



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/13303/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 6 June 2019**

**Decision & Reasons Promulgated
On 19 June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MUDASSAR KHAN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Mr A Chohan, counsel.

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing an appeal by the applicant against the Secretary of State's decision of 5 June 2018 refusing him leave to remain on the basis of his private and family life. In this decision, I will refer to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Secretary of State as the respondent.

Background.

2. The appellant is a citizen of Pakistan, born on 23 December 1991. He first arrived in the UK on 14 March 2011 with a Tier 4 visa, valid until 21 July 2014. He met his wife, a British citizen, in 2015 and they married in an Islamic ceremony in Ireland on 25 May 2016 and there was a subsequent civil ceremony in Nottingham on 6 November 2018. They have a son, born on 4 November 2016 in Limerick, who has British and Irish nationality. The appellant has a stepdaughter, his wife's daughter, born in July 2009, also a British citizen.
3. The appellant and his wife lived together in Ireland from February 2016 until they returned to the UK in November 2017 because of the worsening health of his mother-in-law. They continue to live together with the two children in Nottingham.
4. The appellant's application for further leave to remain was refused on the basis that he failed to make meet the suitability requirements of the Rules because on 17 October 2012 at London College of Social Studies (LCSS) he used a proxy to take a speaking test with ETS, so obtaining his TOEIC certificate by deception. Accordingly, his presence in the UK was not conducive to the public good and his application was refused under para S-LTR.1.6 of the Rules.

The Hearing before the First-tier Tribunal.

5. At the hearing before the First-tier Tribunal, the respondent put in evidence and relied on the generic witness statements from Lesley Singh, Rebecca Collings, Peter Millington and an expert report from Professor French [17]. In the supplementary bundle there were documents specific to the appellant, to the test centre where he took his test and a copy of the ETS Test Centre Look Up Tool showing that on the relevant date, 17 October 2012, of the 15 tests taken at LCSS 1 (7%) was questionable and 14 (93%) were invalid.
6. The judge heard oral evidence from both the appellant and his wife. He accepted that the respondent had discharged the initial burden of showing that there was prima facie evidence of deception on the part of the appellant [23]. However, she said that she accepted the credibility of the appellant and his wife in all material respects and that, where there were perceived inconsistencies in the evidence, she found the appellant and his wife had satisfactorily explained them [28]. She noted that the appellant had provided details of where he sat the test, the administrative arrangements for that test and some detail of the tests undertaken but there was no persuasive information before her from the respondent to show that the information provided by the appellant was incorrect [33]. She also noted that the appellant had written to the respondent requesting a copy of the voice recordings of his TOIEC test, but the respondent said that he did not hold copies and the appellant should have written directly to ETS [34].

7. The judge found that in all circumstances she was not satisfied that the respondent had satisfied the legal burden of proving that the appellant's test results had been obtained by dishonesty [36]. She accepted that the appellant had a private and family life with his wife, child and stepchild and that he was in a genuine and subsisting relationship with both children [42]. She took into account that the appellant and his wife had resided lawfully in the Republic of Ireland for over 18 months and had made a separate application to the respondent under the Surinder Singh ((1992) EUECJ C-370/90) route [45]. She found that the decision to remove the appellant would not be proportionate. The appeal was, therefore, allowed on article 8 grounds.

The Grounds of Appeal and Submissions.

8. In the grounds of appeal, it is argued that the judge failed correctly to consider the burden of proof as set out in the decision in SM and Kadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229, which had made it clear that the generic evidence submitted was sufficient to discharge the evidential burden. If the generic evidence had been properly considered, the judge would have found that the onus of proving deception on the balance of probabilities had been discharged.
9. It is further argued that the judge did not adequately address the issue of whether there was an innocent explanation as the appellant was simply describing a process with which he would have been familiar in any event. The judge referred to the appellant's ability in English and to his other qualifications but the issue for her was whether he had in fact employed deception. It is also argued that the judge failed to give adequate reasons why she found that there was no reason for the appellant to use a proxy to take the test.
10. Mr Bramble relied on the grounds and did not seek to expand on them. He confirmed that the appellant had now been granted a residence permit as a result of his application made under the rule in Surinder Singh.
11. Mr Chohan submitted that the judge had reached findings properly open to her for the reasons she had given. She had made a specific finding that the appellant and his wife were honest witnesses and had given clear reasons for her decision. Whilst a different judge might have reached a different conclusion, the fact remained, so he submitted, that the judge's decision was properly open to her for the reasons she gave.

Assessment of whether the Judge Erred in Law.

12. I must consider whether the judge erred in law such that the decision should be set aside. I am not satisfied that she did for the following reasons. It is argued firstly that the judge failed to assess correctly the burden of proof in line with the case of SM and Qadir. There is no substance in this ground. The judge referred to that decision in [22] and found at [23] that the respondent had discharged the initial burden of

showing that there was a prima facie evidence of deception. She then went on to consider the appellant's explanation and found that the respondent had failed to discharge the onus of proving that the test results were obtained by dishonesty [36]. There is nothing in the decision to indicate that the judge did not properly understand the approach set out in SM and Qadir. Quite the reverse, her decision is entirely consistent with it.

13. The grounds then argue that the generic evidence combined with the evidence particular to the appellant was sufficient to satisfy the legal burden of proof as the judge should not have accepted the appellant's explanation. However, in substance this ground seeks to challenge issues of fact, which were for the judge to assess.
14. The appellant put forward an innocent explanation: that he had taken the test and had not used a proxy. He gave oral evidence to support this contention. It was a matter for the judge to decide what weight to give to that evidence in the context of the evidence as a whole. She found that the appellant and his wife were honest witnesses. She was also entitled to comment at [31] that she had no cogent evidence to show how the conclusion was reached that the appellant's test results were found to be invalid as opposed to questionable and that she would have expected the respondent to be able to confirm, for example, whether the same voice appeared on several tests or whether there was an incorrect gender of voice sample when compared against the test candidate.
15. The judge also commented that she had not been given details of what irregularities it was alleged had taken place on the specific day the appellant sat the tests or whether any proceedings had been brought against any party [32]. I am satisfied in the light of the evidence before the judge and, in particular, her credibility findings that she was entitled to conclude that the respondent had not satisfied the legal burden of proving the appellant's test results were obtained by dishonesty.
16. The grounds argue that the judge failed to deal adequately with the fact that, although the appellant may have had no need to engage in deception in the light of his ability to speak English, that did not necessarily mean that there were not in fact other reasons why a proxy was used. However, there is no reason to believe that the judge left matters such as this out of account. These were issues of fact for the judge to decide in the light of the evidence as a whole. In substance, the grounds again are simply seeking to re-open issues of fact where the judge reached a decision properly open to her.
17. In summary, the grounds do not satisfy me that the judge erred in law. She reached a decision properly open to her for the reasons she gave.

Decision

18. The First-tier Tribunal did not err in law and it follows that the decision to allow the appeal on human rights grounds stands.

Signed: H J E Latter

Dated: 14 June 2019

Deputy Upper Tribunal Judge Latter