Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03583/2016

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 3 October 2018	**On 5 February 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

WASEEM [F]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr O' Ceallaigh, instructed by M & K Solicitors
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Waseem [F], was born on 16 August 1980 and is a male citizen of Pakistan. He has applied for leave to remain in the United Kingdom on the basis of his family life with his partner. He is married to a Mrs [S] and they have three children together who were born in 2015, 2017 and 2017 respectively. Mrs [S] and all three children are British citizens. The appellant had submitted in support of his application to remain in the United Kingdom a TOEIC certificate from ETS. Following checks made on the appellant's test by ETS, the respondent considered

that the test had been undertaken by a proxy. The respondent was consequently satisfied that, as a consequence of his conduct, the appellant's presence in the United Kingdom was not conducive to the public good (see paragraph S-LTR 1.6 of Appendix FM). The appellant appealed to the First-tier Tribunal (Judge O'Brien) which, in a decision promulgated on 16 April 2018, dismissed the appeal. The appellant now appeals, with permission to the Upper Tribunal.

2. At [51], Judge O'Brien wrote:

> "I remind myself that the burden of proof in this case ultimately lies on the respondent and the standard of proof is the balance of probabilities. Unquestionably, the respondent has discharged her initial evidential burden; not only has generic evidence been provided abroad at Universal Training College but also case-specific evidence that the appellant's own test was taken by a proxy. The appellant has, as noted above, had provided evidence about the centre and the test and of his own circumstances which might otherwise satisfy the relatively low evidential burden of setting out an innocent explanation. However, it is now common cause that the voice recordings provided by ETS in respect of the appellant are not of his voice. He has not given any satisfactory explanation for that, and I am not persuaded that it is the result of a mix-up. On balance I am satisfied there is cogent evidence the appellant, presumably for expediency (although his motive is irrelevant), used a proxy test taker to pass the ETS test."

3. The grounds challenge the judge's findings. The appellant relies on *R (Saha and Another) v SSHD* (Secretary of State's duty of candour) [2017] UKUT 17 (IAC). That case drew attention to problems existing with the ETS record keeping system; the processes by which a candidate's name was linked to a particular test was unclear. The Upper Tribunal found that it was not always possible for ETS to match candidates with the tests. The grounds [11] assert that the judge appears to have been under the impression that the only possible explanation for the fact that an appellant's voice was not on a recording was that the appellant had acted fraudulently. The appellant submits that the judge failed to consider (following *Saha*) that the ETS's system for matching voice files cases was unreliable. Further, even if the test centre had employed fraud, it was not clear that the appellant had been a party to fraud.

4. The judge was aware of the extensive jurisprudence arising in ETS cases, including the decision in *Saha*. The difficulty for the appellant, as the judge noted, is that he has accepted that "the voice recordings provided by ETS in respect of the appellant are not of his voice". Earlier in the decision at [48], the judge recorded that the appellant was unable "… to explain why it is that the test recordings held for him by ETS are not his voice". At [15], the judge states that the Presenting Officer had submitted "now that the appellant has conceded the voice on his ETS recordings was not his, the respondent's case of fraud is irresistible" The difficulty for the appellant is that the judge has recorded more than once in the decision that the voice files held by ETS do not contain his voice. The judge was not bound to accept the appellant's explanation that there had been a

"mix-up". The evidence before the Tribunal in *Saha* was not that every single file attributed to every test taker was wrongly attributed or "mixed-up;" it follows that at least some of the voice files attributed on the ETS system to particular individuals had been correctly attributed. That is what the judge, having considered all the evidence and having had the benefit of hearing oral evidence, has concluded in this instance. Indeed, the appellant himself conceded as much before the judge. As regards the incorrect attribution of the burden of proof in the appeal, I agree with the Secretary of State who has pointed out, in the Rule 24 statement, that the burden of proof rested on the Secretary of State and that, in light of the concession made by the appellant, that burden had been discharged. I do not accept that the judge has imposed upon the appellant an impossible burden of proving something which was beyond his competence to prove. The appellant has suggested an explanation for the evidence produced by ETS and the judge, as she was entitled to do, has rejected it. I find that the judge's findings in respect of the appellant's use of a proxy are sound.

5. Having concluded that the appellant had used fraud in his ETS test, the judge went on to consider the appeal on Article 8 grounds. The second ground of appeal draws attention to the fact that the appellant appears to have overlooked the correct immigration status of the appellant's wife; she is a British citizen and not merely a person in the United Kingdom with indefinite leave to remain as the judge stated at [52]. This, the grounds of appeal assert, amounts to an obvious error of law.

6. It is not clear from the decision what evidence of the wife's status was provided to the judge. Assuming that the grounds are correct and that she is a British citizen, the question is whether the error is material. The judge concluded that "[the appellant and his wife] are both citizens of Pakistan so doubtless [the children] are entitled also to Pakistan citizenship and all the rights and privileges that entail." The grounds of appeal do not challenge that statement. The fact that Mrs [S] may be a British citizen does not mean that she is no longer a Pakistani citizen as is, of course, the appellant. The judge found that, as a result of the entire family moving to Pakistan, they would have improved access with their extended family living there. Further, at [55] the judge observed that Mrs [S] has a right to remain in the United Kingdom, as do the children. The judge also correctly noted that the children were "qualifying children" as defined by Section 117D of the 2002 Act (as amended). She rightly identified the correct test as being whether it would be reasonable to expect the children to leave the United Kingdom. She concluded [60] that there were "strong reasons to conclude that it would be reasonable to expect the appellant's children to leave the United Kingdom notwithstanding they are British citizens". By leaving together, the family unit would be maintained. The children are very young, they are entitled to the citizenship of Pakistan and would have contact with their extended family living there. These were all factors in the analysis which remain materially unaltered even if the judge had proceeded on the basis that Mrs [S] is a British citizen. In essence, the judge has found that the British citizenship of the children was not an impediment to their returning to Pakistan with the appellant; there was no

reason to suppose that her analysis would have been any different had it been conducted on the basis that Mrs [S] is also a British citizen. I can identify no error of law in the judge's consideration of Article 8 ECHR or section 55 of the Borders, Citizenship and Immigration Act 2009 which requires the decision to be set aside.

7. In conclusion, I find that the judge has not erred in her assessment of the ETS/proxy test taker issue in this case. Further, the judge has reached a decision on the Article 8 ECHR appeal which was available to her on the evidence and which is in accordance with the law. Accordingly, the appeal is dismissed.

Notice of Decision

This appeal is dismissed.

No anonymity direction is made.

Signed Date 20 November 2018

Upper Tribunal Judge Lane

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 20 November 2018

Upper Tribunal Judge Lane