Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/01679/2019

THE IMMIGRATION ACTS

Field House	**Decision & Reasons Promulgated**
On 1st October 2019	**On 9th October 2019**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

FARRAKH ABBAS
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Shilliday, of Counsel, instructed by Elaahi & Co Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Pakistan born in June 1988. He arrived in the UK in April 2011 as a Tier 4 student migrant with entry clearance. He had leave to remain in that capacity but when he applied to extend that leave he was refused with a right of appeal. That appeal was dismissed on 3rd July 2015 by Judge of the First-tier Tribunal C Burns, and the

appellant became appeal rights exhausted in November 2015. In July 2015 the appellant applied for leave to remain outside of the Immigration Rules but this was voided due to his being within the appeal process. In February 2016 he again applied for leave outside of the Rules but this application was refused as a fresh human rights claim under paragraph 353 of the Immigration Rules. On 27th March 2017 the appellant applied for leave to remain based on his private and family life ties with the UK, and that application was refused in the decision of 11th January 2019. His appeal against that decision was dismissed by First-tier Tribunal Judge J Lebasci in a determination promulgated on the 13th June 2019.

2. Permission to appeal was granted by Upper Tribunal Judge Owens on the 1st July 2019 on the basis that it was arguable that the First-tier judge had erred in law in giving inadequate reasons for rejecting the appellant's oral testimony that he took his TOEIC test himself to obtain his ETS English qualification and for concluding that this evidence did not amount to an innocent explanation. It was thus arguable that the decision that his Article 8 ECHR appeal based on his family life relationship with a British citizen fell to be dismissed erred in law.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

4. In oral submissions by Mr Shilliday and in the grounds of appeal it is contended, in short summary, that there was a failure to consider the account that the appellant gave of the test he took at Burnley Training College on 16th January 2013 as there are no findings regarding this evidence and whether it properly amounted to an innocent explanation. It appeared that the First-tier Tribunal might have thought that the evidence did not need to be considered without corroborative evidence, see paragraph 33.1. The appellant was not represented and had not understood he could try to obtain the voice recording from ETS and mistakenly believed that a previous judge, Judge of the First-tier Tribunal Burns, had cleared him of deception. There was no strong evidence that Burnley Training College was a "fraud factory": as only 22% of tests were said by ETS to be invalid, with 78% being simply questionable on the day the appellant took his test.

5. Mr Avery submitted, in summary, that it was clear from paragraph 30 that the appellant's oral evidence was viewed as important, and further it is set out at paragraph 31 of the decision. It was open to the First-tier Tribunal to find that the appellant had only submitted generic evidence and overall from paragraph 33.1 of the decision it is clear that the First-tier Tribunal looked at all of the evidence and was not impressed by the appellant's explanation, and so properly found he had used deception.

6. I told the parties that I found that there had been an error of law by the First-tier Tribunal, as I found that there was an innocent explanation which satisfied a minimum level of plausibility raised by the appellant in response to the evidential burden evidence from ETS put forward by the respondent. The reasoning at paragraph 33.1 of the decision that this was not a qualifying explanation was not lawful as it implied that corroborative evidence was needed or that it needed to be one which was one which reached further than a minimum level of plausibility. The First-tier Tribunal had therefore failed to move to the third stage of consideration and consider whether overall the evidence of the respondent meant that this explanation should be rejected. It was therefore necessary to remake the appeal to determine whether on the balance of probabilities the respondent had satisfied the burden on him to show deception by the appellant. The remaking would also require submissions on whether any different outcome for the appeal should be reached if it was found that deception by the appellant had not been proved by the respondent.

Submissions- Remaking

7. Mr Avery submitted that the ETS investigation had been shown to be robust and it was very unlikely that it would have been shown that the appellant had cheated through those processes if this were not the case, false positives were less than 2% according to the respondent's expert analysis of those processes. The evidence of the appellant was not persuasive as it was just a generic account of taking an English test, so when balancing against the evidence of the respondent the respondent should be found to have shown cheating and deception on the balance of probabilities. Mr Avery argued that even if the appellant was found not to have cheated in his TOEIC examinations this could not mean that he succeeded in his human rights appeal. He had not met the points-based Immigration Rules for students in his appeal before Judge of the First-tier Tribunal Burns as he had no English language certificate. There was no meaningful challenge to the decision of the First-tier Tribunal on human rights grounds dismissing the appeal and so this should be upheld.

8. Mr Shilliday submitted that the ETS evidence had been found only to reach the evidential burden and not satisfy the legal burden in SM & Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 when an innocent explanation was raised. The respondent's evidence had not moved on significantly since that time. The appellant had given proper answers about his test-taking and there was no reason to doubt his account. Mr Shilliday submitted that if it were found the appellant had not used deception then this should materially affect the outcome of his human rights appeal as he should be put in the position that he would have been if this decision had not been made, as if all of this had not happened he would have been able to succeed in his student appeal before First-tier Tribunal Judge Burns. He accepted that the appellant's life had moved on, and that he now wishes to remain in the UK on the

basis of his relationship with his wife, but this should not be held against him. He had remained in the UK pursuing a just cause of clearing his name of deception, his human rights claim has deepened as a result and his appeal should therefore be allowed on human rights grounds.

9. At the end of the submissions I reserved my decision.

Conclusions -Remaking

10. I start my consideration from the point where it is accepted that the ETS evidence satisfies the evidential burden on the respondent, and the description of taking the test plus a contention of doubt in the conclusive nature of the ETS evidence given by the appellant satisfies the requirement to put forward an innocent explanation which satisfies a minimum level of plausibility.

11. I do not agree with Mr Shilliday's submission that the state of the respondent's evidence remains at the level that it was at when SM & Qadir was decided as since that time further expert evidence, including that of Professor French, has been obtained to support the contention that the ETS procedures were sufficiently robust to mean that they are very unlikely to find that a person had cheated when they had not done so. Further the ETS data for this appellant is that his scores were invalid which means that they concluded that he had cheated rather than it was not possible to tell if he had due to the general unreliability of the college, although this existed too as none of the test results from the college being found to be able to be preserved. However, I find that there must be consideration of the difficulty for the respondent that whatever exacting procedures ETS operated to detect fraud the material that they had to rely upon was supplied by the colleges, and the quality of that input data therefore relied upon was supplied by very questionable colleges. Burnley college was one where the procedures were deemed such that nearly two thirds of the tests, 64% of all ETS tests taken there, were deemed unreliable due to the general unreliability of those running the college and its procedures without any specific evidence of fraud in those cases. I also accept that even though, as set out below, I find that this appellant did not need to cheat as he had sufficiently good English this does not mean that he did not do so as there are other explanations as to why a person might cheat beyond inability to speak English.

12. On the other hand, in the appellant's favour, is the following: he has no history of abusing immigration control in any way and was believed in his other evidence about his marriage by Judge of the First-tier Tribunal Burns at the hearing in June 2015 (who found he did not need to make a finding with respect to deception); I find that he had sufficient English not to have needed to cheat as he would have had to show an English test certificate to obtain his original student leave to enter in 2011, he was able to speak sufficient English at the hearing before the First-tier Tribunal in June 2015 to give evidence without an interpreter and he

was married his UK born wife in 2012 who also gave evidence in English before the First-tier Tribunal in 2015; his is adamant he took the test himself and was able to give a detailed description of how he took the test which has not been shown to be at variance with the actual situation at Burnley College and did not demonstrate internal inconsistencies when subject to cross-examination before the First-tier Tribunal; he gave a good reason for using Burnley College which was that it was opposite the place where he was studying which in turn was near to his sister's residential address; and the respondent does not apparently contend that Burnley College was a "fraud factory", perhaps as there were relatively low numbers of persons taking the ETS tests at that college.

13. This is a very finely balanced decision, but bearing in mind that strong evidence is required by the respondent to show on the balance of probabilities that the appellant used deception, and thus his innocent explanation should be rejected, due to the consequences of such a decision I find that when all of the above is considered that this has not been shown given the many factors in the appellant's favour and the possibility of the evidence against him having been contaminated or muddled at source by Burnley College.

14. However, I do not find that this changes the outcome of this appeal for the following reasons. I do not accept that this is a situation where there is a "historic injustice" committed by the respondent which should lead the appellant to succeed in his human rights appeal. The appellant did not lose his student appeal before Judge Burns in 2015 because he was wrongly found to have used deception. He lost that appeal because his English language certificate had been cancelled by ETS, which clearly was a decision which was properly open to them given the fact they had discovered mass cheating in their examinations. It was also clearly not a decision by the respondent at all so it cannot be argued that there was injustice committed by the respondent which led to the appellant not having an English certificate. The appellant had not taken another English test and supplied an alternative certificate so he could meet the Immigration Rules when his appeal was heard by Judge Burns, and there is no evidence I was referred to that he has done so since that time either. Further, when it came to the human rights appeals, firstly before Judge Burns and now before Judge of the First-tier Tribunal J Lebasci and myself, he did not argue that he wished to remain as a student at all: the factual matrix had, as Mr Shilliday accepted, moved on and he wished and wishes simply to remain as a spouse.

15. This appeal has therefore enabled him to "clear his name" in the sense I found that the respondent had not satisfied me on the balance of probabilities that he cheated in his TOEIC examinations, but I do not find that this is a factor to which I should give weight when determining whether his removal is a disproportionate interference with his family life in the UK. He is now to be seen neutrally as a man whose character does not have this blemish.

16. I find that the appellant is genuinely married to his British citizen wife, Ms [LS], who has lived in the UK all of her life and works in this country, and that the couple have cohabited as man and wife since their marriage in 2012. However, he is not able to meet the requirements of the 5 year route under Appendix FM because he does not have leave to remain in the UK. He also cannot meet the requirements of the ten year route under EX1 of Appendix FM to the Immigration Rules because he has not shown there would be insurmountable obstacles to family life with his wife taking place in Pakistan as he has not put forward evidence that this would entail very serious hardship as issues such as his wife having to leave family, change work and adapt to life in a different country where she does not wish to live do not suffice to meet this exacting test, particularly as she speaks some Urdu, has visited Pakistan in the past, and both the appellant and his wife have qualifications which would assist with obtaining work and establishing themselves. There is further absolutely no evidence that the appellant could meet the private life Immigration Rules at paragraph 276ADE(1)(vi) as he cannot show he would have very significant obstacles to integration if he returned to Pakistan which is his country of nationality, where he has lived for most of his life and has the necessary language and cultural connections, and where he has friends and family.

17. If the appeal is looked at outside of the Immigration Rules on wider Article 8 ECHR grounds only little weight can be given to the appellant's private life ties with the UK as these have been formed whilst he has been precariously and unlawfully present, applying s.117B(4) and (5) of Nationality, Immigration and Asylum Act 2002. Some weight can be given to his relationship with his qualifying partner, as the relationship was formed when the appellant was lawfully present with leave as a student, but I find that there is nothing further that can be balanced against the significant weight that must be given to the public interest in removing those who cannot meet the requirements of the Immigration Rules and thus in maintaining immigration control. The fact that the appellant speaks English and is financially independent due to his wife's work are neutral matters.

18. I conclude in light of all of the evidence that the removal of the appellant is not disproportionate, although of course this does not mean that he might not be entitled to return to the UK with entry clearance as a spouse in accordance with the Immigration Rules at Appendix FM, but this will be a matter for him to consider with his legal representatives.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal.

3. I re-make the decision in the appeal by dismissing it on human rights grounds.

Signed: Fiona Lindsley Date: 2nd October 2019
Upper Tribunal Judge Lindsley