Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/33087/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 16 June 2017	**On 20 June 2017**

Before

UPPER TRIBUNAL JUDGE GILL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

KULJEET SINGH DHAMI
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Ms C Turnbull of Counsel, instructed by Alpha Business & Legal Consultants
For the Respondent: Mr. P. Duffy, Senior Home Office Presenting Officer.

DECISION AND DIRECTIONS

Introduction and background facts

1. The Secretary of State has been granted permission to appeal against the decision of Judge of the First-tier Tribunal Manyarara who, following a hearing on 24 October 2016, allowed the appeal of Mr Dhami (hereafter the "claimant") against a decision of the Secretary of State of 2 October 2015 refusing his application of 16 April 2014 for indefinite leave to remain as a spouse of Mrs. Gurjeet Kaur, a British citizen (hereafter the "sponsor").

2. In brief, the judge found that the Secretary of State had not discharged the burden upon her to show that the claimant had practised deception and she therefore found against the Secretary of State, and for the claimant, in relation to the refusal under para 322(2) of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the "Rules"). The judge also considered Article 8 under Appendix FM and para 276ADE as well as outside the Rules and decided to allow the Article 8 claim outside the Rules.

3. There are two matters to which I should draw attention at the outset. Firstly, the Secretary of State was not represented at the hearing before the judge. Secondly, Ms Turnbull and Mr Duffy agreed before me that the claimant's application of 16 April 2014 for indefinite leave to remain as a spouse fell to be treated under the transitional provisions and therefore para 287 of the Rules applies to his case. This means that if (as the judge found) the claimant succeeded on the para 322(2) issue, his appeal should have been allowed under para 287 of the Rules. There was no need for the judge to consider Appendix FM or EX.1 of Appendix FM or the Article 8 claim outside the Rules.

4. It is therefore not clear why (in the "Notice of decision" part on the final page of her decision) the judge dismissed the claimant's appeal under the Rules notwithstanding that she found that the Secretary of State had not discharged the burden upon her to establish that the claimant had practised deception. Nor is it clear why she considered Article 8 under Appendix FM, EX.1 and Article 8 outside the Rules.

5. The Secretary of State's reasons for refusing the applicant's application maybe summarised as follows:

   i) The Secretary of State took the view that the claimant's presence in the United Kingdom was not conducive to the public good because she considered that, in support of his application of 2 May 2012 for leave to remain as a spouse, he had submitted a false certificate from Electronic Testing System ("ETS") in relation to his Test of English for International Communication ("TOEIC") taken on 17 April 2012 at Synergy Business College of London. ETS had cancelled the claimant's scores from the test. His test had been categorised by ETS as invalid. The Secretary of State therefore refused the application for leave to remain under para 322(2) and para 289 of the Rules with reference to para 287(v).

   ii) As the claimant did not satisfy the requirements of para 287, the Secretary of State refused the application for leave under the Rules and proceeded to consider the application under Appendix FM and outside the Rules on the basis of Article 8.

   iii) The application under Appendix FM was refused on the ground that the claimant did not meet the suitability requirement under para S-LTR.1.6 because it was considered that his presence in the UK was not conducive to the public good. The Secretary of State considered that the claimant did not meet the requirement in EX.1(b) because she concluded that there were no insurmountable obstacles to claimant and the sponsor enjoying their family life in India. In relation to para 276ADE(1), the Secretary of State considered that para 276ADE(1)(iii)-(v) did not apply and that the claimant did not satisfy para 276ADE(1)(vi) because she considered that there were no very significant obstacles to his reintegration in India. She did not consider that the claimant had raised any grounds which were significant enough to warrant the grant of leave outside the Rules on the basis of Article 8.

6. In relation to the refusal under para 322(2) of the Rules, the judge had before her the witness statements of Rebecca Collings and Peter Millington. Their witness statements have been used in many similar ETS cases. The judge also had a witness statement from Lesley Singh, a Senior Home Office case worker (para 41 of the judge's decision). The evidence submitted with the witness statement from Mr Singh showed that the claimant's test was categorised as invalid (para 43 of the decision). The Secretary of State also produced an ETS TOEIC Centre Look up Tool (para 41 of the decision). On the basis of this evidence, the judge found that the Secretary of State had discharged the initial evidential burden and she considered that the burden therefore shifted to the claimant to provide a plausible explanation whereupon the burden would shift back to the Secretary of State to discharge the overall legal burden upon her to establish deception. The judge then referred to the Court of Appeal's judgment in SSHD v Shehzad & Chowdhury [2016] EWCA Civ 615 before turning to

the claimant's evidence before her which she dealt with at paras 46-50 in the following terms:

> "46. I have derived considerable benefit from hearing the [claimant] giving evidence before me in support of his appeal. The [claimant] was able to give his evidence in English. The [claimant] gave evidence relating to his educational achievements and his additional English language test results. I have seen the [claimant]'s pass notification in relation to the Life in the UK test. The test was taken by the [claimant] on 8 October 2013.
>
> 47. Prior to his arrival in the UK, the [claimant] took an English language test despite not being required to do so. I find considerable force in the submission that the [claimant] would not therefore have had the need to take a further English language test by proxy in light of his achievement prior to his arrival in the United Kingdom.
>
> 48. I have further had the benefit of seeing the [claimant's] ESOL certificate dated 20 February 2014. This shows that the [claimant] was awarded Grade 5 in spoke English. The result is the equivalent of B.1.1 of the Common European Framework. The [claimant] further attended an interview at the request of the [Secretary of State] and the interview record is included in the [Secretary of State]'s bundle. Having had the benefit of reading the interview record, I find that the [claimant] has been consistent about where, when and how he took the English language test that has been impugned in the decision under appeal.
>
> 49. One of the landmark features in [SM and Qadir v SSHD [2016] UKUT 229 (IAC)] was that the appellants gave evidence and were cross-examined on the contents of their witness statements. I find that the [claimant] in this appeal has been proficient in the English language for some considerable time.
>
> 50. Having considered all of the evidence cumulatively, I find that the [claimant] has discharged the evidential burden that shifted to him and I hold that the legal burden has therefore not been discharged by the [Secretary of State] in relation to the use of deception."

7. It is therefore clear that the judge found that the claimant had discharged the evidential burden that she considered had passed to him because (in essence) she considered that the evidence showed that he had been proficient in the English language for some considerable time.

8. In her grounds, the Secretary of State relied upon MA (Nigeria) [2016] UKUT 450 where at para 57, the Upper Tribunal said that, in the abstract, there is a range of reasons why persons proficient in English may engage in TOEIC fraud which include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system; that these reasons could conceivably overlap in individual cases; and that there was scope for other explanations for deceitful conduct in this sphere. The Secretary of State contended that the judge had therefore erred in relying upon the claimant's ability in the English language; that she had failed to give adequate reasons for finding that a person who speaks English would have no reason to secure a test certificate by deception; and that none of the evidence that the claimant had given was detailed or specific to the test.

9. In view of the decision of the Upper Tribunal in MA (Nigeria), Ms Turnbull accepted that the judge had erred in law in reaching her finding that the claimant had not practised deception, in that, she relied upon his English language ability and gave inadequate reasons for concluding that the claimant's evidence was such as to overcome the Secretary of State's evidence in discharging the initial evidential burden upon her. Ms Turnbull therefore accepted that the judge had materially erred in law in resolving the issue under para 322(2) in

the claimant's favour and that the judge's decision on the para 322(2) issue must therefore be set aside.

10. However, Ms Turnbull submitted that the judge's error in reaching her finding under para 322(2) was not relevant to her finding in relation to the claimant's Article 8 claim outside the Rules, that the decision was disproportionate.

11. Given Ms Turnbull's acceptance that the judge had materially erred in law in reaching her conclusion on the para 322(2) issue, the sole issue before me is whether the error in finding that the Secretary of State had not discharged the overall legal burden upon her to establish that the claimant had practised deception in relation to the test taken on 17 April 2012 was material to her assessment of proportionality in relation to the Article 8 claim outside the Rules.

12. It is therefore necessary to summarise the judge's reasons for allowing the appeal outside the Rules. Her reasons may be summarised as follows:

    i) The judge began by stating at para 52 that it was appropriate to first consider the claimant's Article 8 claim with reference to the Rules. She found that there were no insurmountable obstacles to family life being enjoyed in India and therefore that the claimant did not satisfy EX.1.(b) of Appendix FM (para 69). She found that the claimant satisfied the remaining requirements (paras 53-60), including the suitability requirement in S-LTR.1.6 given that the allegation of deception had not been established (para 60).

    ii) At para 70, the judge said she therefore considered whether there were any circumstances which warrant consideration of the appeal outside the Rules because the absence of insurmountable obstacles to relocation outside the United Kingdom was not determinative of all issues before her. At para 71, the judge reminded herself that the claimant had to show that the test to be applied for the grant of leave on the basis of Article 8 outside the Rules was that of "*compelling circumstances*". She said that she had considered the claimant's circumstances "*through the lens of the Rules*".

    iii) Having reminded herself of relevant principles from decided cases (paras 72-79), the judge said, at para 80:

        > "80 … I further find that it would not be reasonable to expect the [claimant] to leave the United Kingdom to make an entry clearance application. It is clear that, on the facts that have been accepted in this case, the requirement that the [claimant] seeks entry clearance is a procedural one. **The [claimant] has already been granted leave to remain by the [Secretary of State on the basis of his family life with the sponsor".**
        >
        > (My emphasis)

    iv) The judge then said, at paras 82-83:

        > "82. Whilst a married couple does not have the right to choose where to continue family life, in relation to the [claimant's] current ties to the United Kingdom and any expectation that he would be allowed to remain in the United Kingdom, I find that any suggestion that **the [claimant] who was granted leave to remain on the basis of his family life with the sponsor,** would not have cut or loosened his ties to his country of origin would be unsupported by any evidence. **I find that the [claimant] was entitled to apply for ILR (as he did) having been given leave for a probationary period**. Therefore, despite the fact that the [claimant] may have family remaining in India, his ties are now to the United Kingdom where his wife is.

83. By analogy, a person granted leave to remain as a student or worker is very clearly someone who is admitted on a limited basis. **Once a spouse is acknowledged however, the presumption that the state would facilitate settlement if the marriage subsists.** It is plain to see that a student or a worker cannot have no reasonable expectation of having a future or permanent home in the United Kingdom. **I find that the same cannot be said of a spouse of a person who is settled in the United Kingdom, whatever the status of the previous leave granted as long as the grant of leave was on the basis of the relationship.** The [Secretary of State] accepted the marriage in this case and this is therefore not a case were the presumption at the outset would have been that the [claimant] would leave the United Kingdom, unless the marriage broke down."

(My emphasis)

v) At paras 91 and 93-94, the judge said:

"91. Having considered the [claimant's] circumstances through the lens of the Rules, I find that there is an existing gap in the Rules and the part played by the [Secretary of State's] discretion is greater when the circumstances of this case are considered **against the background of the [claimant's] initial grant of leave to remain as a spouse.** I find that there is disproportionate interference with family life on the facts of this case.

93. Whilst I have considered the public interest in immigration control, the sponsor is a qualifying partner under [section] 117D [of the Nationality, Immigration and Asylum Act 2002]. **The [claimant] was granted leave to remain in recognition of the relationship in this case.** The claimant has been able to give his evidence in English and there has been no recourse to public funds in this case. I bear in mind following the cases of Forman (ss.117A-C considerations) v Secretary of State for the Home Department [2015] UKUT 00412 (IAC) and Bossade [[2015] UKUT 00415 (IAC)] that these are not the only considerations.

94. I find that the interference in this case is disproportionate to the legitimate aim."

(My emphasis)

13. Ms Turnbull accepted that, in assessing the Article 8 claim outside the Rules, the judge must have taken into account her finding that the claimant satisfied the suitability requirement under Appendix FM. However, she submitted that this was not material to the judge's balancing exercise in relation to proportionality.

14. I pressed Ms Turnbull for her reasons for saying that the judge's error in relation to the para 322 (2) issue was not material to her decision on the Article 8 claim outside the Rules. Ms Turnbull submitted that the judge considered the claimant's circumstances through the lens of the Rules. She considered that the requirement for the claimant to make an entry clearance application was a procedural one in this case. She took into account that the claimant satisfied all of the requirements of the Rules except for the deception issue. She found that there was family life between the claimant and the sponsor. She found that the decision interferes with family life.

15. I again asked Ms Turnbull to explain why she said that the judge's error in relation to the deception issue was not material to the judge's assessment of proportionality outside the Rules. Ms Turnbull said she had nothing further to add.

16. I have to say that I simply cannot accept Ms Turnbull's submission that the judge's error in relation to the para 322(2) issue was not material to her assessment of the Article 8 claim outside the Rules, for the following reasons:

i) I do not accept Ms Turnbull's submission that the judge took into account that the claimant satisfied all of the requirements of the Rules except for the deception issue. It is clear that, in assessing the Article 8 claim outside the Rules, she took into account her earlier finding that the claimant satisfied the suitability requirement. This is the only basis upon which she could have found (at para 80) that the requirement for the claimant to return to India to make an entry clearance application was a procedural one. The only requirement that she considered the claimant did not satisfy under the Rules was the requirement that there be insurmountable obstacles to family life being continued in India. This much is clear from para 70 of her decision.

ii) It is clear from the text I have emboldened above in the quotes from paras 80, 82, 83, 91 and 93 that the judge relied heavily upon her finding that the claimant had received an initial grant of leave to remain as a spouse. However, that application was the application made on 2 May 2012 in which the claimant used the TOEIC certificate from ETS that resulted from the test taken on 17 April 2012. If, therefore, the claimant had practised deception in relation to the test of 17 April 2012, it follows that he practised deception in obtaining his initial grant of leave as a spouse, in which event the initial grant of leave as spouse was not a factor in his favour but a weighty factor against him. There is nothing in the judge's reasoning that acknowledges this fact.

iii) To the contrary, the words "*whatever the status of the previous leave granted as long as the grant of leave was on the basis of the relationship"* in para 83 suggest that she considered that, even if the initial grant to leave as a spouse was obtained by the use of a fraudulently obtained TOEIC certificate from ETS, the use of such fraud was irrelevant to balancing exercise outside the Rules and that *the mere fact* that the Secretary of State had granted limited leave to remain as a spouse went in the claimant's favour even if the status of such leave was called into question by reason of any deception practised in obtaining the leave. If this is what she meant by the words *"whatever the status of the previous leave granted"* at para 83, her reasoning was perverse or irrational. It is perverse logic or irrational to say, when deception is alleged, that the fact that such deception has led to the grant of leave is irrelevant in the balancing exercise.

iv) I shall deal with the judge's reasoning at para 90 before returning to para 80. It is clear from the judge's reasoning at paras 74-79, that the "*gap*" referred to at para 91 of her decision concerned the possibility of the claimant making an entry clearance application. In this respect, the judge concluded, at para 80, that: "*It was clear, on the facts that have been accepted in this case, the requirement that the [claimant] seeks entry clearance is a procedural one".* It is not clear whether the judge was referring to facts accepted by the Secretary of State or facts as found by her. If the former, she was incorrect because there is no basis for saying that the Secretary of State had accepted facts such that the only issue remaining was whether the claimant had entry clearance for indefinite leave to remain as a spouse. She must therefore have been referring to facts as found by her. It must therefore follow that, in finding that any requirement for the claimant to make an entry clearance application was a procedural one, she was relying upon her finding that the claimant did not fall for refusal under the general grounds for refusal on the ground that he had practised deception.

Accordingly, for the reasons given at ii) and this sub-para iv), if the judge erred in reaching her finding on the deception issue (as Ms Turnbull accepted), there is nothing in para 80 of the judge's decision that can survive that error.

v) What remains of para 82 of the judge's decision (once one strips away the text I have emboldened above) cannot survive the error in relation to the para 322(2) issue. Firstly,

because the judge continued to rely upon the fact that the claimant had been granted initial leave as a spouse in the remainder of her reasoning in para 82. Secondly, in any event, because the judge did not explain why she considered that someone who had been granted probationary leave as a spouse cannot be considered to have continued to maintain their ties to their country of origin whilst forging new ties to United Kingdom. Maintaining one ties with one's country of origin and forging new ties to the United Kingdom are not mutually exclusive, as the judge appears to have considered.

vi) It is self-evident that the judge's reasoning in para 83 was dependent upon her reasoning that the claimant had been granted an initial grant of leave as a spouse. Given that that initial grant of leave was obtained by the use of the TOEIC Certificate from ETS to which the deception allegation relates, there is nothing in para 83 that can survive the para 322(2) error.

vii) The only matters referred to at para 93 (leaving aside the fact that the judge took into account the grant of initial leave to remain as a spouse to the claimant, which I have dealt above) concern the fact that the claimant was able to give his evidence in English and that there had been no recourse of public funds in this case. However, the ability to speak English and financial independence are neutral factors (AM (s.117B) Malawi [2015] UKUT 0260 (IAC) and Rhuppiah v SSHD [2016] EWCA Civ 803).

17. Accordingly, I have concluded that the judge's error (accepted by Ms Turnbull) in finding, in relation to the para 322(2) issue, that the Secretary of State had not discharged the overall burden upon her to show that the claimant had practised deception was material to her decision to allow the appeal outside the Rules on the basis of Article 8.

18. I therefore set aside the decision of Judge Manyarara in its entirety. None of her findings stand.

19. In the majority of cases, the Upper Tribunal when setting aside the decision will be able to re-make the relevant decision itself. However, the Practice Statement for the Immigration and Asylum Chamber of the Upper Tribunal at para 7.2 recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

> "(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

20. In my judgement, this case falls within para 7.2(b). In addition, having regard to the Court of Appeal's judgment in JD (Congo) & Others [2012] EWCA Civ 327, I am of the view that a remittal to the First-tier Tribunal for a re-hearing on the merits on all issues is the right course of action. Ms Turnbull and Mr Duffy agreed that, if I found that the judge had materially erred in law in reaching her decision to allow the appeal on human rights grounds with reference to Article 8, the appropriate course of action would be to remit this case for a re-hearing on the merits on all issues by another judge. This is because none of the findings of Judge Manyarara stand.

21. It is necessary for me to make the following points in relation to the next hearing:

i) Although the decision letter refers to para 322(2) of the Rules, Mr Duffy informed me that the appropriate provision in the Rules is para 322(5). However, it is not entirely clear to me why para 322(5) applies instead of para 322(2). Ms Turnbull did not comment, one way or the other, whether para 322(5) as opposed to para 322(2) is

applicable. The claimant should attend the next hearing ready to deal with both. However, it will be necessary for the judge dealing with the appeal on the next occasion to obtain clarification from the Secretary of State's representative whether she wishes to proceed under para 322(2) or para 322(5).

ii) If the judge hearing the appeal on the next occasion concludes that the Secretary of State has not discharged the overall legal burden upon her to show that the claimant had submitted a TOEIC certificate that had been fraudulently obtained in his application of 2 May 2012 for leave to remain as a spouse, then the appeal should be allowed under para 287 of the Rules. There would be no need for judge to consider Appendix FM or EX.1. or Article 8 outside the Rules.

iii) If the judge hearing the appeal on the next occasion concludes that the Secretary of State has discharged the overall legal burden upon her to show that the claimant had submitted a TOEIC certificate that had been fraudulently obtained in his application of 2 May 2012 for leave to remain as a spouse, it follows that the claimant cannot satisfy the requirements of para 287 of the Rules, nor can he satisfy the suitability requirement in Appendix FM, EX.1. or para 276ADE of the Rules. In that event, the appeal should be dismissed under the Rules and the judge should proceed to consider the Article 8 claim outside the Rules, taking into account, in the balancing exercise, the finding in relation to the deception allegation and the fact that the claimant cannot as a consequence satisfy the requirements of para 287 or Appendix FM, EX.1. or para 276ADE.

Ms Turnbull and Mr Duffy agreed with ii) and iii) above.

Decision

The decision of Judge of the First-tier Tribunal Manyarara involved the making of errors on points of law such that the decision of the First-tier Tribunal is set aside in its entirety.

This case is remitted to the First-tier Tribunal for that Tribunal to re-make the decision on the appeal of Mr Dhami on the merits on all issues by a judge other than Judge of the First-tier Tribunal Manyarara.

Upper Tribunal Judge Gill Date: 20 June 2017