



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/23411/2018
HU/23412/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 7 June 2022**

**Decision & Reasons Promulgated
On 8 July 2022**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

**BAKSHINDER KAUR
GURDIP SINGH**
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Badar, Counsel instructed by Farani Taylor Solicitors
For the Respondent: Ms S Lecointe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of India and are married to each other. The first appellant (Mrs Kaur) is the wife of the second appellant (Mr Singh) and they appealed to the First-tier Tribunal a decision of the respondent on 7 November 2018 refusing them leave to remain on human rights grounds. The papers shows that the appellants entered the United Kingdom together in December 2009 with entry clearance as a Tier 4 Student or the partner of a Tier 4 Student as the case may be. It seems that their leave ran out on 27 June 2014 but soon after that an application for leave on human rights grounds was refused and then reconsidered after judicial review. The respondent found that the first

appellant had supported an application made on 21 October 2013 with a certificate of competence in the use of English issued by Educational Testing Services (ETS) following a Test of English for International Communication (TOEIC) examination that had been obtained dishonestly. The first appellant denies being a cheat and the appellants appealed to the First-tier Tribunal but the First-tier Tribunal dismissed the appeals.

2. Permission to appeal to the Upper Tribunal had been given by the First-tier Tribunal on five of six grounds. Upper Tribunal Judge Rintoul gave permission on the sixth ground because he anticipated that the point would soon be illuminated by a decision of the Upper Tribunal.
3. Mr Badar did not address me at length on most of the grounds. He had not drawn the grounds; they are signed by a member of the Bar who did not appear in the First-tier Tribunal and did not appear before me but they are extensive and I consider those grounds now.
4. Ground 1 complains that the First-tier Tribunal had applied the wrong legal test. The complaint in ground 1 is that the judge misdirected herself. Although she recognised that the burden of proof was on the Secretary of State to make out the allegation of dishonesty, it was said that the judge directed herself, wrongly, that once the Secretary of State had discharged the legal burden to show that the evidence was capable of supporting a finding that the first appellant had been dishonest it was for the first appellant to show, on a balance of probability, that the innocent explanation was unsound.
5. According to the grounds, the inference drawn from the Secretary of State's evidence that a person had been dishonest is rebutted by an explanation that reaches a "minimum level of plausibility" (see **R (Abbas) v SSHD [2017] EWHC 78 (Admin)**). It is said that the judge erred in this appeal it is said that the judge erred by saying at paragraph 43 of the Decision and Reasons:

"On the totality of evidence before me I am not satisfied that the Appellant has discharged the evidential burden to challenge the assertions, analysis and conclusions as clearly evident from the generic evidence filed by the respondent, to the effect that she used a Proxy Test Taker for her TOEIC test in July 2013. I am satisfied on the totality of evidence, and to the requisite civil standard, on a balance of probabilities, that the Appellant used a Proxy Test Taker and thereby used deception/dishonesty in order to obtain her aforesaid TOEIC Certificate."
6. This is described as the wrong legal test.
7. The second ground complains that the judge's rejection of the first appellant's "innocent explanation" is flawed. It is said that the judge disbelieved the first appellant's evidence concerning her choice of test centre for improper reasons. It was the first appellant's case that she needed the result "quickly" but the judge found there was no reason to obtain it quickly and the explanation given made no sense. The grounds contend there was an obvious answer not considered by the judge which was that the appellant wanted to give herself time to take a second test if necessary.
8. The judge also disbelieved the first appellant's claim that she chose the particular test centre because it was "near to her aunt's house". This is described by the judge as "completely undermined by the fact that she did not stay at her aunt's house the night before taking the test".

9. I have to say that it does not appear to me to have been the first appellant's case that she needed to stay overnight before taking the test and I struggle to understand why it was an unsatisfactory answer on its own terms.
10. The judge is also criticised for drawing adverse inferences from the first appellant's ability to recall in detail her journey to the test centre.
11. Ground 2 also contains criticisms at paragraph 26 of the Decision and Reasons which I find are seriously misconceived. It is said that the First-tier Tribunal Judge disbelieved the appellant because the appellant *could* describe "in 'some detail'" her journey from her home to the test centre. This is the allegation at paragraph 19 of the grounds but it is not what the judge did at all. What the judge did (see paragraph 26 of the Decision and Reasons) was to note that there was background evidence showing that one of the ways that test certificates were obtained fraudulently was that people attended the test centre to take the test but a proxy appeared and took it for them when they were there. The fact that a person went to the test centre did not, according to the judge, "establish that the appellant personally undertook the test". I find it very difficult to see any fault in that reasoning. The grounds certainly do not illuminate any. However, it still maintained that the judge applied too high a standard of proof.
12. Ground 3 complains that the judge erroneously assumed the role of an expert regarding ETS scores. The criticism is of the judge's finding at paragraph 40 where she agreed with the Presenting Officer that:

"The appellant's ability to be able to communicate in terms of understanding and speaking, today, suggests that she has considerable difficulty in understanding relatively basic English questions. Consequently, it is highly improbable that she would have been able to achieve the results associated with her TOEIC test in July 2013; in which she allegedly achieved a speaking score of 200/200 and a writing score of 200/200".
13. I understand the point being made in the grounds but the judge cannot be expected to ignore the fact that a person who scored highly in a test result seemed incapable of answering basic questions and the judge was entitled to give *some* weight to that glaring discrepancy.
14. Ground 4 makes a different kind of point. It challenges the judge's finding that the appellant would face no obstacles to reintegration in India. The thrust of ground 4 is that the judge did not have regard for the decision of the Court of Appeal in **Khan v SSHD [2018] EWCA Civ 1684** confirming **Ahsan v SSHD [2017] EWCA Civ 2009** which essentially decided that a person whose leave was curtailed or whose leave expired because of a wrong finding that the person had been dishonest should not be treated for the purposes of an Article 8 balancing exercise as a person who has in any way behaved improperly. This ground only makes sense if the judge's finding that the appellant had been dishonest is unsound.
15. Ground 5 is a refinement or gloss on ground 4 and claims that insufficient regard had been had for the appellants' private and family life established in the United Kingdom. This was said all to be at the private life end of the "private and family life" continuum and I see nothing important in the ground unless the judge was wrong to find the appellant had been dishonest.

16. Ground 6 criticised the judge for her rather lofty dismissal of the All Party Parliamentary Group (APPG) Report on TOEIC.
17. A particular difficulty for the appellants in this case is that we now have the benefit of the decision of this Tribunal by its President Lane J and its Vice-President Mr C M J Ockelton in **DK and RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 (IAC)** which confirms, for very detailed reasons, that the APPG Report is of little value in immigration appeals being essentially a retelling of evidence known to the Tribunal and opinions on that evidence which are not expert opinions and are not something to which the Tribunal needs to give much weight.
18. Further, the decision in **DK and RK** moves away from requiring an analysis of shifting burdens and makes the point that it is for the Secretary of State to prove dishonesty if dishonesty is alleged. Shifting burdens are an analysis of the judicial processes which may or may not be helpful in a particular case. What matters is that the evidence relied upon by the Secretary of State must be sufficient to support a finding of dishonesty. If it is, then the Tribunal must conclude that the appellant was dishonest unless satisfied on the totality of the evidence that, notwithstanding the prima facie case, the totality of the evidence, including any explanation offered by the appellant, does not leave the Tribunal satisfied that this particular appellant was in fact dishonest.
19. The same case also made very clear that the standard generic evidence relied on by the Secretary of State is more than enough to establish dishonesty unless it is contradicted by further, credible, evidence.
20. Dealing with the criticisms made in the grounds I find that they are without merit.
21. I see no merit in ground 1. The Decision and Reason does not confirm the contention that the judge applied too high a standard of proof. Rather I find that the judge showed at paragraph 43 that her decision was based on the respondent proving on the balance of probabilities that the first appellant had cheated. There is no error there.
22. I am similarly unimpressed by ground 2.
23. As I have already indicated, the judge did not err at all in concluding that the fact that the appellant may be able to recall in detail travelling to the test centre and may have produced evidence that she paid for a ticket does not mean that the first appellant actually took the test. It is an established pattern of cheats that a candidate attends a test centre but a proxy appears at the centre to take the test. The judge was perfectly entitled to take that approach and there is no criticism to be made there.
24. There is a more room to criticise the judge's explanation of drawing adverse conclusions from the choice of college. It makes sense to me that out of the available choices of college the appellant may have chosen to go to one that was near to her aunt's home because she was familiar with that area, which is what she said, albeit after some prompting in re-examination. However, it is not a very strong explanation and it was only extracted in re-examination. Although the grounds and argument before me might go as far as to showing how the point could have been decided differently, I am not persuaded that the

judge's approach was perverse or otherwise unlawful. The judge regarded it as a bad point and gave adequate reasons.

25. The judge gave proper reasons for being unimpressed by the first appellant's claim that she took the test when she did because she needed the result "quickly". The judge found that there was no urgency. The judge was entirely aware that the appellant said she wanted to give a chance for a re-sit because she records that explanation at paragraph 23 of the Decision and Reasons. The judge was entitled to find that the explanation was inadequate.
26. The overriding criticism that the judge applied too high a standard in looking for the explanation is, I find, unsustainable.
27. Paragraph 43 is important. I find it convenient to set out again what the judge said:
- "On the totality of the evidence before me I am not satisfied that the Appellant has discharged the evidential burden to challenge the assertions, analysis and conclusions as clearly evident from the generic evidence filed by the respondent, to the effect that she used a Proxy Test Taker for her TOEIC test in July 2013. I am satisfied on the totality of the evidence, and to the requisite civil standard, on a balance of probabilities, that the Appellant used a Proxy Test Taker and thereby used deception/dishonesty in order to obtain her aforesaid TOEIC Certificate".
28. What the judge has decided is that fraud has been established on the balance of probabilities. The overly detailed and at times rather tortured analysis of the shifting burdens (I recognise that is an approach encouraged by jurisprudence from this Tribunal) may have led everybody onto the fringes of error. The important thing is the judge recognised that it was for the Secretary of State to prove cheating and decided that cheating had been proved and gave proper reasons for her decision.
29. The second appellant's appeal was dependant on the decision in the first appellant's appeal.

Notice of Decision

30. These appeals are dismissed.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 15 June 2022