



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**First-tier Tribunal Nos:**  
**HU/02244/2019**  
**& HU/02247/2019**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 25 July 2023**

**Before**

**UPPER TRIBUNAL JUDGE PERKINS**

**Between**

**GOMA DHEKAL**  
**and**  
**PUDASAINI BHOJ PRASAD**  
(no anonymity order made)

Appellants

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr K Khan, Solicitor from Adam Bernard, Solicitors  
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

**Heard at Field House on 19 May 2022**

**DECISION AND REASONS**

1. The appellants are citizens of Nepal who were born in 1981. They are married to each other. They appeal a decision of the First-tier Tribunal on 23 August 2019 dismissing their appeals against a decision of the Respondent on 22 January 2029 to refuse them leave to remain on human rights grounds. The First Appellant has been identified as a person who obtained a certificate of competence in the use of English fraudulently. The First Appellant denies that she was dishonest.
2. Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Martin acting as a judge of the First-tier Tribunal. She said: "It is arguable that the Judge erred in that at [32] the Judge says:  
"The Tribunal accepts that the first appellant has provided an innocent explanation which satisfies the minimum level of plausibility to rebut the respondent's (largely) generic evidence", but then goes on from [33] to [43] to reason that the appellant was guilty of fraud. The two are contradictory."

3. The Respondent contended that there was no material error.
4. I begin by considering the Decision and Reason.
5. The Judge has before her the respondent's standard generic bundle relied upon in TOEIC cases. She directed herself, correctly, on the burden and standard of proof, having cited **SM & Qadir v SSHD (ETS - Evidence - Burden of Proof)** [2016] UKUT 00229 (IAC) and gave other appropriate self-directions.
6. She then considered the facts of the case.
7. The first appellant entered the United Kingdom in 2009 with permission as a student. The second appellant is her dependent.
8. There leave was extended in stages until 10 October 2015. The First Appellant relied upon an ETS TOEIC test certificate that the Respondent says was obtained fraudulently. Her leave was curtailed to end in 2014.
9. The First Appellant gave evidence about taking her test. She also gave evidence that she was competent in the use of the English language and so had not need to cheat.
10. On 1 September 2014 the appellants were served with a removal decision because the Respondent was satisfied that the First Appellant's test results were obtained by fraud. The Appellants took various steps to secure their position including applying for leave to remain on human rights grounds. That application was refused on 22 January 2019 and that decision led to the present appeal.
11. The Appellants have a daughter, AP, who was born in April 2015 and, when the appeal was before the First-tier Tribunal, was about to start school.
12. The Appellants said that the each had parents in Nepal but they were made homeless by a notorious earthquake.
13. They had worked in the United Kingdom when that was permitted. They did not think that their employment prospects were good in Nepal.
14. The Judge reviewed the evidence that the First Appellant had cheated.
15. The First Appellant had taken her test at Elizabeth College where fraud was widespread. ETS had found her test result "invalid" rather than "questionable". The generic evidence showed that she had cheated.
16. The Judge accepted that the generic evidence established the evidential burden that rested on the Respondent to show that the First Appellant had cheated.
17. The Judge noted evidence supporting the First Appellant's claim that she was not a cheat. She had been awarded a Master's degree that was taught and examined in English. She gave a detailed account of attending the test centre and explained that she had been recommended that centre by a friend. She took the test about 3 months before her leave expired so she was not under and time pressure to secure a certificate. She was of good character.
18. The Judge was satisfied that the:

"First Appellant has provided an innocent explanation which satisfies the minimum level of plausibility to rebut the respondent's (largely) generic evidence.
19. The Judge then considered relevant leading cases.
20. She cautioned herself that present competence in the use of English does not equate with competence when the test was taken and that a person who had every reason to expect that she could pass a language test might still cheat.

21. The Judge also altered herself to the possibility of an honest person being the innocent victim of dishonest practices at a test centre.
22. The Judge found that the First Appellant's confidence in her ability to pass an English test in 2012 was "unclear". The First Appellant had been required to retake an English comprehension test in her first year of study at the University of Nepal.
23. The Judge analysed the First-Appellant's evidence.
24. The Judge reminded herself that the First Appellant was seeking to recall a test that she was supposed to have taken some 7 years before giving evidence and commended the First Appellant for not seeking to embellish her memory.
25. However the Judge found two aspects of the evidence unsatisfactory.
26. The First Appellant was able to remember her score for "speaking" but not for "writing". Given that the First Appellant was awarded a perfect 200 for each part of the test the judge found this "curious".
27. Further, the Judge could not reconcile the First Appellant's claim in her witness statement that she had "no family ties left as all my close friends and family have settled in the UK" with documentary evidence that undermined that claim. The Judge described the witness statement as "patently incorrect and at odds with the other evidence in the bundle."
28. The Judge was clearly interested by submissions from the Secretary of State that the First Appellant's "full marks" scores were themselves suspicious. Candidates examined at Elizabeth College tended to get high marks but perusal of the First Appellant's academic record tended to suggest that she was a rather ordinary rather than exceptionally able student.
29. The Judge was careful to consider reasons for the First Appellant being able to do very well in the ETS tests but still concluded that two perfect scores was "incongruous".
30. The Judge drew some adverse inference from the First Appellant's failure to request a copy of the voice recording. Similarly the Judge regarded the First Appellant's decision to pay in cash as "consistent with" someone paying a proxy candidate.
31. Paragraph 43 of the Decision and Reasons is vital. There the Judge finds that the cumulative damage of the adverse factors persuaded her that the Respondent had shown that the First Appellant had obtained her certificate fraudulently.
32. The Judge then conducted an Article 8 balancing exercise after reminding herself that the First Appellant's fraud is not determinative.
33. The Judge dismissed the appeal.
34. Grounds of Appeal to the Upper Tribunal are signed by counsel. These contend, at paragraph 7, that the judge misdirected herself and that a finding of dishonesty was only justified by a combination of generic and particular evidence, and at paragraph 9 that the finding of dishonesty in this case was inconsistent with the find judge's recognition that there was a real possibility that the First Appellant's results were not those attributed to her for the purpose of testing. Further it was said that the Judge was irrational (the phrase "non-sequitur") was used when she said that "the Appellant would not, if her results had been interfered with, be at risk of becoming a false positive by reason of defective testing.

35. I have not been able to find the sentence relied upon to support the further point in the Decision and Reasons. The Judge clearly aware that it was inherently unlikely that the checking procedure would wrongly identify someone as a cheat (see paragraph 43). I cannot take that point any further.
36. The first point, that the generic evidence alone is not enough ignores the Judge's clear finding at paragraph 4.1 that the generic evidence was supplemented by specific evidence from the "Lookup Tool".
37. The contention that the Judge found a "real possibility" of the attributed results not coming from the First Appellant rather misses the point. They did not. They were attributed to another person whose voice was often heard, that is a repeat proxy test taker.
38. The reason that Judge Martin gave permission, as she makes quite clear, is her concern that there is an irreconcilable tension between the plausible innocent explanation (paragraph 32) and the conclusion that the First Appellant used fraud (paragraph 33).
39. I have considered Mr Kahn's and Ms Ahmed's submissions but it is quite clear to me that if the judge erred at all it is in writing the decision in a way that left herself open to the criticism that she accepted that the First Appellant had provided satisfactory explanation for the adverse evidence. That is not what the Judge meant. If that is what the Judge found then she should, and no doubt would, have allowed the appeal.
40. It is quite clear to me that the Judge meant that, first, there was sufficient cogency in the Respondent's case for the First Appellant to have resist the inference of dishonesty and then sufficient cogency in the First Appellant's case for it to require consideration. The Judge considered it carefully and frequently suggested innocent explanations before concluding, rationally, that the inference of dishonesty had not been lodged.
41. In short, the Judge's finding that the Respondent had shown the First Appellant to have bene dishonest was sound.
42. The grounds did not raise a general challenge to the Article 8 balancing exercise.
43. I do not agree with Mr Khan that the Judge wrong asked herself if there were "insurmountable obstacles" in the way of the Appellants returning to Nepal. The Judge was deciding for herself if refusing leave was proportionate and her finding that the family could reestablish itself in Nepal was open to her.
44. Immediately after the hearing Mr Khan, with Ms Ahmed's knowledge, sent a note pointing out that the Appellants' child had accrued 7 years residence in the United Kingdom. That might well be relevant in the event of the decision being remade but I find no error and so I will not be remaking the decision.
45. It may be that the Appellants will want to make another application for the sake of their child.

### **Notice of Decision**

46. The First-tier Tribunal did not err in law. The appeals are dismissed.

**Jonathan Perkins**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**14 July 2023**