Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/08981/2015
HU/08984/2015
HU/08985/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 October 2017	**On 7 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES

Between

MONABEN [P] (FIRST APPELLANT)
[K P-1] (SECOND APPELLANT)
[K P-2] (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

Representation:

For the Appellants: Mr Z Nasim, Counsel instructed by Lee Valley Solicitors
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are a family who came to the UK lawfully, and ultimately in 2015 applied for a further grant of leave to remain. Those applications were refused on 15 October 2015. The Appellants duly appealed to the

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First-tier Tribunal where their appeals came before Judge Scott on 22 November 2016. As both parties accept before me Judge Scott clearly misunderstood the nature of the appeals before him because he purported to allow the First and Second Appellants' appeals under the Immigration Rules, to dismiss the Third Appellant's appeal under the Immigration Rules, but then to allow her appeal under Article 8.

2. The Respondent sought to challenge that decision and a grant of permission to appeal to the Upper Tribunal was made by Deputy Upper Tribunal Judge Kelly on 21 July 2017. Judge Kelly identified that Judge Scott had misunderstood the nature of the jurisdiction that he had as a result of section 15 of the Immigration Act 2014, and he also went on to grant permission in relation to the second ground of the Respondent's challenge which was the complaint that Judge Scott had failed to provide adequate reasons for the findings that he had made to the effect that the Secretary of State had not discharged the legal burden of establishing that the First Appellant had acted dishonestly in acquiring a TOEIC certificate in 2013 which he had then used to support an application for leave to remain that had been made in 2013.

3. There is no Rule 24 response before me but the Appellants resist the appeal.

4. This is not one of those appeals in which the only evidence that was before the First-tier Tribunal was evidence from officers of the Home Office, what one might describe as the first phase of the ETS TOEIC litigation, where the only evidence relied upon was that of Mr Collings and Ms Millington. This was one of the later phase of appeals in which the Respondent offered expert evidence in the form of a report of 20 April 2016 by Professor French which analysed the manner in which ETS conducted their testing. The reason that this was relevant was that this was a case in which it was alleged that the First Appellant had not sat the language test herself, but a proxy had been used, whose voice could be identified as a proxy, because he or she was a speaker that could be identified as having been used in a number of other tests. Professor French's evidence was that the percentage of false positive errors in the ETS analysis was likely to be below 1%. On the face of it this was compelling evidence that dishonesty had taken place, which was not rebutted by other expert evidence relied upon by the Appellants.

5. The judge in the First-tier was not helped by the parties failing to provide all of the relevant jurisprudence that was then available at the date of the hearing. The parties for whatever reason appear to have confined themselves to referring only to the decision in Qadir [2016] UKUT 229 in the Upper Tribunal without making any reference to the Court of Appeal decision in Qadir [2016] EWCA Civ 1167 which had been promulgated the month before the hearing. Nor had the parties' representatives chosen to provide the judge with the decision of the Presidential Panel in MA [2016] UKUT 450, or Shahzad in the Court of Appeal [2016] EWCA Civ 615.

Neither parties are able to shed any light on why that was the case before me today.

6. If the judge had had the benefit of that jurisprudence, and if he had had the benefit of submissions that were informed by that jurisprudence, it is difficult to see how he could have ended up making the decision that he did make. In my judgement that is the root cause for the errors that followed.

7. This was an appeal that concerned the allegation that the appellant's test had in fact been taken by a proxy. The evidence of Professor French properly analysed (as we now know from the analysis undertaken by Judge Freeman in the Upper Tribunal decision of Nawaz [2017] UKUT 288), was directed to, and a rebuttal of, the criticisms that his colleague Dr Harrison had raised about the manner in which the test company identified proxy test takers. Professor French's evidence, which has been accepted by the Upper Tribunal now in a number of cases, was that the percentage of false positive errors was likely to be below 1%. That was compelling evidence that in this case it was overwhelmingly likely that the test certificate obtained by the First Appellant had been obtained by dishonesty. Not because she failed to attend the test centre, but because someone else undertook the substantive part of the test for her. That evidence not merely discharged the evidential burden that lay upon the Respondent, but it did so conclusively. Thus the situation before the Judge was quite unlike the situation in Qadir itself where the Tribunal was faced with no rebuttal evidence to Dr Harrison's evidence and the evidential burden was only just satisfied.

8. The Judge's task was then, having recognised (as he did) that the evidential burden upon the Respondent had been discharged, to analyse the evidence before him to identify whether the legal burden upon the Respondent was also discharged by her. In undertaking that task he needed to demonstrate that he had asked himself the correct questions, and that he had analysed the relevant evidence, rather than taking into consideration irrelevant evidence. In my judgement he fell into error in looking at whether the First Appellant could describe to him the route that she had taken to the test centre and how the test centre on the day of the test had been laid. This was irrelevant evidence. Nobody had suggested that she had not been to the test centre. The question was whether she had sat the test. It was relevant, of course, to consider that the First Appellant had undertaken courses in the UK in English and that she had obtained educational qualifications in consequence, about which there was no dispute, and no issue of dishonesty. However, I am satisfied that overall he fell into error for looking at irrelevant matters. In my judgement it is quite plain that he looked at irrelevant matters and failed to focus on the relevant factors. As to the test itself, and indeed the description of relevant factors, I agree with Mr Nasim's argument that this should not be seen as a checklist, but a description of the relevant factors is most usefully set out by the Court of Appeal in Qadir at paragraph 18. That confirms and adopts the President's view that the First-tier Tribunal when

considering an allegation of dishonesty in this context should consider the relevant factors to include the following:-

(a) what the person accused had to gain from being dishonest;

(b) what he had to lose;

(c) what is known about his character;

(d) the cultural environment in which he operated;

(e) how the individual accused of dishonesty performed under cross-examination;

(f) whether the Tribunal's assessment of that person's English language proficiency is commensurate with the TOEIC scores; and

(g) whether his or her academic achievements are such that it was unnecessary or illogical for them to have cheated.

9. In my judgement the judge fails to demonstrate in his decision that he has taken that guidance on board. As indicated at the outset, that is undoubtedly because the parties failed to address him in relation to the relevant guidance. Thus he did not analyse the evidence with those factors clearly in mind, or demonstrate that he bore clearly in mind Professor French's evidence that the percentage of false positive errors, that is to say an incorrect identification of a proxy test taker, is below 1%.

10. That being so, I am satisfied that the only proper course with the appeals raised by the members of this family is to remit them to the First-tier Tribunal. The fact finding exercise must be undertaken afresh, in the light of the relevant guidance. Moreover, although the judge did not demonstrate that he understood this, the appeals were all only ever Article 8 appeals. The First-tier Tribunal will need to identify whether the Appellants' "family life" is in truth only with one another, and thus whether these are "private life" appeals, which has not yet been done. In any event should Article 8 be engaged, the balancing of the public interest will need to be undertaken in the correct factual context, of whether or not the Respondent has made out her case of dishonesty.

11. The effect of the error of law has been to deprive the parties of the opportunity for their case to be properly considered by the First Tier Tribunal; paragraph 7.2(a) of the Practice Statement of 25 September 2012. Moreover the extent of the judicial fact finding exercise is such that having regard to the over-riding objective, it is appropriate that the appeal should be remitted to the First Tier Tribunal; paragraph 7.2(b) of the Practice Statement of 25 September 2012. Having reached that conclusion, I make the following directions;

(a) The decision is set aside, and the appeal is remitted to the First Tier Tribunal for rehearing. The appeal is not to be listed before Judge I. M. Scott.

(b) No interpreter is required for the hearing of the appeal.

(c) There is presently anticipated to be the Appellant and no other witness, and the time estimate is as a result, 3 hours.

(d) The parties are to file and serve any further evidence to be relied upon at the hearing of the appeals by 5pm 27 November 2017

(e) The appeal may be listed at short notice as a filler on the first available date at the Taylor House hearing centre after 27 November 2017.

(f) No further Directions hearing is presently anticipated to be necessary. Should either party anticipate this position will change, they must inform the Tribunal immediately, providing full details of what (if any) further evidence they seek to rely upon.

Decision

12. The decision promulgated on 11 January 2017 did involve the making of an error of law sufficient to require that decision to be set aside and reheard. Accordingly the appeals are remitted to the First Tier Tribunal with the directions set out above.

Signed Date

Deputy Upper Tribunal Judge J M Holmes

To the Respondent
Fee award

No fee is paid or payable and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge J M Holme