Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/02427/2019**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 5th December 2019	**On 2nd January 2020**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

G S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Samra (Solicitor)
For the Respondent: Mrs H Aboni (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Bell, promulgated on 20th June 2019, following a hearing at Birmingham Priory Courts on 11th June 2019. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of India, and was born on 15th July 1990. He appealed against the decision of the Respondent dated 22nd January 2019, refusing his application for leave to remain in the UK as the partner of a person who was

settled here. The application was refused by the Respondent on the basis that the Appellant had submitted a TOEIC certificate from ETS, but this certificate had been cancelled by the ETS, who had undertaken to check on his test, and had confirmed to the Respondent Secretary of State that there was significant evidence to conclude that it had been fraudulently obtained by the use of a proxy test taker. It was true that the Appellant claimed to now have a partner by the name of R K, but they were not married and they could not show that they had at least two years previous a relationship as partners.

The Appellant's Claim

3. The Appellant's claim is that the Appellant had taken the English language test himself. He had not cheated. His wife could not go to live with him in India because she had heart problems and was on warfarin and had a prosthetic heart valve. He said he had chosen a particular college to do his English language test because the college was affordable for him. He did not take a receipt. He could record that there were 23 or 25 people sitting the test and he did not see anyone cheating.

The Judge's Findings

4. The judge dismissed the appeal on the basis that the Respondent had submitted that a ETS TOEIC test centre lookup tool document, on 6th March 2013, at Queensway College, had found that 98 tests had been taken of which 33 were found to be questionable and 65 were invalid (see paragraph 31). The judge referred to "Project Façade" which showed that there was "a high level of cheating" which was taking place (paragraph 35). The Appellant had to put forward an innocent explanation once the prima facie burden which lay on the Secretary of State had been discharged, and what had happened here was that "the Appellant simply asserts that he had not obtained the test by proxy and had gone to the test centre where he gave test and obtained the certificate and the allegation against him was baseless" (paragraph 37).

5. The judge recognised the Appellant's additional argument that "he said he already had an IELTS certificate which he had taken in India two years prior to that date and had sufficient skill in English language to pass the test but his problem was that his certificate had expired" (paragraph 37). The judge reasoned that the Appellant had been ambivalent about why he had chosen a particular college. The Appellant was in a bind, "because the Appellant needed to get a certificate quickly and there was a two month waiting time" (paragraph 38). That being the case, he had simply enlisted the help of an imposter to do the test for him quickly, although the Appellant's case was that "his English ability was good enough for him to obtain the certificate without cheating" (paragraph 39).

6. The judge, however, reasoned that, "I am satisfied that he had a clear alternative incentive for needing to obtain a certificate through means of deception, which was that he needed a certificate as a matter of urgency. As is said he, 'did not have the luxury of time'" (paragraph 39).

7. The appeal was dismissed.

Grounds of Application

8. The grounds of application state that the judge erred in his assessment of the Appellant's evidence concerning his taking of an ETS test in English and failed to apply the strictures in **AA (Nigeria) [2010] EWCA Civ 773**.

9. On 17th September 2019, permission to appeal was granted on the basis that it was argued that the judge failed to make clear findings on the deception that the Appellant was alleged to have undertaken when he took the English test, especially given that he was a person who had already passed a similar test before. Secondly, it was also arguable that the judge's assessment of the Appellant's Article 8 appeal was lacking in detailed findings.

Submissions

10. At the hearing before me on 5th December 2019, Mr Samra, appearing on behalf of the Appellant, submitted that the judge erred particularly at paragraph 38 of the determination in concluding that, "he said the advisor chose the college because the Appellant needed to get a certificate quickly and there was a two month waiting time" (paragraph 38), because the delay of two months here was for a IELTS test, and not for a TOEIC test, which the Appellant had in fact already taken two years previously in India, and this had never been contested as having been fraudulently procured.

11. Secondly, he submitted that insofar as it was helpful, there was now postdecision evidence, which he wished to submit, and this was a certificate from the Trinity College London, which showed that the Appellant had since the hearing taken a ISE test in Birmingham on 13th November 2019 and had passed all the four skills in reading, writing, speaking and listening. These results, submitted Mr Samra, showed the Appellant performing at an even higher level than in his previous TOEIC test.

12. There was, it is submitted, a third reason why the decision of the judge was unsustainable. This was the fact that the Appellant had stated in his witness statement (at paragraphs 15 to 17) exactly how he had travelled to the test centre, what bus he had taken, what the duration of time travel was, and none of this had actually been evaluated by the judge, particularly when the judge had concluded that the Appellant, who had already previously passed an English language test now had a "clear alternative incentive" (paragraph 39) for cheating. Before such a conclusion could be arrived at, the judge had to consider the Appellant's account as to how he went to take the test.

13. Indeed, the Appellant had even gone on to explain that his ID was checked before he could enter the building (see paragraph 17) and that the test he took at the building was on a computer (paragraph 18). None of this has been assessed by the judge. Moreover, the judge's conclusion that, "I also find it wholly unsatisfactory that there is no paper trail relating to the Appellant's dealings with the advisor" (paragraph 39) was not justifiable given that the paper trail that the judge was asking for was now some six years old, and the Appellant was not likely to have kept any of the

documentation from that time. It may have been desirable for the Appellant to have kept some documentation but to conclude that his failure to do so was "wholly unsatisfactory" was unwarranted when it is borne in mind that the burden of proof was fundamentally upon the Secretary of State and that all the Appellant had to do was to furnish an innocent explanation.

14. For her part, Mrs Aboni submitted that the judge had dealt adequately with the issue of the Appellant taking an TOEIC test previously in India (at paragraph 37) but this had now lapsed after two years, which meant that he was absolutely now required to have a new test completed. Second, the judge does focus on the relevant test (at paragraph 31) when he notes that it was taken "at Queensway College" where 98 tests had been taken and 65 had been declared invalid. Third, the fact that there was no paper trail, and that the Appellant could not even remember the name of the advisor that he had enlisted, was a matter that the judge could properly draw attention to (and Mr Samra here appeared to accept that there were problems with the Appellant's account in this regard even though he submitted that this was not fatal to the merits of his claim). Finally, submitted Mrs Aboni, the judge was right to have concluded that "the Appellant has not provided an innocent explanation in response to the evidence of deception relied on by the Respondent" (paragraph 40).

15. In reply, Mr Samra submitted that there were no clear findings on the Appellant having exercised deception. There was no reference to the explanation he had given of how he took the test at paragraphs 15 to 17 of his witness statement because these matters have simply not been evaluated by the judge. There were no clear findings in relation to the Appellant previously having done an IELTS test in India. Finally, Mr Samra submitted that the Secretary of State could have produced a recording to demonstrate, in the light of the fact that all that was presented was generic evidence, that it was being alleged that the Appellant cheated by using an imposter.

Error of Law

16. I am satisfied that the decision of the judge did involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. This was a case where the Respondent Secretary of State was relying upon generic evidence in relation to an allegation that the Appellant had exercised deception in an English language test certificate that he purported to rely upon. It was also a case where the Appellant previously did undertake a TOEIC test in India two years previously which had expired. In the circumstances, it was incumbent upon the decision maker to have regard to the Appellant's explanation, when considering whether he had been able to furnish an innocent account, about how he went and took the test in question. The Appellant details this at paragraphs 15 to 20 of his witness statement, but these matters are not addressed by the judge. The Appellant gave evidence at the hearing in English without the assistance of an interpreter. There is no recording produced by the Secretary of State to demonstrate that the Appellant had engaged in cheating. All that the Appellant has to do is to provide a "innocent explanation" and that explanation could only have been rejected after looking at the evidence that he gave in his witness statement and properly factoring in the existence of a previous English

language test that the Appellant had already passed in India when he undertook an IELTS certificate two years previously. This is a case where the strictures of **AA (Nigeria) [2010] EWCA Civ 773** have not been properly applied.

Notice of Decision

17. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Bell, pursuant to Practice Statement 7.2(b) because the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.

18. Anonymity direction is made.

19. This appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 30th December 2019