Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03013/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th October 2019	**On 07th November 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR KAMRAN WAHEED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Dingley of Counsel
For the Respondent: Mr Singh

DECISION AND REASONS

Introduction

1. The Appellant born on 14th January 1987 is a citizen of Pakistan. The Appellant was represented by Mr Dingley of Counsel. The Respondent was represented by Mr Singh a Presenting Officer.

Substantive Issues under Appeal

2. The Appellant had made application on 26th June 2018 for leave to remain in the UK on the basis of family life with his spouse Miss Begum. That application was refused by the Respondent on 29th January 2019. The Appellant had appealed that decision and his appeal was heard by a panel of judges namely Judges of the First-tier Tribunal Abdar and Loke sitting at Taylor House on 24th April 2019. They had dismissed the Appellant's appeal.

3. Application for permission to appeal was made and granted on 24th July 2019. It was said that it was arguable that an error of law had been made by the judge when looking at the ETS matter and arguably had incorrectly identified the burden of proof. Permission to appeal was limited to the ETS and deception matter only. The Respondent had issued a response letter opposing the appeal dated 24th September 2019. Directions had been issued for the Upper Tribunal firstly to decide whether an error of law had been made in this case or not and the matter came before me in accordance with those directions.

Submissions on Behalf of the Appellant

4. Mr Dingley helpfully referred me to his skeleton argument in respect of the submissions raised namely that there had been an error by the judge when identifying the appropriate burden of proof when looking at cases of deception. He also noted that the judge had failed to deal with EX1 under the Immigration Rules.

Submissions on Behalf of the Respondent

5. Mr Singh referred me to the Rule 24 response in this case.

6. At the conclusion I reserved my decision to consider the evidence and submissions raised. I now provide that decision with my reasons.

Decision and Reasons

7. The judge granting permission had found an arguable error in respect of the panel's assessment of the burden of proof in respect of the alleged ETS deception matter. However he did not find merit in the ground raised under the Immigration Rules and limited permission to the deception point only.

8. Mr Dingley sought to raise afresh the point concerning the Immigration Rules namely that the judge had failed to consider the case under EX1(b) of the Immigration Rules. His skeleton argument referred me to the central points in respect of both that matter and the ETS matter.

9. I deal firstly with the decision in respect of the ETS/deception point. The judges referred at paragraph 15 to the Respondent's bundle without identifying specific documents. I have checked the documents within that Respondent's bundle that were available to the panel of judges in the First-tier Tribunal. In these types of cases the first generation

Respondent's bundles containing little more than generalised and largely hearsay evidence from Millington and Collings were evidentially of little value. It was only after time that the most recent type of bundle produced by the Home Office contains sufficient that allowed the court in **SM and Qadir [2016] UKUT 00229** and other cases to state that the Home Office in the presentation of such a bundle passed the evidential burden of proof. In particular in this case the bundle contains the ETS look-up tool, which described the Appellant's test as being invalid rather than questionable and further there was a full report into the college where the Appellant took his test and covering a period of time during which the Appellant claimed to have taken his test. There are also further statements within this latest type of generic bundle.

10. The judges at paragraph 35 specifically referred to **SM and Qadir** and set out the three-stage burden of proof in these cases referred to within that case. They correctly set out those stages at paragraph 35. Thereafter under the heading "prima facie case against the Appellant" they briefly set out the features of the Respondent's case and acknowledge that in **SM and Qadir** and other cases heard the evidence presented by the Respondent was sufficient to discharge the evidential burden upon the Respondent. They had then moved to the second stage under the heading "innocent explanation from the Appellant". They provided at paragraphs 39 to 47 reasons for the findings they made but the Appellant had failed to provide an innocent explanation. They found as stated at paragraph 48 that the Appellant had failed to discharge the burden on him albeit the burden being a low one to provide an innocent explanation. At paragraph 48 they had specifically referred to the Appellant failing to discharge the burden "albeit the burden being a low one". That is a reference to the second stage of the burden of proof that they had outlined at paragraph 35 namely the burden shifting to the Appellant to raise an innocent explanation namely an account which satisfies the minimum level of plausibility. The phrase "albeit the burden being a low one" is it seems a clear enough reference to "the minimum level of plausibility". Having made that finding they concluded at paragraph 48 by stating "therefore we uphold the Respondent's allegation against the Appellant". That essentially refers to the third stage of the burden of proof test as set out at paragraph 10 of **SM and Qadir** namely "where (innocent explanation) is satisfied the burden rests on the Secretary of State to establish on the balance of probability that the Appellant's prima facie innocent explanation is to be rejected". The judges found no innocent explanation had been provided by the Appellant even applying that minimal level of plausibility. They were therefore entitled to conclude by finding that they found in favour of upholding the Respondent's allegation. They could perhaps have used different phraseology but when looking at the relevant paragraphs as a whole there was no material error of law in the manner in which they dealt with this case.

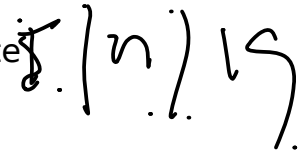
11. In respect of the Immigration Rules the judges perhaps should have begun their examination of the facts to see if the Appellant theoretically came within the terms of EX1(b)/EX2 i.e. were there very significant obstacles to

family life continuing outside the UK. In their examination of Article 8 outside of the Rules they had looked at the same factual matrix including an assessment of removal to Pakistan of the Appellant and the potential for his wife to accompany him. They had found in all the circumstances including those features that removal was proportionate. The reasons given were clear and adequate. They were not irrational or unlawful. Having found on the basis of proportionality the Appellant could return and such consideration taking into account his family life it is highly unlikely that had the judges looked at EX1(b)/EX2 where the test is "very significant obstacles" they would have reached different conclusions. There was therefore no material error of law in this case.

Notice of Decision

12. There was no material error of law made by the judges in this case and I uphold the decision of the First-tier Tribunal.

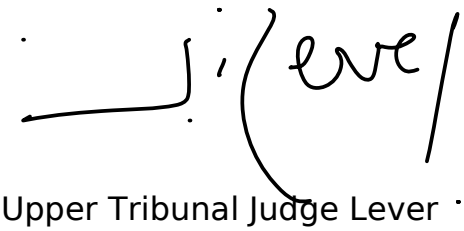
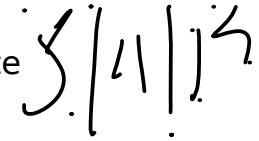
Anonymity not retained.

Signed  Date 

Deputy Upper Tribunal Judge Lever

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed  Date 

Deputy Upper Tribunal Judge Lever