Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09345/2018

THE IMMIGRATION ACTS

Heard at Field House
On 7 June 2019

Decision & Reasons Promulgated
On 01 July 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

MR DHARMINDER KUMAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Makol
For the Respondent: Mr S Whitwell, HOPO

DECISION AND REASONS

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Buckwell dismissing the appellant's appeal against the respondent's refusal of his application made on 4 December 2017 for leave to remain on the basis of his family life with his wife and partner, Asha Lad.

2. The respondent refused the appellant's application on 6 April 2018 on the basis that the appellant did not qualify for leave to remain under the partner route, due to findings with respect to suitability under Section S-LTR of the Immigration Rules.

3. The respondent stated that ETS, the educational testing service, were able to detect when a single person, a proxy, was undertaking a number of tests for different candidates. ETS maintained that that applied to the circumstances of the appellant and therefore the scores which the appellant appeared to have achieved as a consequence of tests undertaken at Universal Training Centre on 17 July 2013 were cancelled. The respondent was satisfied that the relevant language test certificate had been fraudulently obtained. As a consequence, the respondent further decided that the presence of the appellant in this country was not conducive to the public good.

4. The appellant was also refused on suitability grounds because he had failed to pay litigation costs which had been awarded against him in favour of the Home Office. It was also not found that the appellant satisfied the immigration status or financial requirements.

5. In relation to private life, the application fell to be refused with reference to suitability for the same reasons. The respondent was of the view that paragraph 276ADE(1)(vi) was not satisfied as there would not be very significant obstacles facing the appellant as to his integration on return to India.

6. At the hearing before the judge the appellant gave evidence as did his wife Asha Lad. They were not legally represented at the hearing before the judge. The appellant confirmed his reliance upon all documentation submitted by him or on his behalf. The documents included a statement by him.

7. In his statement he set out details of his experience in the English language and said he would have no reason to have engaged a proxy. The judge recorded that in cross-examination the appellant could not recall the details of where he had taken his TOEIC test, but had said it had been in London and had been in 2013. He had then been living in Abbey Wood. He had chosen the particular college, Universal Training Centre, because his own college had recommended it. Other venues had also been fully booked. It had taken him an hour in London traffic to reach the centre. There had been many students present. He had reported to reception and had been required to give his personal details and present his passport.

8. He said that he had taken the tests over two days; the first had related to speaking and writing. After a gap of few days there was then the listening and reading tests. The speaking test lasted about twenty minutes and ten to twelve people had been present. He had been notified of the results through his college. He realised there had been issues arising from the results when a letter had been sent by the Home Office to his college.

9. The appellant said he met his wife in 2017 and they married on 21 October 2017. When the relationship had deepened he had told her everything concerning his immigration status. Due to her affection for him, his immigration situation had made no difference.

10. The appellant confirmed that he has a family in India who have supported him and his wife. He has two sisters and a mother in India. He has no brothers and his father is deceased. His wife has no family in India, as they are all in the UK.

11. He confirmed that his wife is employed and earns approximately £21,000 a year.

12. He said that he could not return to make an application in India to return to the UK as he had been in the UK for a long time and his wife would not be able to accompany him because of her family in this country.

13. His wife gave evidence that it had been a difficult time because her sister, had committed suicide on 4 March 2016. She confirmed that she and the appellant were married on 21 October 2017. Due to the death of her sister and the needs of her family members she was not employed between March and August 2017. She subsequently recommenced regular employment. She would not find it possible to live in India if the appellant had to return. She is concerned at country circumstances there and stated that in particular her mother was dependent upon her on a daily basis. She and the appellant have lived together since their marriage in October 2017. Her annual based income is approximately £20,000.

14. The judge's findings and reasons are set out at paragraphs 51 to 71.

15. Permission was granted to the appellant to appeal the judge's decision by DUTJ Pickup. He held that in the main the grounds as drafted were little more than a disagreement with the decision and an attempt to re-argue the appeal. However, he granted permission on the following basis:

> *"It is arguable that the judge misapplied the burden and standard of proof in an ETS case following the decision of the Court of Appeal in Qadir [2016] EWCA Civ 1167. Whilst at [55] the judge correctly placed the burden on the Secretary of State, the way in which the shift of the evidential burden to the appellant takes place on establishment of a prima facie case so as to require the appellant to provide an innocent explanation is not set out and does not make clear that the judge understood the legal burden remains throughout on the Secretary of State. The way in which the conclusion is expressed at [64] is also suspect, suggesting that the appellant had not discharged the burden to show that he had not been involved in cheating. It may be that on the facts of this case the outcome would have been the same but it is at least arguable that if the judge misapplied the burden and standard of proof that error was material".*

16. I find that it was paragraph 52 (not 54) where the judge made reference to the burden of proof. The judge held as follows at paragraph 52:

> *"In this appeal the burden of proof generally rests with the Appellant and the standard of proof to be applied is that of the balance of probabilities. However, in allegations, as here, where the Respondent asserts that dishonest behaviour applies by the allowing or instructing of a proxy to sit English language examinations, the burden rests with the Respondent in that allegation. With respect generally to cases involving ETS proxy appointment allegations, if the Respondent*

successfully establishes a prima facie case against an individual the burden then shifts to that person to demonstrate that dishonest behaviour was not involved on his or her part".

17. The judge at paragraph 54 took account of a statement dated 11 September 2018 by Peter Lawson, Home Office employee since 2002. At paragraph 55, the judge said that Mr Lawson presented at Annexes A and B evidence provided by ETS in relation to the detail of the scoring in the name of the appellant from tests undertaken on 17 July 2013. Both results were recorded as invalid. The three categories designated are "invalid", "questionable" or "released".

18. The judge noted at paragraph 56 that at Annex B the statistics for the 56 tests taken at Universal Training Centre on 17 July 2013 were detailed. No results were released, 13 out of 56 tests taken were questionable and 43 out of 56 tests were invalid. Accordingly ETS was satisfied that there were no results which could be published which did not have some doubt. Questionable results were 23% of the total that day. However, the much larger total, 77% were classed as invalid, being 43 tests.

19. The judge held that taking the statements of Rebecca Collings and Peter Millington with the specific detail provided in relation to Universal Training Centre for the day concerned, he was satisfied that sufficient evidence established that there was a *prima facie* against the appellant. In that respect he followed the guidance set out by the Upper Tribunal in **SM and Qadir [2016] UKUT 229 (IAC)**.

20. At paragraph 60 the judge held that caselaw guidance makes clear that every case is fact sensitive. He found that the burden rests with the appellant to show that he did not cheat in the examination process on the date concerned. Both the judgment in **Shehzad and Chowdhury [2016] EWCA Civ 615** and the Upper Tribunal decision in **MA [2016] UKUT 450 (IAC)** emphasised that it is important to make a finding as to whether a *prima facie* Home Office case has been established.

21. The judge also had regard to the views expressed by the Court of Appeal in **Ahsan and Others [2017] EWCA Civ 2009**, where it was stated at paragraph 22 that "The Home Office case now is that certain centres were 'fraud factories' and that all test results from those centres, generally or on certain dates are bogus".

22. The judge said it was necessary to consider and find whether deception did occur in the circumstances of this appeal on the evidence presented, including the oral evidence given by the appellant and his partner. The judge took into account the fact that the appellant's wife was not in a relationship with the appellant at the date of the test concerned and therefore she would have no direct evidence in that respect. The appellant indicated that the test had been a long time ago (it was in 2013) and his own recollection on that basis.

23. Based on the evidence which he heard from the appellant, the judge was not persuaded that he had discharged his burden in demonstrating that his tests were taken personally. The judge said the appellant had not brought forward what he would consider to be evidence of strength in denying that a proxy was deployed to

take any test on the day concerned. The appellant maintained that he had good English and still has good English skills and therefore would not have needed to have appointed a proxy. However it has been acknowledged that it was not only those with less than adequate English language skills who followed the option of appointing a proxy. The judge said it was also relevant to take into account that certain test centres were clearly offering arrangements to encourage those who had registered for tests at that location to pay sums in order for a proxy to take the test which would be, in effect, a route to a guaranteed pass on each test. The judge held that a person claiming that he or she had good English at the time of the test did not rule out that they paid a proxy.

24. The judge's assessment of the evidence was that the appellant had not discharged his burden to show that he did not cheat in the test concerned. The judge held that the evidence showing the complicity of Universal Training Centre was very significant and powerful. The appellant would therefore need to show, based on the statistics annexed to the statement of Peter Lawson, adequate evidence which on the balance of probabilities showed that he had not been involved in cheating. On the evidence the judge held that the burden was not discharged by the appellant.

25. The judge therefore found that the appellant was correctly refused on human rights grounds with reference to the Immigration Rules. The judge held that this was in itself a weighty finding in assessing the overall merits of his human rights appeal.

26. In failing to meet the Immigration Rules, the judge said it was appropriate to consider whether the appellant has established on the evidence presented that there was a basis on which it would be appropriate that he should be granted the immigration leave he seeks on an assessment of Article 8 human rights grounds outwith the Immigration Rules. That required the consideration of provisions within Section 117B of the 2002 Act. The judge agreed with the HOPO's argument that in the development of the relationship between the appellant and his wife, the circumstances of the appellant were precarious. It also applied particularly to the consideration of the private life he had established in this country. His wife has a reasonable income which the HOPO submitted would satisfy the financial requirements if the appellant made an application for entry clearance from overseas.

27. The judge said he had taken into account the personal circumstances within the family of the appellant's wife. She and her family had his sympathy in that respect but in assessing proportionality, all factors favouring both parties must be taken into account. In view of the failure by the appellant to establish his innocence in the ETS tests, the public interest must prevail, that is to say, the maintenance of an effective system of immigration control.

28. For these reasons the judge found that the appellant could not succeed in his application with reference to the Immigration Rules. He found that the appellant would not face obstacles on returning to India with reference to sub-paragraph 276ADE(1)(vi) of the Immigration Rules due to his background. On return he would

be in a position to make an application to join his wife in the UK. The judge found that the respondent's decision was not disproportionate.

29. The decision by Judge Pickup to grant permission was only in relation to whether the judge properly applied the burden and standard of proof.

30. Mr Makol submitted that in the light of **SM and Qadir** the Secretary of State discharges the burden of proof and which then shifts to the appellant to satisfy on a minimum level of plausibility whether he cheated and then the burden shifts back to the Secretary of State. He relied on page 6 of the skeleton argument which had been submitted for today's hearing; he relied on **Shen (Paper Appeals: Proving Dishonesty) [2014] UKUT 236 (IAC)** which held (a) that first were the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State; (b) the spotlight thereby switches to the applicant if he discharges the burden, again, an evidential one – of raising an innocent explanation namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs; (c) where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities that the appellant's *prima facie* innocent explanation is to be rejected.

31. Mr Makol submitted that in his evidence recorded at paragraphs 22 to 25 of the judge's decision, the appellant properly answered the questions that were put to him. The appellant confirmed in his statement what he said on the day in cross-examination.

32. Mr Makol submitted that at paragraph 52 the judge set the burden wrong and because of this, the judge's conclusions at paragraph 54 and 55 were legally wrong. Mr Makol submitted that the error is legal and material.

33. Mr Whitwell submitted that at paragraph 52 the judge set out the law as to evidential and legal burden of proof impeccably. He said the question was whether the judge erred in looking at whether or not the appellant provided an innocent explanation.

34. Mr Whitwell submitted that at paragraph 22 the judge recorded that the appellant could not recall the detail location of where his TOEIC test was taken. The appellant said he had booked the test centre through the college. Mr Whitwell submitted that the judge looked at the evidence in the round and came to a conclusion. Even if the judge erred in the characterisation of the standard of proof, that was not material.

35. Mr Makol replied saying that the appellant's test result was held to be invalid. There was however no fraud report or certificate to say that the test had been taken by a proxy. He said if the legal foundation is not correct then the determination cannot stand.

36. Having considered the submissions and the evidence that was before the judge, I find that the judge did not err in law.

37. I accept Mr Whitwell's submission that at paragraph 52 the judge set out the law as to the evidential and legal burden of proof impeccably.

38. I find that at paragraph 57 following consideration of the evidence submitted on behalf of the respondent and following the guidance set out by the Upper Tribunal in **SM and Qadir** that the respondent had submitted sufficient evidence to establish that there was a *prima facie* case against the appellant.

39. I find that at paragraphs 60, 63 and 64, the judge correctly held that the burden rests with the appellant to show that he did not cheat in the examination process on the date concerned. I accept that the judge did not in terms say that the burden on the appellant was an evidential burden and that he had to provide an innocent explanation. I find that this omission was immaterial to the judge's decision.

40. At paragraph 64 the judge held as follows:

> *"My assessment of the evidence here is that the Appellant has not discharged his burden to show that he did not cheat in the test concerned. The evidence showing the complicity of Universal Training Centre is very significant and powerful. The Appellant would therefore need to show, based on the statistics annexed to the statement of Peter Lawson, adequate evidence which, on the balance of probabilities, showed that he had not been involved in cheating. On the evidence before me that burden is not discharged. I also take into account in making my findings the Court of Appeal judgment in Majumber and Qadir [2016] EWCA Civ 1167, but here find that the evidence concerning the overall outcomes of the tests on the date in question at the particular institution outweigh other factors".*

41. I accept that the judge was wrong to expect the appellant to show on the balance of probabilities that he had not been involved in cheating. I accept that this was a high burden than the low minimum level required. However, looking at the evidence that was before the judge, I find that the error made by the judge was not material. The appellant could not remember the location of the test centre. His test result was held by ETS to be invalid. The judge held that the evidence showing the complicity of Universal Training Centre was very significant and powerful. In the light of the findings made by the judge, I find that the questions the appellant properly answered did not amount to an innocent explanation.

42. I find that the judge's decision dismissing the appellant's appeal shall stand.

No anonymity direction is made.

Signed Date: 27 June 2019

Deputy Upper Tribunal Judge Eshun