Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/06610/2019**
HU/06612/2019
HU/06614/2019

THE IMMIGRATION ACTS

Heard at Field House *via Skype for Business*	**Decision & Reasons Promulgated**
On 17 March 2021	**On 25 March 2021**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

(1) Mr. HITESH PATEL
(2) Mrs ZALAK RAMI
(3) AA (A Minor)
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Representation:
For the Appellants: Mr. H Patel, of Hiren Patel Solicitors
For the Respondent: Mr. T Lindsay, Senior Presenting Officer

Introduction

1. This is an appeal against the decision of Judge of the First-tier Tribunal Cohen ('the Judge') sent to the parties on 20 December 2019 dismissing the appellants' appeals against a decision of the respondent to refuse to

grant them leave to remain on human rights (article 8) grounds under, or alternatively, outside the Immigration Rules.

2. By a decision sent to the parties on 18 May 2020 Judge of the First-tier Tribunal Wilson granted the appellants permission to appeal on all grounds.

Remote hearing

3. The hearing before me was a Skype for Business video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in exactly the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

Anonymity

4. The Judge did not issue an anonymity order and no request was made by either party for such order to be issued.

5. This is not a matter where a statutory provision requires the making of an anonymity order. Paragraph 18 of the UTIAC Guidance Note 2013 No 1 concerned with anonymity orders confirms that the identity of children whether they are appellants or the children of an appellant (or otherwise concerned with the proceedings), will not normally be disclosed nor will their school, the names of their teacher or any social worker or health professional with whom they are concerned, unless there are good reasons in the interests of justice to do so.

6. Upon considering the issues in this matter, there is no requirement for the child to be named, nor for their personal details to be given save for that they are an appellant in these proceedings. The names of the child's parents are relatively commonplace, and there is no requirement to detail where the family reside in this country. Consequently, I am satisfied that the requirements of open justice require that the parent's names are not anonymised. The open justice principles will be met by the parents first and last names only being detailed. I am satisfied that there is no open justice requirement for an anonymity order to be issued in respect of the child in circumstances where their sole reference in this decision is to their being the third appellant. The child's interests can be preserved by their being referred to as 'AA'.

Background

7. The first appellant is a national of India. He was granted entry clearance as a Tier 4 (General) Student on 18 December 2009 and entered this country on 22 January 2010. He enjoyed leave to enter until 28 August 2012. He applied for leave to remain by an application dated 9 August 2012 and subsequently secured leave to remain as a Tier 4 (General) Student until 30 October 2014.

8. The first appellant made an in-time application for leave to remain on human rights (article 8) grounds. The respondent refused by a decision dated 22 January 2015. There was no exercise of an in-country right of appeal.

9. The second appellant is also a national of India. She was granted entry clearance as a Tier 4 (General) Student on 21 December 2010 and entered this country on 6 January 2011. She enjoyed leave to enter until 27 November 2012. She successfully made an in-time application for leave to remain as Tier 4 (General) Student and enjoyed such leave until 19 April 2015.

10. The first and second appellants were married in 2013.

11. On 31 July 2018 the appellants made an application for leave to remain on human rights (article 8) grounds. The respondent refused the application by a decision dated 26 March 2019, with attendant rights of appeal. The decision detailed, *inter alia*:

> 'Education Testing Services (ETS) is obligated to report test scores that accurately reflect the performance of test takers. For that reason, ETS routinely reviews testing irregularities and questions test results believed to be earned under abnormal or nonstandard circumstances. ETS's Score Cancellation Policy state that ETS reserves the right to cancel scores and/or take other action(s) deemed appropriate where ETS determines your test centre was not following established guidelines set forth by the TOEIC Program. During an administrative review process, ETS have confirmed that your test was obtained through deception. Because the validity of your test results could not be authenticated, your scores from the tests taken on 16 May 2012 at Seven Oaks College have been cancelled. You are specifically considered a person who has sought LTR in the UK by deception following information provided to us by the Educational Testing Service (ETS), that an anomaly with your speaking test indicated the presence of a proxy test taker.'

Hearing Before the FtT

12. The hearing came before the Judge sitting at Taylor House on 10 December 2019. The appellant was represented by Mr. Patel. The respondent was unrepresented.

13. The core of the first appellant's case is detailed at paras. 9 to 12 of his witness statement, dated 3 December 2019:

> ‘9. The Home Office states that I submitted ETS TOEIC certificate of my speaking exam which I took on 16 May 2012 in support of my application for leave to remain and I say that this completely false because I did not use that certificate because I failed in the test of 16 May 2012. Howe can I use failed test result in first place to obtain sponsorship for Tier 4 (General) visa and secondly for my application for leave to remain?
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> 10. I appeared for speaking exam on 16 May 2012 and scored 140 out of 200. I was required to score 160 to achieve B2 level, i.e. I scored less than what I was required to score. I appeared in the examination without ant preparation but when I took the examination again I prepared and passed the same and used that certificate in support of my application.
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> 11. The certificates in which I passed was valid for two years hence I also destroyed that certificate but I did submitted my original certificate of my speaking examination to the Home Office in support of my application of 9 August 2012.
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> 12. The Home Office states that I achieved score of 140 with the help of proxy, I ask if I have to cheat why would I use proxy who will fail to achieve 160 score. The fact that I scored below required level of 160 itself shows that I would not have used proxy.’
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> [The various grammatical and spelling errors have been reproduced without amendment.]

14. In refusing the appeal, the Judge addressed the first appellant’s explanation at [28] and [29] of his decision:

> ‘28. The appellant has attempted to claim that he did not rely on the test results dates [sic] 16 May 2012. He indicated that he scored badly in that test result with a result of just 140 in speaking. He [sic] that that [sic] he has destroyed the certificate. He indicated that he then undertook the test on a 2nd occasion. The appellant has failed to submit any evidence to indicate that he took a 2nd test. He has not produced either certificate. The respondent on the other hand has used the Lookup tool and produced the appellant test results for 16 May 2012. I find the appellant’s claim to be incredible and contrary to the evidence before me and further damaging to his credibility.
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> 29. The appellant claims that if he had utilised a proxy test taker, that he would not have failed his first test and would not have needed to take a 2nd test. Using the appellant’s logic however, I find to the contrary. If the appellant took the first test and failed, he would have had more motivation to use a proxy test taker on the 2nd occasion in order to ensure that he passed. I find the appellant’s claims to be implausible and further damaging to his credibility.’

Grounds of Appeal

15. By grounds of appeal dated 20 February 20202 and drafted by Ms. Iqbal, Counsel, four complaints are advanced as identifying material errors of law:

    i. The Judge failed to lawfully consider the suitability ground.

    ii. The Judge failed to lawfully consider material facts.

    iii. The Judge failed to lawfully consider 'innocent explanation'.

    iv. The Judge made an unreasonable finding of fact.

16. In granting permission to appeal JFtT Wilson reasoned, *inter alia*:

> '3. In an otherwise careful decision, it is nonetheless arguable that the judge failed to adequately, or at all, consider the Appellant's innocent explanation within the context of the relevant conclusions of the APPG report. That is arguably a material error of law.'

Decision on Error of Law

17. At the commencement of the hearing Mr. Lindsay confirmed on behalf of the respondent that it was accepted that ground 1 identified a material error of law. He accepted that the respondent had not elucidated with precision whether the first test certificate of 16 May 2012 was relied upon in the August 2012 application for leave to remain. It was accepted that in circumstances where the respondent was not represented at the hearing, the Judge erred in presuming that the test certificate of 16 May 2012 had been relied upon in the application for further leave to remain dated 9 August 2012.

18. Unfortunately, Mr. Lindsay was not in a position at the hearing to confirm the true position as to which test certificate was provided by the applicant to the respondent. He provided a reason as to why he had not been able to provide the answer, which I accepted at the hearing as being a good reason. He confirmed that the respondent would establish the true position by the time of the resumed hearing.

19. Upon considering the decision of the Judge, I am satisfied that the position adopted by the respondent before me is appropriate. This is a matter where consequent to the lack of precision in the decision letter the Judge should properly have adjourned the hearing on his own volition and sought the required information from the respondent. Having decided to proceed with his consideration, the Judge erroneously assumed that the test certificate complained of by the respondent was relied upon in the August 2012 application and so found the appellant incredible. Such approach was materially erroneous in law.

Remaking the Decision

20. As to the re-making of this decision, both parties agreed that it was a matter that could properly be remitted to the First-tier Tribunal.

21. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal, in particular paragraph 7.2. I observe the fundamental nature of the material error identified and conclude that the effect of the error has been to deprive the appellant of a fair hearing before the First-tier Tribunal. Consequently, I set aside this decision and remit it back to the First-tier Tribunal at Taylor House.

22. The respondent will be expected to be in a position to inform both the appellant and the First-tier Tribunal some time before the listing of the remitted hearing as to the true position regarding which test certificate was presented in the application of 9 August 2012.

23. The First-tier Tribunal will also be aided by the parties addressing the reported decision of *Mahmood (paras. S-LTR.1.6 & S-LTR.4.2.; Scope)* [2020] UKUT 00376 (IAC).

Notice of Decision

24. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 20 December 2019 pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

25. This matter is remitted to the First-tier Tribunal at Taylor House for a fresh hearing before any Judge other than Judge Cohen. No findings of fact are preserved.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Dated: 17 March 2021