



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

Appeal Number: HU/06217/2019

**THE IMMIGRATION ACTS**

**Heard at Field House  
And via Skype  
On 16<sup>th</sup> December 2020**

**Decision & Reasons Promulgated  
On 14<sup>th</sup> January 2021**

**Before**

**UPPER TRIBUNAL JUDGE KEITH**

**Between**

**MD SOLAYMAN BHUYAN**

**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the appellant:

*Mr M Biggs*, instructed by Hubers Law

For the respondent:

*Ms A Everett*, instructed by the Government  
Legal Department

**DECISION AND REASONS**

**Introduction**

These are the approved record of the decision and reasons which were given orally at the end of the hearing on 16th December 2020.

Both representatives attended the hearing via Skype and I attended the hearing in-person at Field House. The parties did not object to attending

via Skype and I was satisfied that the representatives were able to participate in the hearing.

This is an appeal by the appellant against the decision of First-tier Tribunal Judge M A Khan (the 'FtT'), promulgated on 20<sup>th</sup> September 2019, by which he dismissed the appellant's appeal against the respondent's refusal on 20<sup>th</sup> March 2019 of the appellant's human rights claim.

In essence, the appellant's claim involves two key issues:

- 1.1. whether he had participated in deception by use of a proxy test taker for tests of proficiency in English (a so-called 'TOEIC' test), via a third party test provider, ETS, at a test centre at Seven Oaks College, taken on 20<sup>th</sup> June 2012. The appellant's test result had been assessed under a "look up" tool as "invalid." As a result of the "look up" tool result, coupled with the number of invalid results at the test centre (59%) with none being accepted as valid, the Secretary of State concluded that the appellant had used deception to obtain the TOEIC. The Secretary of State therefore refused the appellant's application on 'suitability' grounds;
- 1.2. whether the appellant had a genuine and subsisting relationship with his British national wife, 'FK', said to a vulnerable adult with a learning disability and significant mental health issues. The respondent considered the previous decision of a First-tier Tribunal (Judge Beg) promulgated on 2<sup>nd</sup> July 2014, which concluded that the relationship was not genuine, as well as the more recent documentary evidence relied on to substantiate the claim of cohabitation. The respondent identified a number of gaps in that documentary evidence, as a result of which the respondent concluded that the relationship was not genuine.

### **The FtT's decision**

The FtT considered that the TOEIC result was 'invalid'; on the appellant's own case, the voice recorded was not that of the appellant; that he had allegedly taken an earlier test on 16<sup>th</sup> May 2012 at the London School of Technology (which he disputed having taken), at which he had achieved very low scores, but far higher scores in the second test just over a month later. While he disputed at the hearing having taken the earlier test, (with the results only recorded as "questionable"), the appellant had not, prior to the hearing, disputed having taken the tests in May 2012; and while the appellant had asked the ETS for 'meta-data' of the June 2012 test, in cross-examination, he did not know what 'meta-data' meant and was only seeking, in the FtT's view, to "muddy the waters". The FtT concluded that the respondent had proven that the appellant had engaged in deception.

In relation to the issue of the genuineness of the claimed relationship between the appellant and his wife, FK, the FtT noted the previous decision of Judge beg. Judge Beg had recorded the significant age difference between the

two (the appellant's wife was 51 when he was aged 28); there were no explanation for why his wife's three siblings had not attended their marriage, nor did the appellant know where those siblings lived, despite claiming that they were unable to attend the wedding because they lived too far away; as well as regarding other aspects of the appellant's claim as not credible.

At paragraph [47], the FtT regarded FK, who gave evidence, as appearing lost and confused throughout her evidence; and noted that a family friend, Mr Talbot appeared to carry out most of the caring responsibilities for FK. Whilst Mr Talbot suggested that the appellant and FK were in a genuine relationship, Mr Talbot was unable to explain why, and the FtT described their evidence as 'almost' rehearsed. At paragraph [49], the FtT concluded that FK lived in isolated life, with the assistance from Mr Talbot and his family with only occasional visits from the appellant.

Having considered the evidence as a whole, the FtT rejected the appellant's appeal.

### **The grounds of appeal and grant of permission**

The appellant lodged grounds of appeal which are essentially as follows:

- 1.3. First, the FtT had failed to consider that the appellant's standard of English was sufficient to have been granted a student visa in January 2010 and then undertake studies.
- 1.4. Second, the FtT had failed to consider that upon marrying FK in 2012, the appellant had only ever communicated in English and had given evidence in English without the use of an interpreter.
- 1.5. Third, the "look up" tool evidence was unreliable and had been heavily criticised and was not conclusive evidence of whether a student had cheated;
- 1.6. Fourth, the appellant provided a plausible explanation for why he had taken a test at the location he had, and had been able to speak English to a sufficient standard;
- 1.7. Fifth, the appellant was of limited financial means, could not have afforded to pay a proxy and had no incentive to do so.
- 1.8. Sixth, Judge beg had reached the earlier decision in the absence of any witness evidence from FK. In contrast, before the FtT, there had been a wealth of documentary evidence supporting the appellant's claim of cohabitation with FK, which had been corroborated by Mr Talbot. FK had also given evidence and had explained why her family had not attended the couple's wedding, because of her relatives' racism.

Judge Martin, in her capacity as a Judge of the First-tier Tribunal, initially refused permission, but renewed permission was granted by Upper Tribunal O'Callaghan on 12<sup>th</sup> March 2020. The grant of permission was not limited in its scope.

### **The hearing before me**

#### **The appellant's submissions**

In addition to the grounds, I was provided with concise, but relevant, submissions by Mr Biggs. He effectively challenged the TOEIC findings of the FtT because the FtT had failed to consider the weakness in the evidence of the "questionable" test result of May 2012.

Crucially, in this case, the respondent had never asserted, in her refusal decision, that the appellant had taken the first test in May 2012 and it was only at the hearing before the FtT when this was suggested. Therefore, applying the well-known authority of MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC), this was not evidence therefore that could reasonably have been provided by the appellant at the hearing as it had not been in issue prior to the hearing; and since the hearing, the appellant had been able to obtain a recording of the May 2012 test, which was entirely blank. The FtT had made adverse credibility findings by comparing the alleged test results for the May 2012 test with the June 2012 test (which the appellant accepted that he had taken), so that the FtT's analysis of the appellant's credibility was plainly flawed. This infected the FtT's subsequent assessment of the sham marriage issue, as that too depended on an assessment of the appellant's credibility, and the FtT had already found him not to be a credible witness.

The second basis given by the FtT for his adverse credibility finding was that the appellant had not adequately explained why he had not taken the London School of Technology test in May 2012. This was equally flawed, when the issue had not been raised prior to the hearing, and similarly, the FtT had not been wrong to criticise the appellant for not knowing what meta-data was. It was entirely explicable and reasonable for the appellant to have sought advice, even to go as far as to use terminology suggested by advisors in seeking information from ETS.

In respect of the issue in relation to the sham marriage, in summary, the FtT had miscategorised and failed to assess properly the evidence before him. It had never been the case that FK's evidence was limited to expressions of love for the appellant and similarly, the evidence of Mr Talbot about the extent to which he provided caring responsibilities had been mischaracterised, with the FtT's later analysis being internally inconsistent with the evidence that had been given, as recorded earlier in the FtT's decision.

## **The respondent's submissions**

In a pragmatic and measured response, Ms Everett made two concessions. First, she conceded that the reasoning in paragraphs [40] to [42] of the FtT's reasoning, related to his findings of credibility based on the appellant's lack of explanation for the May 2012 test result, was not sustainable. A failure to provide an explanation could, in some circumstances, be the basis for adverse credibility findings but not in this case, given the history, and the same was true of the adverse credibility finding based on the appellant's lack of knowledge of what "meta-data" meant. She accepted, therefore, that the FtT's reasoning on that first TOEIC point was not sustainable.

Second, she conceded that whilst the wider challenge to the sham marriage was not strong, there had been an error on the narrower point that that where the FtT had described FK's evidence as being "lost" and "confused", the FtT had failed to consider, despite the issue being raised, and on the respondent's own case, that FK was a potentially vulnerable witness. The Judge had failed to analyse FK's evidence through that lens and instead had drawn adverse inferences from any vagueness and had failed to consider how many potential inconsistencies in the evidence should be considered and resolved in the context of a witness's vulnerability.

## **Conclusions**

In light of both the submissions of Mr Biggs and the concessions made by Ms Everett (which I accepted were realistically made by Ms Everett in this case) I conclude that the FtT did err in his analysis of the appellant's credibility, in relation to the alleged participation in the TOEIC fraud and in his analysis of FK's evidence, in the context of her being a vulnerable witness. I also accept the submission of Mr Biggs that the adverse findings in relation to the appellant's credibility on the first TOEIC point similarly infected the assessment of his credibility in relation to the genuineness of his marriage to FK.

Therefore, for the above reasons, I conclude that the decision of the First-tier Tribunal is unsafe and cannot stand. I set it aside without preservation of any findings and in the circumstances and having considered the submissions, I do regard it as appropriate by reference to paragraph 7.2 of the Senior President's Practice Statement that the matter should be remitted back to the First-tier Tribunal to be considered de novo, noting that the flaws in the assessment of credibility go to the heart of the evidence before the First-tier Tribunal.

## **Decision on error of law**

In my view there are material errors here and I must set the FtT's decision aside.

## **Disposal**

With reference to paragraph 7.2 of the Senior President's Practice Statement and the necessary fact-finding, this is clearly a case that has to be remitted to the First-tier Tribunal for a complete rehearing, without preservation of findings of fact, as the errors of law go to the heart of the FtT's assessment of credibility and had an impact on all aspects of the FtT's findings.

### **Notice of Decision**

**The decision of the First-tier Tribunal contains material errors of law and I set it aside, without preservation of any findings of fact.**

**I remit this appeal to the First-tier Tribunal for a complete rehearing.**

### **Directions to the First-tier Tribunal**

**This appeal is remitted to the First-tier Tribunal for a complete rehearing with no preserved findings of fact.**

**The remitted appeal shall not be heard by First-tier Tribunal Judge M A Khan.**

No anonymity direction is made.

Signed J. Keith

Date: 18<sup>th</sup> December 2020

Upper Tribunal Judge Keith