Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08385/2016

THE IMMIGRATION ACTS

Heard at Field House
On 11th January 2019

Decision & Reasons Promulgated
On 04th February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

MR NAQASH AZEEM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Ali, Counsel instructed by DV Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan whose date of birth is recorded as 11th March 1990. He made application for leave to remain in the United Kingdom as the partner of [TI], a British citizen, on human rights grounds.

2. On 7th March 2016 the Secretary of State refused the application principally on suitability grounds, it being said that the presence of the applicant in the United Kingdom was not conducive to the public good. Reliance was placed on the suitability requirements, and in particular S-LTR.1.6. It was the Secretary of State's

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case that he had, on 2nd July 2014, taken an English language test in which he had used deception because someone else did the speaking part for him. In the event Judge Graham who heard the Appellant's appeal against the decision of the Secretary of State dismissed that appeal. Judge Graham noted that there had been an earlier appeal in which the question as to whether or not the Appellant had cheated in that IELTS test had been considered by a judge who had found as follows:

> *"In the light of the documentary evidence before me I find that the Respondent has demonstrated to the higher standard of the balance of probabilities that the Appellant has been dishonest and practised a deception when making his application in October 2012 by presenting an ETS certificate in English language which was not a valid certificate honestly obtained. I am also satisfied on the balance of probabilities that the Appellant did admit that he had not taken the speaking section of the English language test and that the Immigration Officer has honestly recorded his answers in the course of that interview. As to the Appellant's scurrilous assertions these may well have been in the nature of a last-ditch attempt to remain within the United Kingdom but they do not reflect well on the Appellant's character or dishonesty".*

3. Those observations and finding came about because the Appellant had been met by an Immigration Officer in 2014 and had been interviewed. It was during that interview that the Appellant was recorded as having said, "*I did the writing reading and listening, but someone else did the speaking test….. I paid the fee of £395 to Metro College, they provided someone to take the speaking test*". That earlier hearing, preceding that which was before Judge Graham, was before Judge Simpson. Her reasons why she accepted the Secretary of State's case that there had been deception were as follows:

> *"Looking carefully at the interview record, the Appellant's signs twice on the front cover and then once at the bottom of each of the two pages of the interview itself. The interview is timed as having commenced at 00.5 hours and the Appellant signed it as completed at 00.20 hours, thus contradicting his evidence that the interview had lasted for between 30 minutes and an hour. Moreover, his answer to question 5 is unequivocal and while I accept that his answer to question 7 is ambiguous and that the £395 may very well have been the exam entry fee, it is the admission in question 5 that is relevant. The Appellant has made various assertions i.e. that the Immigration Officer did not allow him to read the interview prior to signing but given that this was a particularly short interview it should not have taken much more than a glance down the page to see the relevant answers. Moreover, the Appellant's implication is that the Immigration Officer made a false record by writing a confession that was not made. That is a scurrilous assertion and the Appellant has given no plausible reason why the Immigration Officer would do such a thing".*

Judge Simpson dismissed that appeal.

4. It was open to the Appellant to appeal the decision of Judge Simpson if so advised and it is common ground that in fact the Appellant did make application for permission to appeal but did not pursue it. It had been his case that applications

made to the Home Office to provide the transcript of the interview, which he contends was in existence, was not responded to by the Secretary of State and if such a transcript did exist, then it was open to the Appellant to apply for an adjournment before Judge Simpson and seek to challenge the finding in the event. As I say the Appellant withdrew the appeal and therefore was fixed with those findings subject to any additional evidence which might be adduced in the subsequent hearing, as indeed was the case before Judge Graham.

5. The principal evidence upon which the Appellant relied in the instant appeal, in the First-tier Tribunal, although he and the Sponsor both gave evidence, was expert evidence from Dr Holmes. Although Dr Holmes was of the view that the voice file provided to her by the Appellant's solicitors was consistent with the voice file of the person who took the speaking test, Judge Graham did not accept expert's conclusions. The reasons for not accepting the eventual conclusion of Dr Holmes that, "*the evidence lend moderately strong support to the view that Naqash Azeem is the questioned speaker*" were as follows:

   (1) That Dr Holmes had not been provided with a copy of the Appellant's record of interview or the determination of Judge Simpson. Reference was made by Judge Graham to **AAW (Expert evidence – weight) Somalia [2015] UKUT 673** which gave guidance where there was a failure to comply with Practice Direction 10 – Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal.

   (2) Although the expert said that she had been instructed "to compare the voice and speech patterns of the speaker recorded in a series of six TOEIC recordings with the speech of a known sample of Naqash Azeem ..." and "I was supplied with an audio file containing a sample of the known speech of Naqash Azeem which I understand was recorded by DV Solicitors at their premises in accordance with my guidance for preparation of a reference recording" there was no statement from the Appellant's representatives confirming the circumstances in which the voice sample was obtained or how the Appellant's identity was confirmed. Additionally, Judge Graham was not satisfied that the voice sample was obtained in a controlled environment given that the expert made reference to background speech from other speakers in the recording. Judge Graham was not satisfied that the comparative voice recording was provided by the Appellant leaving open the possibility that it was the proxy taker who also prepared the comparative voice recording.

6. That finding was key to what then followed because having found that the decision of Judge Simpson remained undisturbed by the additional evidence, looking to the wider application of Article 8, and the best interests of the children, still Judge Graham found that it was proportionate for the Appellant to be required to leave the United Kingdom and that his family could go with him if they wished to do so. Although the Sponsor was born in the United Kingdom she was a cousin of the Appellant, there were, she found, no sufficient factors weighing in the Appellant's favour nor indeed nothing preventing the Appellant from applying for entry clearance from Pakistan once he met the English language requirements. It would be

open to the Sponsor, Judge Graham found, to support that application from the United Kingdom.

7. Not content with that decision, application was made for permission to appeal to the Upper Tribunal which permission was granted on 18th April 2018 by Judge of the First-tier Tribunal Cruthers though in granting permission I note that Judge Cruthers was giving little encouragement since in the grant of permission he said, "*the Appellant and his family members should not take this grant as any indication that the appeal ultimately will be successfu*l".

8. The grounds submit firstly that the weight given to the expert report was insufficient and in observing that there was the possibility that the proxy taker also prepared the comparative voice recording, it was being suggested that the expert, and "more so" the Appellant's solicitors, were complicit in the deception. It was further suggested that it was not clear from the determination whether the judge alerted the parties of those concerns raised in the determination. I should point out at this stage that I raised with Mr Ali whether or not he had any notes, or a statement from whomsoever represented the Appellant at the First-tier, in order that he could pursue that point. He accepts that he did not have any notes to support the contention. It seems to me that without the ability to support the contention that the judge did not raise this concern, this aspect of the appeal goes nowhere. The judge is not required to deal with each and every point within the decision and reasons.

9. The second ground was in reality an attempt to revisit the finding made by Judge Simpson that the Appellant had used deception. The ground says:

> *"Overlooked the fact that there was no evidence to prove that the Appellant had used a proxy".*

10. That ground is clearly flawed because there was evidence. The evidence was the written record of interview with the Appellant. The fact that the Appellant denied having said what was recorded did not stop what was recorded being evidence.

11. Insofar as those grounds then seek to challenge the finding, and if there was any merit, the appropriate venue was a timely appeal pursued to the Upper Tribunal at the appropriate time; not now in this appeal. However, the Appellant continues to submit that the Secretary of State had failed to discharge the legal and evidential burden on the basis there was no evidence to prove that the recordings established any proxy being used. I am satisfied that there was evidence for the reasons I have just stated.

12. The third ground submits that the decision was perverse given the existence of a British partner and British children, all the more so when it had been accepted that the Appellant was the children's primary carer with the Sponsor being a locum pharmacist and being the breadwinner. It was further said that to equate the Appellant's behaviour as criminal was to have erred. The second Ground 3 set out at paragraph 18 of the grounds was that the judge had erred, it was said, in applying

factors in Section 117B of the 2002 Act to justify the Appellant's removal as if these were aggravating factors.

13. The question for me is whether the findings made by Judge Graham were open to her. She quite properly took, as her starting point, the case of ***Devaseelan***. The starting point in this case was that the Appellant had practised deception. That was the finding of the earlier Tribunal hearing. The question for Judge Graham was whether the further evidence, taken together with the evidence that Judge Simpson had looked at, was capable of leading to a different conclusion, or indeed ought to have led to a different conclusion. It is not suggested that Judge Graham applied the guidance in **Devaseelan** incorrectly. What is submitted is that insufficient weight was given to the report of Dr Holmes.

14. It seems to me absolutely remarkable that although there was an application before me to adduce additional evidence in the Upper Tribunal in the form of an addendum to the report of Dr Holmes, there was still no statement from the Appellant's representatives confirming the circumstance in which a voice sample was obtained or how the Appellant's identity was confirmed. When I raised this with Mr Ali, recognising that it was late in the day, he nevertheless asked for an adjournment. I refused the same. The test for an adjournment is always one of fairness but the solicitors must have been well aware that there was a concern that there was no statement from the Appellant's representatives as mention was made at paragraph 20 of the Decision and Reasons and, indeed, the grounds themselves focused on the very point. It would have been an easy defect to cure and Mr Ali had no answer as to why there was no witness statement though he suggested that it was something which the Appellant's representatives might have overlooked.

15. As to the addendum to the report of Dr Holmes which was there to address those parts which were otherwise lacking, I would simply observe that the judge was entitled to make findings based upon the evidence that was before her. An appeal in the First-tier Tribunal is not a dress rehearsal for an onward appeal; it is the hearing and if, as is clearly recognised now by the application to adduce further evidence, then that better evidence should have been done at the first hearing. There was no suggestion that it could not have been made available at that time: *Ladd v Marshall.*

16. It remains the case, in my judgment, that it was open to Judge Graham, against the background of a finding of deception, to fins as was done and to require sufficient evidence, if the burden of proof was to be discharged, that the voice that the expert was being asked to compare was that of the Appellant. Some continuity evidence was required. It was not sufficient for Dr Holmes to say that the voice files had been obtained at the solicitor's office; it was for the solicitor to say that it had been obtained at the solicitor's office, for otherwise it left open the possibility that the Appellant, as alluded to by Judge Graham, was brought to the solicitor's office by the Appellant to be sent to Dr Holmes. I simply do not know even if the voice file was taken at the solicitor's office whether it was a different solicitor at that practice, who did not know the Appellant, who took the voice recording, so that in fact it was the proxy who came to give the voice file. I do not make a finding; what I do is to look at

the finding of Judge Graham and ask whether it was open to her. In my judgment it clearly was.

17. Having found that the Appellant had used deception she then went on quite properly to embark upon the balancing exercise starting on the one hand with what was in the public interest: the deception used by the Appellant, and then the best interests of the children (at the time of the appeal there had only been one). The judge accepted that the Appellant was the child's primary carer and had found that it was the Sponsor's choice whether or not to follow the Appellant to Pakistan and continue family life there or support him from the United Kingdom whilst he made his application in proper form. Although there was no conviction in respect of the deception the judge was right to describe this at least as *criminal conduct* for deception clearly is in the circumstance in which this was conducted. Of course, in finding that this was criminal conduct I do so only by applying the civil standard which was what Judge Graham did and was something that was open to her. In any event in my judgment describing the conduct as criminal is not material, it clearly was reprehensible and sufficient to weigh heavily in the public interest.

18. Having considered all of the factors including Section 117B of the 2002 Act the judge came again in my judgment to a finding that was open to her. This appeal appears to me to be not so much about errors of law but a challenge to findings of fact which were open to this judge. The judge described the fact that the Appellant could not meet the Immigration Rules because he was on temporary admission and could not meet the English language provisions in Appendix FM, as aggravating factors. Clearly what the judge meant by that was that they were factors which weighed in the public interest. It may have been unwise to use the word "aggravating" but it is not material in this case because anyone reading this decision as a whole knows exactly what the judge meant and the judge was balancing the various factors and indeed quite properly had regard to Section 117B(1) which was that maintenance of effective immigration control is in the public interest; provisions relating to financial independence; relationships formed when a person is in the United Kingdom unlawfully; and when immigration status is precarious. I note that the judge referred to 117B(3) which relates to financial independence rather than (4) but if I were to have re-made this appeal I would have re-made it in any event exactly as Judge Graham did noting that little weight is to be given to a relationship formed with a qualifying partner established by a person at a time when the person in the United Kingdom is present unlawfully

19. I refer to paragraph 12 of the case of **VW (Sri Lanka) [2013] EWCA Civ 522** in which McCombe LJ said at paragraph 12:

> *"Regrettably, there is an increasing tendency in immigration cases, when a First-tier Tribunal Judge has given a judgment explaining why he has reached a particular decision, of seeking to burrow out industriously areas of evidence that have been less fully dealt with than others and then to use this as a basis for saying the judge's decision is legally flawed because he did not deal with a particular matter more fully. In my judgment, with respect, that is no basis on which to sustain a proper challenge to a judge's finding of fact ...".*

20. Despite Mr Ali's submissions and despite his skeleton argument which runs to eighteen paragraphs, I find that the appeal is to be dismissed.

21. I would make this final observation. There is nothing in what I have said or indeed in what Judge Graham found that should be interpreted as casting any dispersions on the manner in which the Appellant's solicitors conducted. Firstly, Ms Everett rightly submitted that solicitors are quite capable of being lied to or deceived, but that does not mean that there was dishonesty on their part, and secondly, just as the witness statement from the Appellant's solicitors might have been overlooked, so too might they have overlooked the circumstances in which the voice file was obtained before being submitted to Dr Holmes. As I say, it was perfectly open to Judge Graham to make the findings that were made and this appeal is dismissed. The decision of the First-tier Tribunal therefore is affirmed.

No anonymity direction is made.

Signed **Date: 28 January 2019**

Deputy Upper Tribunal Judge Zucker