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

**Appeal Number:**
**IA307682015**

**IA307702015**

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 9 July 2017**

**Decision and Reasons Promulgated**
**On 17 August 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BAGRAL**

**Between**

**(1)HARPREET SINGH RALLA**
**(2)KAMALJEET KAUR RALLA**
(ANONYMITY DIRECTION NOT MADE)

Appellants

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: None
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Anonymity**

1. The First-tier Tribunal did not make an anonymity order. I have not been asked to make one and see no reason to do so.

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## Background

2. This is an appeal against the decision, promulgated on 24 October 2016, of First-tier Tribunal Judge K Swinnerton (hereafter "the FTTJ").

3. The Appellants, husband and wife, are both nationals of India. The First Appellant arrived in the United Kingdom (UK) on 21 July 2009 with entry clearance conferring leave to enter as a Tier 4 (General) student Migrant valid until 1 January 2013, and then until 30 November 2014. His wife (the Second Appellant) was admitted to the UK as his dependent on 12 March 2011. Also present in the UK is the Appellants' child. I will address his circumstances later in this Decision.

4. On 28 November 2014, the First Appellant applied for leave to remain on human rights grounds. On 2 September 2015, the Respondent refused the application. Central to the refusal was the allegation that in relation to the First Appellant's application made on 24 December 2012 for further leave to remain as a student, he submitted a TOEIC certificate from Educational Testing Service (ETS). It was said that ETS had undertaken a check of his test and had confirmed to the Secretary of State that there was significant evidence to conclude the certificate was obtained fraudulently by use of a proxy test taker. The scores from the test taken on 16 October 2012 at Stanford College had been cancelled by ETS. The Respondent thus concluded in light of the deception that the Appellant's presence in the UK was not conducive to the public good. She further concluded that the requirements of the Immigration Rules ("the Rules") were not met, and that, there were no exceptional circumstances to warrant a grant of leave outside of the Rules.

5. The Appellants duly appealed to the First-tier Tribunal. In the Notice of Appeal the Appellants requested an oral hearing and the appeal was listed to take place on 25 August 2016. By a letter received by the First-tier Tribunal from the Appellants representatives dated 22 August 2016, the Appellants waived their right to an oral hearing and requested that the appeal be decided upon the papers. The case was, however, reinstated as an oral hearing as the duty judge considered that a Home Officer Presenting Officer was required given the nature of the allegation of fraud against the First Appellant. The appeal was listed for oral hearing on 15 September 2016.

## The hearing before the FTTJ

6. Before the FTTJ, the Respondent was represented but neither the Appellants nor their representatives attended. Their absence was unremarkable given their prior indication that the appeal be determined on the papers. In dismissing the appeal, the FTTJ noted the generic evidence of Ms Rebecca Collins and Mr Peter Millington. The FTTJ referred to **SM and Qadir v Secretary of State for the Home Department (ETS - Evidence -**

**Burden of Proof) [2016] UKUT 229 (IAC)** and noted the Upper Tribunal's finding that the generic evidence relied on by the Secretary of State was considered to suffer from "multiple frailties". The FTTJ also noted that the First Appellant had not come forward with any evidence that he had in fact attended the college in person to take the test. The FTTJ observed that the First Appellant had ample opportunity to do this and noted that he had elected not to give evidence at the hearing. The FTTJ concluded that the witness statements relied on by the Secretary of State were sufficient to discharge the burden on her. He thus concluded that the TOEIC certificate was obtained fraudulently.

7. The FTTJ went on to consider the personal circumstances of the Appellants and noted, in particular, that their medical records did not indicate any significant medical problems. He also noted that there was some documentation in relation to their 9-year-old son, but noted that he had only lived in the UK for 3 years, and there was no evidence the Appellants would be unable to maintain a child in India where there was a functioning education system. In the circumstances, the FTTJ concluded that a grant of leave outside of the Rules was not appropriate.

## The grounds of application and permission to appeal

8. In the grounds seeking permission, it was argued that the full scope of the Appellants case had not been considered by the FTTJ thereby giving rise to unfairness. Reference was made to additional Grounds of Appeal exhibited in the bundle of documents filed with the Tribunal which the FFTJ failed to consider.

9. First-tier Tribunal Judge P Hollingworth granted permission to appeal, finding that it was arguable that there had been some unfairness.

10. There is a Respondent's Rule 24 response formally opposing the Appellants' appeal, stating the FTTJ properly directed himself. The Respondent noted however that she was unable to comment as to whether there had been a material error of law as she was not privy to the documentation sent to the tribunal or to any correspondence between the Appellants representatives and the tribunal.

11. On 10 May 2017, a Notice of Hearing was served on all parties of the date, time and venue of the hearing. By letter of 25 May 2017, the Appellants representatives came off the record stating the Appellants wished to represent themselves. By further letter received on 1 June 2017, the First Appellant advised the Upper Tribunal that he could not afford representation and requested the tribunal to determine the appeal on the papers. By letter of the same date, the tribunal advised the First Appellant that there was no option to have a paper hearing and that his hearing would proceed accordingly on the date scheduled.

## The Hearing before the Upper Tribunal

12. At the hearing before me, the Respondent was represented by Mr

Nath; the Appellants did not appear. It was plain from the foregoing correspondence that the Appellants were effectively served with the Notice of Hearing. The First Appellant in his letter, received by the tribunal on 1 June 2017, requested that his attendance be excused. He stated that he, his wife and child were unwell. He was suffering from depression. He denied using a proxy test taker. He invited the tribunal to determine his appeal. Accordingly, the hearing proceeded in the Appellants absence.

13. Mr Nath submitted the FTTJ did not err in law. He pointed out the First Appellant's failure to set out his case. The FFTJ was entitled to rely on the generic evidence. Mr Nath submitted that if there was an error it was not material. The FTTJ would have reached the same conclusion given the absence of an explanation. The FTTJ dealt with the medical evidence and the circumstances relating to the child. The grounds were incorrect in stating the child was born in the UK.

## Decision on Error of Law

14. I am satisfied the FTTJ materially erred in law. There is no dispute that before the First-tier Tribunal the Appellants filed a bundle of documents consisting of 91 pages. That bundle was received by the First-tier Tribunal on 19 August 2016 and contains a detailed statement of additional grounds setting out the Appellants' case with supporting evidence. The FTTJ makes no reference to the documentation submitted or the dates of submission, and thus it is unclear whether any of this documentation was considered. The brevity of the FTTJ's findings suggests that it was overlooked. In the circumstances, I cannot be satisfied that the full scope of the case adduced by or on behalf of the Appellants has been considered by the FTTJ. Accordingly, I am satisfied that an unfairness has arisen and that the decision of the FTTJ cannot stand in the circumstances. I set aside the decision of the FTTJ.

15. The Respondent orally at the hearing through Mr Nath, and the Appellants in their written representations of 1 June 2017, invited the tribunal to re-make the decision on the documentation before it. In the circumstances, it is appropriate to do so.

## Re-making the Decision

16. In re-making the decision, I have considered the tribunal's bundle prepared for the purposes of this appeal, which contains the evidence relied upon by the Respondent, and the bundle filed on behalf of the Appellants received by the First-tier Tribunal on 19 August 2016 consisting of 91 pages identified in the index thereto. I have assessed the evidence as at the date of hearing.

17. The background is as follows. On 28 November 2014, the Appellants applied for leave to remain outside of the Rules on human rights grounds. The substance of the application is not particularised in any detail in the application form. Nevertheless, in refusing the application the Respondent considered the application both within and outside of the Rules. She noted

the Appellants did not qualify for leave under Appendix FM of the Rules as they failed to meet the eligibility requirements thereof, and neither were they or their child qualifying persons as defined therein. Further, neither Appellant qualified for leave on private life grounds under the Rules as their period of residence was insufficient, and there would be no very significant obstacles to their integration to India if required to leave the UK. In any event, the Respondent concluded that the presence of the First Appellant in the UK was not conducive to the public good because he had perpetrated a deception, as confirmed by ETS, by submitting a TOEIC certificate in support of an application made on 24 December 2012.

18. The Respondent finally considered whether there was any reason(s) to grant leave outside of the Rules on an exceptional basis. In doing so, she considered Article 8 of the ECHR and took into account section 55 of the Borders, Citizenship and Immigration Act 2009. It was observed the Appellants' child was aged 9 and had been living in the UK for 3 years. It was noted the Appellants could return to India with their child, and that they would be able to support him through a period of readjustment. It was further noted the child would have access to education in India. The Respondent concluded that a grant of leave outside the Rules was not therefore appropriate.

19. The Appellants case is that the First Appellant sought leave to remain outside of the Rules for a *"short period of time"* in order to complete his studies in the UK. The First Appellant states that he has been unable to do so due to the suspension of the sponsor's licence(s). He stated that he intended to remain in the UK for a limited and temporary period (unspecified). He had sufficient funds to support himself without recourse to public funds. He argued that he is a genuine student and that preventing him from completing his studies was a disproportionate interference with his private life and/or the Respondent should have exercised her discretion and her failure to do so was unlawful.

20. The First Appellant denied using a proxy to take the test and argued that the Respondent's reliance on generic evidence was unlawful. He further stated that he was blind in one eye and that requiring him to leave the UK would interfere with his medical treatment and would place his life *"in danger".* As for the Appellants child, it was said that he was settled in school, he had spent all of his life in the UK and that requiring him to leave would interfere with his education.

21. Save for the allegation of deception, the burden of proof is on the Appellants to establish the primary facts on the balance of probabilities. I make the following primary findings of fact.

22. There is no dispute the Appellants entered the UK lawfully and that there stay thus far has been lawful. The Appellants have lived in the UK for a period of 7 (nearly 8) and 6 years respectively. The immigration history of the child is less clear. There is no reference to the child in the application form (or the original grounds of appeal to the First-tier Tribunal). The Respondent however was plainly aware of the existence of a child as she

briefly touched upon the child's position in the refusal.

23. At the hearing, I was troubled by the paucity of information in respect of the child's immigration history and the First Appellant's claim that he was born in the UK and has lived here all his life, (see page 16 of the Appellants bundle), which was contrary to the Respondent's position that the child has lived in the UK for 3 years at the date of refusal (2 September 2015). While Mr Nath was given time to take instructions he was unable to furnish any information in respect of the child. He was however correct to point out that as the child was 9 years old at the date of decision, and given that his mother did not enter the UK until 12 March 2011, he could not have been born in the UK. I find that view is likely to be correct and it is supported by the documentation in the Appellants bundle.

24. The child's primary school reports from June 2011 to June 2015 record his date of birth as 29 September 2005. He is now 11 years old. The report of June 2011 is based on a four-week period of attendance and indicates the child was not enrolled until the week commencing 16 May 2011. It is stated the child is developing his understanding and use of English and that the school had no previous school records to draw upon. A letter from a Dentist further confirms the child was registered at the practice from October 2012. There is no documentary evidence indicating the existence of the child in the UK prior to May 2011. The cumulative effect of the above is that the evidence strongly indicates the child is likely to have entered the UK with his mother in March 2011. I am not therefore satisfied and do not accept that the child was born in the UK and has lived here all his life. The First Appellant's assertions to the contrary undermines his credibility. I find the child has lived in the UK since March 2011 and that he has now been here for a period of 6 years.

25. It is a significant part of the First Appellant's case that the Respondent's decision *"robbed"* him of an opportunity to complete his studies in the UK and he complains that he should have been granted discretionary leave to remain to allow him to do so. The evidence in respect of his studies is as follows.

26. For the purposes of entry to the UK he applied to study a degree level qualification at Rayat London College. The course commenced in July 2009 and was expected to end in September 2012. The evidence shows that he was unable to continue that course *"due to his progression"* and he transferred to another course at the same college which commenced in October 2010 and ended in December 2012. While there are copies of his March 2011 Examination Results, it is unclear whether he completed that course. In 2012, he applied to study at the London Metropolitan College to follow a Post-Graduate Diploma in Hospitality and Tourism Management. The course was due to commence in January 2013 and end in July 2014. In support of that application he relied on a TOEIC certificate issued by ETS. His speaking test score is given as 180. There is evidence he completed the course in April 2014 and the qualification was awarded in July 2014.

27. The evidence does not indicate that the First Appellant's studies

have been hampered through no fault of his own. On the contrary, the evidence indicates that he successfully completed his last course in 2014. There is no evidence that he has or intends to enroll on a further course or that he is part-way through a course that he has been unable to complete by dint of his immigration status or a suspension of the sponsor's license.

28. The First Appellant further states that he cannot be expected to leave the UK whilst undergoing medical treatment. The only medical evidence relating to any physical problem is a letter stating that he was to undergo General Surgery in 2016 and an appointment letter for an abdominal ultrasound also in 2016. There is no evidence of any ongoing issues or treatment. There is also no medical evidence supportive of the assertion that he suffers from depression and has lost sight in one eye. I find that while the First Appellant may have had some medical issues in the past, there is no evidence that he requires ongoing treatment. Should it be the case that he is undergoing treatment, there is no evidence that a temporary interruption in treatment will significantly affect his health if he is required to leave or, that such treatment or medication would not be available in India. In the circumstances, his claim that his life will be *"in danger"* if required to leave is one of considerable hyperbole.

29. There is insufficient detail in respect of the Second Appellant's circumstances. The relevance of 24 pages of her GP records are neither apparent or explained. While she seems to be in receipt of treatment for diabetes and other ailments, none of which appear to be serious, there is no evidence that any interruption to a course of treatment in the UK would cause a breach of her human rights or that such treatment could not for whatever reason continue in India, or that any medication required would be otherwise unavailable there.

30. As for the child, while there are some appointment letters to see an Orthoptist, there is no evidence that he is currently being treated for any medical condition or that he requires medication.

31. I find that neither the Appellants or their child are suffering from any serious medical condition that would cause a serious impediment to their removal. Given the paucity and state of the evidence there are I find serious reasons to doubt the request of the First Appellant that his absence at the hearing should be excused on medical grounds.

*The ETS issue*

32. I next turn to deal with the Respondent's allegation of fraud. It is not necessary to repeat the history in relation to ETS cases as this is known to the parties and the information is widely available in the public domain. The subject matter has also been debated at length in cases reported by the Upper Tribunal and the Higher Courts. The burden of proof in respect of the allegation of deception rests with the Respondent. The standard of proof is that of a balance of probabilities.

33. Mr Nath confirmed that the sole evidence relied upon by the Secretary

of State in order to prove the allegation of deception was the generic witness statements of Ms Rebecca Collins and Mr Peter Millington. Following questions from the Tribunal Mr Nath confirmed that there was no extract from the *"ETS Lookup Tool"* or any other evidence of deception specific to the First Appellant, but he submitted the evidence of Ms Collins and Mr Millington was sufficient to discharge the burden on the Secretary of State.

34. The first question that I must address is whether the Respondent's evidence can discharge the evidential burden at the initial stage. I note that in **SM** (supra) the Upper Tribunal held that the threshold for discharge is *"modest",* and that the evidential burden was discharged albeit by a narrow margin in that case [68]. The tribunal also found that the generic evidence suffered from *"multiple frailties"* and it was described in **Gazi v Secretary of State for the Home Department (ETS - judicial review) IJR [2015] UKUT 00327 (IAC)** as being "*lean in detail*" and produced by witnesses who "*can lay claim to no relevant credentials or expertise in the field of voice recognition*" and were "*self-serving*."

35. In these cases, the court was seized of evidence that specifically related to each individual concerned. By comparison, in this case no such material is before me. There is no extract from the *"ETS Lookup Tool"* or any other material specific to the First Appellant supportive of the claim that he employed a proxy test taker. I observe that in the case of the **Secretary of State for the Home Department v Shehzad & Anor [2016] EWCA Civ 615**, LJ Beatson (at [30]) stated that, *"in circumstances where the generic evidence is not accompanied by evidence showing that the individual under consideration's test was categorised as "invalid", I consider that the Secretary of State faces a difficulty in respect of the evidential burden at the initial stage."* I respectfully concur with that view. That is the position before me and I cannot see how, without any specific evidence showing the First Appellant's test was categorised as invalid, that the generic evidence can be found to be sufficient to discharge the evidential burden and I find accordingly. In the circumstances, I find that the burden does not shift to the First Appellant to put forth an innocent explanation. It follows that the Respondent has not discharged the legal burden of proving deception in this case.

*The Immigration Rules*

36. The Appellants do not claim that they meet the requirements of Appendix FM or that they qualify for leave under any other category of the Rules. While they applied for leave to remain outside of the Rules, the Respondent duly undertook a detailed consideration of the Rules and found the Appellants and their child did not qualify for leave for the reasons given in the refusal. Those reasons were summarised earlier and it is not necessary to rehearse them again here. In view of the fact that there is no claim under the Rules, it is sufficient to say that I have considered the Rules for myself and I am satisfied and find that the Appellants do not qualify for leave under the Rules for the reasons given by the Respondent.

*Article 8 (ECHR)*

37. The Appellants rely on Article 8 of the ECHR. The focus of the First Appellant's statement is essentially in respect of private life that he has established while studying in the UK, but I shall endeavor to consider all relevant factors material to the human rights of the Appellants and their child.

38. I accordingly proceed to examine the issues applying the five-step approach outlined in **R (Razgar) v SSHD [2004] UKHL 27**. I have further borne in mind the judgements in, **Huang [2007] UKHL**_11 and **Beoku-Betts [2008] UKHL 39.** I remind myself that in assessing proportionality there is no separate test of exceptionality and I must consider the Article 8 rights of all affected persons and not just the Appellants.

39. The Appellants and their child are a family unit. They have an established family life in the UK, however, as they will be removed together, there will be no interference with family life. There is no dispute that the Appellants and their child are likely to have established some semblance of a private life and that there will be an interference with private life in the event of a removal.

40. I thus find that the decision interferes with the Appellants and their child's respective private lives. I also find that the decision is in accordance with the law and pursues a legitimate aim namely the economic wellbeing of the country. The issue boils down to the question of whether the Respondent's decision is proportionate. I find that it is for the following reasons.

41. Whilst I am not mandated to consider the issues in any way it is sensible to consider the best interests of the Appellants' child first. What is in the best interests of the child must be considered as a primary consideration, **ZH (Tanzania) [2011] UKSC4**, with reference to section 55 of the Borders, Citizenship and Immigration Act 2009. There is limited information about the circumstances of the child. The child like his parents is likely to be a national of India. He is 11 years old and has lived in the UK for 6 years. The period of residence is not significant and he is not a qualifying child under the Rules. He does not have any serious health issues. There is insufficient evidence that the child has developed a meaningful private life outside his school or family. It is not claimed that the child has no ties with his country of nationality or that any contact with family members in India has not been maintained. I do not accept the evidence of the First Appellant that his son only speaks English given my concerns over his evidence.

42. While his school reports show that he is settled in school and is doing well, I am not satisfied that this dictates that his best interests lie in remaining in the UK. There is no evidence that a temporary disruption to the child's education at this stage will undermine his long-term prospects and, as the Respondent noted, the child will have access to education in India. It may not be of the same standard of that in the UK, but that is not the point. There is no evidence that the educational system in India is wanting. I have

no reason to believe that with the support of his parents that he will not be able to adjust to life in India where he has spent the first five and a half years of his life.

43. The Appellants residence in the UK is relatively short. Other than the studies of the First Appellant there is insufficient evidence that either of them have established any meaningful ties to the UK. The First Appellant does not have a right to study in the UK. He has completed the last course he was enrolled on and there is insufficient evidence of further studies. Even if the First Appellant has engaged in further studies after he completed his course in 2014, he confirms that the course ended in September 2015. I find therefore that the First Appellant has not been robbed of an opportunity to study in the UK and his reliance on the Respondent's failure to exercise discretion in his favour and the authority of **CDS (PBS: "available": Article 8) Brazil [2010] UKUT 00305 (IAC)** is in the circumstances misconceived.

44. Neither Appellant has established that they have any serious medical conditions that would warrant a grant of leave outside of the Rules.

45. I must and do have regard to the public interest considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002. It is now made explicit by section 117B(1) that the maintenance of effective immigration controls is in the public interest. I am prepared to accept that the Appellants speak English and are self-sufficient. The public interest is not further fortified by the presence of these factors. They are neutral factors. I am required to attach little weight to the Appellants' private life established at a time when their immigration status was precarious (section 117B(5)).

46. I also take into account that the child is not to be blamed for the conduct of his parents. However, I find that in this case considerable weight must be attached to the public interest of maintaining immigration control. The Appellants have no basis to remain here under the Rules and the evidence does not show that there are any compelling reasons why the public interest in the maintenance of firm and fair immigration control should not prevail.

47. Weighing into the balance all of the above factors on either side, I find that this is a case where the balance lies in the Respondent's favour.

## Decision

The decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I re-make the decision by dismissing the appeal on all grounds.

**TO THE RESPONDENT**
**FEE AWARD**

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

Signed

Date: 10 August 2017

Deputy Upper Tribunal Judge Bagral