Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11447/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 January 2020	**On 10 February 2020**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR NAEEM SHARIF
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Sharma, Counsel instructed by Magna solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Pakistan born on 16 January 1980. He arrived in the UK in 2006 with entry clearance as a student until 31 May 2008. He made an in time application for further entry clearance until 31 March 2009 and then obtained further leave until 28 February 2011 on the same basis. The Appellant applied for and was granted a further student visa until 30 April 2014, but his leave was curtailed to expire on 6 September 2013.

2. The Appellant sought and obtained further leave on 30 August 2013 until 6 July 2015, but this too was subsequently curtailed until 20 April 2014. The Appellant made an in time application for further leave on 14 April 2014 and submitted a TOEIC certificate from ETS. That application was refused without the right of appeal on 3 July 2014 and he was thereafter dealt with an as an overstayer.

3. In September 2014 the Appellant made an application for asylum. On 25 March 2015, he sought leave to remain on family and private life grounds, but this application was refused and certified as clearly unfounded. Subsequent applications made on the basis of his Article 8 private life in the UK were made in November 2015 and refused in September 2016 and on 7 September 2016, refused on 7 February 2017.

4. On 5 September 2017, the Appellant made a further application, which was refused on 26 February 2018 without the right of appeal, but the Respondent subsequently agreed to accept further submissions and refused this application with the right of appeal on 19 June 2019. In that decision the Respondent relied on an assertion that the Appellant's TOEIC ETS test had been fraudulently obtained as there was significant evidence to show that he had utilised a proxy. The application was refused both with regard to paragraph 276 and long residence under the Immigration Rules, and outside the Rules with regard to Article 8.

5. The Appellant appealed against this decision and his appeal came before Judge of the First-tier Tribunal Clemes for hearing on 15 August 2019 in Newport. In a decision and reasons promulgated on 29 August 2019, the judge dismissed the appeal, having heard evidence from the Appellant and finding at [16] that the generic evidence in the appeal sufficed to discharge the initial evidential burden on the Respondent, at [17] the Judge held as follows:

> *"17. I did not find the Appellant a credible witness. He gave me an unclear journey of the place and time that he claims to have taken the test. His description of the journey was muddled involving him changing the starting point and detail of the transport used when he went across London to the test centre. He chose a test centre in Barking because it was near his place of full-time study he says. Barking is in the far east of London when the Appellant was living in the far west (Greenford). I am satisfied that he chose that centre as it was renown (sic) for permitting or ignoring fraud that was taking place there. The Appellant is a man of some intelligence I am satisfied yet he was unable to glean that three quarters of the tests being taken were being done so fraudulently. He told me quite clearly that he took his tests in 2009 and this evidential anomaly was only cured when he was re-examined. I conclude that either his English is so poor that he cannot distinguish 2009 from 2012 or that he is simply unable to remember a date because he did not attend. I find that the latter is more likely to be the position as the Appellant gave evidence without an interpreter and answered questions competently at the hearing.*
>
> *18. The Appellant also relies on the fact which was not contested by the Respondent that he undertook interviews with other agents of the Respondent in Pakistan and in the UK after which his English language*

competence was not queried. I am satisfied that this is at best a neutral point. He had no option but to attend these interviews in person. They would not have been concluded with the same rigour as an objective English language test would have presented or have been as multifaceted. He also relies on the fact that he took different courses in the medium of English. He provides little in support of this contention. The documents which he has supplied are unhelpful relating that he committed academic misconduct at one college (Edge Hill) together with other evidence of enrolment and course details which are so vague and arcane as to attract little or no weight. There is nothing from any educational establishment whether a public or private college which addresses his English capabilities in support of this part of his appeal. The fact that the Appellant successfully gave evidence is relevant but I find is outweighed by the more persuasive evidence that shows that it is more likely than not that he used deception. Taking all of the evidence into account I am satisfied and find as a fact that he was not present at the time that he says that he took his English language tests and that the conclusion of the Respondent that deception was used is correct".

6. Permission to appeal to the Upper Tribunal was sought in respect of this decision on a number of bases: that the judge had failed to provide reasons as to why he found the Appellant's evidence as to the timing and place of the test to be an unclear account. He failed to explain what aspect of the Appellant's evidence was muddled and/or involved inconsistencies, has failed to state clearly with specific reference to the evidence, the reason for rejecting the Appellant's evidence or to provide examples of the basis for not accepting his evidence on this issue; erred in drawing an inference from the length of the journey, in this case from the Appellant's home in circumstances where the Appellant gave clear evidence he had chosen the test centre due to its proximity to his previous college; erred in finding that had the Appellant attended his test in person, he would have been aware of any imposters because this was based on speculation and lacking in any evidential basis; erred in holding against the Appellant an obvious mistake as to the date of his test, given that the Appellant was asked to clarify the date in re-examination and did so without any prompts and this was a simple mistake and that the judge's findings were seriously flawed for lack of reasons and/or being backed by evidence and were based on a mistaken understanding of the evidence and/or speculation.

7. The judge further erred in failing to explain which aspects of the Appellant's certificates were found to be vague and arcane and for what reason.

8. The judge acted procedurally unfairly in attaching no weight to the Appellant's qualifications when no concerns were raised nor was the Appellant afforded an opportunity to address this during the hearing and the Appellant gave oral evidence before the judge without the use of the interpreter and in fluent English. Whilst this was not determinative it should have been accorded some weight.

9. It was asserted that following the case of Khan and Others [2018] EWCA Civ 1684 in light of any finding that the Appellant had not used deception this would place him in the same position as he would have been prior to July 2014 as a consequence of

which he would have lawfully completed ten years' long residence by 7 October 2016 or would have acquired a private life which merits a reasoned balancing exercise as to the proportionality or otherwise of removal.

10. Permission to appeal was granted by Judge of the First-tier Tribunal Keane in a decision dated 16 December 2019 in the following terms

> *"The grounds disclosed an arguable error or errors of law but for which the outcome of the appeal might have been different. Having found that the Respondent discharged the initial evidential burden the judge went on to consider whether the Appellant had provided an innocent explanation at paragraphs 17 and 18 of his decision. The judge arguably failed to advance any or any adequate reasons in finding that the Appellant had not advanced an innocent explanation and the judge's findings were arguably to be characterised as speculative. The application for permission is granted."*

Hearing

11. The appeal came before the Upper Tribunal for hearing when Mr Sharma appeared on behalf of the Appellant. He formally adopted the grounds of appeal and submitted that they raised two points. Firstly, that the judge had erred in misapplying the standard of proof and failing to properly apply the Shen (Paper Appeals: Proving Dishonesty) [2014] UKUT 236 (IAC) plausibility test also applied in the judgment in SM and Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC) and secondly in relation to the same dishonesty finding, that this was improperly or inadequately reasoned with respect to [17] and [18] of the judge's decision.

12. Mr Sharma submitted that at [16] the judge had found that the burden of proof had moved on to the Appellant, which was not quite right, given that it was not for the Appellant to prove his innocence but rather whether he could provide an innocent explanation. Consequently the judge erred in misapplying the Shen test, i.e. that the issue is not whether he has given evidence that can be believed but whether such evidence is capable of being believed. Mr Sharma submitted there was nothing particularly implausible about the Appellant's evidence and therefore was capable of belief.

13. At [17] the judge criticised the Appellant in respect of his description of his journey to the test centre, which had been chosen by the Appellant because it was close to his Tier 4 test centre in Barking. Mr Sharma then submitted, based on his instructions, that the Appellant had been to the test centre on eight occasions, twice from college and six occasions from home and that four occasions were for his pre-assessment course or gear up lessons at the college. However, upon checking the judge's Record of Proceedings it was clear that this did not reflect Mr Sharma's instructions as to the number of visits made to the college and to the test centre. Mr Sharma then submitted that the judge's Record of Proceedings which I read to the parties does not record the Appellant's evidence as to his journey to and from home and the test centre as being confused. Mr Sharma submitted that there was nothing implausible

about the Appellant choosing a test centre because it was near his place of full-time study nor did the judge explain why this was not capable of belief. Mr Sharma submitted it was unclear on what basis the judge found that three quarters of the tests taken were fraudulent and this did not follow on from the findings that had been made. In respect of the fact that during cross-examination the Appellant stated he had undertaken the test in 2009 and then in re-examination stated it was in 2012, Appellant corrected himself when prompted. The judge found that there were only two reasons for his answers, either his English was so poor or he simply did not attend the test, but Mr Sharma submitted there could be other explanations. He submitted the Appellant was clearly an intelligent man and that documents had been submitted showing that he has satisfied a number of English language tests, including whilst in detention.

14. At [18] the judge found the Appellant's documents in this respect to be *"vague and arcane"*. Mr Sharma went through that evidence at page 96 onwards of bundle B. There is a postgraduate diploma in business management awarded in January 2010, see also page 97. At page 107 the Appellant was awarded an advanced diploma in IT by the London College of Business and IT. At page 108 to 111 are ESOL stage 3 certificates, including listening and speaking, taken whilst the Appellant was in detention and in respect of which he obtained a distinction. In relation to the reference to academic misconduct, Mr Sharma submitted that this was an unfair characterisation of the evidence in relation to Edge Hill University. At page 102 of the Appellant's bundle are the Appellant's test results where it is clear that he scored zero for his dissertation. Page 103 is a form setting out the Appellant's mitigating circumstances, which are that he contracted dengue fever when he returned to Pakistan for a visit and so was unable to submit his dissertation as a consequence of which he failed the course. It was not clear whether he subsequently submitted his dissertation. The Appellant then had to find an alternative Sponsor in order to continue his education. Mr Sharma submitted that whilst the judge at [18] found as a fact that the Appellant was not present at the time he was supposed to have taken his English language test he failed to ask himself the correct question. He submitted that the judge erred in finding the burden was upon the Appellant and that the reasoning provided by the judge was not sufficient to substantiate his findings.

15. In her submissions, Ms Everett asked that the decision be upheld. She submitted the Appellant could have discharged the burden by providing a plausible explanation. The judge would not accept the Appellant's explanation. There was no evidence before the judge as to the number of times that the Appellant had visited the test centre and she submitted that essentially the points being made were nothing more than a disagreement with the judge's findings of fact. Ms Everett submitted that no cogent reasons had been provided to disturb the judge's findings of fact. The judge did not find the documentary evidence to be helpful on the basis that they do not purport to show what the Appellant is relying on them for. She submitted there was no error of law that had been raised, reasons have been provided, these were cogent and not perverse and there was nothing to show that the outcome would be any different.

16. There was then a brief discussion of the impact of the judgment in Khan [2018] UKUT 00384 (IAC) before Mr Justice Martin Spencer and which refers at [25] to the judgment of the Supreme Court in Ivey v Genting Casino Limited [2017] UKSC 67 at 74 where it was said:

> *"When dishonesty is in question the fact-finding Tribunal must first ascertain subjectively the actual state of the individual's knowledge or belief as to the acts … when once his actual state of mind as to knowledge or belief as to facts is established the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the objective standards of ordinary decent people".*

17. Ms Everett submitted that that ratio did not entirely encompass the Appellant's situation because he was aware of the allegations against him as opposed to a *"tax evasion case where there is the possibility of honest mistake"*. The question was whether he used a proxy or not. The judge found that he did and gave sufficient reasons for that finding. Mr Sharma agreed with that interpretation but sought to rely on paragraph 37(vi) of *Khan,* which provides as follows:

> *"There will be legitimate questions for the Secretary of State to consider in reaching her decision in these cases including that these are by no means exclusive:*
>
> *(1) whether the explanation for the error by the accountant is plausible*
>
> *(2) whether the documentation which can be assumed to exist for example correspondence between the applicant and his accountant at the time of the tax return has been disclosed or there is a plausible explanation for why it is missing;*
>
> *(3) why the applicant did not realise that an error had been made because his liability to pay tax was less than he should have expected; and*
>
> *(4) whether at any stage the Appellant has taken the steps to remedy the situation and if so when those steps were taken and the explanation for any significant delay".*

18. Mr Sharma submitted that this was not much of a modification of the judgment in Shen. The judge had failed to ask himself the correct question and at least one of the reasons given was in conflict with the evidence recorded.

19. I reserved my decision, which I now give with my reasons.

Findings and reasons

20. I have concluded that there was no material error in the manner in which the Judge applied the standard of proof, finding at [16] that the generic evidence sufficed to discharge the initial evidential burden on the Respondent, which "moved the burden onto the Appellant". Whilst Mr Sharma took objection to the manner in which the Judge directed himself, asserting that he should have directed that it was for the

Appellant to provide an innocent explanation, I do not find that the difference in phrasing made any material difference to the outcome of the appeal.

21. However, I have concluded that there are material errors of law at [17] and [18] of the decision, in the reasons provided by the Judge for rejecting the Appellant's credibility. I accept Mr Sharma's submission that it is not at all apparent from the Judge's record of proceedings why he found the Appellant's account of his journey and transport from his home in Greenford to the test centre in Barking to be muddled or unclear. Thus I find this reason for rejecting the Appellant's credibility is unsustainable. Whilst it was open to the Judge to reject the Appellant's explanation as to why he chose a test centre in Barking, because it was near his place of study, I find that the Judge has not provided sustainable reasons for finding that he was satisfied that the Appellant chose that centre as it was renowned for permitting or ignoring fraud that was taking place there. The reason provided by the Judge was that he was satisfied that the Appellant was a man of some intelligence but was "*unable to glean that three quarters of the tests being taken were being done so fraudulently*." However, the Judge failed to state the evidential basis of this finding nor how the Appellant would have known this.

22. Whilst I find that it was open to the Judge to place weight on the Appellant's initial incorrect answer that he took the tests in 2009 rather than 2012, I find he fell into error in placing no weight on the fact that the Appellant corrected himself unprompted when re-examined on this point. I find the Judge further erred in essentially disregarding quite a substantial body of evidence as to the Appellant's English language ability. Having considered the documents in question [14. above refers] I find they are neither vague nor arcane and the ESOL Part 3 certificates in particular are deserving of consideration as being material evidence as to the Appellant's English capabilities, contrary to the Judge's finding at [18].

23. In light of my conclusion that the First tier Tribunal Judge materially erred in law, I set the decision and reasons aside.

Notice of Decision

The appeal is allowed to the extent that it is remitted to the First tier Tribunal for a hearing *de novo* before a Judge other than First tier Tribunal Judge Clemes.

No anonymity direction is made.

Signed *Rebecca Chapman* Date 5 February 2020

Deputy Upper Tribunal Judge Chapman