



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/25224/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 13 June 2018

Decision & Reasons Promulgated  
On 14 August 2018

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KHURRAM [A]  
(ANONYMITY ORDER NOT MADE)

Respondent

**Representation:**

For the Appellant: Ms Willocks-Briscoe, Home Office Presenting Officer

For the Respondent: Mr Obiakor

**DECISION AND REASONS**

1. For convenience I retain the designations as they were before the First-tier Tribunal, thus, Mr [A] is the appellant and the Secretary of State the respondent.
2. Mr [A] is a citizen of Pakistan born in 1991. He appealed against a decision of the respondent made on 27 October 2016 to refuse his application for leave to remain on family and private life grounds.

3. The basis of the refusal is that it was not accepted that the appellant meets the partner route of Appendix FM because he used deception in an application on 19 June 2013 by submitting an English language certificate fraudulently obtained from a test taken at Stanfords College by use of a proxy test taker. Further, a previous TOEIC speaking test taken on 16 October 2012 was declared invalid for the same reason and a test taken on 12 December 2012 was withdrawn by ETS as questionable. At interview on 17 October 2016 he stated that the only test he had been involved in was the test in June 2013. In addition, he was convicted in October 2013 at a Crown Court of theft by employee on three occasions and given a six months' prison sentence suspended for eighteen months on each count.
4. It was accepted that the appellant meets the eligibility requirements of paragraph R-LTRP.1.1. (d)(ii) and that he has a qualifying relationship contained in EX.1. and, thus, meets the requirements of paragraph R-LTRP.1. (d)(iii). He is married to a British citizen and at date of application was stepfather to her son. He now also has a child by his wife.
5. As for private life it was considered that there would not be very significant obstacles to his integration into Pakistan.
6. As for exceptional circumstances it was deemed as reasonable that the stepson remain with his mother in the UK. However, the severity of the deception used by the appellant justified separation from his stepson and a grant of leave outside the Rules was inappropriate.
7. He appealed.

### **First-tier Hearing**

8. Following a hearing at Taylor house on 23 February 2018 Judge of the First-tier Colvin allowed the appeal.
9. The crux of her findings on the claimed deception are at paragraph [27] to [29]. In summary, she noted his failure to mention either in his witness statement or at interview that he had taken two previous tests in October and December 2012. She found his explanation to be *"less than credible particularly as all three were TOEIC tests and his answer at Q26 of the interview is evasive as there is no clear reason why he would not have remembered taking the two earlier tests."* She also found his claim of not having been issued with certificates for the two previous tests to lack plausibility although she accepted that he did not use these test results in any applications made to the Respondent. She also noted his conviction for dishonesty [27].
10. At [28] the judge considered the claim that the appellant is proficient in English and had no need for a proxy taker. She noted his claim that he has a degree from Pakistan but found that only one subject was taught in English. She noted references by the appellant to two IELTS tests taken in November 2011 and May 2014; to an award certificate, English for Business with a score of B1 issued in August 2010; to a CAS dated June 2014 referring to his English SELT Test at level 1 (equivalent to a CEFR

level: B2). Finally, to his having been issued with an MA in Marketing and Innovation by Anglia Ruskin University in December 2015.

11. She concluded (at [29]):

*“...whilst the Respondent has raised an issue of proxy test taking in three different tests it has to be noted that the test taken in December 2012 was assessed as ‘questionable’ and therefore I do not consider it can be relied on by the Respondent and ... it was only the third test certificate that was submitted by the Appellant as part of an application for further leave to remain.”*

She continued

*“If the inadequacies in the Respondent’s evidence of proxy testing (which is well rehearsed in the case decisions) are taken into account with the Appellant having shown what I am told are satisfactory IELTS English test scores for Tier 4 before and reasonably soon after the alleged proxy test in June 2013, I have reached the decision that the Respondent has not discharged the legal burden of proving that the Appellant obtained further leave to remain in the UK by submitting a knowingly false language test certificate.”*

12. As a result the application should not have been refused on suitability grounds.

13. Advancing, finally, to consider Article 8, as the judge noted there are two British citizen children involved in this case, the elder aged 13 for whom he has played the role of stepfather from a very early age and his own child by his wife born in December 2016. There is a genuine and subsisting relationship with the children.

14. She noted section 117B of the 2002 Act finding that the appellant’s stay in the UK has always been lawful albeit with precarious status. His wife was born in the UK and has always lived here.

15. She concluded that the public interest did not require the appellant’s removal under section 117B(6) in relation to the two British citizen children.

### **Error of Law Hearing**

16. The respondent sought permission to appeal which was granted on 6 April 2018.

17. At the error of law hearing before me Ms Willocks-Briscoe submitted that the judge’s analysis at [29] has been inadequate. She appeared to have compressed her analysis into one sentence. She referred in her self-direction in law only to **SM & Qadir v SSHD (ETS - Evidence - Burden of Proof) [2016] UKUT 229** and appeared to take the view in her reference without particularity to “*inadequacies in the Respondent’s evidence of proxy test taking*” that the evidential burden was not satisfied, or if she was satisfied on that issue, the analysis of an innocent explanation was peremptory in the extreme. There had been no proper analysis. She made no challenge to the findings at [27 and 28].

18. Mr Obiakor's brief response was that the judge had properly directed herself. She had noted that each case is fact sensitive. Looked at in the round it was a well thought out and logical decision which should be upheld.

### **Decision on Error of Law**

19. I agreed with Ms Willocks-Briscoe. As indicated the judge referred to **SM & Qadir** in the Upper Tribunal which stated that the respondent's generic evidence sufficed to discharge the evidential burden that the certificates had been procured by dishonesty. However, given the multiple frailties from which this generic evidence was considered to suffer and in light of the actual evidence adduced by the appellants, the respondent failed (in that case) to discharge the legal burden of proving dishonesty on their part.
20. Subsequently the Court of Appeal decided in **Shehzad & Chowdhury [2016] EWCA Civ 615** that the generic evidence accompanied by evidence showing that the individual's test was categorised as "invalid" is sufficient to meet the evidential burden on the respondent to raise a doubt such that the evidential burden shifts to the appellant to proffer an innocent explanation. If he can the respondent may be unable to meet the legal burden of proof.
21. The problem in my view is that with the reference to the "*inadequacies in the Respondent's evidence of proxy testing*" which were "*well-rehearsed*" in the relevant authorities, it is indeed not clear that the judge was satisfied that the initial evidential burden of proof was satisfied. That, in light of the authorities, was an error of law.
22. Even if the judge had accepted that the initial burden was satisfied her consideration of an innocent explanation was inadequate. She relied on a single point, namely, what she took to be satisfactory test scores "*before and reasonably soon after*" the June 2013 test. She gave no consideration to her several findings which called into significant question the appellant's credibility referred to at [27] of her decision. As a result her conclusion that the respondent had not proved dishonesty was not adequately reasoned.
23. Having found material error of law in the consideration of the dishonesty aspect I concluded that the decision could not stand. It impacted on the Article 8 assessment. I set it aside.

### **Resumed Hearing**

24. We were able to continue to a resumed hearing. Brief submissions were made. Ms Willocks-Briscoe emphasised that she did not challenge the findings on family life. However, it was her submission that the respondent had clearly satisfied the evidential burden of proving fraud. As for an innocent explanation the appellant had not provided such. His conviction for dishonesty did not help him in that regard. Looking at the whole circumstances there was ample evidence from which to conclude that the respondent had satisfied the legal burden of establishing fraud.
25. As a result the suitability requirement was not satisfied. The failure to satisfy the Rules was a relevant factor to take into account when considering human rights outside the

Rules. Section 117B(6) was not necessarily a trump card. There were serious grounds justifying removal. There is no indication of health issues. He can seek entry clearance to return.

26. Mr Obiakor's submission was that the accusation of deception amounted to little more than suspicion. He had given a clear description of events on the test day. Such enhanced his credibility, as did the evidence that before and after that test he had gained qualifications in English. Further, that indicated that he had no reason to use a proxy.

### Consideration

27. In considering this matter I find that the initial evidential burden of furnishing proof of deception which was on the respondent has been satisfied. The respondent has provided prima facie evidence of deception. In that regard there is the generic evidence of Rebecca Collings and others, also the evidence particular to the appellant which includes the report from ETS and spreadsheet. Additionally, at Annex A and B of the respondent's supplementary bundle there are tables of results indicating that on the day in question none of the numerous test scores were deemed valid.
28. The appellant's position in response is denial that he used a proxy. In his statement he gave details how he got to the test centre at Stanfords and what happened during the test. It was also emphasised that prior to and after that test he had acquired qualifications from courses which were taught in English and has passed other English language assessments. He had no need to use a proxy.
29. I do not consider that the appellant has given a satisfactory explanation. I do not doubt that the appellant now has proficiency in English. It is hardly surprising that in the years since the 2013 test such has improved. As for the evidence of his claimed proficiency in English shown prior to 2013 as the First-tier judge noted, the indication is that his degree from Pakistan was largely not taught in English.
30. Further, as the First-tier judge noted, the appellant failed to mention either in his written statement or at interview that he has taken previous tests in October and December 2012. His answer at Q26 is "*No I do not think so.*" It makes no sense that he would not have remembered taking previous tests. I find that he was not being truthful. His conviction for dishonesty in 2013 does not assist his claim to honesty.
31. As for the claim that there was no need to use a proxy, as the former President stated in **MA (ETS - TOEIC testing) [2016] UKUT 450** (at [57]) "*...there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, in exhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system.*"
32. In summary, I find that the respondent to the civil standard meets the legal burden of showing, on the balance of probabilities, that deception took place.
33. Paragraph S-LTR 1.6 states that

*“The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR 1.3 to 1.5), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.”*

34. For the reasons given in respect of his dishonesty and conviction I find that the appellant does not satisfy the suitability requirement.
35. He thus does not satisfy the Immigration Rules.
36. However, that is not the end of the matter. It is accepted that he is in a genuine relationship with his wife a British citizen and has a genuine and subsisting relationship with his stepson, aged 13, and the child by his wife who is a baby. There is thus family life.
37. It is clear that the removal of the appellant would have consequences of sufficient gravity to engage Article 8. Such would be in accordance with the law and in pursuit of a legitimate aim of immigration control.
38. I note the Respondent’s guidance, Family Life (as a Partner or Parent) and Private Life: 10 Year Routes (February 2018) which updated the previous guidance dated August 2015. It is to the same effect:

*“Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave the UK because, in practice, the child will not, or is not likely to, continue to live in the UK with another parent or primary carer, EX.1(a) is likely to apply.*

*In particular circumstances, it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal, where the British citizen child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has or is being granted leave to remain. The circumstances envisaged include those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules.”*

39. In looking at the best interests of the children, as indicated, the elder was born in 2004 and the younger in 2016.
40. It is indisputable that it is in the best interests of both children to remain in the UK, the country where they were born and the only country of which they have knowledge. The elder child is now settled into school life.
41. I disagree with Ms Willocks-Briscoe that there is no good reason why the children could not remain even if the appellant left. The result would be at the very least to

disrupt the relationship between him and the children. Such cannot be in the children's best interests.

42. This case involves the family life of a husband, wife and two young children both British citizens as is their mother. I find it would plainly be contrary to the best interests of the children to separate that family unit. Realistically there are therefore only two options: expect mother and children to go to Pakistan with the appellant or allow him to remain in accordance with the principles in section 117B(6). This is a case which must be assessed on the basis that it would be unreasonable to expect the children to leave with their mother.
43. There is a conviction in October 2013 for theft which resulted in a suspended sentence. Such clearly is deplorable but I do not think for a first time offender with a suspended sentence such can amount to having committed "*significant or persistent criminal offences.*" The sentence was at the lower level of the range of disposals. It occurred nearly five years ago. It is not indicated that he was in a position of trust or responsibility. Nor is it indicated that there is anything else outstanding. As for his immigration history he has not overstayed, his leave throughout has been precarious. However, he has breached the Immigration Rules by using deception in his application in June 2013 by fraudulently obtaining and submitting an English language certificate. Such again is deplorable but he has not "*repeatedly*" breached the Immigration Rules. It may cause his immigration history to be described as "*poor*" but it could not reasonably be said to be "*very poor.*"
44. Applying the terms of the policy, which I take to represent the respondent's case on where the balance should be struck, I find that it would not be reasonable to expect the children to leave this country. There is, accordingly, no public interest in the appellant's removal and his appeal must be allowed.

### **Notice of Decision**

45. For the reasons I have given I am satisfied the decision of the First-tier Tribunal involved the making of a material error of law. It is set aside and remade as follows: the appeal is allowed.

No anonymity order is made.

Signed

Date

Upper Tribunal Judge Conway