Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/01062/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On January 2, 2018	**On January 4, 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR SYED IRTAZA ALI MEHTAB
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Plowright, Counsel, instructed by All Levene Solicitors LLP
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I do not make an anonymity direction.

2. The appellant is a Pakistani national. The appellant was given leave to enter the United Kingdom as a Tier 4 (General) Student Migrant on February 13, 2011. On February 18, 2013 he submitted an application to extend that leave but withdrew it on March 4, 2014. With that application he provided a TOEIC certificate from Educational Testing Service (ETS) dated September 18, 2012.

3. On March 13, 2014 the appellant applied for leave to remain as the partner of a Tier 1 Migrant. The respondent refused his application on February 19, 2016 under paragraphs 322(2) and 245DD(a) HC 395 on the basis she believed the appellant had submitted a fraudulently obtained TOEIC certificate.

4. The appellant lodged grounds of appeal on February 24, 2016 under Section 82(1) of the Nationality, Immigration and Asylum Act 2002. His appeal came before Judge of the First-tier Tribunal Aujla (hereinafter called "the Judge") on March 6, 2017 and in a decision promulgated on March 13, 2017 the Judge refused his appeal finding the appellant had used a fraudulently obtained TOEIC certificate.

5. The appellant appealed the decision on March 31, 2017. Permission to appeal was initially refused by Judge of the First-tier Tribunal Saffer on September 28, 2017. The grounds were renewed and on November 1, 2017 Upper Tribunal Rimmington found there were arguable grounds and granted permission to appeal.

6. The matter came before me on the above date and the parties were represented as set out above.

SUBMISSIONS

7. Mr Plowright submitted the Judge had erred when she considered the appellant's explanation. She placed weight on a conviction that had been set aside by the Court of Appeal and this adverse finding undermined her assessment of whether the appellant was an honest person who had taken the test. It affected the weight she gave to the wife's evidence about the appellant and led the Judge to make adverse comments. Whilst the appellant had not given evidence, due to illness, there was evidence that when he spoke to the doctor he could speak English and the wife confirmed his ability as well. Whilst the Court of Appeal suggested the appellant may be guilty of another offence the appellant had never been convicted of such an offence and the Judge erred firstly using the acquittal to assess credibility of the appellant and secondly to undermine the wife's evidence. The decision in R (on the application of Nawaz) v Secretary of State for the Home Department (ETS: review standard/evidential basis) [2017] UKUT 00288 (IAC) was a judicial review and did not affect the facts of this decision.

8. Mr Melvin submitted there was no error in law. Case law demonstrated the respondent had satisfied the legal burden placed on her and the Judge, in this appeal, had a statement from a caseworker as well as the relevant results and table. There was no evidence before the Judge, apart from the grounds of appeal, that the appellant had attended the test or taken the test. The Judge was hampered by the appellant's inability to give evidence but it had been open to the appellant to adduce evidence demonstrating he had taken the test and could speak English in 2012. The wife's evidence did not assist the Judge on the core issue because she did not know him at the time. The Court of Appeal, in allowing his appeal against

conviction, made it clear that he may have been a party to a sham marriage but even if the Judge was wrong to place weight on this the appellant had failed to discharge the evidential burden placed on him. The Tribunal in Nawaz made it clear "Evidence obtained by use of the Look-up Tool, and subject to the human verification procedure, is an adequate basis for the Secretary of State's deception finding in these cases, in the light of Flynn & another [2008] EWCA Crim 970 [24 – 27], and the evidence of both Dr Harrison and Professor French." The appellant had not presented any evidence to contradict the respondent's claim and the decision was therefore open to the Judge.

9. Having heard submissions I indicated to the parties that the main issue for me to consider was whether the Judge's findings on the appellant's acquittal were inappropriate and if they were, did they infect his decision on whether a fraudulent TOEIC was submitted. I reserved my decision.

FINDINGS ON THE ERROR IN LAW

10. Paragraphs [57] and [58] of SM and Qadir c SSHD (ETS-Evidence-Burden of Proof) [2016] UKUT 000229 (IAC) set out the correct approach to take when considering cases of this nature. The approach was confirmed by the Court of Appeal in SM and Qadir and SSHD [2016] EWCA Civ 1167.

11. The Administrative Courts have also considered the correct approach to take when looking at ETS cases and one of the latest authorities on this issue is R (on the application of Nawaz) v Secretary of State for the Home Department (ETS: review standard/evidential basis) [2017] UKUT 00288 (IAC). Upper Tribunal Judge Freeman made clear that when considering such a case the following should be borne in mind-

    (a) Dr Harrison sets what might be called the gold standard for the kind of independent expert analysis of voice comparison evidence which would ideally be required in a criminal case … where one or a relatively small number of speakers will be under consideration.
    (b) Professor French confirms, from the point of view of an at least equally recognized expert, that natural ability, training, even of a fairly basic kind, and experience all play a valuable part. With the hindsight provided by his evidence, as well as Dr Harrison's, into the system of ASR, together with human verification, operated by ETS, I do not think the respondent can be regarded as having acted unfairly, in this and very many other cases of the same kind, in taking it as the basis for findings of deception.
    (c) While the lack of visible note-taking means that direct independent checking of results obtained in an individual case is not possible … applicant(s) … were offered the chance to get copies of the recordings made, so (t)he(y) could have them analysed… The system as a whole is not unfair, in the context in which it had to be operated.
    (d) Deception in ETS cases is not a question of precedent fact, except in particular circumstances, for example those in Abbas [2017] EWHC 78 (Admin).

(e) Oral or other evidence of an applicant's English-language skills or attainments is unlikely to have any decisive effect in judicial review proceedings on the fairness of the decision under challenge, for the reasons given in Habib (JR/1260/2016) [20], and those at [21].
(f) Evidence obtained by use of the Look-up Tool, and subject to the human verification procedure, is an adequate basis for the Secretary of State's deception finding in these cases, in the light of Flynn & another [2008] EWCA Crim 970 [24 – 27], and the evidence of both Dr Harrison and Professor French.

12. The Courts have made clear that the respondent cleared the initial legal burden of demonstrating the test may be fraudulent. Nothing that was submitted to the Judge in the FTT supported a submission that this burden was not met by the respondent.

13. What has often been described as the "evidential burden" is the burden the appellant has to rebut by presenting evidence. At paragraph [47] of Nawaz the Tribunal stated-

> "While the state of the evidence in *Qadir* made it possible for the appellants to satisfy the Tribunal, on their own evidence and those of their expert, that the respondent had not satisfied the legal burden of proving deceit, the evidence which she has put forward since has invariably satisfied both courts and this Tribunal that evidence obtained through the ETS Look-up Tool entitled a reasonable decision-maker to refuse an application made in these circumstances. It is certainly a pity that this evidence was not assembled in the first place; but its effect is very clear."

14. Mr Plowright has submitted that the decision is flawed because of the Judge's approach to the appellant's conviction/acquittal. The Judge summarised the correct approach to be taken to the issue that was before her at [39]. She noted there was no evidence from the appellant to rebut the presumption and that was because (a) he did not give evidence about the events of 2012 and (b) his wife did not know him at that time. The findings in [40] are fatal to the appellant's appeal and these finding are made regardless of the Judge's concerns about the conviction/acquittal.

15. I accept the Judge does place weight on the Court of Appeal's decision as demonstrated by her approach at [41] of her decision but she went on to find there may have been evidence that the appellant was knowingly a party to a sham marriage and that there was no evidence to support the appellant's wife's view that she was "pretty sure he has given this test honestly."

16. As the Rule 24 response and the grounds of appeal (see 4.1) quite properly point out the issue is not whether the appellant had been convicted of an offence but whether he produced sufficient evidence to satisfy the burden placed on him.

17. The Judge noted that despite arriving here in early 2011 there was no evidence the appellant attended any genuine college or passed any formal

examinations. She also made a finding, which was open to her, that marrying on July 6, 2011 raised questions as to his motives in coming here in the first place.

18. The Judge gave reasons for refusing the appellant's appeal. Whilst it is arguable the Judge may have placed too much weight on what the Court of Appeal had stated the fact remains the appellant failed to rebut the evidence presented in respect of the "test". The appeal was refused because the appellant failed to do this.

19. The Judge correctly, in light of Nawaz, made it clear the respondent's evidence demonstrated the appellant's use of fraud and nothing that was presented to the Judge suggested the appellant had rebutted that presumption. The adverse findings made about the appellant's wife do not alter the evidence or lack of it.

DECISION

20. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. I uphold the decision.

Signed Date 02/01/2018

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I make no fee award as the appeal was dismissed.

Signed Date 11.12.2017

Deputy Upper Tribunal Judge Alis