendix FM of the

Immigration Rules and found that the appellant did have a genuine and subsisting relationship with a relevant partner, but that there were not insurmountable obstacles to his return to Pakistan and there was not a real threat, or real likelihood of harm, facing him and his wife if she chose to follow him to Pakistan. The FtT considered Art 8 rights outside the rules and concluded that any interference would be proportionate.

## The appeal

12. Permission to appeal was granted by the FtT on 1 November 2021.

13. The appellant's grounds of appeal were settled by Ms Malhotra on 20 September 2021. They are under two headings:

*"Incorrect assessment of the Respondent's evidence".*

The FtT placed too much weight on the respondent's 'generic' evidence. The generic evidence is evidence which is relied on by the respondent in many (if not all) cases concerning allegations of a proxy sitting a TOEIC exam. This evidence was considered in SM and Qadir v SoS for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC) ('Qadir') and found to contain *"multiple frailties and shortcomings"*.

While the generic evidence discharged the evidential burden of proving the TOIEC result was obtained dishonestly, it was insufficient to discharge the legal burden in this respect.

In assessing the legal burden, the FtT should have had regard to the factors listed at [69] of Qadir.

By describing the generic evidence as "significant", the judge gave himself an incorrect starting point because Qadir finds it to be riddled with frailties.

*"Not engaging with the facts and not applying the Law to them"*.

The FtT failed to have regards to the factors listed at [69] of Qadir. Evidence of the appellant's ability in English in particular was identified by the judge but not taken into account in assessing whether the legal burden had been discharged.

14. Other elements of the FtT judgment are not challenged.

15. In response, the respondent submitted that the FtT was entitled to reject that the appellant had proved an innocent explanation in his case. Not only was there no evidence to substantiate his journey to the London area, but there was no evidence from friends or other sources. Further, and importantly, the voice recordings from the test provider were not of the appellant.

## Analysis

16. We consider that the judge was bound by Shen (Paper Appeals: Proving Dishonesty) [2014] UKUT 236 (IAC) in their approach to assessing the evidence regarding the allegation of the appellant's dishonesty. That case described that there is an evidential pendulum which swings three times: First, the Secretary of

State has an evidential burden to raise an issue as to the existence of a TOIEC result obtained improperly. Second (if that is achieved) the spotlight switches to the appellant who carries an evidential burden of raising an innocent explanation – an account which satisfies the minimum level of plausibility. Third (if that is achieved) the Secretary of State carries the legal burden to establish, on the balance of probabilities, that the appellant's innocent explanation is to be rejected.

17. The approach at [69] in Qadir concerns the approach that should be taken when assessing this third swing of the pendulum:

*69. We turn thus to address the legal burden. We accept Mr Dunlop's submission that in considering an allegation of dishonesty in this context the relevant factors to be weighed include (inexhaustively, we would add) what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated. Mr Dunlop also highlighted the importance of three further considerations, namely how the Appellants performed under cross examination, whether the Tribunal's assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic achievements are such that it was unnecessary or illogical for them to have cheated.*

18. We further note that in Qadir at [102] this Tribunal took the *"opportunity to re-emphasise that every case belonging to the ETS/TOEIC stable will invariably be fact sensitive. To this we add that every appeal will be determined on the basis of the evidence adduced by the parties..."*

19. We turn to whether the judge properly determined the case on the basis of the evidence produced by the parties in line with the swinging pendulum test.

20. Ms Malhotra made clear to us in her verbal submissions that the appellant accepted the generic evidence was enough to shift the burden to the appellant (but no more). The FtT found that the generic evidence was sufficient to do this at [111] based on the generic evidence and a similar concession by the appellant. The first swing of the pendulum is therefore made by the FtT on a sound basis.

21. The FtT at [112] considers whether the appellant raises an innocent explanation satisfying the minimum level of plausibility. The judge, having heard live evidence from witnesses and having outlined the evidence, found the appellant unpersuasive on this point. The judge lays out the apparent inherent lack of credibility in the appellant's evidence that he travelled the distance from Southampton to the London area to sit an exam. Further, the judge concluded that there was no positive evidence of the appellant's travel to, or attendance at, the exam venue and that *"the appellant has no supportive evidence in that respect"*.

22. We find this to be the second swing of the pendulum, and that the FtT had found the appellant had failed to adduce sufficient evidence to raise an innocent explanation.

23. Perhaps this is where the pendulum should have been held. In fact, the judge goes on to mention some of the evidence which the respondent would no doubt have relied on if seeking to disprove an innocent explanation.

24. Ms Malhotra is correct in her submission that the judge did not consider the factors outlined in [69] of Qadir. She might also be correct that the generic evidence would not have discharged the legal burden. The judge, however, did not need to consider the factors or the legal burden because they are only relevant if an innocent explanation is raised on sufficient evidence. In this case, the appellant had not discharged their burden of showing an innocent explanation. This is clear from the judge's phrasing that the appellant 'does not persuade' the judge that he had booked the test at, or travelled to, a college so far from Southampton.
25. We are not persuaded that the FtT's characterisation of the evidence against the appellant as 'significant' signifies an incorrect starting point. The evidence plainly is significant (or important) because it discharges the first evidential burden – without that significant evidential burden being satisfied, the appellant would carry no evidential burden at all.
26. We find that the judge's reasons with regards to the second swing are tolerably clear in showing that the FtT had in mind the relevant law and evidence, were not influenced by the irrelevant, and came to a rational conclusion.
27. Although the judge considered part of the third swing of the pendulum when it was not necessary to, this does not negate our finding with regards to the judge's treatment of the second swing.
28. We find that there is no error of law.

### **Conclusion**

29. The judge did not err in law.

### **Anonymity Order**

30. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders we do not consider it appropriate to make an anonymity order

### **Decisions and Directions**

1. The appeal is dismissed.
2. There is no order for anonymity.

Signed D Cotton

Date: 13 March 2022

Deputy Upper Tribunal Judge