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First-tier Tribunal
(Immigration and Asylum Chamber)

A[redacted]

THE IMMIGRATION ACTS

Heard at Hatton Cross Justice Centre	**Decision & Reasons Promulgated**
On 22 February 2023	16/03/2023

Before

JUDGE OF THE FIRST-TIER TRIBUNAL ALDRIDGE

Between

[redacted]

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Bellara, Counsel
For the Respondent: Mr Bassi, Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a citizen of India born on 30 March 1990. He has appealed under section 82 of the Nationality, Immigration and Asylum Act 2002 against a decision of the Secretary of State, dated 28 January 2020, to refuse him entry clearance to enter as a partner (spouse) of a British citizen.

2. I was not asked and saw no reason to make an anonymity direction in this case.

3. In brief outline, the background is as follows. The appellant came to the UK in November 2010 as a Tier 4 student. He held leave in that capacity until 31 March 2012. He was granted further leave until 30 April 2014 and then a subsequent application was refused on 17 September 2014. Further applications were subsequently refused, and the appellant was traced and arrested by the police on 1 July 2018 and released after making an asylum application for which the interview was never attended, and the appellant left the UK to return to India voluntarily on 17 June 2019. However, on 16 July 2015 the appellant had been served with papers that notified him that he was to be removed from the UK and it was believed that he had used deception in order to secure a pass at an English Language test.

4. The reasons for refusal set out in the notice of decision can be summarised as follows:

- The appellant did not meet the suitability requirements of the rules because he had made false representations for the purpose of obtaining a previous variation of leave. Specifically, the appellant submitted a TOEIC certificate from Educational Testing Service ("ETS") and checks had confirmed that the certificate was fraudulently obtained by the use of a proxy test taker.
- There were no exceptional circumstances to warrant a grant of leave outside the rules.

The appeal

5. In essence, the appellant denied that his ETS certificate had been fraudulently obtained. The respondent should have exercised discretion as the appellant voluntarily left the UK to return to India and, whilst overstaying, there are no significant aggravating features. The appellant now has a wife in the UK who is a British citizen and has limited ties to India. She is employed in the UK and has a strong social network in this country. The decision to refuse was not proportionate.

The Hearing

6. The hearing took place at Hatton Cross Justice Centre on 22 February 2023 by way of a hybrid hearing. The appellant is currently in India and was not able to join the proceedings and give evidence. His wife attended the hearing via a video link and confirmed that she was able to understand English and communicate without an interpreter. I heard oral evidence from the appellant's partner. All the oral evidence was given in English. This was a hearing that had been remitted to the FTT from the Upper Tribunal to be heard *de novo*.

7. The oral evidence is recorded in the record of proceedings, and I have taken it all into account along with the documents filed by the parties and the closing submissions made by the representatives when making my findings of fact and reaching my conclusions on the appeal. I have only set out the evidence and submissions as necessary to explain my findings and conclusions.

8. At the end of the hearing, I reserved my decision.

9. I may consider evidence about any matter which I think relevant to the substance of the decision, including evidence which concerns a matter arising after the date of decision.

Submissions

10. Mr Bassi sought to rely on the reasons for refusal letter and the respondent review and further evidence from a senior caseworker. The stance of the respondent remains that the appellant did cheat on his test to receive his English qualification. Mr Bassi referred to the statement of the appellant and noted that, whilst the appellant claimed to have completed exams in India and schooling in English, he has provided no evidence of this to the respondent. The appellant states that he paid £150 for the exam but has not provided a receipt. Mr Bassi also noted that the appellant claimed to speak to friends in English, but his wife says that they speak both English and Punjabi. There is nothing to suggest that the appellant paid for the test or booked it himself. The appellant claims to have been deeply upset after being accused of cheating but he has no evidence that he contacted the college after that to clear his name. The appellant has only made enquiries of the institute in December 2022 and January 2023, this should have been done years earlier. On balance, the tribunal is invited to find that the appellant has not rebutted the allegation against him with an innocent explanation and his appeal should be dismissed on grounds of suitability. Tribunal should also take into account the poor immigration history of the appellant.

11. Mr Bellara submitted that these are unique circumstances where the oral evidence of the appellant cannot be tested, and the respondent chose not to put questions to the appellant in writing. Mr submitted that the test is not how the appellant speaks now but the tribunal Bellara could look at the qualifications the appellant achieved before he took the test in 2012. The appellant has demonstrated these qualifications and obtained good grades and passed all of his modules, this is evidence of a good command of English in 2012. The tribunal should attach weight to the statement of the appellant which deals with the specifics of the test. The appellant remembers travelling to the

exam centre and that Wimbledon was on at the time. He recalls paying £150 and topics that came up during the course of the test. The appellant remembers features of the test centre. The tribunal should consider the WhatsApp messages that have been submitted which show that he messages both in Punjabi and in English. The tribunal should attach weight to the statement and qualifications of the appellant and, it is important to note, the appellant did not challenge the decision of 2015 because he had no right of appeal. Caselaw indicates that overstaying is not an aggravating factor and there is nothing preventing the appellant joining his wife in the UK. He voluntarily returned to India and has now made the correct application.

Suitability and the ETS certificate

12. The issue I must decide concerns the allegation that the appellant used deception in a previous application.

13. Whilst the burden of proving facts on which he relies generally rests on the appellant, different considerations apply where allegations of deception have been made. Although dealing with a mandatory general ground for refusal in that particular appeal, it has been explained by Beatson LJ in paragraph 3 of his judgment in the case of *Secretary of State for the Home Department v Shehzad & Anor* [2016] EWCA Civ 615, as follows:

> "It is common ground that for a decision to be made under paragraph 322(1A) there must be material justifying a conclusion that the individual under consideration has lied or submitted a false document. It is also common ground that the Secretary of State bears the initial burden of furnishing proof of deception, and that this burden is an "evidential burden". That means that, if the Secretary of State provides *prima facie* evidence of deception, the burden "shifts" onto the individual to provide a plausible innocent explanation, and that if the individual does so the burden "shifts back" to the Secretary of State: see *Shen (paper appeals: proving dishonesty)* [2014] UKUT 00236 (IAC) at [22] and [25] and *Muhandiramge (section S-LTR 1.7)* [2015] UKUT 675 at [10]. As to the standard of proof, the civil standard of proof applies to this question. The approach in *Re B (Children)* [2008] UKHL 35, [2009] 1 AC 11 to the standard of proof required to establish that a child "is likely to suffer significant harm" under section 31(2) of the Children Act 1989 is of relevance in the present context. It was held in that case that the standard required is the balance of probabilities. Baroness Hale stated (at [70]) that "neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies."'

14. The Court of Appeal had intended to assess the question of whether the

generic evidence sufficed to discharge the legal burden on the respondent in *Majumder and Qadir* [2016] EWCA Civ 1167, which was an appeal from the Upper Tribunal's decision in *SM and Qadir (ETS – Evidence – Burden of Proof)* [2016] UKUT 229 (IAC). However, the appeals were dismissed by consent. When it came to the appellant seeking to show there was an innocent explanation, the Court noted what the Upper Tribunal had said on the matter at paragraph 69 of *SM and Qadir*:

> "We turn thus to address the legal burden. We accept Mr Dunlop's submission that in considering an allegation of dishonesty in this context the relevant factors to be weighed include (inexhaustively, we would add) what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated. Mr Dunlop also highlighted the importance of three further considerations, namely how the Appellants performed under cross examination, whether the Tribunal's assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic achievements are such that it was unnecessary or illogical for them to have cheated."

15. Turning to the evidence in this appeal, the respondent relies on the generic evidence of Rebecca Collings and Peter Millington which has been exhaustively analysed in the cases referred to above, as well as the report of Professor French. The latter sought to respond to the earlier report by his colleague, Dr Harrison, which has not been produced in this particular appeal. This evidence is designed to establish that, notwithstanding the generic nature of the evidence and the absence of anything directly from ETS, it can safely be found that an invalid test result meant deception had been employed. As said, it has been analysed by the Upper Tribunal and the higher courts so there is no reason to elaborate on it here.

16. The respondent has also provided a witness statement made by a senior caseworker, Ms Raana Afzal, on 27 October 2022. This states that the test result in question was cancelled by ETS and the decision to refuse the appellant was based on that information. The rest of the statement highlights parts of the generic statements of Rebecca Collings and Peter Millington.

17. Ms Afzal produced the Excel spreadsheet by which ETS notified the Home Office ("ETS SELT SOURCE DATA") that the appellant's test results were invalid. This correctly identifies the appellant, who accepts he took the test on 27 June 2012 at Premier Language Training Centre. The spreadsheet states the test is "invalid." The document does not appear to be dated and is unsigned. There is a reference number but, as the TOEIC certificate to which it is said to relate has not been produced, I cannot compare it.

18. The final significant piece of evidence adduced by the respondent is a copy of the Project Façade – criminal inquiry into abuse of TOEIC report on Premier Language Training Centre, Barking. The report, which is dated 5 May 2015,

relates to the period in which the appellant took his test and contains strong evidence of organised and widespread cheating taking place at the college.

19. As the Upper Tribunal found in *SM and Qadir*, the initial evidential burden on the respondent has been discharged as a result of the provision of these documents and therefore it must be determined whether the appellant has discharged the burden of showing an innocent explanation, by showing a minimum level of plausibility, and then whether the respondent has discharged the legal burden to show the appellant has used deception. This has been described a "burden of proof boomerang" (see *Muhandiramge (section S-LTR.1.7)* [2015] UKUT 00675 (IAC)).

20. I note the following. As the Upper Tribunal discussed in *MA (ETS – TOEIC testing)* [2016] UKUT 00450 (IAC), there may be a range of reasons why persons already proficient in English may engage in TOEIC fraud (see paragraph 57). I also recognise that I am not an expert in assessing English language ability. Moreover, a considerable time has elapsed since the appellant says he took the test in June 2012, during which the appellant's English could have improved beyond all recognition. I further note the findings in respect of DK & RK {2021} UKUT 00061 IAC that the evidence being tendered on behalf of the respondent is amply sufficient to discharge the burden of proof and requires a response from any appellant whose test entry is attributed to a proxy.

21. However, it must weigh heavily in the appellant's favour that he has obtained academic qualifications which must of necessity have entailed his having a good command of English. For example, by April of 2012, he had commenced a graduate diploma in Business Management and Marketing in the UK which was very successfully completed with a high attendance rate. The appellant had completed his advanced diploma in Business Management at Kingston College before the date of the test in June 2012. Prior to that, I accept his witness evidence as consistent that he completed his schooling in English.

22. The appellant's witness statement contains a remarkable level of detail regarding his recollection of the journey to Barking and the location of the test centre. The appellant is able to recall details regarding the examination room and topics that were raised during the course of the test despite it being over ten years ago.

23. On the other hand, submissions revealed that the appellant had not evidence of contacting Premier Language Training Centre until very recently and long after the allegation of deception was made. He could not offer any real explanation why he had not taken either of these obvious steps, although I could think of reasons for believing that neither institution would have been very helpful to him.

24. Whilst not determinative, I note that the appellant was able to demonstrate

that he continues to communicate in both his native tongue and in English to his wife who resides in the UK. It is not necessary to be an expert to recognise that his level of English is certainly what one might expect of somebody who has been studying in the medium of English for many years. I conclude it is more likely than not that he was present and took the test. The appellant has provided a plausible innocent explanation and he satisfies the evidential burden.

25. The frailties of the generic evidence relied on by the Secretary of State in ETS cases has been examined and analysed in enormous detail, particularly in *SM and Qadir*. Whilst there is clear prima facie evidence of corruption, as exposed by the Panorama television programme shown in February 2014, there must in every case be clear evidence showing specifically that the individual concerned has used deception. Each case is intensely fact specific. At the heart of all this lies concern about the quality of the evidence linking assertions made by ETS to the Secretary of State's records. The Secretary of State's case has been augmented to an extent by the provision of an expert report by Professor French, which counters the expert report by Dr Harrison, which was relied on by the Upper Tribunal in *SM and Qadir*.

26. Cogent evidence has been provided by the appellant which is specific to this case, and which is capable of discharging the legal burden of proof where deception is alleged. I therefore find the appellant does not fall foul of the suitability requirements of the rules.

Article 8

27. I approach my evaluation of article 8 by reference to the five questions to be asked as set out in paragraph 17 of *Razgar* [2004] UKHL 27. The appellant must show that he currently enjoys protected rights and that there would be a significant interference with his human rights as a result of the decision. It is for the respondent to show that the interference is in accordance with the law and in pursuit of a legitimate aim. I must then assess whether the decision is necessary in a democratic society, including whether it is disproportionate to the legitimate aim identified.

Section 117B of the 2002 Act reads as follows:

> "(1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English-
>
> (a) are less of a burden on taxpayers, and
> (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons-

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to-

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where-

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

The following principles can be gleaned from the extensive case law interpreting these provisions.

28. In *Bossade (Sections 117A-D: Interrelationship with Rules)* [2015] UKUT 00415 (IAC), UTJ Storey said as follows:

"1. For courts and tribunals, the coming into force of Part 5A of the Nationality, Immigration and Asylum Act 2002 (ss.117A-D) has not altered the need for a two-stage approach to Article 8 claims.

2. Ordinarily a court or tribunal will, as a first stage, consider an appellant's Article 8 claim by reference to the Immigration Rules that set out substantive conditions, without any direct reference to Part 5A considerations. Such considerations have no direct application to rules of this kind. Part 5A considerations only have direct application at the second stage of the Article 8 analysis. This method of approach does not amount to according priority to the Rules over primary legislation but rather of recognising their different functions."

29. However, there is no threshold test for article 8 to be engaged outside the rules. In *R (on the application of Agyarko) v SSHD* [2017] UKSC 11, the Supreme Court explained that the ultimate question in article 8 cases is whether a fair balance has been struck between the competing public and individual interests involved, applying a proportionality test. The rules and IDIs do not depart from that position and are compatible with article 8. Appendix FM is said to reflect how the balance will be struck under article 8 so that if an applicant fails to meet the rules, it should only be in genuinely exceptional circumstances that there would be a breach of article 8.

30. The rules set out the Secretary of State's policy and, as such, must be given considerable weight (*Hesham Ali v SSHD* [2016] UKSC 60 at [46]).

31. The appeal can only be allowed if there is a breach of the appellant's human rights. The application of the rules would normally dictate the outcome of the appeal but not always. A 'balance sheet' approach is required.

32. I am satisfied that the appellant and his wife are in a genuine relationship, this was not a point of contention raised by Mr Bassi. I am also satisfied that the appellant did overstay in the UK for a number of years. However, I also note that the appellant voluntarily returned to India and had, subsequently, made the correct application. I have considered the Home Office Guidance in respect of suitability and the caselaw in respect of PS(India) UKUT 440 2011, I find that the overstaying, in the specific circumstances of this case, is not such an aggravating feature that would lead me to find against this appellant in respect of this appeal. The wife of the appellant is established in the UK and has been with the same employer for nearly 9 years. The wife has now been resident in the UK for more than 20 years. Clearly the proposed removal will be an interference with the family life of the appellant and his wife.

33. My decision turns on the issue of proportionality in respect of questions 4 and 5 from Razgar. The decision on the question of proportionality is a balancing exercise between the Appellant's interests and the public interest. I remind myself that Parliament has clearly stated its intention in Section 117B (1) that "*The maintenance of effective immigration controls is in the public interest*" and I remind myself that I must give effect to the will of Parliament. I also remind myself that Parliament has decided that it is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English are less of a burden on taxpayers and are better able to integrate into society and that for similar reasons persons who seek to enter or remain in the United Kingdom are financially independent (Section 117B (2) and (3)). I am also directed to attach little weight to a private life or to a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully or to a private life that has been established when the person's immigration status is precarious (Section 117B (4) and (5)). Finally, in case of a person who is not liable to deportation, I remind myself that the public interest does not require the person's removal where the person has a genuine and subsisting parental relationship with a qualifying child, and it would not be reasonable to expect the child to leave the United Kingdom (Section 117B(6)).

34. In making the proportionality balancing assessment, I remind myself that the public interest requires effective immigration controls. It is clearly in the public interest for Parliament to legislate and establish Immigration Rules that will be applied properly, fairly and equally in the pursuit of the public interest.

35. The Appellant can speak English.

36. The Appellant and his wife are financially independent in that they are not dependent on the British taxpayer. I remind myself that the Supreme Court has defined "financial independence" in Rhuppiah v Secretary of State for the Home Department [2018] UKSC as referring to an appellant not being financially dependent on the British taxpayer.

37. I attach little weight to the Appellant's private life here in the United Kingdom because it has been built up while his immigration status has been precarious. In Rhuppiah v Secretary of State for the Home Department [2018] UKSC, it was confirmed that any leave short of indefinite leave to remain is precarious. However, "little weight" does not mean "no weight" and so I attach some weight to the Appellant's private life.

38. Section 117B (6) does not apply because the Appellant is not a parent of a "qualifying child."

39. In assessing proportionality, I remind myself of the "balance sheet approach" endorsed by the Supreme Court in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60.

40. On one side of the balance sheet, there is a strong public interest in the maintenance of effective immigration controls.

41. On the one side of the balance sheet, there is no criminality or bad character on the part of the Appellant. I also rely on my findings that the Appellant has not committed fraud in his ETS test. I refer to the case of Ahsan. However, Khan and others v Secretary of State for the Home Department [2018] EWCA Civ 1684 deals with decisions after changes brought in by the Immigration Act 2014 and the approach to be taken by the Secretary of State when a First Tier Tribunal finds that there has not been fraud or deception on the part of the Appellant:

"*Further, at para. 8 of the note, it was stated:*

"*Nonetheless, for the avoidance of doubt, the SSHD confirms that:*

(i) For those individuals whose leave was curtailed, and where that leave would still have time to run as at the date of an FTT determination that there was no deception, subject to any further appeal to the UT, the curtailment decision would be withdrawn and the effect … would be that leave would continue and the individuals would not be disadvantaged in any future application they chose to make;
(ii) For those, whose leave has been curtailed, and where the leave would in any event have expired without any further application being made, the Respondent will provide a further opportunity for the individuals to obtain leave with the safeguards in paragraph (iii) below.
For those, whose leave had expired, and who had made an in time application for further leave to remain which was refused on ETS grounds, the effect of an FTT determination that there was no deception would be that the refusal would be withdrawn. The applicant in question would still have an outstanding application for leave to remain and the Respondent will provide them with a reasonable opportunity to make any further changes to their application which would be considered on the basis of them not having employed any deception in the obtaining of their TOEIC certificate, and they would in no way be disadvantaged in any future application they chose to make.
(iii) In all cases, the Respondent confirms that in making any future decision he will not hold any previous gap in leave caused by any erroneous decision in relation to ETS against the relevant applicant, and will have to take into account all the circumstances of each case.
However, the Respondent does ***not*** *accept that it would be appropriate for the Court now to bind him as to the approach that he would take towards still further applications in the future, for example by stating that each applicant has already accrued a certain period of lawful leave. The potential factual permutations of the cases that may need to be considered are many and various. In some cases, for example, it will be apparent that, whilst on the facts as presented at the appeal an appellant's human rights claim is successful, he would not have been able to obtain leave at previous dates. Again, this issue will have to be dealt with on a case by case basis."*

42. Given my findings that the Appellant did not use deception and did not cheat in his ETS test, and the approach adopted now by the Secretary of State where a Tribunal finds that there is no fraud, I find that the public interest in the Appellant's removal is significantly diminished and on the facts of this case, I find that the Appellant's removal is a disproportionate interference with his Article 8 rights.

43. I also find that the Appellant should be placed back into the position he was in prior to the Respondent's decision that he had cheated and prior to the curtailment of his leave.

44. Accordingly, I allow the appeal.

NOTICE OF DECISION

The appeal is allowed because the decision is compatible with section 6 of the Human Rights Act 1998.

Signed **Date 13 March 2023**

Judge Aldridge

Judge of the First-tier Tribunal

TO THE RESPONDENT
FEE AWARD

The appeal has been allowed. However, considerable further information since the date of the refusal has been relied upon by the appellant in the pursuit of this appeal and as such there can be no fee award.

Signed **Date 13 March 2023**

Judge Aldridge

Judge of the First-tier Tribunal