



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Numbers: HU/09597/2019 (P)

HU/09598/2019 (P)

HU/10105/2019 (P)

THE IMMIGRATION ACTS

**Decided under rule 34
On 20th July 2020**

**Decision & Reasons Promulgated
On 3rd August 2020**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

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(ANONYMITY DIRECTIONS MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. Pursuant to directions sent on 20 March 2020 indicating a provisional view that in light of the need to take precautions against the spread of Covid-19 and the overriding objective, it would be appropriate in this case to determine the issue of whether the First-tier Tribunal's decision involved the making of an error of law and if so whether the decision should be set aside; the parties agreed with no objections being raised and both made written submissions on the issues raised in the appeal. It is in the interests of justice to proceed to determine these issues on the papers in light of the detailed written submissions from the parties and the full appeal files.

2. The Appellants appeal with permission against the decision of First-tier Tribunal Judge Reid promulgated on 7 November 2019, in which the Appellants' appeals against the decisions to refuse their human rights claims dated 20 May 2019 were dismissed.
3. The First Appellant is a national of Nepal, born on 11 June 1986, who first entered the United Kingdom in 2009 with leave to remain as a Tier 4 (General) Student and leave to remain as such was extended to 30 November 2016. On 13 August 2014 the First Appellant was served with an IS.151A notice (a section 10 removal notice) on the basis that he had used deception in an English language test in 2013 relied on in his previous application for leave to remain. The Second and Third Appellants are the First Appellant's wife and daughter who are both dependent on this latest application for leave to remain on human rights grounds made on 2 May 2020.
4. The Respondent refused the applications the basis that the Appellants did not satisfy the requirements of the Immigration Rules for a grant of leave to remain, either under Appendix FM on the basis of family life or under paragraph 267ADE on the basis of private life. Further, the First Appellant was refused on suitability grounds on the basis of having used deception in obtaining an English language test by a proxy test taker, relied upon in a previous application for leave to remain. There were no exceptional circumstances to warrant a grant of leave to remain.
5. Judge Reid dismissed the appeal in a decision promulgated on 7 November 2019 on all grounds. In relation to the suitability criteria and allegation of deception against the First Appellant, it was found that despite the criticisms by the All Party Parliamentary Group of the ETS evidence, the Respondent had discharged the initial burden of proof. The First Appellant's explanation in response was considered in detail but overall, it was found that the Respondent had discharged the legal burden of proof to establish on the balance of probabilities that the prima facie innocent explanations of the First Appellant were rejected and he did use a proxy test taker in 2013. Separate consideration was given to the Appellants' private and family life as well as the best interests of the Third Appellant; with the finding that there would be no breach of the right to respect for family life as the Appellants would return to Nepal together as a family unit (and Appendix FM of the Immigration Rules is not therefore satisfied as they are all Nepalese nationals); and there were no very significant obstacles to reintegration in Nepal for the purposes of paragraph 276ADE of the Immigration Rules. In relation to Article 8 and private life more broadly, the First-tier Tribunal took into account the factors in section 117B of the Nationality, Immigration and Asylum Act 2002 and overall found that the public interest in immigration control outweighed the interference with the Appellants' private life.

The appeal

6. The Appellants appeal on four grounds as follows. First, that the First-tier Tribunal materially erred in law in making speculative findings, in particular by finding that the lack of evidence as to the First Appellant's studies between 2009 and 2013 was because they were not going well due to him struggling with English, which was found to be a motivation for cheating in 2013. The finding was made without evidential basis and then contradicted by the finding that the First Appellant had sufficient English, which could be improved rapidly, to undertake a Master's degree course from 2013. Secondly, that the First-tier Tribunal materially erred in law in applying the wrong standard of proof to the evidence, higher than the balance of probabilities. Thirdly, that the First-tier Tribunal materially erred in law in failing to make any clear assessment of the First Appellant's credibility and in particular failed to give any weight to the consistency of his evidence as to the detail about the test taken and transport to get there. Finally, that the First-tier Tribunal materially erred in law in failing to give sufficient weight to the First Appellant's evidence under cross-examination and his academic achievements, in particular his study in English between 2002 and 2007 before he arrived in the United Kingdom; not making findings on the flaws in the Respondent's generic evidence and failing to take into account that the First Appellant had completed an Association of Business Executives course in the United Kingdom prior to commencing his Master's degree in 2013.
7. The Appellants submitted further written submissions setting out five separate grounds of appeal, said to be those originally made but significantly recast and including additional points and at least one additional ground, that the First-tier Tribunal's findings in relation to the First Appellant's English language ability between 2009 and 2013 were made without giving him an opportunity to respond. The written submissions fail to correspond with the grounds of appeal submitted by the Appellants upon which permission was granted and seek, without leave, to significantly widen and change the matters relied upon with no explanation for the approach. I set out below a summary of the submissions but return later to consider the extent to which they are actually within the scope of this appeal.
8. The first ground of appeal identified in the written submissions is that there was a failure by the First-tier Tribunal to consider relevant evidence before it. It is submitted that further evidence sent as an addendum to the Appellants' bundle on 16 October 2019, which contained evidence of the First Appellant's attendance at the South London College; was not taken into consideration by the First-tier Tribunal. There was a failure to take into account relevant material relied upon by the Appellant.
9. The second ground of appeal identified in the written submissions, is that the First-tier Tribunal had failed to give the Appellants' notice of an adverse finding against them, which appears to be relied upon on further to a statement in the original grounds that the First Appellant was not asked questions about the position prior to 2013. However, there was no

express ground of appeal on this basis in the application for permission, nor has permission granted on it (which I return to below). On this point, the Appellants' submit that there was no basis for speculation as to the First Appellant's academic progression in this time and if asked, he could have drawn attention to the documents not considered by the First-tier Tribunal as to this period.

10. The third ground of appeal identified in the written submissions is that the First-tier Tribunal made contradictory findings that the First Appellant was struggling in English between 2009 and 2013 but was then able to successfully begin a Master's degree in 2013 and completed it in 2016 in English; with an attempt to reconcile this by suggesting a rapid improvement in this period.
11. The fourth ground of appeal identified in the written submissions is that the First-tier Tribunal applied the wrong standard of proof, failing to follow the approach set out in Mhandiramge (section S-LTR. 1.7) [2015] UKUT 675 (IAC) and in relying on the findings in SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC) without appreciating that the findings in the All Party Parliamentary Group report could alter the stage one conclusion. The Appellants submit that the First-tier Tribunal fail to answer the second stage as to whether the First Appellant's evidence met the test of a plausible innocent explanation; such that the final conclusion is flawed.
12. The fifth ground of appeal identified in the written submissions is that the First-tier Tribunal failed to properly engage with the evidence from the All Party Parliamentary Group or generally the criticisms of the Respondent's evidence; making findings apparently based solely on the First Appellant's motivation to cheat.
13. The Respondent submitted further written submissions pursuant to the directions issued by UTJ Smith on 20 March 2020, setting out her response to the grounds of appeal. The Respondent continued to rely on her rule 24 notice dated 4 March 2020, which in summary, opposed the appeal on the basis that the First-tier Tribunal expressly considered all of the evidence and reached findings that were open to it, with adequate reasons in relation to the finding of deception, applying the correct standard of proof.
14. On the first ground of appeal, the Respondent submits that this amounts only to a disagreement with the findings made without identifying any error of law in the decision. The First-tier Tribunal relied on the lack of evidence of the First Appellant's studies between 2009 and 2013 (in contrast to other periods) to confirm even when and whether the Appellant attended and no explanation had been given by the First Appellant to explain the gap. It was open to the First-tier Tribunal in the absence of evidence about this period to conclude that this was because the First Appellant's studies were not going well and he was struggling with his English. Further, it was open to the First-tier Tribunal to find the absence

of evidence was inconsistent with the First Appellant scoring 100% in his English language test in 2013. It is submitted that there is no contradiction in finding that the Appellant had studied in English before and after this period, but became rusty in this middle period when there was no evidence that he was studying or using his English.

15. On the second ground of appeal, the Respondent submits that the First-tier Tribunal correctly set out and applied the correct standard of proof and there is nothing in the decision to show anything other than the balance of probabilities being applied after consideration of all of the evidence in the round.
16. On the third ground of appeal, the Respondent submits that the weight to be attached to the evidence is a matter for the First-tier Tribunal and it was open to it to attach no significance either way to the evidence of the First Appellant's journey to the test centre for the reasons given in paragraph 27.
17. Finally, the Respondent submits that the First-tier Tribunal expressly referred to evidence of the First Appellant's studies in English prior to his arrival in the United Kingdom and more recently, but concludes that this does not identify his language ability at the pertinent time in 2013. Further, the All Party Parliamentary Group report was expressly taken into account at paragraph 30 and that the failure to expressly refer to the First Appellant's Association of Business Executive course was not material as it did not shed any light on the Appellant's English language ability between 2009 and 2013.
18. Upon consideration of the written submissions, it became clear that neither party had seen those made by the other and therefore I issued directions on 6 July 2020 providing for the responses to be shared and the parties were given the opportunity to make any further submissions if needed. Both parties confirmed that they did not wish to make any further submissions and continued to rely on those already filed.

Findings and reasons

19. It is necessary to specify first what the grounds of appeal before the Upper Tribunal actually are. I have set out above the four grounds in the application for permission to appeal which are confirmed and summarised in the grant of permission by First-tier Tribunal Judge Grant-Hutchison as follows:

"Whilst the Judge consider [sic] the correct burden of proof it is arguable that the Judge has erred in law (a) by making speculative findings in stating that the lack of evidence about the period when the Appellant was first starting in the UK between 2009 to 2013 was on the basis that his studies were not going well and that he did not want to explain why that is the case because it involves struggling with English; (b) by contradicting

herself in stating that whilst the Appellant must have been struggling with English during the period from 2009 to 2013 he was able to complete a three-year MSc course from 2013 onwards "as his English could be improved quite rapidly given his existing knowledge"; (c) by failing to make any clear assessment of the Appellant's credibility in relation to his journey to the test centre; (d) by failing to make any findings on the evidence that the Appellant had completed the Association of Business Executive Course in the UK prior to the offer to commence a Master's degree at the University of West London in 2013 which could have made a material difference to the weight the Judge gave to the Appellant's study of English before he arrived in the UK and the period from 2009 to 2013."

20. To the extent that written submissions on behalf of the Appellants go wider than these grounds, permission has not been sought or obtained to argue them and only those submissions relevant to the actual grounds of appeal will be expressly considered; albeit for completeness some of the additional points are addressed but can not be determinative.
21. The first ground of appeal is that the First-tier Tribunal made speculative findings on the First Appellant's English language ability based on the absence of documents relating to his studies between 2009 and 2013. The further written representations refer to documents submitted under cover of a letter dated 16 October 2019 containing, inter alia, a record of the Appellant's attendance from South London College which were not considered by the First-tier Tribunal.
22. However, although a copy of those documents accompanied the written grounds of appeal and further submissions, there is no evidence of an addendum to the main bundle having been received by the First-tier Tribunal or available to Judge Reid when considering the appeal – it is not on file (save for as an attachment to later documents) and it is not listed in paragraph 4 of the decision as evidence before the Tribunal. The record of proceedings start with a list of the evidence before the First-tier Tribunal and discussion on this between the parties as the Respondent did not have the Appellants' bundle and arrangements were made to deal with that. There is nothing to suggest any reference was made at that point to an addendum bundle, nor at any other point during the hearing before the First-tier Tribunal; nor reliance placed in submissions or otherwise on any document contained in an addendum bundle. Further, there is no reference to the particular document now referred to in the skeleton argument on behalf of the Appellants (contrary to the express reference to other educational documents before and after the period 2009 to 2013 in the United Kingdom); nor to any other documents in an addendum bundle. There is no error of law in the First-tier Tribunal not taking into account evidence which was simply not before it nor mentioned or relied upon at all at the hearing.

23. The evidence that was before the First-tier Tribunal did not include any documentary evidence about the First Appellant's studies between 2009 and 2013, in contrast to detailed written evidence with supporting documentation of his studies before and after this period. It was not simply the absence of evidence for this period but the contrast between the availability of evidence before and after this period combined with the lack of explanation about the period in between which led the First-tier Tribunal to draw adverse inferences about the Appellant's lack of progression during this time and that this would be relevant to his motivation to use a proxy test taker in 2013 when applying for a Master's degree course. The First-tier Tribunal considered that if there had been evidence of attendance and progression, it was less likely that problems with the First Appellant's study in English would have arisen. I find those are findings which were open to the First-tier Tribunal to make on the basis of the evidence that was, and was not before them at the date of the appeal (which as above, did not include the attendance letter for South London College or anything documenting completion of any course during the period 2009-2013).
24. Further, I do not find that the First-tier Tribunal's finding about the First Appellant's English language ability in 2013, which was in any event directed towards possible motivation for using a proxy test taker rather than any specific finding as to his level of English at that time (given the lack of evidence of the same and in recognition of the fact that a person may still use a proxy test taker even if their English was sufficient that they could have passed the test themselves) was inconsistent with the finding that his English could have rapidly improved between 2013 and 2016 by the time of completion of his Master's degree and subsequently to the date of hearing when he gave oral evidence. For these reasons I find no error of law on the first ground of appeal.
25. The second ground of appeal is that the First-tier Tribunal applied the wrong standard of proof, higher than that of the balance of probabilities. That is not borne out by a rational reading of the decision of the First-tier Tribunal which expressly sets out both the three stage approach where the Respondent bears the initial evidential burden of a prima facie case of deception; followed by the burden shifting to the Appellant to establish an innocent explanation to a minimum plausible level; and finally the legal burden on the Respondent to establish deception. There are clear findings on all three stages in paragraphs 30 to 32 of the decision with express reference to the standard of proof applied being the balance of probabilities. There is nothing express nor in substance in the decision to support an assertion that any different or higher standard was in fact applied to the evidence. There is no error of law on this second ground of appeal.
26. The third ground of appeal is that the First-tier Tribunal failed to make an assessment of the First Appellant's credibility and failed to give any weight to the consistency of his evidence about his test and travel to it. There is

no need for a Tribunal to expressly state whether a person is found to be credible or not as a free-standing statement within a decision. In the circumstances of this case, where numerous reasons are given for the overall finding that the First Appellant used a proxy test taker for his English language test and was dishonest in doing so and further, the specific and express finding that his prima facie innocent explanation is rejected; there is no doubt that the First-tier Tribunal did in substance assess the First Appellant's credibility and found that aspect of his claim, that he took the test himself, was not credible.

27. In paragraph 27 of the decision, the First-tier Tribunal considers the First Appellant's evidence of his test and in particular travel to it; giving clear and sustainable reasons for not attaching weight to it either way. The weight to be attached to evidence is primarily a matter for the First-tier Tribunal and there is no error of law or irrational approach to this particular evidence. There is no error of law on this third ground of appeal.
28. The final ground of appeal also concerns the weight attached to evidence by the First-tier Tribunal, in particular to the First Appellant's performance in cross-examination, his academic achievements and duration of his study in English; as well as too little weight being attached to the flaws relied upon in the Respondent's generic evidence. This is expanded upon in the further written submissions to rely more specifically on the All Party Parliamentary Group report and inconsistent information on the look-up tool about the First Appellant's nationality.
29. The First-tier Tribunal expressly took into account within its findings the First Appellant's academic qualifications (to the extent that these were in evidence before the First-tier Tribunal; as above this did not include information about completion of the Association of Business Executives course) and previous English language assessment; at school and with a diploma in General Medicine, studied in English in Nepal (paragraph 22 of the decision), his British Council English test in 2009 (paragraph 23 of the decision), his MSc between 2013 and 2016 and offer of a place to do a PhD (paragraph 24 of the decision). It can not be said that these matters were not taken into account nor is there any error with the weight attached to this evidence by the First-tier Tribunal, as above, that is a matter for the Tribunal with no irrationality in the approach or reasons given.
30. In relation to the Respondent's generic evidence, the First-tier Tribunal noted at paragraph 29 of the decision that there was a criminal investigation into South Quay college where the First Appellant stated that he sat his English language test, which is more specific than the All Party Parliamentary Group report which was wider on the ETS system more generally. The First-tier Tribunal then make further express reference to that report in paragraph 30 and the criticisms made of the ETS evidence found to mean that it is impossible to take decisions based on that evidence alone. There is then an express finding that the report identifies

a number of real concerns about the ETS process and decision making using that data; but those concerns were not sufficient for the First-tier Tribunal to find that the Respondent had not discharged the initial evidential burden as also decided in SM and Qadir.

31. Contrary to the suggestion in the further written submissions on behalf of the Appellants; these paragraphs in the First-tier Tribunal's decision expressly engage with the findings in the report and an overall assessment of all of the evidence was made, rather than just a simple reliance on the earlier findings in SM and Qadir. Although there is no express reference to the concerns raised about the content of the look-up tool, the First-tier Tribunal expressly found that a decision could not, and was not, made on the basis of that evidence alone. The First-tier Tribunal expressly considered all of the evidence in the round, in a balanced way and reached conclusions which were open to it on the evidence available and with adequate reasons being given for those findings. There is no error of law on the final ground of appeal as to the assessment of the First Appellant's history, the Respondent's generic evidence or material contrary to it; nor in the weight attached to any of this evidence.
32. For the reasons set out above, there is no error of law in the decision of the First-tier Tribunal.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed G Jackson

Date

20th July 2020

Upper Tribunal Judge Jackson