



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01534/2019

THE IMMIGRATION ACTS

Heard at : Field House
On : 25 June 2021

Decision & Reasons Promulgated
On : 13 July 2021

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

ASHLY TOMY GEORGE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Sharma, instructed by Paul John & Co Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India, born on 13 October 1983. She arrived in the UK on 22 February 2011 with leave as a Tier 4 student until 29 June 2012. Following an application made on 26 June 2012, she was granted further leave until 14 May 2014. Her leave was subsequently curtailed to 20 May 2013, but a further application for Tier 4 leave was granted and she was given leave to 19 March 2016. On 15 August 2014 the appellant was served with an IS151A removal decision. She then made a human rights claim on 15 August 2016, which was refused and certified as clearly unfounded on 5 October 2016. She made a further human rights claim on 5 April 2017 which was refused on 11 January 2019 with a right of appeal.

2. In the decision refusing the appellant's claim, the respondent considered that the suitability provisions in S-LTR.1.6 of Appendix FM applied on the basis of the appellant having submitted a fraudulently obtained TOEIC certificate following an English language speaking and writing test taken on 23 May 2012 at Seven Oaks College. The appellant's test result had been cancelled by ETS as it was considered that she had used a proxy test taker in the speaking test. The respondent noted that 72% of the speaking and writing tests taken on that day were deemed invalid as having been obtained by the use of a proxy and 28% were questionable. None of the results were released by ETS as reliable and the respondent considered that the evidence therefore demonstrated that Seven Oaks College was not operating under genuine test conditions on the date the appellant took her test. As a result, the respondent was not satisfied that the appellant's presence in the UK was conducive to the public good. The respondent found further that the appellant's relationship with her partner did not meet the eligibility requirements of Appendix FM and considered there to be no evidence of very significant obstacles to integration in India for the purposes of paragraph 276ADE(1) of the immigration rules. It was considered further that there was no evidence of exceptional circumstances entitling the appellant to leave outside the immigration rules.

3. The appellant appealed against that decision. Her appeal was allowed by First-tier Tribunal Judge Sweet in a decision promulgated on 6 September 2019. The judge considered that the respondent had failed to discharge the burden of proving fraud. He relied upon the report of the All-Party Parliamentary Group (APPG) in concluding that there were considerable flaws in the respondent's evidence about proxy test-takers. He considered that the appellant was a credible witness, he noted that she had taken studies in India and in the UK in English and he concluded that her application should not have been rejected on suitability grounds. He also concluded that there were very significant obstacles to the appellant's integration in India because of the length of time she had been in the UK.

4. The Secretary of State sought, and was granted, permission to appeal to the Upper Tribunal against Judge Sweet's decision. The matter came before Upper Tribunal Judge Kamara on 27 February 2020, to decide the error of law question.

5. In a decision promulgated on 4 March 2020 UTJ Kamara found material errors of law in the judge's decision, on the grounds that the judge had failed to engage with the findings, and follow the guidance, in SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 229 and Secretary of State for the Home Department v Shehzad & Anor [2016] EWCA Civ 615 and had failed to say anything to justify departing from those authorities; and that he had given inadequate reasons for concluding that the appellant's application was wrongly refused on suitability grounds. UTJ Kamara set aside the decision in its entirety and directed that it be re-made at a resumed hearing in the Upper Tribunal on another date.

6. The matter then came before me. Mr Tufan applied for an adjournment to await the final decision of the Upper Tribunal following the preliminary decision in DK and RK

(Parliamentary privilege; evidence) India [2021] UKUT 61. Mr Sharma was neutral in the matter although he was content to proceed with the appeal and pointed out that the appellant had been waiting for a lengthy period of time to resolve her case. I decided that an adjournment was not necessary at this point and that it was appropriate to proceed to hear the appeal.

7. The appellant gave oral evidence before me, confirming that she had booked her TOEIC test by attending the college in person at the end of April 2012 and had attended four day-long classes in preparation for the test at the college. The college, Seven Oaks College, was in central London. She travelled to the college for the classes by train to Chancery Lane or Holborn and then took a taxi to the college. She paid around £250 for the classes and the tests together, all in cash. She was given a receipt but had since lost it. The appellant explained that there were about ten people in the room taking the test, although there were more than that present at the college overall. She did not know if any cheating was taking place in the other rooms and was not aware of any cheating in her room. She explained that she wore headphones, through which she was given instructions, and the relevant questions appeared on the computer screen. She spoke through a microphone. The appellant explained the content of some of the questions and how she answered. She said that she had studied and practised nursing in India and had worked as a health care assistant in the UK, conversing in English. She had taken the first year of a CIMA course, in English, but had been unable to complete the next two years because her visa was cancelled. When she received the removal decision advising her that she had exercised deception, she tried calling the college but there was no answer. She spoke to the receptionist of the building where the college was located but was told that the college's licence had been cancelled. Her husband had returned to India three years ago.

8. When cross-examined by Mr Tufan the appellant said that she and her husband had a daughter who was born in 2008 and was living with her parents in India. She said that she travelled to the tests by car - her friend's black BMW - rather than using the train as she was afraid of delays if she took the train. She was living with her friend in Haywards Heath and he looked after her. He parked in the car parking area next to the college and waited for her whilst she did the test.

9. The appellant's friend, Mr Nelson Chummar Poyappdamam then gave evidence before me. He confirmed that he drove the appellant to the college and saw her enter the building. The college was in Millharbour, not far from the London Eye, in Central London. They were living together and he used to see her studying for the test. She and her husband were living with him at the time. She was not the kind of person to cheat. In response to Mr Tufan's cross-examination, Mr Poyappdamam said that the car park was near to the test centre, but was separate from it. He waited for the appellant in the car park.

10. Both parties then made submissions.

11. Mr Tufan relied upon the refusal decision and the respondent's written submissions previously produced by Mr Stephen Whitwell. He referred to the statistics for the college showing the percentages of the test results found to be invalid and relied upon the evidence of Professor French which found there to be only a 2% chance of false negative results. Mr Tufan pointed out that the appellant's level of English was not as fluent as had been suggested and several questions had had to be repeated for her. There was no reason why the appellant went to Chancery Lane or Holborn station from Haywards Heath in order to get to the college. Mr Tufan asked me to find that the appellant had cheated in her test and that the appeal had to be dismissed. Even if it was found that she had not cheated, the appeal should still be dismissed as there was no established family or private life here.

12. Mr Sharma conceded that the respondent had met the initial burden of proof, following the decision in SM and Qadir, subject to the decision in DK and RK, but submitted that the appellant had provided an innocent explanation. The amount of detail she had provided was consistent with someone who had taken the test and she had given a credible explanation as to how she travelled to the test centre. As for the third stage of the relevant test, the appellant had been taught in English prior to coming to the UK and had studied in English after coming to the UK, including taking the CIMA examinations for which she had received high scores in most of the subjects. Her fluency in English may have been adversely affected by the lengthy period she had been in limbo here, unable to work or study. The statistics for Seven Oaks College suggested that the college itself was 'dodgy' and, as such, the information they provided could not be trusted. The Secretary of State was unable to show that the test score was invalidated because of cheating or because the college was dodgy. Mr Sharma relied upon Professor French's report in submitting that there was a very good chance that the appellant's microphone had picked up another voice in the room leading to the conclusion that a proxy was used and that there was a lack of training for the listeners including training on foreign accents. He submitted that the respondent had failed to provide a consistent account of the source of the information in Annex A. The evidence was only as good as its source and Seven Oaks College could not be trusted.

13. Mr Sharma submitted that the appeal should be resolved by finding that: the respondent had failed to discharge the burden of proving the deception allegation; that in line with the decision in Ahsan v The Secretary of State for the Home Department (Rev 1) [2017] EWCA Civ 2009 the appellant's Article 8 rights were engaged and had been since 2014 when the respondent had made an improper removal decision; that the refusal of the human rights claim was materially based on the unfounded ETS allegation; and, in line with Khan & Ors v Secretary of State for the Home Department [2018] EWCA Civ 1684 and the Home Office ETS policy the appellant was entitled to leave to remain and the refusal of her human rights claim was unlawful. The appeal should be allowed on that basis.

Consideration and findings

14. Mr Sharma properly conceded that the first stage of the test in SM and Qadir was met and that the respondent had provided sufficient evidence to meet the initial burden of

proof. The burden therefore shifted to the appellant to provide an innocent explanation in response to the allegation of cheating. Mr Sharma submitted that the appellant had provided such an explanation whereas Mr Tufan submitted that she had not. Having heard from the appellant and her friend and having considered all the evidence, both oral and documentary, I have to agree with Mr Tufan that the appellant has failed to discharge the burden of proof upon her, even to the basic level of plausibility.

15. The evidence relied upon by the respondent which was specific to the appellant consists of the ETS TOEIC Test Centre Lookup Tool for Seven Oaks College and the ETS Selt Source Data showing the appellant's test score to be invalid. The statistics in the Lookup Tool for the status of the TOEIC tests taken at Seven Oaks College paint a dismal picture, showing that on the date the appellant took her second test, 23 May 2012, 72% of all tests (64 out of 89 tests) that day were found by ETS to be invalid and 28% (25 out of 89 tests) were questionable, with none being released. In addition, the statistics showed that without specifying a date, 67% of the total tests taken (708 out of 1051) were invalid and 33% (343 out of 1051) were questionable. The appellant's evidence was, furthermore, that Seven Oaks College had had its licence revoked.

16. The case put for the appellant in response to these statistics was that this was a matter of a college being "dodgy", but not that the appellant had cheated herself. In support of this, reliance was placed, aside from the appellant's past and current ability in the English language, upon her description of the journey to the test centre, her attendance at classes in preparation for the tests and the process of taking the speaking test, which were said to demonstrate that she had genuinely undertaken the test herself. I accept that the appellant did indeed provide a detailed description in that regard. However, in the absence of any supporting evidence other than her friend's account of having seen her studying and having driven her to the test and back, the appellant's own description is limited in the weight that it can be accorded when there are otherwise parts of her evidence that are of concern.

17. One area of concern was the appellant's account of her journey to the college and the location of the college. Neither the appellant nor her friend was able to give anything other than a very vague account of the area where the college was. The appellant stated that she took a train from her friend's house in Hayward's Heath to Chancery Lane or Holborn station and then took a taxi to the college to attend the four days of classes at the college. She was able to recall that the taxi took about ten minutes and that the fare was about £6 but could not say where the college was, other than central London. Her friend, who had driven her to the test and back on two different days, said that the college was in Millharbour, in the area of the London Eye. However, Millharbour is not near the London Eye and neither is it anywhere near Chancery Lane or Holborn stations. Neither is there any plausible explanation as to why the appellant would have taken a train to Chancery Lane or Holborn if she was travelling from Haywards Heath to the college in Millharbour, a point made by Mr Tufan in his submissions. The appellant explained that she took a taxi from the train station because she did not have a smartphone at that time and had only recently come to the UK and was only familiar with her home and the college, yet she had in fact been living in the UK for over a year by that stage.

18. Another concern is that, when asked by Mr Tufan what steps she had taken to speak to ETS or the college after she found out that her visa had been cancelled on the basis of an allegation of deception, the appellant said that she tried to call the college but received no answer and managed to speak to a receptionist in the building where the college was located who told her that it had had its licence cancelled. She gave no explanation why she did not try to contact ETS or to clear her name by other means. Indeed, when she was asked by Mr Tufan, twice, what steps she had taken to challenge the allegation, she failed to provide a proper response, but simply asked why ETS issued her with a certificate if she had cheated and why did they not let her take another English examination and give her another chance as she had spent a lot of money.

19. It is argued on behalf of the appellant that she had no reason to cheat because she had previously and subsequently established her English language ability to a sufficient level to enable her to pass such a test herself. In that regard the appellant relies upon the various certificates and qualifications in her appeal bundle confirming her high school studies and her studies in nursing in India conducted in the English language, together with a previous IELTS test, her work in the UK as a health care assistant and her CIMA examination results. The latter were, however, conducted two years after the TOEIC test was taken and, in any event, the decision in MA (ETS - TOEIC testing) Nigeria [2016] UKUT 450 found that "*there is a range of reasons why persons proficient in English may engage in TOEIC fraud*". I also have to agree with Mr Tufan that the appellant's level of English at the hearing was such that on occasions questions had to be repeated and the answers did not correspond with the questions asked. Mr Sharma's response, that her English may have deteriorated as a result of not having studied or worked due to being in limbo since 2014, is not a persuasive one.

20. As for the weaknesses in the respondent's evidence that have been repeatedly referred to in the relevant authorities and by the experts, as referred to in Mr Sharma's skeleton argument at [14] to [21], I do not consider that to be a sufficient answer to the concerns in this appellant's case, when considering the matters set out above and taking account of the particularly adverse statistics in the case of Seven Oaks College.

21. For all of these reasons I simply cannot accept that the appellant has provided a sufficiently 'innocent explanation' to discharge the burden of proof upon her. Even according due weight to her detailed description of the test, the overall picture is one in which the respondent has discharged both the evidential and legal burden of proving cheating. For all of those reasons it seems to me, therefore, that the respondent was entitled to conclude that the suitability provisions in S-LTR.1.6 of Appendix FM applied such that the appellant could not meet the requirements of the immigration rules.

22. Aside from the suitability provisions of the rules, the appellant cannot meet the eligibility requirements in Appendix FM or the requirements in paragraph 276ADE(1) in any event. Her husband and child are in India and there is no family life existing in the UK. There is no evidence of any very significant obstacles to integration into India. The appellant has spent the majority of her life in that country and has worked there. There is

no reason why she could not find employment there again. There are no compelling circumstances justifying a grant of leave outside the immigration rules. The appellant has clearly failed to show that the respondent's decision is disproportionate and her Article 8 human rights appeal is accordingly dismissed.

DECISION

23. The making of the decision of the First-tier Tribunal involved an error on a point of law and has been set aside. I re-make the decision by dismissing the appeal.

Signed *S Kebede*
Upper Tribunal Judge Kebede

Dated: 28 June 2021