Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/24897/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 September 2018	**On 10 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DINESH KARKI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Mr L Lourdes, Counsel

DECISION AND REASONS

Background

1. The appellant is the Secretary of State and the respondent is Mr Karki. However for the purposes of this decision, I refer to the parties as they were before the First-tier Tribunal, where Mr Karki was the appellant.

2. Mr Karki is a citizen of Nepal born on 11 February 1988 who appealed to the First-tier Tribunal against the decision of the respondent, dated 26 October 2016, to refuse

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the appellant's application for leave to remain outside of the Immigration Rules (to enable the appellant to continue his studies in the UK). In a decision promulgated on 26 March 2018, Judge of the First-tier Tribunal Moore allowed the appellant's appeal.

3. The Secretary of State appeals, with permission, on the following grounds:

> Ground one: Making a material misdirection of law – the Tribunal directed that the Secretary of State grant leave for which there is no power to remit a decision as per **Greenwood No 2**;
>
> Ground two: Failing to give reasons for findings on an adequate matter. **Shehzad & Anor [2016] EWCA Civ 615** – it was argued the Tribunal failed to give adequate reasons for finding that the appellant had not practised deception;
>
> Ground three – it was argued that the Tribunal erred in allowing the appeal to enable the appellant to continue his studies and failing to take into consideration the current case law including **Patel and Others v SSHD [2013] UKSC 72**.

Error of Law Hearing

4. Mr Jarvis submitted that the judge had misunderstood the impact of the Secretary of State's evidence and had misapplied **Shehzad**. Mr Jarvis submitted that the starting point was wrong and the Tribunal only looked at the appellant's and had materially misunderstood the evidence. The First-tier Tribunal had failed to consider the evidence of Professor French. Mr Jarvis relied on paragraph 56 of **MA Nigeria [2016] UKUT 450**:

> "Second, we acknowledge the suggestion that the appellant had no reason to engage in deception which we have found proven. However this has not deflected us in any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere. We are not required to make the further finding of why the appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter."

5. In relation to Article 8 Mr Jarvis submitted that even if the Tribunal was not with him in relation to the deception point the jurisprudence on Article 8 and private life pointed to an error of law by the First-tier Tribunal.

6. **Patel & Others [2013] UKSC 72** reminds that:

> "The opportunity for a promising student to complete his course in this country however desirable in general terms is not in itself a right protected under Article 8."

7. Mr Jarvis further relied on the Court of Appeal in **Rhuppiah v SSHD [2016] EWCA Civ 803:** although the appellant had finance for his studies he was not financially independent from his family.

8. Mr Lourdes submitted that the First-tier Tribunal did apply the law correctly and was entitled to reach the findings that he did; he submitted reminded that the evidence of Peter Millington and Rebecca Collings did not have any personal knowledge of the appellant. Mr Lourdes relied on the appellant's witness statements and the evidence he had given to the First-tier Tribunal about how he stated he got to the test centre and how long it took him and other accompanying evidence. Mr Lourdes accepted however that the Article 8 case law was against him in relation to private life.

9. The decision of the First-tier Tribunal is problematic. This was a case where the appellant's application failed, in part, due to the respondent concluding that he had cheated in an English language test. Although the judge acknowledged the evidence before him, including the respondent's supplementary bundles and cited **Shehzad,** the First-tier Tribunal materially erred in its approach, including in failing to acknowledge, or make adequate findings on, the respective legal and evidential burdens of proof on the respondent and the appellant and the shifting evidential burden. The First-tier Tribunal failed to examine the case in the correct context of the relevant case law and to take the correct legal steps in determining whether the appellant was correctly refused under the general grounds of refusal.

10. The Tribunal also erred in concluding at [25] that the respondent's evidence was 'generic' without any analysis or adequate findings in relation to the case specific evidence in this case, relating to Eden College International Test Centre.

11. In addition, the First-tier Tribunal misdirected itself in its consideration of Article 8 including it its consideration of Section 117B where little weight must be afforded to the appellant's private life, as it was established when his presence in the UK was precarious. The judge also erred in his consideration of financial independence, given that the appellant relies on his family for funding. In addition, there was nothing compelling or exceptional identified in the appellant's case which might warrant a grant of leave outside the Immigration Rules.

12. The decision of the First-tier Tribunal contains errors of law therefore, such that it should be set aside. It was agreed by the parties that I could remake the decision.

Remaking the Decision

13. I heard oral evidence from the appellant who gave evidence in English and adopted his amended witness statement of 9 November 2017 together with a "statement of purpose" which he had prepared for the purposes of his studies. There was also additional evidence including in the form of the appellant's application for admission to the University of West Scotland and email IELTS correspondence. I had before me the appellant's bundle before the First-tier Tribunal, the respondent's bundle and supplementary evidence (as set out in the decision of First-tier Tribunal

at [5]). The appellant's evidence is set out in full in the Record of Proceedings. I also heard submissions from both parties which are also recorded in the Record of Proceedings.

14. In summary, Mr Jarvis relied on the Home Office evidence and supplementary bundles. This included document 7 of the supplementary bundle, the Home Office 'Project Façade' criminal enquiry into Eden College, where the appellant states he took the ETS test on 5 June 2013. Paragraph 11 of that report indicates that during the period from 20 March 2012 to 5 February 2014, there was a colossal fraud underway and 77% of the tests were found to be invalid.

15. Mr Jarvis further submitted that the evidence establishes that there is less than 1% chance of a false positive. Paragraph 14 of the Project Façade document indicated that approximately 1,131 students availed of "pilots" who took the test for them at Eden College. Mr Jarvis submitted that the appellant's oral evidence indicated that he had attended a centre quite a significant journey from his home, an hour and fifteen minutes. The appellant claimed that he did not see any evidence of proxies and did not see any evidence of questions and answers being read out, which was also an element of the ETS fraud. Mr Jarvis asked me to find the appellant's evidence unreliable and that either he did not attend the test and a proxy was used or he was party to the fraud at the test centre.

16. Mr Jarvis submitted that the fact that the appellant may have English qualifications, which is relied on by the appellant, is beside the point and there are a number of reasons why an individual might agree to participate in a fraud. It was submitted that the appellant had not provided an innocent explanation, the evidential burden having passed to him. There was nothing from the college in Aldgate that the appellant had referred to, to indicate that he had tried to book a test initially with them. The appellant in oral evidence confirmed that he did not request a recording from ETS and as such there was no separate assessment of the recording. The Tribunal was asked to reject his explanation. Mr Jarvis also pointed out that the appellant only did two of the four possible tests, a further possible indication that the appellant had obtained a fraudulent test.

17. In relation to Article 8, Mr Jarvis submitted that the appellant's application was outside the Rules, he was not applying for Tier 4 leave. There was no evidence the appellant met the Immigration Rules. Even if the Tribunal was not satisfied that the respondent had demonstrated that deception had taken place, little weight should be attached to the appellant's private life.

18. Mr Lourdes submitted that the appellant did not use the certificate obtained from Eden College and the appellant did not sit the other two modules. Mr Lourdes pointed to the appellant's evidence of how he went to the test centre and why he took the test there. He submitted that the appellant's evidence that when he found out about the college on the BBC, his evidence that circumstances had overtaken and he therefore did not need the test and made no further enquiries, was credible.

However there was evidence before the Tribunal that the appellant had contacted ETS.

19. Mr Lourdes further submitted that the appellant was not a person who does not speak English; he has been assessed by a college in Nepal before coming to the UK. He has been assessed by Sunderland University where he had taken a diploma in business management. He had also completed an MBA. It was submitted he had no motivation to cheat. Mr Lourdes submitted that whilst **MA Nigeria** indicated that there were reasons why an individual may cheat Mr Lourdes submitted that the appellant in **MA Nigeria** had had a number of negative credibility factors. It was submitted that the appellant has given an innocent explanation and that the legal burden of proof remains with the Secretary of State which it was submitted was not discharged. It was submitted that the Secretary of State had discretion to grant leave outside of the Rules and the appellant wanted to continue studying.

Findings

20. It is not disputed that the appellant's appeal is on human rights grounds alone. I have considered the appeal through the prism of the Immigration Rules including the respondent's refusal on conducive grounds.

21. The application was refused under paragraph 322(1) of the Immigration Rules as the appellant applied for leave for a purpose not covered by the Immigration Rules. Although the appellant did not seek to rely on the particular certificate for the purposes of an application for leave, the respondent refused the appellant's application including as the respondent was satisfied that the appellant's presence was not conducive to the public good as the appellant's conduct makes it undesirable to allow him to remain in the UK.

22. I have considered whether the generic evidence and the evidence relating to the appellant discharges the evidential burden on the Secretary of State, that the appellant procured his TOEIC tests by dishonesty (see **SM & Qadir V SSHD (ETS – Evidence – Burden of Proof) [2016] UKUT 229)**. In making this assessment, I have also considered what was said in **Shehzad**. The Court of Appeal concluded that the 'generic evidence' together with the evidence that the individual test was 'invalid' was sufficient to shift the evidential burden onto the test taker to raise an innocent explanation.

23. In addition to the generic evidence of Rebecca Collings and Peter Millington I also had sight of the additional bundle, including the expert report of Professor French together with the witness statement of Jagdev Singh dated 22 February 2018. Annex A of that witness statement confirms both the appellant's test certificate results, from 5 June 2013 at Eden College, to be 'invalid.'

24. I have considered the totality of the respondent's evidence, including in relation to the process of the invalidation of the ETS tests, the fact that the appellant's test was considered invalid (rather than just questionable), the likelihood of a false positive to be 'substantially less than 1% (Professor French) and the evidence in relation to the

significant fraud perpetrated in the vast majority of tests taken in Eden College during the time period covering the appellant's tests there.

25. Considering the evidence in the round, although the legal burden of proof remains with the respondent, I am satisfied that there is adequate evidence to shift the evidential burden to the appellant to provide an innocent application.

26. Having considered all the evidence, including the appellant's oral evidence, I am not satisfied that he provided any such innocent explanation. I did not find the appellant to be a credible witness including in his evidence in relation to allegedly taking the tests.

27. I have also considered that although he has more recently, in February 2018, made an email enquiry of ETS (which resulted in a reply reiterating that the appellant's Certificate was no longer valid and that the appellant should raise any queries with the Home Office) the appellant could provide no adequate explanation as to why, when he was made aware of the problems with ETS tests and fraud (and he confirmed in oral evidence that he saw this reported on television) he did not at the time approach the Home Office for example, or ETS or Eden College. If as the appellant claims, he had no involvement in either a proxy taking his case or the fraud more generally his failure to take any action at the time in respect of his ETS test, particularly when he stated he had only at that stage completed two modules, is lacking in credibility when considered in the round.

28. Instead, the appellant stated he relied on an IELTS test he completed around the same time, as well as on separate assessments by subsequent education providers. I am not satisfied that this adequately explains the appellant's failure to follow up at the time, in any way, his tests at Eden College, whether he required the test for his immigration status or not. He was aware, on his own evidence that he heard it on the news, of problems with the ETS tests, yet made no attempts at the time to ensure, for example, that he was not tainted by the fraud. I consider the appellant's credibility to be reduced.

29. In reaching this finding I have taken into consideration that the appellant did provide information as to how he claimed he travelled to the test centre. The fact that the appellant can describe a journey does not in itself mean that I have to accept that he is telling the truth. Even if the appellant did travel to the hearing centre that does not mean that a proxy did not take his test. He was also, in my findings, unable to provide any adequate explanation as to why he would take a test an hour and fifteen minute journey from his home.

30. Although the appellant stated that he had approached another test centre, at Aldgate, there was for example no other confirmation of any such enquiry, or any other adequate explanation, where such ought reasonably to be available, as to why he did not approach another test centre closer to his home. Although the appellant may have subsequently demonstrated an acceptable level of English (and there was reference to him also taking an English test prior to leaving Nepal although no other

adequate information in relation to that test although I accept he entered the UK as a Tier 4 student)) and has subsequently taken a number of third level qualifications, that does not amount to an innocent explanation, particular in light of his actions (and inactions) in 2013.

31. The fact that the appellant may have had a certain level of English, even in 2013, does not mean that an individual would not use a proxy. I take into consideration what was said in **MA Nigeria.** The credibility of the appellant in that case is irrelevant to the general principles, espoused at paragraph 57, including that issues including, but not limited to, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system, may lead an individual to engage in TOEIC fraud, notwithstanding English proficiency.

32. Having weighed all the material, although the burden to establish an innocent explanation is a low one (the appellant need only show the minimal level of plausibility) I am not satisfied that he has discharged that burden. I find that the respondent has demonstrated that the appellant did obtain an ETS test by deception. Although I accept that the appellant did not use this test in any application to the respondent, there is no error in the respondent's conclusion that the appellant's presence in the UK is not conducive to the public good due to the appellant's conduct in partaking in this deception (paragraph 320(19) of the Immigration Rules).

Article 8

33. In addition (and in the alternative if I am wrong in relation to what I find to be the appellant's participation in deception) I not satisfied, in any event, that the appellant's appeal can succeed on human rights grounds.

34. It was not suggested that the appellant could meet the Immigration Rules and indeed the appellant had applied for leave to remain, outside the Immigration Rules, to allow him to allow him to make a further application as a student. I take into account what was said in **Patel and Others v SSHD [2013] UKSC 72** where it was reminded that Article 8 is not a general dispensing power:

> "It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the Rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the Rules are not reviewable on appeal: Section 86(6). One may sympathise with Sedley LJ's call in *Pankina* for 'common sense' in the application of the Rules to graduates who have been studying in the UK for some years (see paragraph 47 above). However such considerations do not by themselves provide grounds of appeal under Article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under Article 8."

35. Although I accept the appellant has been in the UK for some time, since April 2011, I do not find that the appellant has shown that he has any private or family life such

that the respondent's decision to refuse to grant further leave outside the Immigration Rules would have sufficiently grave consequences to engage Article 8.

36. In the alternative that Article 8 is engaged, any interference with the right to respect for the appellant's private life is in accordance with the law and for the legitimate aim of the maintenance of effective immigration control.

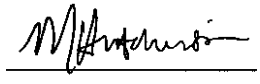
37. I must give significant weight to the public interest. The appellant does not satisfy the requirements of any Immigration Rules. I have applied Section 117B of the Nationality, Immigration and Asylum Act 2002. I have reminded myself that maintenance of immigration control is in the public interest. Although the appellant states that he is in receipt of funding from his family it has not been established that he is financially independent in the terms considered by the Court of Appeal in **Rhuppiah**. That is a factor in favour of the public interest. Although I accept the appellant now speaks English that is, at best, a neutral factor.

38. I take into account Section 117B(5) of the 2002 Act and that little weight should be attached to private life developed in the UK when an individual's leave to remain is precarious. There was no evidence to suggest the appellant's leave to remain in the UK has been anything other than precarious. Although 'little weight' has been found to be a spectrum, there is nothing in the appellant's case that would suggest that anything other than little weight should be applied in his case. There was no other adequate evidence in relation to any other element of the appellant's private life in the UK, over and above his studies, or any adequate evidence to suggest that there is anything exceptional or compelling about the appellant's case which would require a grant of leave to remain in the UK.

39. Applying the balance sheet approach (**Hesham Ali [2016] UKSC 60)** I accept that the appellant has pursued a significant academic career (and provided an application to the University of West Scotland (although his oral evidence suggested that he was unable to start this course due to his immigration status)). Nevertheless, even if it had not been established that the appellant obtained an ETS test by deception (which for the reasons above I am satisfied he did), the factors in favour of the public interest outweigh the appellant's private life in the UK such as it is.

40. The decision of the First-tier Tribunal is set aside. I substitute my decision dismissing the appellant's appeal on Human Rights grounds

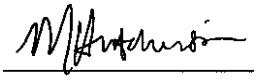
No anonymity direction was sought or is made.

Signed  Date: 2 October 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

As the appeal is dismissed, no fee award is made.

Signed  Date: 2 October 2018

Deputy Upper Tribunal Judge Hutchinson