Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/29039/2015**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decisions and Reason Promulgated**
On 9 June 2017	**On 16 June 2017**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MR Md ABU SUFIAN
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Ms R Manning	(Counsel)
For the Respondent:	Ms H Aboni	(Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appellant's appeal to the Upper Tribunal, brought with the permission of a judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (Judge Pooler hereinafter "the Judge") whereupon he dismissed the appellant's appeal against a decision of 10 August 2015 refusing to grant him leave to remain as a Tier 4 (General) Student Migrant.

2. By way of brief background, the appellant is a national of Bangladesh. Having previously had the benefit of a grant of leave he had sought further leave in order to pursue some studies. However, the application had been refused because he had not been able to provide a valid Confirmation of Acceptance for Studies (CAS) and because it was thought that he had used deception in his application by relying upon a false document. In that context, it was said that an English Language Test Certificate he had relied upon had been fraudulently obtained because the test had been taken by a proxy.

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3. The appellant's appeal was heard on 13 October 2016. He attended and gave evidence. He was represented. There was no attendance on behalf of the Secretary of State.

4. It does not appear to have been argued before the Judge that he had provided a valid CAS. Accordingly, the Judge concluded that the appeal fell to be dismissed under the Immigration Rules on that account alone. That part of the Judge's decision has not been the subject of any further challenge. The Judge, though, also resolved the deception allegation against the appellant. In doing so he said this:

> " 16. I did however consider it appropriate to consider the evidence and to hear submissions in relation to the allegation of dishonesty and the refusal under paragraph 322(1A). I did so because of the importance to the appellant of a finding of dishonesty which could have consequences for any future application for leave. Paragraph 322 provides, so far as relevant:
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> > '322. In addition to the grounds for refusal of extension of stay set out in Parts 2-8 of these Rules, the following provisions apply in relation to the refusal of an application for leave to remain, variation of leave to enter or remain or, where appropriate, the curtailment of leave:
> >
> > *Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom are to be refused.*
> >
> > …
> >
> > (1A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application.'
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> 17. Mr Samad relied on the decision of the Upper Tribunal in SM and Qadir (ETS - Evidence – Burden of Proof) [2016] UKUT 00229 (IAC) for the principle that the evidence on which the respondent relied was so flawed that dishonesty was not proved. The Upper Tribunal had summarised is decision in the following terms:
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> > '(i) The Secretary of State's generic evidence, combined with her evidence particular to these two appellants, sufficed to discharge the evidential burden of proving that their TOEIC certificates had been procured by dishonesty.
> >
> > (ii) However, given the multiple frailties from which this generic evidence was considered to suffer and, in the light of the evidence adduced by the appellants, the Secretary of State failed to discharge the legal burden of proving dishonesty on their part.'
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> 18. In general in an immigration appeal the burden of proof is on the appellant and the standard of proof is the normal civil standard. However, it is by now well settled that where the respondent alleges dishonesty on the part of an appellant, the burden of proof is on her. Moreover, the Upper Tribunal had spoken of an evidential burden which lies initially on the respondent but may, if discharged, result in there being an evidential burden on the appellant to raise an innocent explanation. The Upper Tribunal elaborated on this as follows:
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> > '67. We begin by asking ourselves whether the Secretary of State has discharged the evidential burden of proving that the Appellants were, or either of them was, guilty of dishonesty in the respects alleged. Bearing in mind that, as noted above, all of the Secretary of State's evidence was adduced first, reflecting the burden of proof, it is appropriate to record that at the stage when the Secretary of State's case closed there was no submission on behalf of either Appellant that the aforementioned evidential burden had not been discharged. We draw attention, en pasant to a procedural issue which may be worthy of fuller consideration in an appropriate future appeal, namely the question of whether in a case where the Secretary of State bears the evidential burden of establishing sufficient evidence of deception and, at the hearing, goes first in the order of batting, the Tribunal should invite submissions from the parties' representatives at the stage when the Secretary of State's evidence is completed.

> 68. As our analysis and conclusions in the immediately preceding section make clear, we have substantial reservations about the strength and quality of the Secretary of State's evidence. Its shortcomings are manifest. On the other hand, while bearing in mind that the context is one of alleged deception, we must be mindful of the comparatively modest threshold which an evidential burden entails. The calls for an evaluative assessment on the part of the tribunal. By an admittedly narrow margin we are satisfied that the Secretary of State has discharged this burden. The effect of this is that there is a burden, again an evidential one, on the Appellants of raising an innocent explanation.'

19. In SSHD v Shehzad and Another [2016] EWCA Civ 615 the Court of Appeal was concerned with a different ETS case in which the respondent had alleged deception. Beatson LJ, who gave the only reasoned judgment, referred to the issue before the court as follows:

> 19. I summarised the FtT's approach to the generic evidence of Mr Millington and Ms Collings regarding ETS's analysis of the spoken English component of the TOEIC test at [6] and [7] above. These appeals are only concerned with whether their evidence, together with evidence that the test of the individual under consideration has been assessed as 'invalid' rather than as 'questionable' because of problems at the test centre, suffices to satisfy the evidential burden of showing dishonesty that lies on the Secretary of State and to impose an evidential burden on the individual to raise an innocent explanation. The question before us is thus not the ultimate reliability of the evidence or the ultimate disposition of the appeals. Those matters were considered by the Upper Tribunal in *Qadir*, which, after a full hearing, rejected the evidence. An appeal by the Secretary of State against the decision in *Qadir* is pending in this court. There may be other cases in the pipeline.
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> …
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> 22. As I have stated, the question in these appeals only concerns the initial stage and whether, with the evidence of Mr Millington and Ms Collings, the evidential burden on the Secretary of State is satisfied. If it is, it is then incumbent on the individual whose leave has been curtailed to provide evidence in response raising an innocent explanation.
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> 23. At the hearing, Ms Giovennetti informed the court that the other cases pending in the tribunal or in this court involve a range of different evidence adduced by the individual. These included an independent comparison of that person's voice with the voice tested by ETS, evidence of attainment in English language, for example by educational qualifications in English (some in this country), and evidence of spoken English ability. I do not address the question of what evidence will be sufficient to enable a tribunal to conclude that there has been no deception. That is likely to be an intensely fact-specific matter. These appeals and my judgment are only concerned with the initial stage and the evidential burden at that stage.

20. The evidence before me comprises material which is very similar to that which was before the Upper Tribunal in *SM and Qadir*. In that case the Upper Tribunal was satisfied that the initial evidential burden had been discharged. The Court of Appeal reached a similar conclusion in *Shehzad*. I am satisfied that the evidence adduced by the respondent does satisfy the initial evidential burden on her and that it is appropriate therefore to look at whether the appellant has provided an innocent explanation.

21. In his statement the appellant said that he did not use a proxy tester but undertook his English language test in person at Aston College in 2011. He said that between fifteen and twenty students were present and that the testing took place over two days. He described the questions put to him in the speaking test.

22. I have to assess whether, on the evidence as a whole, the respondent has discharged the burden of proof which rests upon her. This appeal is not one in which the appellant has adduced any evidence, expert or otherwise, which challenges the statements on which the respondent relies in terms of the methodology employed by ETS. There is no evidence with regard to the appellant's educational qualifications, either at the time when he undertook the ETS test in 2011 or at the time of the hearing. There is no evidence beyond the ETS certificate, now challenged, of the appellant's ability in English.

> 23. I consider that the appellant's evidence amounts to little more than a bare assertion that he did attend the test centre and did take the test personally. He has adduced no other evidence to the effect that he was present and took the test and that he had the ability to pass at that time. The respondent has adduced evidence with regard to the checking process undertaken by ETS and individual data to show that the result was considered by ETS to be invalid. That conclusion was reached only where there was evidence of proxy test taking or impersonation: see the statement of Rebecca Collings at [28]."

5. As to Article 8 of the European Convention on Human Rights (ECHR), the Judge was aware that the appellant was seeking to rely upon the fact that he had married a British citizen and that the couple were expecting a child. However, he decided that he was not able to consider those Article 8 arguments because of the content of section 85(5) and (6) of the Nationality, Immigration and Asylum Act 2002 and because he thought it appropriate to characterise the family life arguments as a "new matter".

6. Permission to appeal was sought on the appellant's behalf. It was contended that the Judge had erred in overlooking or misconstruing transitional provisions and by then wrongly thinking he was not permitted to consider the Article 8 arguments raised. It was also argued that he had given inadequate reasons for his conclusions regarding the deception issue.

7. Permission to appeal was granted but only in relation to the first of the two above grounds. The appeal was then listed before the Upper Tribunal (before me) so that it could be decided whether the Judge had erred in law and, if so, what should flow from that. Representation at that hearing was as indicated above and I am grateful to each representative.

8. In fact, there was a degree of agreement between the representatives. Both accepted that the Judge had, indeed, erred in failing to consider transitional provisions which meant that the provisions relied upon by the Judge for his conclusion that he was unable to consider the Article 8 arguments did not operate to preclude him from so doing. So, it was agreed he had erred insofar as he had failed to consider the Article 8 arguments and to decide them as an integral part of the appeal. There was no attempt to resurrect the second ground before me. Whilst Ms Manning urged me to set aside the decision given the accepted error of law, Ms Aboni invited me to conclude that the error was not material because the appellant could not possibly have succeeded under article 8.

9. Ms Aboni, in support of her argument, pointed out the adverse finding regarding deception which, she suggested, would have considerable relevance with respect to the Article 8 issues. She also pointed out that the relationship relied upon by the appellant was a relatively recent one and had only commenced at a time when he was, in fact, awaiting a decision upon his application under the Immigration Rules as a Tier 4 Migrant. She asserted that there were no compelling circumstances capable of persuading a judge that the appellant could possibly succeed under Article 8 outside the rules.

10. I accept the Judge did err in law in failing to appreciate that transitional provisions operated to compel him to address and decide the Article 8 issues notwithstanding the content of the amended section 85. The reasons for that are most fully explained in the actual grounds of appeal and it is not necessary, given the agreement between the parties, for me to say any more about that. Despite Ms Aboni's determined arguments, I cannot say that the Judge, had he not erred in the agreed manner, would inevitably have dismissed the appeal. Of course, in general terms, it might be thought that it is now more difficult to succeed under Article 8 than had once been the case. There are now Immigration Rules governing (though not exclusively) decision making under Article 8 and there are statutory provisions, perhaps most notably section 117B of the Nationality, Immigration and Asylum Act 2002, which bear upon the nature of Article 8 decision making. Nevertheless, the appellant was relying upon a relationship with a British citizen who was, at the

time he first raised the arguments, expecting his child. I conclude that, whatever might be the ultimate outcome, he was advancing arguments which had, at least, some prospect of success and which merited a proper and full consideration. So, I am unable to accept Ms Aboni's submission that the agreed error was not a material one. Accordingly, I do set aside the Judge's decision.

11. Having explained that I was going to set the decision aside, both representatives urged me to remit rather than to seek to remake the decision myself. Given that the error did result in what I consider to be the major issue raised by the appeal not being considered, such that there will be a need for fresh evidence and fresh fact-finding, and given the agreement between the parties as to what I should do, I have decided to remit. Ms Manning appeared content for me to preserve the findings concerning deception and Ms Aboni urged me to do that. Normally, in setting aside and remitting, I would not wish to tie the hands of the first tier at all. However, the deception aspect is a discreet issue and Ms Manning did not seek to persuade me that, permission having been refused on that ground, I should not preserve the findings relevant to that. So, that is what I have decided to do. I have issued some brief directions which will, hopefully, be of some assistance to the First-tier Tribunal although I have not been prescriptive because I appreciate the First-tier Tribunal may well wish to issue its own directions regarding the future conduct of the appeal.

Decision

The making of the decision by the First-tier Tribunal involved an error of law. Accordingly, (subject to preserved findings referred to above) its decision is set aside.

No anonymity direction is made.

No fee order is made.

Signed: Date: 15 June 2017

Upper Tribunal Judge M R Hemingway