IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/08393/2018;
HU/08400/2018;
& HU/08397/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20th July 2021	**On 24th August 2021**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

'RBS' (1)
and
'IN' (2)
and
'IS' (3)
(ANONYMITY DIRECTION CONTINUED)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the Appellant: Mr M Nadeem, Counsel, instructed by Piper May Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 20th July 2021.

2. This is the remaking of the decision in the appellants' appeals against the respondent's refusal of their human rights claims. The background to these appeals is set out my decision promulgated on 6th January 2021, annexed to these reasons, in which I found that a First-tier Tribunal had erred in law. I do not repeat that background. Suffice it to say, I preserved no findings of fact. The issues for the two adult appellants (a married couple) and their infant son, all Nepalese citizens, are:

   2.1. on the TOIEC issue, with the appellants accepting that the respondent has demonstrated a prima facie case, first, whether the appellants have provided an innocent explanation meeting the minimum level of plausibility (see SM and Qadir v SSHD (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC) and SSHD v Shezad and Chowdhury [2016] EWCA Civ 615?

   2.2. Second, in respect of the TOEIC issue, should I reject any innocent explanation by the appellants, having been satisfied that the respondent has proven the alleged deception?

   2.3. Third, whether, on wider article 8 ECHR grounds outside the Immigration Rules, the appeal should be allowed?

Documents

3. In terms of documentation, I discussed with the representatives at the beginning of the hearing whether I should be referring to any additional documents that had not been before the First-tier Tribunal. The representatives confirmed that I did not and instead, all I needed to refer to were three sets of documents: the first, entitled a "list of essential reading," which ran to some 126 pages including the witness statements of the first and second appellants; a second supplementary bundle, which included a statement of Professor French and a report of a criminal investigation by Detective Inspector Carter in relation to the test centre at Westlink College where the appellant asserts she took the TOEIC test; and third, a comparison document entitled "IELTS in CEFR scale," which compared the IELTS qualification, which the appellant passed to get her student visa in 2008, with the impugned TOEIC test she took in 2012.

The appellants' witness evidence

4. I heard oral evidence given by the first and second appellants, who adopted their witness statements. Those statements were a number of years old, dating back to 2018 and had been produced to the First-tier Tribunal, with limited evidence in respect of the third appellant; the current circumstances in Nepal; and the circumstances in which the second appellant took the TOEIC test. Nevertheless, it is important to note that the second appellant was adamant, both in her witness statement and in oral witness evidence, that she had taken the TOEIC test in question and there was no motivation or reason for her to have used a proxy to take the test.

5. She was cross-examined by Mr Tufan and confirmed that in April 2012, when she had taken the TOEIC test, she had lived in Rayners Lane in Middlesex near Harrow, whereas the test centre in question was in Harlow. She candidly accepted that it was

some distance apart but she also explained that her visa was due to expire and she needed to obtain a valid English language certificate by July/August of 2012. When she approached a test centre offering her first preference, an IELTS qualification, nearer to her college, the London College of Management Studies, that test centre was fully booked, so she then sought further advice from her college, who recommended that instead she take the TOEIC qualification. That was some distance away but did enable her to take her qualification promptly and she did not wish to leave matters until the last minute. In terms of the remainder of her oral evidence, she said that she did not notice anything untoward when she took her test and indeed, after taking the test, she went on to carry out successfully additional studies to which I was referred at pages [70] to [80] of the first bundle.

6. The second appellant candidly confirmed that in terms of her son, the third appellant, whilst he was now four years old, at nursery and about to start reception class in the UK, there had been no health difficulties and he had progressed well in nursery.

7. However, the second appellant emphasised the period of time that she had spent in the UK and also the difficulties of returning to Nepal, where there were no jobs. She also accepted that she had not carried out any job searches recently but even with her qualification to MBA level, she had not worked for a number of years. She and her husband were only able to survive by living in a property belonging to her brother, who also owned a business in the UK and paid for the family's full needs.

8. The first appellant also gave evidence, in respect of which there was limited cross-examination. He explained that he had never overstayed, including a period when he in fact left the UK to re-enter, in order to ensure that he did not overstay. He re-iterated that whilst he had also attempted to study at a college, his college had had its licence revoked and he, for reasons set out in his witness statement, had been unable to access an alternative sponsoring college. The couple had spent thousands of pounds over the years attempting to regularise their position and, in his words, his life had been ruined in the circumstances. He too was adamant that his wife had not cheated in relation to her studies and at the time of the TOEIC test she had been on a Tier 2 (General) visa, which was a route to settlement.

The respondent's closing submissions

9. Mr Tufan relied on the respondent's refusal letter. He also referred me to the well-known authority of MA (ETS - TOEIC testing) Nigeria [2016] and in particular §57, where it was recognised that there might be a number of motives for why somebody would cheat. That might be the case even where their English was, as potentially here, perfectly satisfactory. Those reasons might include a lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. Those reasons could potentially overlap.

10. Moreover, I should also give weight to the "look-up tool" and in particular, the criminal investigation into the Westlink College and the section of Detective

Inspector Carter's report in May 2015, which included an unannounced visit on 15th May 2012, only a matter of weeks after the second appellant took her test on 18th April 2012. At the unannounced visit, those taking the tests had apparently fled and upon discovery it appeared that there had been proxy tests taken. Of the tests taken at that centre, two thirds were invalid and the remainder were questionable and no tests at had been released as "valid". Whilst Mr Tufan addressed the best interests of the third appellant, a minor, nevertheless, the best interests of that child were to return as a family unit with his parents to Nepal. There was little evidence of any obstacles to integration in Nepal. The couple were more educated than most and they had financial resources in order to ensure their integration into Nepal. Any challenges, as sometimes was the case in relation to the efficacy of the finding in relation to deception and the validity of the result had been dealt with by Professor French at page [14] of his report and in particular, the limited number of false positives that arose in the ETS investigation.

Closing submissions on behalf of the appellants

11. Mr Nadeem reiterated that the second appellant had successfully passed an IELTS test in May 2008, a number of years before the 2012 test. Looking at the specific IELTS results at page [79] of the first bundle, it appeared that her proficiency between 2008 and 2012 had improved, which was entirely consistent with her having reasonable English on entry to the UK and then, four years later, her English improving as she lived and studied in the UK. It was also entirely plausible that she would have genuinely taken the test in circumstances where she was rigorous in ensuring that she had appropriate qualifications. She even went on to obtain further qualifications.

12. There was, it was acknowledged, an incident at Westlink College in May 2012 but that was not a date on which the appellant was present and it was also further unclear as to what action had been taken between 2012 and 2015 (the date the second appellant's leave was curtailed), when Detective Inspector Carter's report had suggested that Westlink College had been closed as a result of the 2012 raid.

13. The second appellant had been consistent in challenging the allegations against her and whilst she had not sought a copy of the test recording, she had nevertheless continued to pursue applications, including judicial review, noting that there was no in-country right of appeal at the time. I was also asked to take into account her general plausibility and the good quality of her English in giving evidence at the hearing today.

14. In relation to the human rights appeal more widely, I was asked to take into account that were I satisfied that the second appellant had not engaged in TOEIC fraud, then the respondent's caseworker guidance was clear that she would therefore be granted six months' leave to remain. The consequence of that, because of the recent decision on long residence in R (Waseem & Others) v SSHD (long residence policy – interpretation) [2021] UKUT 146 (IAC), was that the second appellant would then

become a "book-ended" overstayer, who had been in the UK for over ten years, which should have significant weight. Indeed the refusal letter had actively considered long residence.

15. In terms of any wider concerns relating to suitability, any specific concerns relating to deception would fall away. The second appellant had now paid off the litigation debts and whilst the NHS debt remained, that was something where she had agreed a schedule of repayments with the NHS. In any event, consideration of that under paragraph 9.11.1 of the Immigration Rules did not mandate refusal but allowed the respondent to exercise discretion to grant her leave to remain. Whilst the appellants had made their case in relation to difficulties in integrating into Nepal, the primary point was that the private life and family life had not been established or developed when the couple were present in the UK unlawfully. They had, in good conscience, attempted to regularise and clear the second appellant's name in relation to the allegations against her.

Findings

16. I deal first with the question and allegation of deception and second, the question of the wider article 8 rights.

17. On the one hand, I am conscious that the result for the second appellant in respect of her TOEIC test taken in April 2012 was marked as 'invalid'. I have also been referred to the criminal inquiry into Westlink College, which had revealed that between 18th October 2011 and 18th April 2012, Westlink College had undertaken 915 TOEIC speaking and writing tests, of which ETS had identified the following:

"Invalid	661
Questionable	254
Not withdrawn, so no evidence of invalidity	zero
and	
Percentage invalid	72%."

18. It is noteworthy that that period covers the date on which the second appellant took her test. §12 of the same "Project Façade" Report completed by Detective Inspector Carter said that there was evidence of organised and widespread abuse of TOEIC that took place at that particular test centre, and at §13, continued that an ETS audit had taken place on 15th May 2012, as a speaking and writing test was taking place. On arrival the auditors were met by a college employee who attempted to prevent them from going directly to the test room. When they did arrive at the test room all of the candidates and others ran out of the room leaving it empty. No invigilators were present. On closer inspection of the computers, the online tests had been abandoned before completion and documents were seen that suggested pilots (imposters) had been used to take the test for the candidates. As a result of this audit, no test scores were registered and the licence to continue testing was revoked

by ETS. Voice analysis showed evidence of widespread cheating and voice samples compared the voices of eight candidates interviewed under caution and none were the same. That is therefore a piece of evidence to which I give significant weight and the context is one where, as the appellants themselves accept, there is sufficient evidence to show a prima facie case that the second appellant may have been involved in TOEIC fraud. Nevertheless, as the case-law reminds us, that is not the end of the matter, and I have to consider whether there was an innocent explanation which is plausible to the relevant basic standard.

19. The second appellant's case is a very simple one. First of all, the quality of her English meant that she had no motive, in particular what was said to be a fear or lack of confidence in taking the test in question. Her English, a number of years previously, was already good enough and her later TOEIC scores were consistent with having improved even further. Whilst I accept Mr Tufan's submission that there will be cases where, nevertheless, even where somebody has English of sufficient level they may still cheat for other reasons, for example of nervousness or a lack of time, nevertheless, prior proficiency in English has to be a relevant factor.

20. Second, I also take into account the second appellant's straightforward evidence as to why she took the test in April 2012 in Essex, when living near Harrow. Her explanation was plausible, namely that she had wished to take the test before her visa expired in August 2012. She had wanted to take a second IELTS test, could not find a test centre with dates that did not run close to the deadline and asked her college for advice. Her explanation was not, in reality challenged to any degree by Mr Tufan and instead, what he submitted, in closing submissions, was that this was implausible in circumstances where there was an ETS audit a number of weeks later where suggested that there had been mass fraud. Nevertheless, the fact that there was an unannounced ETS audit visit a number of weeks later suggesting that the fraud was widespread does not detract from the central clarity of the second appellant's submission as to why she chose the test she did; at the location which she did; to which there has been no substantive challenge.

21. In terms of the second appellant's general credibility, whilst I attach limited weight to it, I noted that her spoken English and comprehension was good today, albeit this is many years after the event in question in 2012. Moreover, the second appellant was a witness who was willing to concede points that were not in her favour. She was readily willing to accept the fact that, for example, the third appellant has no healthcare issues and he is doing well at school; she has not made regular or recent enquiries in relation to the availability of work in Nepal and she also readily accepted that she currently receives significant support from her brother in the UK. I infer that he might even be willing to support her for a limited, albeit not an indefinite period, if she and the other two appellants were returned to Nepal.

22. I am satisfied, based on the clarity of the second appellant's evidence as to why she chose the test centre she did, on the date she took the test, that she has provided a plausible innocent explanation. Moreover, in considering whether the respondent

has gone on to discharge the overall burden on herself, I am also satisfied that the respondent has not proven that the second appellant had engaged in the TOEIC fraud. While on the one hand, I bear in mind the Project Façade report which indicated no valid test results in the period in question; Professor French's views on the small number of "false positives" (see §4 – conclusions, at page [12] of his report); I also consider not only on the plausible explanation, but beyond that, the second appellant's prior attainment in English under the IELTS qualification; her studies prior to, and after the TOEIC test in April 2012, ranging from the award of a postgraduate diploma, in studies accredited by Ofqal, which included corporate communications and strategic management (page [73] of the supplementary bundle), to the award of the second appellant's MBA from the University of Sunderland in April 2013 (page [71]), which indicate a person who is not reluctant or unmotivated to study, or have her work externally assessed. The IELTS qualification score was consistent with her English improving in the period from 2008 to 2012 and I also took into account her general credibility before me at the hearing, willing to accept points that were not necessarily in her favour, as well as her excellent English (accepting that this is many years after the TOEIC test).

23. In conclusion, the respondent has not shown that the second appellant engaged in TOEIC deception, as alleged.

24. I then turn to the question of the appellants' under article 8 ECHR. I have considered section 117B of the 2002 Act, and in particular, as neutral factors, the adult appellants' proficiency in English and the fact that they have not relied on the UK taxpayer for support, having instead relied on the second appellants' brother. I take into account that they have never had settled status in the UK, although at the date of curtailment in 2015, they were on a route to settlement via the second appellant's Tier 2 visa. I also take into account that the appellants have not had lawful leave to remain since curtailment in 2015, albeit at the time, the second appellant had had continuous lawful leave from 28th March 2009 to 1st October 2015 (the date of curtailment) and the first appellant had entered the UK on 29th November 2007.

25. I consider, in that context, the public interest in the maintenance of immigration control and, whilst this is not an appeal under the Immigration Rules, the extent to which the appellants might otherwise meet any part of the Rules, in circumstances where the appellants' leave was initially curtailed solely on grounds of deception.

26. Mr Tufan understandably relied upon the question of whether there were any obstacles, very significant or otherwise, to the family's integration into Nepal. I accept his primary submission that the appellants have not established very significant obstacles to their integration in Nepal. The couple are educated (the second appellant to MBA level) and the second appellant has candidly admitted that she has not carried out any detailed job searches in Nepal. I do not accept the appellants generalised assertions that there are no jobs which the couple could find in Nepal, when they have not even searched for jobs. They have the significant support of the second appellant's brother, who provides them accommodation and

money, and even though there appears to have been some sort of estrangement between the appellant's relatives in Nepal and the appellants, nevertheless I am satisfied that were they to return to Nepal, here they could at least rely, in a short term, on financial support from the second appellant's brother. I do not accept that there is any evidence that the couple, who left Nepal as adults, would return as "outsiders", in the sense of SSHD v Kamara [2016] EWCA Civ 813.

27. However, in the assessment of the appellants' article 8 rights, the obstacles to return are not an end to the matter. This is a case where the first appellant was very careful to not breach the terms of his leave and even left the UK to re-enter for that very purpose on a Tier 2 spousal visa in September 2013. As already noted, the second appellant had her leave curtailed only because of the TOEIC allegation.

28. There are two further ways in which my TOEIC finding impacts on the appellants' human rights. They were on a route to settlement prior to curtailment. I discussed with Mr Tufan, the guidance: "Educational Testing Service (ETS): casework instructions - Version 4.0" dated 18th November 2020, which states, at page [9]:

> *"Implementing appeal findings*
>
> *If an individual who has used an invalid Test of English for International Communications (TOEIC) certificate in support of an application wins an appeal on Article 8 grounds, then the grant of leave will depend upon whether the relevant rules are met. Usually, the individual will be on the path to 5-year settlement if the rules are found to be met and the 10 -year route if the appeal succeeds on the basis of the exceptions in Appendix FM.*
>
> *If the appeal is dismissed on human rights grounds but a finding is made by the Tribunal that the appellant did not obtain the TOEIC certificate by deception, you will need to give effect to that finding by granting six months leave outside the rules. This is to enable the appellant to make any application they want to make or to leave the UK."*

29. On the basis of the respondent's own policy, at the very least, as Mr Tufan accepted, the consequence of my finding on the TOEIC deception allegation is that the appellants will be granted some form of leave, and to use a phrase from the case of Hoque & Ors v SSHD [2020] EWCA Civ 1357, will become "book-ended overstayers". Whilst it is not possible to conclude on the evidence before me that the appellants would therefore have continuous lawful residence, by virtue of Muneeb Asif (Paragraph 276B – disregard – previous overstaying) [2021] UKUT 0096 (IAC), because the appellants may not be able to rely on some of their subsequent applications benefiting from paragraph 39E, (because they are out of time), the fact that the appellants were on a route to settlement; had lived in the UK for a significant period of time lawfully; and had always otherwise attempted to comply with the Immigration Rules must, in my view, lessen the weight of the public interest in immigration control.

30. Moreover, I also conclude that the alternative basis of the refusals, on grounds of suitability, because of NHS and litigation debts, no longer have any material weight.

Mr Nadeem submitted, and Mr Tufan did not dispute, that the litigation debts have been repaid. In respect of the NHS debt (incurred because of the third appellant's childbirth), first, I take into account that the debt was incurred in the context of curtailment of leave, based on the TOEIC allegation. Had leave not been curtailed and instead the adult appellants had been permitted to continue to work, pursuant to the Tier 2 visas, any liability would have instead been to a far more limited immigration health surcharge. Put simply, it is unlikely that the debt would have arisen. Second, the appellants have already agreed a repayment schedule, with which they are complying. Third, the outstanding debt is not a mandatory ground for refusal (see paragraph 9.12.1 of the Immigration Rules).

31. In summary, the appellants cannot meet the Immigration Rules, but that is in large part, if not wholly, the result of the curtailment of leave based on the TOEIC allegation. The appellants were on a route to settlement before curtailment and will, as a result of the respondent's own policy, become book-ended overstayers. There are no outstanding issues around suitability. While I do not conclude that the appellants should be granted indefinite leave to remain (it is not possible to say that they have the required continuous lawful residence), nevertheless, I conclude that refusal of leave to remain would be disproportionate, in the context of the appellants' right to respect for their private and family lives. As a consequence, the respondent's decision to refuse leave to remain is not upheld, and the appellants' appeals succeed.

Decision

32. The appellants' appeals on human rights grounds succeed.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: **4th August 2021**

TO THE RESPONDENT
FEE AWARD

The appeal has succeeded. I regarded it as appropriate to make a fee award of £140.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: **4th August 2021**

ANNEX: ERROR OF LAW DECISION

IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/08393/2018;
HU/08400/2018;
& HU/08397/2018

THE IMMIGRATION ACTS

Heard at Field House
And via Skype
On 16th December 2020

Decision & Reasons Promulgated

Before

UPPER TRIBUNAL JUDGE KEITH

Between

'RBS' (1)
and
'IN' (2)
and
'IS' (3)
(ANONYMITY DIRECTION CONTINUED)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the appellants: *Mr A Chohan,* instructed by Piper May Solicitors
For the respondent: *Ms A Everett*, instructed by the Government Legal Department

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which were given orally at the end of the hearing on 16th December 2020.

2. Both representatives attended the hearing via Skype and I attended the hearing in-person at Field House. The parties did not object to attending via Skype and I was satisfied that the representatives were able to participate in the hearing.

3. This is an appeal by the appellants against the decision of First-tier Tribunal Judge N M Paul (the 'FtT'), promulgated on 24th January 2020, by which he dismissed the appellants' appeals against the respondent's refusal on 28th March 2018 of their application for leave to remain based on a right to respect for their family and private lives under article 8 of the European Convention on Human Rights ('ECHR').

4. The appellants are citizens of Nepal. The two adult appellants, RBS and IN are a married couple who entered the UK in 2007 and 2009 respectively with valid student visas, which were subsequently curtailed in 2015. IS is their infant son, born in the UK in February 2017. The family's leave to remain was curtailed in 2015 on the basis of the second appellant's alleged participation in deception by use of a proxy test taker for tests of proficiency in English (a so-called 'TOEIC' test), via a third party test provider, ETS, as a test centre at West Link College, Essex, taken on 18th June 2012. The second appellant's test result had been assessed under a "look up" tool as "invalid."

5. As a result of the "look up" tool result, coupled with the number of invalid results at the test centre (72%) with none being accepted as valid, the respondent concluded that the second appellant had used deception to obtain the TOEIC. The respondent refused the appellants' application on 'suitability' grounds, not only relation to the TOEIC deception, but also on the basis of outstanding litigation debts, in relation to previous unsuccessful applications for judicial review, in respect of one of which a payment plan was in place but in respect of the second debt, no attempt had been made to pay that debt. The second appellant had also failed to pay an outstanding NHS charge of nearly £7,000 incurred because of the birth of IS.

6. In addition, the respondent did not accept that the appellants could not return to Nepal as a family unit; nor that they would be destitute as claimed, upon return to Nepal, because of an earthquake that had taken place in Nepal in 2015. The appellants had family in Nepal and would not return to Nepal as outsiders.

7. The appellants appealed against the respondent's decision. A previous appeal before a First-tier Tribunal was dismissed, but the First-tier Tribunal was found by the Upper Tribunal to have erred in law, and the earlier decision was set-aside, without preservation of any findings of fact. The Upper Tribunal remitted the appeal back to the First-tier Tribunal, to be considered afresh. It was in this context that that the FtT heard the appellants' appeal.

The FtT's decision

8. The FtT identified the key issue before him as being whether the second appellant had engaged in the TOEIC deception. The FtT noted that while the earlier decision of the First-tier Tribunal had been set aside without preserved findings of fact, the earlier decision had recorded evidence given by the second appellant before it. The FtT considered the second appellant's more recent evidence before him, in particular that she had failed to refer to a visit to Nepal in 2015, which the earlier First-tier Tribunal had recorded as having been referred to in evidence by the second appellant. At paragraph [38], the FtT did not regard the adult appellants as credible or honest witnesses and in particular, drew adverse inferences in relation to the issue of whether the second appellant had invited her family relatives to her wedding to her husband, the first appellant.

9. At paragraph [42], the FtT regarded the prima facie evidence against the second appellant, as having participated in the TOEIC deception, as very strong. There was widespread invalidity of the results at the test centre where the test had been taken and the FtT was not satisfied as to why the second appellant had not simply sought to retake the language test, upon learning that it had been treated as invalid, nor had she made any enquiries after October 2015 to challenge the circumstances in which her leave had been curtailed. The FtT found that this was inconsistent with somebody who was a student at MBA level in the UK, who was anxious to protect her position.

10. At paragraph [43], the FtT was not impressed by the second appellant's ability to explain the layout of the test centre where she had taken the test, as her answers were capable of being rehearsed. Her strongest argument, as assessed by the FtT at paragraph [44], was the fact that she had obtained an MBA from the University of Sunderland. Against this, the FtT noted that the second appellant had provided no material from her course to demonstrate her writing or reading skills and she had acknowledged that the standards of the University of Sunderland were lower than at other institutions. At paragraph [45], the FtT concluded that he was satisfied that the second appellant had obtained her TOEIC certificate by deception.

11. At paragraphs [46] to [47], the FtT referred to and rejected the appellants' wider human rights claim, noting that the Upper Tribunal had previously refused permission to bring judicial review proceedings in 2017 on the basis that there was nothing pointing to there being overwhelming difficulties in the family's return to Nepal.

12. Having considered the evidence, the FtT dismissed the appellants' appeals.

The grounds of appeal and grant of permission

13. The appellants lodged grounds of appeal which are essentially as follows:

(1) It was procedurally unfair for the FtT to have allowed cross-examination of what the second appellant had said in witness evidence before a previous Tribunal, when that decision had been set aside without preserved findings of fact. The appellants' objection, raised with the FtT, had not been noted in the FtT's most recent decision, nor had the FtT recorded his response in allowing cross-examination. If it were acceptable to rely upon earlier evidence given in another Tribunal, a full copy of that evidence should have been made available to the appellants, including the record of the proceedings of the previous Judge, which the Upper Tribunal, in setting aside the previous decision, had noted was missing from the Tribunal file.

(2) At paragraph [36], the FtT had misdirected himself in law by failing to consider that ultimately, the legal burden of proving fraud rested on the respondent.

(3) Whilst the FtT had recorded the second appellant's evidence as evasive, he had failed to explain why it was vague and evasive. No finding of fact had been made in relation to the first appellant's evidence whatsoever.

(4) At paragraph [40], the FtT had referred to fundamental flaws in the second appellant's account but had not explained what these flaws were.

(5) At paragraph [42], while the FtT described the second appellant's explanation of: how arrangements were made to take the test at the test centre; why she did not seek to retake the TOEIC test; and evidence about her college's involvement or complicity, as unreliable; the FtT failed to engage with the second appellant's evidence, recorded at paragraph [13], that the test centre at which she had taken the TOEIC test had closed down and therefore no information could be obtained.

(6) At paragraph [44], the FtT referred to the second appellant not providing course materials from her MBA program but the second appellant had never been asked why she had not provided such material and it was therefore procedurally unfair for the FtT to raise the issue after the event.

(7) At paragraphs [46] and [47], the FtT had failed to carry out a proper proportionality assessment of the appellants' human rights claims and instead had briefly relied upon an earlier refusal of an application for judicial review.

14. First-tier Tribunal Judge Easterman granted permission on 25th June 2020. The grant of permission was not limited in its scope.

The hearing before me

Oral submissions

15. First, as a procedural matter, Mr Chohan asked me to consider the witness statement of the representative, Mr M Nadeem, a level 3 OISC adviser who had represented the

appellants before the FtT. Mr Nadeem adopted his witness statement and was willing to be cross-examined. I regarded it as is important to record, particularly if a person's professional standing might otherwise be affected, whether there was any challenge to their credibility and integrity. Ms Everett confirmed that she did not seek to challenge in any way the facts contained in the witness statement of Mr Nadeem, or his credibility or integrity. I therefore accept his unchallenged evidence and record that I have no concerns about the accuracy or honesty of his evidence.

16. Before I come on to the submissions, I very briefly outline what was contained in the witness statement. At paragraph [4], Mr Nadeem confirmed that during cross-examination before the FtT, the Presenting Officer asked whether the second appellant and her family were invited to a wedding, to which the second appellant replied, "*no*". The Presenting Officer followed up by putting to the second appellant that she had told a previous Tribunal that she was so invited, to which the second appellant answered, "*not me, my husband's parents invited us*". At this point the Presenting Officer pointed to paragraph [26] of the previous First-tier Tribunal determination. The quote continues: "*I objected and advocated that the previous determination was set aside and so it could not be used for cross-examination*." The evidence of Mr Nadeem was that he continued to reiterate his objection, pointing out that there was not a copy of the questions from the Presenting Officer or a record of proceedings from the hearing before the earlier Tribunal (Judge Swaniker), by analogy to production of Asylum Interview Record questions. If the proper course of action were, as suggested by the FtT, that witnesses could be questioned on the record of their evidence before a previous Tribunal, the appellants had a right to see any record of proceedings and Mr Nadeem referred to the FtT refusing the adjourn the hearing, despite this issue not being raised beforehand.

The appellants' submissions

17. In relation to Mr Chohan's submissions, without reiterating what was in the grounds, the decision of Judge Swaniker had been set aside, without preserved findings of fact. Decisions by First-tier Tribunals often did not purport to record all the evidence or precise questions that had been put to an individual or the context or nuances of those questions. Where there was, for example a mixture of fact and evidence, that in turn would have to be separated out and it was simply unfair, procedurally, for the appellants, who had not had notice of the issue being raised, to have the issue sprung on them and at the very least, the hearing before the FtT should have been adjourned with the opportunity to review any record of proceedings.

18. Mr Chohan reiterated the ground that the FtT had misdirected himself in relation to the law, without considering the overall legal burden and also reiterated that the FtT's conclusion that the second appellant was evasive had simply not been explained. Moreover, referring to paragraph [34] of the decision, Mr Chohan asked me to consider that the second appellant had expressly given evidence as to her successful pass in English at level B2 in 2009, so substantially prior to the impugned TOEIC test in question, which was relevant to any motive in seeking to have a proxy

to take the test. Moreover, it was important that I considered the timeframe and the fact that the second appellant had been able to later extend and vary her visa on the basis of her MBA award, without not needing to rely upon the impugned test.

19. With regard to the MBA transcript, the second appellant had simply never been asked about this and the Tier 2 visa that she had obtained, which extended her leave to remain, was based on the MBA award and if it was satisfactory for the Secretary of State, in those circumstances, it would beg the question why it was not satisfactory for the purposes of this appeal. The FtT's conclusions in relation to paragraph [42] and what the second appellant was able to comment on in relation to the test centre's complicity in any deception was similarly flawed. She could only comment on what she had done at the test centre and was not able to comment on what others had done and she could not be criticised for not having tried to track down other international students at the college when it had been closed down, as the FtT had criticised her at paragraph [14].

The respondent's submissions

20. In response on behalf of the Secretary of State, Ms Everett, in a measured response identified two areas where she accepted that the FtT's criticisms of the second appellant were not valid but she nevertheless asserted that the overall findings on the appellants' credibility were unarguably open to the FtT and therefore any flaws in certain aspects of the analysis around credibility did not affect the overall approach.

21. First, Ms Everett, accepted that the second appellant's lack of knowledge of any widespread fraud at the test centre in question was not one that the second appellant could be criticised for as there was nothing to suggest that she would necessarily know what was going on. Second, Ms Everett also accepted that it might not necessarily be the case that simply because the second appellant had not adduced evidence and a transcript of the MBA educational material, that her credibility could be criticised.

22. However, where the real weaknesses in the second appellant's evidence as identified by FtT remained were first of all that it was perfectly procedurally fair, albeit in the circumstances it was a finely balanced decision, to use the record of a previous judge, even if that decision had been overturned and she did not see what an adjournment would have achieved. Similarly, the FtT had not misdirected himself in law and it was clear that the "lookup tool" together with the generic evidence had satisfied the initial evidential burden of proof on the respondent. The FtT had also specifically given examples of the context of the appellants trying to distance themselves from their relatives on their return visit to Nepal.

Discussion and conclusions

23. In relation to the ground relating to reliance on evidence given before a previous First-tier Tribunal, on the one hand, I do not accept Mr Chohan's general submission

that a later Tribunal is never permitted to rely on any aspect of an earlier First-tier Tribunal decision where that decision has been set aside and the findings of fact have not been preserved. There can, it seems to me, clearly be circumstances where if, with sufficient clarity, evidence given before a First-tier Tribunal has been recorded, that a subsequent Tribunal and indeed advocates may legitimately be able to refer to that prior evidence. However, having not accepted that general proposition, such reliance may require safeguards and caveats.

24. The first point is in relation to prior notice and the need for a potential adjournment. Mr Nadeem had objected to the use of such evidence and the possibility of an adjournment had clearly been discussed and rejected. The basis of the objection was that the context of the questions in the earlier evidence and the precise nuances may not have been understood and at the very least, to the extent they existed, any record of proceedings should have been made available to the witnesses for them to be able to refresh their memory. Even if, the FtT had disagreed with that submission, it was, in my view, incumbent for him to have recorded and then explained why he rejected the submission made by Mr Nadeem and similarly why he had refused the adjournment request. Not to have recorded that submission and the adjournment request risks, as in this case, the decision making no reference to those submissions and a party, as in this case, being left with the impression that a contested issue has not been resolved by the FtT. There was an issue that was contested, namely the admissibility of the evidence and whilst the FtT had clearly regarded it as appropriate for the evidence to be admitted, he had not explained why he did not regard Mr Nadeem's submissions as being without merit. On that very ground alone, I do regard that as a material error of law, based on a failure by the FtT to record his reasons on an important contested issue.

25. Moreover, I accept that in some cases there will be judgments that clearly set out the record of evidence but I also accept the submission that many judgments will not recite the evidence and crucially, as in the decision in Judge Swaniker, there may be a mixture, in the same passage, of evidence on the one hand, and findings, on the other, so that it becomes less clear about what was evidence; and what was a finding. Mr Nadeem referred in his witness evidence to the cross-examination of the second appellant by reference to what had been said at paragraph [26] of Judge Swaniker's decision. Considering paragraph [26], it is a lengthy paragraph (which it is unnecessary to recite) containing precisely such a mixture, which does not (nor does it claim to) discuss all of the nuances and context of the questions and answers. That makes separation of a finding which has not been preserved from the record of the evidence, which might remain relevant, all the more difficult. In the circumstances, to rely on such a summary, without considering the possibility of obtaining and reviewing any record of proceedings, or seeking to agree a note of what was said between the representatives, amounted to an additional material error. It may not be necessary in every case, but it was a material failing where there had been no advance notice of an intention to rely on specific answers to questions in the earlier hearing.

26. In relation to the second ground, namely the FtT's directions on the law at paragraphs [36] and [37] of his decision, the FtT correctly reminded himself of the well-known authorities of **SM and Qadir v SSHD (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC)** and **SSHD v Shehzad & Anor [2016] EWCA Civ 615** and the fact-sensitive nature of these case. Whilst a Tribunal is counselled against long recitations of case law, the FtT's summary of it at paragraph [36] states:

> *"In relation to the issue of fraud the burden is on the respondent to show there is a prima facie case, and if established, for the appellant then to rebut the allegation."*

27. That ignores the remaining stages of the legal analysis, which are that if an innocent explanation is provided which satisfies the minimum level of plausibility, the respondent must satisfy the Tribunal that the explanation should be rejected, bearing in mind that the overall legal burden remains upon the respondent. In other words, in terms of what has been described as a "*burden of proof boomerang*", the final stage of the legal analysis has been missed out by the FtT. Bearing in mind the relatively limited findings, analysis and conclusions set out at paragraphs [43] to [45] in relation to the TOEIC deception, I accept the submission that when read as a whole with paragraphs [38] to [42] (dealing with general credibility), it is far from clear that the FtT approached his analysis of the evidence before him, applying the correct legal test. In those circumstances, I accept the second ground that the FtT materially misdirected himself.

28. In relation to the third and fourth grounds (conclusions about evasiveness and fundamental flaws in evidence, without explaining what they were), once again, I accept the force of the challenge that the FtT failed adequately to explain these conclusions. The practical difficulty is that whilst there are references to the evidence of both appellants being "evasive" (paragraphs [38] and [39]), with '"fundamental flaws" in their accounts (paragraph [40]), they are never explained beyond a difficulty in being able to "fathom" the first appellant's evidence; and the second appellant's evidence before the FtT in contrast to what it was argued she had said in evidence to Judge Swaniker about inviting her parents to the couple's wedding (paragraph [38]).

29. In relation to the fifth and sixth grounds: at paragraph [42], the FtT's criticism of the second appellant for not being able to explain the test centre's involvement; at paragraph [44], the FtT's drawing of adverse inferences because the second appellant did not adduce evidence of the detail of her MBA course material, Ms Everett accepted that neither was a valid criticism of the second appellant. I conclude that they compounded the earlier errors of law, although for the avoidance of doubt those earlier errors (the first to the fourth grounds) were sufficiently material to warrant the setting aside of the FtT's decision alone.

30. In relation to the seventh, final, ground and the challenge to the FtT's proportionality assessment, at paragraph [46] the FtT analysed the appellants' evidence in relation to claimed family estrangement. That analysis was, of course, underpinned by the perceived inconsistency with evidence given to Judge Swaniker, to which I have

already referred and therefore the analysis is similarly compromised, and there is a material error in the reasoning.

Decision on error of law

31. For all of the above reasons, there are material errors in the FtT's decision, such that it is unsafe and must be set aside, without preserved findings of fact.

Disposal

32. With reference to paragraph 7.2 of the Senior President's Practice Statement, notwithstanding that there are no preserved findings, the appeal has already been considered by the FtT on two occasions and it is more expeditious that the Upper Tribunal remakes the FtT's decision which has been set aside. Mr Chohan agreed to the Upper Tribunal retaining remaking, while Ms Everett did not have a strong view on remittal. I regard it as appropriate to retain remaking in the Upper Tribunal.

Directions

33. The following directions shall apply to the future conduct of this appeal:

    33.1 The Resumed Hearing will be listed before Upper Tribunal Judge Keith sitting at Field House, face-to-face on the first open date in 2021, time estimate 2.5 hours, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.

    33.2 The parties are to agree a consolidated, indexed, and paginated bundle containing all the documentary evidence for use at the remaking hearing. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside, with no preserved findings of fact. The Upper Tribunal will remake the decision on the Appellants' appeals.

The anonymity directions continue to apply.

Signed *J Keith* Date: 30th December 2020

Upper Tribunal Judge Keith