Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/08749/2015**

THE IMMIGRATION ACTS

Heard at North Shields **Decision and Reasons Promulgated**
On 23 February 2016 **On 29 February 2016**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A M TABASSUM

Respondent

Representation:

For the Appellant: Mr J Kingham, Home Office Presenting Officer
For the Respondent: Mr M Khan, of Nationwide Law Associates, London

DECISION AND REASONS

1. The parties are as described above, but the rest of this determination refers to them as they were in the First-tier Tribunal.

2. The appellant is a citizen of Pakistan, born on 20 October 1985. On 21 January 2015 he sought leave to remain as a spouse. The SSHD refused that application by letter dated 19 February 2015, for reasons fully set out

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therein, and rehearsed in the decision of First-tier Tribunal Judge Balloch, promulgated on 14 August 2015, at paragraphs 9-22.

3. This is one of a large number of cases arising following the detection of widespread fraud in the obtaining of Educational Testing Service (ETS) certificates. The SSHD considered that on 18 July 2012 the appellant had obtained such a certificate through the use of a proxy test taker. The usual forms of evidence to that effect were provided, which are on file and which are described and discussed in the FtT determination, principally at paragraphs 35-61. At paragraph 62 the judge said that notwithstanding that evidence she was "not satisfied" that the SSHD had been "able to demonstrate, to the civil standard of proof, deception … in the obtaining of the [certificate]".

4. The appeal was allowed under the Immigration Rules.

5. The First-tier Tribunal refused permission to appeal to the Upper Tribunal.

6. The SSHD sought permission to appeal from the Upper Tribunal. On 15 January 2016 UT Judge Kekic granted permission. This was issued to the parties on 21 January 2016. The accompanying notice advises parties *inter alia* that "… subject to any direction to the contrary, the application stands as the notice of appeal to the Upper Tribunal."

7. In response to the grant of permission, the appellant did not file any notice under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, and did not communicate in any other way with the respondent or with the Upper Tribunal. He did not take this opportunity to make any observations on the grounds, or to suggest that he might rely on any grounds which were not resolved in the FtT's decision.

8. On 19 February 2016 the respondent wrote to the Upper Tribunal stating that the application for permission made to the Upper Tribunal had mistakenly been accompanied by grounds relating to another case, and that it had been sought to rectify this error by email to the Upper Tribunal on 29 January 2016, with the "correct" grounds attached. In response, and as instructed by an Upper Tribunal Judge, a clerk of the Upper Tribunal advised the respondent that the application for permission did not remain outstanding, but had been considered on the grounds put forward, and it was a matter for the SSHD if she wished to apply to amend such grounds.

9. The "incorrect" grounds relate also to an ETS case. Paragraphs 1-12 of those grounds are generally in terms applicable to most if not all such appeals. Paragraph 13 makes a point regarding a college which was the subject of criminal enquiry, a matter which has nothing to do with the present case.

10. At the outset of the hearing Mr Kingham sought to amend the grounds of appeal so as to read in the form originally intended, as follows:

1 The determination finds that the SSHD has not discharged the burden of proof in demonstrating that the appellant used deception … the FtT's reasoning for this is entirely inadequate.

2 The FtT indicates … that the witness statements and extracts from the spreadsheet do not assess the SSHD's case. This is incorrect. The witness statements, read in conjunction with one another, detail extensively the investigation undertaken by ETS on this appellant's case, along with thousands of other applicants, and the process of identifying those tests found to be "invalid". It is clear from the statements that ETS identified this appellant after a lengthy and systematic investigation.

3 The SSHD asserts that the FtT should have had due consideration to the specific evidence which identifies this appellant as an individual who exercised deception, together with the witness statement outlining the investigation process.

4 The SSHD maintains that the appellant does not meet the suitability requirements of Appendix FM of the Immigration Rules.

5 In failing to provide adequate reasons for rejecting the SSHD's evidence … the FtT's entire findings are undeniably flawed.

11. I observe here that there is nothing in the above grounds of which the appellant was not on fair notice, as their substance is all within the other set of grounds, used by mistake.

12. Mr Kingham sought to add a further point. He said that the determination was incomplete. Having found as she did, the judge should have gone on to decide on suitability in terms of the Rules, and in particular to consider whether paragraph EX1 applied in the appellant's favour. He said that the determination "fizzled out" without resolving this point.

13. I invited Mr Khan to respond to the application to amend the grounds.

14. Mr Khan said that he refused to argue the case. He had never seen such an appalling blunder by the SSHD in 20 years of practice. The grounds on which permission had been granted were about another case entirely. He had not seen the new grounds until this morning.

15. I asked Mr Khan to clarify his position on how the Upper Tribunal should proceed. I pointed out that the matter firstly before me was an application to amend the grounds of appeal, to which I wished to ascertain the appellant's answer.

16. Mr Khan said that the appellant should be awarded his costs. No permission had been granted. The case should be "thrown out". The Upper Tribunal could not proceed to decide it, because he and the appellant had attended for his case, not for some other case.

17. I did not find these submissions from Mr Khan of much assistance. I enquired why, if there was thought to be prejudice to the appellant by the grant of permission being made on another set of grounds, there had been no response to the grant.

18. Mr Khan said that the case had been listed for hearing in the UT while he was out of the country. He had returned from abroad especially in order to undertake this appeal. He had been able to read the grounds only this morning. However, he next said that he had informed the appellant and his father a week ago of the possible difficulty. I asked Mr Khan to clarify when it was that he became aware that the grounds on which permission was granted related to another case. His reply was unclear, but I understood him to say that it was only on the morning of 23 February.

19. I decided to allow the grounds to be amended.

20. I saw nothing in the amendment which bore on the appellant's preparation or on his knowledge of the case he had to meet, other than removal of a confusing reference which has nothing to do with this case. There was nothing in Mr Khan's observations which suggested that it was inequitable to the appellant to permit amendment of the grounds, or that the erroneous reference at paragraph 13 of the "incorrect" grounds had been noticed before the SSHD drew attention to the point.

21. Mr Khan had said nothing which suggested that the hearing might not fairly proceed upon the amended grounds. Neither at this stage, nor at any other stage, did he request any adjournment.

22. I explained my decision on the point, and invited Mr Kingham to proceed to make his submissions on the amended grounds.

23. Very shortly after Mr Kingham had begun, Mr Khan sought to interrupt with further remarks. I found those rather incoherent, but they were along the lines of those recorded above. I advised him that I had made my ruling on the matter of amendment, which was binding at least for purposes of the hearing, and that he should now permit the Presenting Officer to make his submissions, and be ready to make his reply. The demeanour of Mr Khan did not convey that he was content to follow my advice.

24. Mr Kingham referred to the judge's description of the SSHD's evidence in the main body of the determination, and suggested that flowing from that a reader might logically have expected the decision to go in favour of the Secretary of State.

25. Mr Khan again interrupted the proceedings and said that unless the Upper Tribunal was immediately to put its "grant of permission to appeal" in writing, he would walk out of the court, along with his appellant. I told him again that the issue of the grant of permission, and on which grounds, had been resolved and that he should reserve any further submissions until it came to his turn, according to the usual formalities of Tribunal hearings.

26. Mr Khan then left the hearing room, along with the appellant. Mr Khan's final remark as he exited was, "Go ahead and decide, you are going to anyway."

27. I asked Mr Kingham for his view on whether the Upper Tribunal should proceed with the hearing in absence of the appellant and his

representative. Mr Kingham submitted that the hearing should go on. He observed that the appellant and his representative had been happy to attend on the basis of the grounds on which permission was granted; that there had been no submission about any difficulty in the presentation of the case which might arise from the amendment of the grounds; and that Mr Khan had, while leaving, invited the Upper Tribunal to proceed to make its decision.

28. I considered that in terms of Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 it was in the interests of justice to proceed.

29. Mr Kingham resumed his submission that everything in the determination up to paragraph 61 went towards a finding in favour of the SSHD and against the appellant. The only two points in the determination in favour of the appellant to explain the result were at paragraph 63, that there was "room for error" in ETS processes, and at paragraph 64, that the appellant had shown fluency in English by obtaining other certificates at a later date, and had been sufficiently fluent in English to understand the proceedings in the FtT and to give evidence. The judge herself noted that the ability to pass a later exam did not demonstrate proficiency at the relevant time or that a proxy had not been used. There was scope for error in ETS processes as in all other processes, but that observation did not suffice to explain why the Secretary of State had not proved her case on the balance of probabilities. ETS processes might be outweighed by other evidence, but there was no such evidence in this case. The indications were all the other way. At paragraph 56 the judge recorded that there had been little evidence from the appellant regarding the test he allegedly took, that his witness statement provided no details, and that in cross-examination he could not remember the date he took the test or at which college.

30. Finally, Mr Kingham submitted that the FtT decision should be set aside and that on the evidence which had been before the FtT a finding should be reached that the appellant used deception in obtaining his ETS certificate. On such a finding, there would be no basis for a conclusion in the appellant's favour under the Immigration Rules. That would leave only the matter of Article 8, outwith the Rules, but there was nothing before the Upper Tribunal to justify an outcome in the appellant's favour on that basis.

31. I formally reserved my determination.

32. It does not appear to me that the conduct of the case by the appellant's representative was consistent with the obligation on all parties under Rule 2(4) of the Tribunal Procedure (Upper Tribunal) Rules to help the Upper Tribunal to further its overriding objective of dealing with cases fairly and justly, and to co-operate with the Upper Tribunal generally. If the appellant, through his representative, had complied with that duty, he would have pointed out the error in the grounds at the time of the grant of permission. Even more importantly, he would have been well prepared to meet the substance of the case, which was not altered through the amendment permitted. He would not have sought to raise unnecessary

difficulties. There was no reason why the appellant's submissions regarding the findings on the ETS might have had to change in any substantial way in light of the amendment of the grounds.

33. Points might also have been made for the appellant about the remaking of the decision, if that stage were reached, both in and out of the Immigration Rules. The appellant having unfortunately been unrepresented and absent in relation to those issues, I have been careful to consider whether there is anything which should count in his favour. Having done so, however, I have come to prefer the position of the respondent, largely for the reasons given, outlined above.

34. The processes used by the respondent and by ETS to detect deception are not infallible, nor are they claimed to be. However, the evidence provided generally, and in this case in particular, is plainly enough to make out a *prima facie* case on the balance of probability that deception has been used. The documentary evidence provided here is not only generic. It is specific to this appellant. It is a recorded documentary trail to establish that he did not in fact take the test he claimed to have passed.

35. The judge's decision is based in essence only on the proposition that there is room for error in the ETS procedures. That is correct, but the room for error is not such as to displace generally the possibility of proving use of deception by such evidence and methods.

36. There are of course cases in which the evidence as a whole may justify the conclusion that deception was not used, notwithstanding the documentary trail from ETS. This is not such a case. There was no meaningful evidence at all on the appellant's side. Rather, his inability to give any useful information about the test he allegedly took was a strong feature against him. He might forget the exact date, but it is telling that he could not even say where he allegedly took the test.

37. The determination of the First-tier Tribunal is **set aside** for inadequacy of reasoning.

38. In remaking the decision, I am satisfied, for the reasons above, and on all the evidence, that the allegation of deception is established by the SSHD to the necessary standard. The appellant has put no case against the outcome that on such a finding, his appeal fails in terms of the Immigration Rules.

39. Although the appellant did not advance at any stage in the UT an alternative case that his appeal should be allowed on the basis of family life, I consider the issue.

40. The structure of the SSHD's decision is that the appellant is found not to meet the suitability or eligibility requirements of the rules, but that "for completeness" his case is considered under appendix FM on the basis of family life (page 3 of 9). This leads to consideration under paragraphs EX1 and EX2 (page 5). There are not found to be very significant difficulties which could not be overcome in relation to family life outside the UK, or

which would entail very serious hardship for the appellant or his wife. Finally, no circumstances are found to justify leave outside the Rules (page 7).

41. On these aspects, the grounds of appeal to the First-tier Tribunal were a bare insistence that the obstacles were insurmountable, that the appellant's wife had not lived in any other culture, and the decision was "not proportionate to immigration rules".

42. The evidence in the FtT was that the appellant's wife is a UK citizen who has not been to Pakistan. She has health issues including heart problems, asthma, diabetes, and anxiety and depression. She said that she would not go to Pakistan because of her health problems, as well as not knowing the culture and not previously being out of the UK. She was aware that the appellant had no permanent leave when they met.

43. The test of insurmountable obstacles is (as recognised in case law and in paragraph EX2) not to be taken literally. The objections to relocation by the appellant's wife are readily understandable. However, there was no evidence that her needs could not be met in Pakistan. Her objections do not reach the level of very significant difficulties or very serious hardship. The requirement that the appellant should leave the UK has not been shown to be disproportionate in the light of his and his wife's rights to family life, whether considered in or out of the Immigration Rules.

44. The following decision is substituted: the appeal, as brought to the First-tier Tribunal by the appellant, is **dismissed on all available grounds**.

45. No anonymity direction has been requested or made.

24 February 2016
Upper Tribunal Judge Macleman