Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02484/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 January 2022	**On 1 March 2022**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

RAJBIR SINGH
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Bellara, Counsel instructed by SMK Law Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal dismissing the appellant's appeal against a decision of the respondent, by an Entry Clearance Officer, on 28 January 2020 refusing him entry clearance to the United Kingdom as the husband of a person present and settled there. The appellant is a national of India. He was born in March 1990. In order to understand the appeal it is necessary to set out something of the appellant's immigration history.

2. The appellant entered the United Kingdom with leave as a Tier 4 Student in November 2010 and his leave was extended until 30 April 2014. He made a further application on 13 May 2014 but that was refused. This prompted a

"human rights" application which was also refused. On 16 July 2015 he was served with papers pertaining to his removal and was told that he had used deception in a previous application by providing a false certificate of his competence in the English language. Apparently he remained in the United Kingdom and came to the attention of the authorities on 1 July 2018 when he was arrested. He then claimed asylum and the asylum process was started. He was given bail but failed to attend for a substantive interview but he did leave the United Kingdom voluntarily and went back to India in June 2019.

3. In December 2019 he applied for leave to enter on the basis of his relationship with his wife, Ms Charanjit Kaur, who is an Indian national born in 1973. It was claimed in supporting documentation that their relationship began in March 2019 and they married in India approximately six months later in October 2019. Ms Kaur was described as a widow with regular work as a cook said to be earning about £20,000 per year.

4. In the application leading to the decision complained of he disclosed that he had previously overstayed from September 2014 until his departure in 2019.

5. The respondent refused the application. The application was refused under paragraph 320(11) of HC 395 because the appellant had previously overstayed and had breached conditions attached to his leave and had used deception in an application for leave to remain.

6. This is explained. It was said the appellant entered the United Kingdom in November 2010 as explained above. Application was refused on 14 October 2014 and a subsequent application on human rights grounds was refused on 23 July 2015. Shortly before that decision, on 16 July 2015, he was served with papers notifying him that he would be removed from the United Kingdom. He was told that he had previously applied for leave to remain by using a deception. According to the respondent he had claimed falsely that he had secured a pass in an English language test and supported the claim with a certificate of competence that was obtained improperly.

7. The appellant was not traced until he was arrested. Following his arrest he was kept in immigration detention and while there he made an application for asylum and was released but he did not attend for an interview and was recorded as an absconder. He last reported in April 2019. He had indicated he wished to return voluntarily to India and the records show he left the United Kingdom voluntarily on 17 June 2019.

8. The respondent accepted that the appellant "eligibility" requirements because he had proved a necessary relationship and met the financial requirements and the English language requirements but found that he was not "suitable".

9. The Entry Clearance Officer looked for exceptional circumstances but decided there would be no unjustifiably harsh consequences for the appellant or his "family" and he refused the application.

10. The First-tier Tribunal Judge was assisted with bundles from both sides and heard evidence.

11. The appellant gave evidence. It is not clear to me where he was when he gave evidence. I respectfully remind the appellant of the requirements. I respectfully

remind the parties of the requirements explained in **Agbabiaka (evidence from abroad, Nare guidance) Nigeria (Rev1)** [2021] UKUT 286 (IAC) (26 October 2021).

12. The appellant gave his evidence in English that the judge described as being of a "good" standard. He then heard evidence from the appellant's wife, who had the assistance of a Punjabi interpreter.

13. The judge noted at paragraph 28 of his Decision and Reasons that Counsel for the appellant had accepted that the Secretary of State had shown sufficient evidence that the appellant had provided a false test result for the evidential burden to shift to the appellant to provide an explanation.

14. The judge was not impressed with the appellant's evidence.

15. At paragraph 31 he noted that the appellant had never asked for a copy of the audio recording that incriminated him. He said that he had tried to contact the college but the college was closed and the judge concluded that the appellant had not "made any substantial attempts to challenge the conclusion about the test time or to see if he can take any action against the college."

16. The judge noted at paragraph 33 that the appellant was able to give details about what happened on the day of the test but the judge did not believe him, noting that the appellant had time to have made enquiries and reflect on what might have happened if the test had occurred.

17. The judge noted that before him the appellant spoke and understood English well but it was some time since he had taken the disputed test. The judge did not consider that the appellant's "proven ability in English in April 2021 has any significant bearing on his abilities in 2012".

18. The judge then looked at the evidence and found that the appellant had not shown an innocent explanation that reaches the minimum level of plausibility that required the Home Office to disprove it.

19. The judge then had to decide what to do with the finding that the appellant had used deception in an earlier application. Although expressly satisfied that the appellant was in a genuine marriage the judge regarded his conduct as "so aggravating that refusal under paragraph 320(11) was justified. He has contrived in a significant way to frustrate the intention of the Rules."

20. The judge then considered the matter with regard to Article 8 and all the matters set out in Section 117B of the 2002 Act and reminded himself that the appellant now speaks and understand English well. The judge also found that the appellant's wife was an innocent party and described her as a woman of:

> "more mature years [than] her husband and she seems to have acted very responsibly in getting him to address his immigration status. Nevertheless, she entered the marriage knowing that he was an over-stayer and that he had no status here and none could be guaranteed him. She also knew the reason why he had been refused leave on his second application from within the UK. It would be natural, of course, if she believed her husband's assertions but I have not."

21. The judge accepted that the appellant's wife is established in the United Kingdom and had found that the decision to refuse entry clearance was

proportionate but did not regard the choices that the appellant's wife had to make as

> "unjustifiably harsh consequences. If she wanted to she could return to her country of nationality India with her husband."

22. The judge dismissed the appeal.

23. Before me Mr Walker, appropriately, relied heavily on the short but apt skeleton argument sent as a Rule 24 notice by Mr Chris Avery, Senior Home Office Presenting Officer, dated 19 August 2021. This emphasises that the judge directed himself correctly following the decision in **SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229**. The same notice asserts:

> "The appellant had failed to make any real attempt to establish his innocence at the time of the original decision, he had overstayed, submitted a bogus asylum claim, failed to attend his asylum interview and absconded from bail. The judge reached properly reasoned findings and correctly applied the law."

24. I have reflected on that. In a sense Mr Avery is undoubtedly right but **SM and Qadir** does identify a threefold test that has to be carried out. The first, which clearly was carried out here, is that there must be sufficient evidence adduced led by the Secretary of State to support the conclusion that the appellant had been a cheat. It was accepted that she had done that. The second step is that the appellant is required to produce credible evidence that offers an explanation. If that is done then and only then the respondent has to prove that it is not in fact what happened. The judge was very clear that this case did not get as far as the third stage. The judge says unequivocally at paragraph 39:

> "I do not consider that he has shown an innocent explanation that reaches the minimum level of plausibility, I consider it is much more likely that he used a proxy tester than not. Accordingly, I do not consider that the Respondent needs to rebut such explanation as he has given."

25. I find there is a risk of muddled thinking here. If the judge had concluded unequivocally that having considered all the evidence the dishonesty was established the decision might have been hard to challenge although it could have been vulnerable to challenge on the grounds that the prescriptive approach required by **SM and Qadir** had not been followed.

26. The difficulty is that at paragraph 39 it seems to me the judge has muddled two tests. He appears to be deciding if the appellant had been dishonest as part of the same exercise as deciding if the appellant had raised a counterargument that reaches the minimum level of plausibility. I do not understand why the evidence was found not to reach the minimum level of plausibility necessary to require the respondent to disprove it.

27. Putting all these things together, I find that although the judge might have come to an acceptable conclusion there is undeniably a gap in the reasoning process, so I cannot be confident that the case has been decided lawfully. Indeed, I am very much of the view that it appears it has not been decided lawfully because a three stage test has been misapplied or alternatively applied with no adequate explanation. I just do not understand how the assertion that a person did take the test properly made by somebody of good

character who at the very least now speaks English to a high standard cannot be said to have raised a plausible explanation even if it proved not to be a persuasive one.

28. It follows that I have to set aside the decision of the First-tier Tribunal. As it has not been determined properly it needs to be determined again in the First-tier Tribunal and no findings of fact are preserved.

Notice of Decision

The First-tier Tribunal erred in law. I set aside its decision and I direct that the appeal be heard again in the First-tier Tribunal.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 3 February 2022