Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33016/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 December 2017	**On 23 January 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR SHEHZAD KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms U Diri, Asher An Tomar Solicitors
For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan. He came to the UK as a student in 2009. His subsequent immigration history is not easy to ascertain. The respondent's refusal decision states that he has been an overstayer since 30 October 2011 when his original student leave expired. However,

following discussion with the parties it appears that prior to 30 October 2011 he made an in-time application for further leave to remain which was refused but on 3 February 2012 he succeeded on appeal. In response, the respondent gave him 60 days to find a new sponsor. On 6 August 2013, the appellant submitted a further application within that time. The respondent then issued him with a residence permit valid from 13 June 2014–26 September 2016 but then wrote to him on 8 December 2014 saying that this had been issued to him in error as the respondent had information he had used deception when undertaking an ETS test on 26 June 2013. On 23 February 2015, the appellant made a human rights claim. It is refusal of this claim against which the appellant appealed.

2. On 2 March 2017 First-tier Tribunal Judge Quinn dismissed his appeal. The judge found that the appellant had used deception to obtain a TOEIC certificate and as a result could not meet the suitability and eligibility requirements of paragraph S-LTR.1.6 of the Immigration Rules.

3. In going on to consider whether the appellant had a sustainable case under Article 8 ECHR the judge first looked at his position under the Immigration Rules. The judge noted that the appellant could not qualify under the partner route, paragraph EX.1(a) of Appendix FM in particular, "for the reasons set out on page 2 of the Refusal Letter", and did not satisfy paragraph 276ADE because he had not shown significant obstacles to integrating into Pakistan society. The judge noted that Ms H had entered her relationship with him with knowledge of his immigration status. The judge considered it was not unduly harsh for him to relocate to Pakistan.

4. The appellant's grounds of appeal contended that the judge erred firstly by treating him as an overstayer; second, in considering that the appellant would fall for refusal under paragraph 320(7A) of the Rules and "ought to have allowed the appeal on the suitability issue"; thirdly, by giving unsustainable reasons for concluding that the appellant had used deception in his ETS test; and fourthly, in deciding that the appellant and his wife would face insurmountable obstacles in Pakistan.

5. I am extremely grateful to Ms Dirie and Ms Ahmad for their submissions; they both argued their positions eloquently and succinctly.

6. I am not persuaded that the grounds establish a material error of law.

7. Undoubtedly the judge erred in proceeding on the basis that the appellant was an overstayer since October 2011 (see, e.g., paragraph 2). This was not, as the judge portrayed it, a "Matter not in Dispute". It is clear that subsequent to that date the appellant was granted at least one further period of leave. However, whether or not the appellant can be correctly said to have had continuous lawful leave to the present (as Ms Dirie contends), it remains that his leave has always been limited leave and was thus, for the purposes of Section 117 of the NIAA 2002, "precarious".

8. As regards the judge's treatment of the deception issue, it was incorrect of the judge (as Ms Ahmad conceded) to consider the relevant suitability provision of the Immigration Rules to be paragraph 320(7A); rather it was, as identified in the refusal letter, S-LTR.1.6. However, the judge's decision and reasoning made clear enough that he was concerned with the deception requirement and the issue of whether the appellant had used false representations by relying on a false document. That was as much a part of S-LTR.1.6 as of paragraph 320(7A).

9. So far as concerns the appellant's challenge to the respondent's decision that he had used deception, I can discern no arguable error in the judge's reasoning. He properly understood that the evidential burden of proof to prove falsity to rest on the respondent, but (if that onus was discharged) then shifted to the appellant. Although he did not cite any of the case law on ETS/TOEIC cases, his reasoning is consistent with these (the case law has recently been summarised very helpfully by Underhill, LJ in **Ahsan v SSHD [2017] EWCA Civ 2009** at [22]–[33]). The judge had before him both generic evidence from Home Office officials regarding ETS/TOEIC cases but also specific evidence from Ms Lesley Singh in the form of printouts of ETS Self Source Data and Fetch Results from an ETS TOEIC Test Centre Lookup Tool identifying that on the day the appellant took his test at Universal Training Centre, 84% were invalid and the remaining 16% were questionable. In addition, the appellant (although not represented) was afforded the opportunity to explain the invalid test result he had received. The judge also had a copy of his witness statement which touched briefly on this issue. The judge clearly took into account in favour of the appellant that he spoke English well. The judge did not, however, consider this enough to explain the invalid results noting, inter alia, that the appellant's account of the time the test had been taken (the point raised in point 10 of the appellant's written grounds amounts to a mere disagreement with the judge's findings on this) differed from the respondent's record; that he had travelled "as far as Watford" to take the test; that despite knowing that he was fingerprinted and there was CCTV evidence (the appellant referred to these features in his witness statement), he had not taken steps to provide evidence to show it was him who attended, even though he said his solicitor was dealing with his case at that time. In short, the appellant's written and oral evidence did not constitute anything that approached an innocent explanation and the judge's conclusion that he had used deception was entirely within the range of reasonable responses.

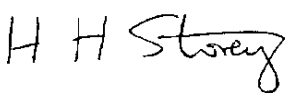
10. The challenge raised in the grounds to the judge's findings regarding insurmountable obstacles is not made out. It is true those findings are extremely brief, but the judge's conclusion at paragraph 48 has to be read in the context of the evidence that was before the judge. That evidence included the respondent's refusal letter which noted the appellant's claim that his wife's health would pose insurmountable obstacles to her joining him abroad. The letter stated that "although your partner is stated to

suffer with Arthritis, there is no medical evidence provided that indicates she is unable to lead her everyday life with your support". That lack of medical evidence of the kind identified in the refusal decision remained a feature of the case when it came before the judge. The letters from the Crystal Palace Medical Group dated 15 October 2015 and an Orthopaedic Surgeon dated 14 October evidenced knee problems but not of a serious order. The grounds mention that the appellant set out in his written submissions that he and his wife, as parties to an interfaith marriage, supported by a report, would face difficulties if they moved to Pakistan. However, that evidence fell well short of establishing that interfaith couples were in general at real risk in Pakistan of either ill-treatment or serious hardship. Bearing in mind the guidance given by the Supreme Court in **Agyarko** as regards the meaning of the term "insurmountable obstacles" and their confirmation that it is a stringent test, the judge's conclusions that the couple would not face insurmountable obstacles in Pakistan was a reasonable one. In terms of the balancing exercise that the judge had to carry out under Article 8 outside the Rules, the position therefore was that the appellant had not shown he met either the substantive requirements of those Rules (relating to family and private life) and he had entered into his marriage when he knew his immigration status was precarious. In addition, the fact of his deception properly found to have been committed by the appellant – see above), added further weight to the public interest factors weighing against his Article 8 claim.

11. Even though, therefore, the judge incorrectly understood the appellant's immigration history the reasoning lying behind the decision to dismiss the appellant's appeal has not been shown to be vitiated by legal error.

No anonymity direction is made.

Signed: Date: 21 January 2018



Dr H H Storey
Judge of the Upper Tribunal