



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-000901

First-tier Tribunal No: HU/50593/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

31st October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR AMIR SHAHZAD

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Ms L. Appiah, counsel instructed by Inayat solicitors

For the Respondent: Mr S. Walker, Senior Home Office Presenting Officer

Heard at Field House on 28 September 2023

DECISION AND REASONS

1. The Appellant is a national of Pakistan born on 11 July 1985 who first arrived in the UK on 11 September 2011 as a student. He subsequently extended his leave until it was curtailed on the basis that the Secretary of State considered that he had used a proxy in his English language TOEIC test. The Appellant made an

application to remain as a spouse, this application was refused and following a hearing before First-tier Tribunal Judge Khan, in a determination promulgated on 27 February 2017, Judge Khan found that he had used a proxy to take his English language test and also found that his marriage to his wife was not genuine. The Appellant subsequently made a further human rights application and an application for leave to remain as a spouse on 11 June 2019, which was refused in a decision dated 12 February 2021. As part of the refusal the Secretary of State applied Section S-LTR.1.6 of Appendix FM of the Immigration Rules i.e. the suitability grounds, on the basis that the Appellant had submitted a fraudulent TOEIC certificate and had acted fraudulently.

2. The Appellant's appeal came before First tier Tribunal Judge Munonyedi for hearing on 10 February 2023. She accepted in light of the reports from the Appellant's GP, Dr Ritvi dated 27 January 2022 and 24 January 2023, that the Appellant should be treated as a vulnerable witness. In a decision and reasons promulgated on 28 February 2023, the judge allowed the appeal, noting as she did that the Secretary of State now accepted that the Appellant was in a genuine and subsisting relationship with his wife.
3. The SSHD sought and obtained permission to appeal against this decision and following a hearing on 7 July 2023, an error of law was found and the decision and reasons of the First tier Tribunal Judge was set aside and adjourned for a resumed hearing before the Upper Tribunal. A copy of that decision and reasons is appended.
4. At the resumed hearing, Ms Appiah confirmed that her solicitors had been unable to obtain the voice recordings from ETS and had been informed that it was unlikely that they would have retained them, given that the tests had been undertaken so long ago [30.11.12 and 5.12.12]. An adjournment to obtain the Home Office paper file was discussed but given that it was not known whether or not this would contain anything of use, Mr Walker agreed to simply inform the Upper Tribunal and the parties if it did, within 14 days of the hearing. I have had no further communication from either party and so I am proceeding to determine the appeal on the basis of the evidence before the Upper Tribunal at the date of hearing.
5. Ms Appiah called the Appellant's wife, Concepcion Lambrinto Eubanks, to give evidence. She confirmed the contents of her statement dated 30 December 2022 and further confirmed that she met her husband in October 2013, which was after he had undertaken the impugned ETS tests. Ms Eubanks said that her husband's English when she met him was very clear and that he spoke fluent English. She further confirmed her employment as a nanny and her income of £2997 per month after tax. Ms Eubanks said her daughter has now graduated but was living at home and working from home as an administration assistant for Marks and Spencer and that her daughter looks after the Appellant during the week, in terms of reminding him to take his medication for anxiety and

depression and also making sure that he eats, whilst she is away from home during the day working as a nanny.

6. In cross-examination, Mr Walker again asked the witness about the fluency of her husband's English and she said she would strongly dispute that he would use deception for his English language certificate; that she does not speak Urdu and he does not speak Tagalog so she did not think he would use deception. She added that her daughter also communicates with him in English. Mr Walker asked about whether he was receiving medical treatment and the witness said that therapy had not helped but he was taking medication every day.
7. In his submissions, Mr Walker accepted that the Appellant and his wife are in a relationship, in line with the preserved findings of Judge Munonyedi. He submitted that the evidence relied upon by the Secretary of State was historic and possibly limited and that the evidence of his wife was that even from the very beginning the Appellant was fluent in English and spoke to her and her daughter in English. He confirmed that he would check if the Home Office has any records or information from ETS from 2013. As indicated earlier, I have not received any indication that the Home Office paper file contains any information of note.
8. In her submissions, Ms Appiah asked that the witness' evidence be taken into account in terms of the relationship between her, the Appellant and her daughter and that they all speak English as their common language. She submitted that the Appellant's ability to speak English when he met his wife just some months after the test could be taken into account.
9. With regard to *DK & RK* [ETS: SSHD evidence - proof] [2022] UKUT 00112 IAC, Ms Appiah submitted that the burden is on the Respondent to prove dishonesty - see [49] and [52] and she questioned whether enough proof had been provided. Ms Appiah accepted in light of the decision of First tier Tribunal Judge Khan at [15], [21] [42] and [43] that *Devaseelan* [2002] UKIAT 00702 applied and that Judge Khan found that a proxy was used. However, it is clear from his decision that the Judge found the Appellant not to be credible about anything including his relationship, whereas Judge Munonyedi found the relationship between the Appellant and his wife to be genuine and subsisting.
10. Ms Appiah also queried whether the Appellant could succeed outside the Immigration Rules given that significant weight must be attached to S-LTR 1.6 of Appendix FM. She submitted that the test was undertaken 11 years ago and the question arose as to how long the issue remains and is held against the Appellant and it was not proportionate to hold it against him forever. Ms Appiah submitted that there did not appear to be any other issues in terms of conduct and even those who commit criminal offences have their offences spent at some point, for the purposes of ILR or citizenship. Given that his

conduct does not meet the severity of a conviction it was disproportionate to continue to attach great weight to the Appellant's conduct, not least as it is a matter that has been hanging over the Appellant since at least 24 April 2015. She submitted that the appeal should be allowed.

Decision and reasons

11. In light of the fact that there has been a previous decision in this case by First tier Tribunal Judge M.A. Khan on 27 February 2017, where he found that the Appellant had used a proxy to take his English language test, my starting point is *Devaseelan* (op cit). I am mindful of the fact that I am not hearing an appeal against that decision and that *Devaseelan* directs me that it is not my role to: "*consider arguments intended to undermine the first Adjudicator's determination*" [37]. On the other hand, I remind myself of the Court of Appeal's comment in LD [2004] EWCA Civ 804 that: "*Perhaps the most important feature of the [Devaseelan] guidance is that the fundamental obligation of every special adjudicator independently to decide each new application on its own individual merits was preserved*". It would be fundamentally inconsistent with that obligation to adopt a previous finding that I judged to have been infected by a clear error of law or of fact.
12. The Judge's findings of fact are set out at [42] and [43] of the decision and reasons and provide as follows:

"42. The appellant's evidence with regards to the English language test (TOEIC) is extremely vague, evasive and totally confusing. He did not know the name of the college where he took the tests, first he said Cransbrook college, he went there by train, then he said SK, it was meant to be South Quay. He did not clearly know the procedure or in what sequence he took the four tests and he did not know any of the questions he was asked to answer in his writing test. The appellant's use of English is very limited, questions had to be repeated for him to respond. It is very clear to me that this appellant did not know a great deal about these tests.

43. In light of the appellant's (sic) with regards to the TOEIC test, on the balance of probabilities I find that a proxy was used. I based on my findings not on the generic evidence provided by the respondent in the form of statements from Rebecca Collings, Peter Millington and expert report by Professor French but on my assessment on the evidence given before me by the appellant. In the circumstances, I find that the respondent has established her case."
13. It is clear that the judge has provided reasons for his findings, including an adverse credibility finding in respect of the Appellant and also his wife at [38] and [40]. However, I take account of the fact that at the last appeal hearing before Judge Munonyedi the genuineness of the relationship between the Appellant and his wife was expressly accepted by the Respondent as well as the First tier Tribunal Judge, thus departing from the finding by First tier Tribunal Judge Khan.

14. However, there is a distinction between credibility findings in relation to whether or not the Appellant utilised a proxy to taken his TOEIC test and the genuineness of his relationship. The Appellant did not give evidence before me albeit I note he was accepted as a vulnerable witness before Judge Munonyedi and clearly he has suffered a deterioration in his mental health since the hearing before Judge Khan, more than 6 years ago. I also take account of the fact that at points in that decision eg when recording the Appellant giving his evidence at [21] the Judge commented in brackets that (*"the appellant had extreme difficulty explaining himself, English language problems"*). These comments are made only in respect of his evidence concerning the English language tests and do not appear in relation to his evidence concerning his relationship.
15. I note that the Judge's findings are inconsistent with the evidence of the Appellant's wife before me that the Appellant's English was always fluent and they have always communicated in English since they met in October 2013. By the time of the hearing before Judge Khan the Appellant and his wife had been together for well over 3 years and I find must have been able to communicate reasonably well in English in order to sustain their relationship. Therefore, I accept the evidence of the Appellant's wife that the Appellant spoke English to a reasonable standard at the time they met.
16. However, this is not the test to be applied. It is clear from *DK & RK* (op cit) that:

"The evidence currently being tendered on behalf of the Secretary of State in ETS cases is amply sufficient to discharge the burden of proof and so requires a response from any appellant whose test entry is attributed to a proxy."
17. I have not had the benefit of hearing evidence from the Appellant on this issue nor has any evidence been adduced to support his contention not to have utilised a proxy. In these circumstances, no error of law or fact in the decision of Judge Khan in relation to the TOEIC issue has been identified. Whilst I accept that the Appellant may well have been fluent in English, the Respondent has discharged the burden of proving that a proxy was used; that decision has been upheld by a Judge and the Respondent was thus entitled to apply S-LTR 1.6 of Appendix FM of the Immigration Rules.
18. S-LTR of Appendix FM of the Rules provides:

"S-LTR.1.1. The applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2. to 1.8. apply."

"S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK."

19. The next question is whether the utilisation of a proxy is sufficient for the Appellant to fall within the meaning of S-LTR 1.6, bearing in mind that S-LTR 1.2.-1.5 are concerned with criminality. On the face of it, the Appellant's conduct, whilst reprehensible, would not appear to be so serious as to fall within the intended targets of S-LTR 1.6 but rather would appear to fit more appropriately within the discretionary suitability provisions eg S-LTR 4.2 or 4.3 regarding the making of false representations in order to support an application or claim or obtain leave to remain. I have had regard to the decision in *Mahmood* (paras. S-LTR.1.6. & S-LTR.4.2.; Scope) [2020] UKUT 00376 (IAC) at [74]-[75] which concerned an appellant who had utilised the identity of a British citizen in order to obtain employment. A panel of the Upper Tribunal held:
- "74. ... we are satisfied that the scope of paragraph S-LTR.1.6. is not sufficiently wide to capture the use of false representations in an application for leave to remain before the respondent or in a previous application for leave to enter or remain.*
- 75. We conclude the paragraph S-LTR.1.6., a mandatory ground of refusal, does not cover the use of false representations or a failure to disclose material facts in an application for leave to remain or in a previous application for immigration status."*
20. The eminent Upper Tribunal panel in *DK & RK* did not determine the question of whether an ETS case could properly fall within the remit of S-LTR 1.6. noting at [30] that:
- "30. The Secretary of State's responses to the classification of an individual's test as invalid were varied, depending on the individual's immigration status and applications that the individual made. Substantively, in each case the assertion was that the applicant had engaged in, or was engaging in, some form of dishonesty."*
- Whilst S-LTR 1.6 was applied to the Appellant *DK* no argument was heard as to whether it was, in fact, the appropriate section to apply, it was simply the factual basis underlying the appeal of *DK*.
21. I have also had regard to the judgment of the Court of Appeal in *Balajigari* [2019] EWCA Civ 673 where the Court held that dishonest conduct was capable of coming within the terms of the non-conductive provision, subject to the guiding principle that the relevant conduct must be sufficiently serious. The Court further held at [37](2):
- "We do not find it helpful to generalise about the height of the threshold, though it is obvious that the rule is only concerned with conduct of a serious character. We would accept that as a matter of principle dishonest conduct will not always and in every case reach a sufficient level of seriousness, but in the context of an earnings discrepancy case it is very hard to see how the deliberate and dishonest submission of false earnings figures, whether to HMRC or to the Home Office, would not do so."*
22. Whilst this Appellant's case is not on all fours with the *Balajigari* appellants, the principles are similar in that the effect of the finding of Judge MA Khan

was that, by use of a proxy, the Appellant had deliberately and dishonestly perpetrated a fraud in conjunction with the English language test centre in order to provide a false English language certificate. *DK and RK* also makes clear that the SSHD's generic evidence is sufficient to discharge the burden of proof.

23. In these circumstances, I find that there is no scope to challenge the application of S-LTR 1.6 of Appendix FM of the Rules, with the effect that the Appellant cannot qualify for partner leave under the Rules as he is unable to meet the suitability requirements.

24. The next issue is whether GEN 3.2. is applicable. This provides:

"GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.

(2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application."

25. The material question is whether upholding the refusal with the effect that the Appellant is required to return to Pakistan would result in unjustifiably harsh consequences for him. It is necessary in order to determine this question to apply both the *Razgar* [2004] UHL 27 criteria and a balance sheet approach.

26. I find that the Appellant has family life with his wife. They have been a couple for 10 years and the Respondent accepts that the relationship is genuine and subsisting. I further find that the Appellant has family life with his stepdaughter who he has known for the same length of time and the family unit continue to live together.

27. I find that removal of the Appellant from the UK would interfere with the Appellant's established family life, given that his wife's evidence before the previous Tribunal was that she did not wish to go to Pakistan, however, it would be in accordance with the law. Mr Walker did not challenge any of the Appellant's wife's evidence.

28. As to the question of proportionality, I take account not only of the fact that the requirements of S-LTR 1.6 of Appendix FM are not met, but also that the Appellant has had no leave to remain since his leave was curtailed on 11 September 2014, albeit he has been seeking to regularise his stay since that

time. Consequently, he has had only 3 years lawful leave out of an overall period of 12 years residence in the UK.

29. I further take account of the statutory public interest considerations set out in sections 117A-D of the NIAA 2002 and note that: the Appellant speaks English but there is no evidence that he is financially independent, albeit he is not a drain on public funds as he is supported by his wife and her income, which is in excess of the minimum income requirement; his leave in the UK has always been precarious, with regard to his private life, however, I have found that he has family life with his wife and stepdaughter and that attracts some weight. His stepdaughter is now an adult and thus s117B(6) is not applicable.
30. On the other side of the balance sheet, I take account of the fact that the Appellant has resided continuously in the UK for 12 years, initially on a lawful basis as a student and then after his leave was curtailed, without leave albeit, having met and married his wife, he continued to seek to regularise his stay on a number of occasions. Ms Appiah asked that I take account of the fact that the impugned conduct took place at the end of 2012 and that there have been no further issues of misconduct or criminality. I accept her argument that it is unfair to hold this issue over the Appellant indefinitely, given that if he had committed a (minor) criminal offence that it would be spent by now and I attach weight to the passage of time without further adverse issues arising.
31. I attach weight to the medical report of Dr Ritvi, the Appellant's GP, dated 24 January 2023, who has been treating him since 2020. She states that he is well known to her and has regular consultations. The diagnosis is one of mixed anxiety and depression disorder since 2017 and that in addition to low moods, tearfulness, lack of concentration, memory issues and sleep disturbance he suffers from frequent panic attacks, claustrophobia and social anxiety and rarely goes out as he fears strangers and crowds and is in a constant state of paranoia. Dr Ritvi notes that the Appellant was assessed by a consultant psychiatrist in June 2021 due to anti-depressants not helping him; that he was currently taking Sertraline 50mg daily plus Zopiclone for sleep disturbance and Propranolol for panic attacks. Dr Ritvi opines that because of his mental health condition the Appellant is specifically dependent financially, emotionally, and materially upon his wife; that his wife and stepdaughter provide him with the stability and support that he needs and are positive factors in his life and separation from them would have a detrimental effect on his already fragile mental health. Dr Ritvi further found that the Appellant would not be able to live alone or leave the UK because of the high risk of self-neglect and deterioration in his mental health and the risk of suicide would not have the ability to seek and ask for treatment for his mental health condition in Pakistan.

32. I take account of the fact that the Appellant's wife and stepdaughter are British citizens of Filipino extraction. They are Christian and do not speak Urdu but speak Tagalog and English. They have never been to Pakistan and have no experience of life there. I further take account of the fact that the Appellant's wife's evidence, which was accepted by the First tier Tribunal Judge, at [29] is that he is estranged from his family in Pakistan for marrying his wife as he was supposed to marry a cousin. The Appellant's wife also said that she would not go to Pakistan and I find it would be unjustifiably harsh to expect her to go there, albeit not to remain in the UK without the Appellant, given she has an established private life and employment in this country.
33. As for the Appellant, I have concluded that, on balance, the refusal of leave would result in unjustifiably harsh consequences for him, on account of his severe mental health issues, including his suicidality, if separated from his wife given his complete dependence upon his wife and stepdaughter. I find in light of the report of Dr Ritvi that he would not manage on his own in Pakistan and that, whilst the *AM (Zimbabwe)* threshold is not met due to the fact that the issue for this Appellant is not access to medication as such in Pakistan but rather separation from his wife and her support, it would be disproportionate to remove him due to the impact on his physical and moral integrity.

Notice of Decision

34. The appeal is allowed on human rights grounds (article 8).

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

18 October 2023