Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03755/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 July 2019	**On 19 February 2020**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

IRFAN SARDAR MUHAMMAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Sharma, of Counsel, instructed by M & K Solicitors
For the Respondent: Mr S Kotas, Home Office Presenting Officer

REMITTAL AND REASONS

Background

1. The Appellant is a citizen of Pakistan born on 26 June 1980. He arrived in the UK on 14 March 2004 with entry clearance conferring leave to enter as a student. He subsequently made applications for leave to remain as a Tier 4 (Student) Migrant with leave granted until 17 August 2012. He then applied for leave to remain as a Tier 1 (Entrepreneur) Migrant and subsequently on the basis of long residence; the last application in that category being made on 5 April 2018.

2. The application was refused by the Respondent in a decision dated 13 February 2019. The Appellant appealed and his appeal came before Judge of the First-tier Tribunal E B Grant.

3. In a decision and reasons promulgated on 21 May 2019, the judge dismissed the appeal on the basis that the Respondent was justified in refusing the application with reference to paragraph 322(2) of the Immigration Rules, on the basis of the evidence that the Appellant had utilised a proxy test taker in respect of his test taken at the London College of Media and Technology on 21 August 2012.

4. An application for permission to appeal to the Upper Tribunal was made in time on the basis of the following grounds: first, that the judge failed to apply a three-stage process to her assessment of the allegation of dishonesty. It was said that the judge failed to distinguish between the legal and evidential burden of proof as identified in *Muhandiramge (section S-LTR.1.7)* [2015] UKUT 675 (IAC). Second, it was argued that the judge's approach placed the burden on the Appellant to prove his innocence.

5. Permission to appeal was granted by First-tier Tribunal Judge O'Brien in a decision dated 24 June 2019 noting, in particular, that it was arguable that *"the judge set too high a standard of proof for the Appellant."*

The Hearing before the Upper Tribunal

6. At the hearing before the Upper Tribunal, Mr Sharma sought to rely on the grounds of appeal. In amplification of them, he submitted that the judge failed to apply the three-stage approach as enunciated in *Shen* [2014] UKUT 236 (IAC) by eliding stages 1 and 3 at [34]. In particular, it was asserted that the judge failed to distinguish between the Respondent bearing an evidential burden as well as a legal burden of proof.

7. Next, Mr Sharma submitted that the judge set too high a standard of proof on the Appellant in assessing his explanation. He referred to the Appellant's explanation at [35] which had a minimum level of plausibility. He submitted that the judge's findings at [43], [49] and [50] were not open to her. The Appellant had sought the voice recording, accepted it was not him, and had invited the Respondent to provide continuity evidence in respect of it. The Appellant had discharged the burden of providing an innocent explanation and the judge failed to properly take all of this into account. Further, it was said that the judge placed a higher burden of proof on the Appellant than that required, and that, this was further evidenced at [54] when the judge referred to the Appellant's explanation as not "reasonable" which was not the correct test.

8. Mr Kotas, on the other hand, submitted that the judge took into account the Appellant's submissions. The ETS "Look- up tool" was sufficient to discharge the initial burden. Mr Kotas stated that at [34] and [35] the judge was assessing the Appellant's innocent explanation. At [54] the

judge referred to the conclusions "overall" and there was no misdirection. Mr Kotas submitted that the judge assessed the evidence and noted that in 2012, he obtained maximum scores, but two years later the evidence showed that his linguistic abilities were not as high. He submitted that the judge was entitled to say that this was inconsistent. There was no evidence as the judge noted at [49] that the Appellant's degree in Pakistan was taught in English.

9. As for the second ground, Mr Kotas submitted that obtaining the voice recordings placed the Appellant in a "win-win" situation and that the judge took into account all the evidence.

10. In reply Mr Sharma submitted that at [51] it was unclear what evidence the Appellant could provide in 2019 that would reflect back to the position in 2012. The judge's criticism was unfair and there was no requirement to provide that evidence. He submitted that the Appellant had dealt with the "fraud factory argument" in the skeleton argument and further criticised the judge for failing to properly assess the evidence of the witness. The judge at [51] had referred to "cogent evidence" and this was not the correct test.

Findings and Reasons

11. While I do not accept all of Mr Sharma's criticisms of the judge's reasoning and, while Mr Kotas said everything he could in defence, I have concluded that the judge's decision does contain material errors of law in her findings and reasons.

12. The judge was ceased of the "generic evidence" in this case from the Respondent which included witness statements from Rebecca Collins, Peter Millington and a Senior Caseworker, Gopen Sethukavalar. This evidence was supported by the relevant extract from the "ETS look up tool" in respect of the Appellant for a test undertaken on 21 August 2012 with a respective speaking and writing score of 200.

13. The Appellant, on the other hand, had provided inter alia a detailed witness statement in rebuttal supported by witness testimony. The judge at [8] set out in full the relevant extracts of the Appellant's witness statement from paragraphs (4) to (49). Therein the Appellant robustly denied using a proxy and gave a detailed explanation of events upto, during and after the test. In respect of the latter events the Appellant further explained how he had requested a copy of the voice recording and how he sought to obtain evidence from the Respondent as to the provenance of that recording.

14. The judge then addressed the case law. The judge is criticised for her observation that Mr Sharma's skeleton argument did not refer to the case of *MA (ETS – TOEIC testing) Nigeria* [2016] UKUT 450 when, in fact, it did but nothing in my view turns on this. It is clear however that the judge set out relevant extracts from applicable jurisprudence at [13] to [21].

15. I set out the judge's material findings below:

> *"49. Two years after the invalidated test the appellant achieved level B1.1 Merit at Trinity College London indeed he achieved a higher level than that achieved in March 2018. I am not satisfied that a test taken two years after the invalidated test is credible evidence that the appellant's English language skills are such that he had no reason to use a proxy test taker in August 2012. The appellant's case before this tribunal has been that he had no need to use a proxy test taker because he had been proficient in the English language throughout. He has referred to examinations taken in Pakistan and allege that he was taught in the English language, but I note that his degree certificate is written in Urdu and English and there's no actual evidence from the University in question that he was taught throughout in the medium of English as claimed.*
>
> *50. I find that the certificate issued to the appellant in 2012 and invalidated by ETS does not reflect any test allegedly sat by the appellant and I find that ETS have not made an error in attributing the voice of another person to his test nor has the appellant shown that the test centre have manipulated his file or deliberately substituted his voice recording for that of another person; the marks are too high for his genuine level of attainment and this is shown by his most recent test at page 53 of the appellant's bundle. This is a CEFR graded mark of B1.1 which is two grades below the CEFR equivalent for the TOIEC tests allegedly taken by the appellant in 2012 which correlates to C1.*
>
> *51. Furthermore, the look up tool for the London College of Media and Technology shows that on 21 August 2012 82% of the tests taken were subsequently invalidated by ETS and 18% were marked as questionable. It is in that context, together with a failure to provide any cogent evidence of his actual English ability at that stage that I have concluded that neither the appellant nor his friend who has given written evidence that he dropped him off at the test centre, has shown any innocent explanation for his test results and has failed to demonstrate that the subsequent invalidation of his test by ETS was incorrect.*
>
> *52. I remind myself that ETS do not know the appellant and have no reason to single him out and have no interest in his specific test results other than to maintain the integrity of the examination system.*
>
> *53. I have considered whether, as the appellant claims, there had been some form of deception by test centre staff in relation to his test in the manner suggested by Professor Sommers, but the look up tool data and the overall number of tests invalidated together with those marked questionable has led me to conclude that all tests taken on 21 August 2012 were fraudulent and that*

> *there were no genuine tests taken in the examination centre. I find that the appellant resorted to using a proxy taker to ensure that he reached the required grade so as to ensure the successful outcome of his Tier 1 entrepreneur visa application and for no other reason.*
>
> *54. Overall, I am satisfied that on the specific facts of this appeal, that the respondent has discharged the burden of proof and the appellant has not given any reasonable explanation. I find that the appellant has sought to brazen out his description in this case. I therefore find as a matter of fact that he cannot meet the suitability criteria of the immigration rules for the reasons given by the respondent in the refusal."*

16. Ground one contends that the judge misdirected herself in failing to consider the issue of deception as a three-stage test by essentially eliding the legal and evidential burden. The judge specifically set out the three-stage test as identified in *Shen* (op.cit) and *Munhandiramge* (op.cit) at [10] and, while the terminology used at [34] and [35] could have been clearer, I am satisfied that on a holistic reading of the decision that the judge was aware of the three-stage test to be applied in such cases and considered each stage accordingly.

17. In the circumstances, I am not satisfied that ground one is made out.

18. I am satisfied however that ground two is made out. I find that the judge, in reaching her conclusions did not properly apply the guidance set out in relevant jurisprudence and her conclusions give the appearance that she set too high a standard for the Appellant.

19. There are difficulties with the judge's assessment of the Appellant's explanation. The judge was required to consider whether the Appellant's innocent explanation satisfied a minimum level of plausibility. I am not satisfied that the judge applied that standard consistently to the Appellant's explanation. While the judge refers to the Appellant's failure to provide an "innocent explanation for his test results" at [51], she appears to have applied a test of reasonableness at [54], and at [51] referred to the Appellant's failure to provide "cogent evidence". I cannot be satisfied that this is simply a matter of form over substance when the decision is read as a whole and I agree with Mr Sharma that there is a strong inference that the judge has not considered whether the Appellant's explanation met with a "basic level of plausibility"- the applicable test - which is not referred to during the course of her reasoning.

20. The context to the judge's reasoning was, unsurprisingly, that 82% of the tests taken at the London College of Media and Technology on 21 August 2012 were invalidated [51]. Whilst the judge was entitled to take this evidence into account, this does not necessarily mean that the Appellant was party to any fraud being perpetrated by or on behalf of the college. Nor does the extent of the fraud or the absence of any cogent evidence of the Appellant's linguistic abilities in 2012 demonstrate that the Appellant's

explanation, the expert evidence and the evidence of his friend all fell to be rejected for that reason. I agree with Mr Sharma that it is not clear what evidence could have been capable of meeting the judge's expectation in this regard.

21. Further, I find, in light of the fact that the Appellant obtained copies of the audio files of the test, which were not of his voice, and sought to obtain evidence from the Respondent of detailed data that would conclusively show that the recordings were from his test and not someone else's (a possible scenario in light of the evidence from Professor Sommer) that the judge did not properly take account of this evidence in making her adverse findings against the Appellant. These are clearly considerations relevant to the question of whether it would have been unnecessary or illogical for him to have cheated.

22. It is essentially for these reasons that I am satisfied that there has been an inadequate and flawed consideration of the Appellant's explanation.

Notice of Decision

The Appellant's appeal is allowed. I set aside the decision of the First-tier Tribunal. The appeal will be reheard *de novo* by the First tier Tribunal at Hatton Cross before a judge other than Judge E B Grant.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Bagral 17 February 2020