**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/06785/2019 (V)**

**THE IMMIGRATION ACTS**

| **Heard remotely at Field House** | **Decision & Reasons promulgated** |
|---|---|
| **On 16th November 2021** | **On 16th December 2021** |

**Before**

**UPPER TRIBUNAL JUDGE FRANCES**
**DEPUTY UPPER TRIBUNAL JUDGE JARVIS**

**Between**

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

Appellant

**and**

**MUHAMMAD HAROON RIAZ**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Ms E Harris, instructed by Buckingham Legal Associates

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Microsoft Teams (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents referred to are in the bundles on the court file, the contents of which I have recorded. The order made is described at the end of these reasons.

**DECISION AND REASONS**

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1. Although this is an appeal by the Secretary of State, we shall refer to the parties as in the First-tier Tribunal. The appellant is a citizen of Pakistan born on 27 April 1992. His appeal against the refusal of leave to remain as a spouse was allowed by First-tier Tribunal Judge H Graves [the judge] on Article 8 grounds on 25 January 2021. The Secretary of State appealed.

2. Permission to appeal was granted by First-tier Tribunal Judge Ford on 8 February 2021 on the grounds that it was arguable the judge erred in:

    (i) Failing to give adequate reasons for her findings on a material matter. It is arguable the judge failed to explain adequately why she accepted the appellant's evidence amounted to an innocent explanation for an invalid ETS result given that the appellant had fabricated his asylum claim and relied on the same account to demonstrate very significant obstacles to re-integration;

    (ii) Making a material misdirection in law in treating the temporary pandemic travel restrictions as a very significant obstacle to the appellant's integration/return;

    (iii) Holding the lack of production of the voice recording against the respondent. It is arguable that the voice recordings are the property of ETS and that from a data protection perspective, it is the responsibility of the appellant to obtain them. It is arguable the respondent did not have to produce such evidence to establish fraud and that the requisite standard of proof, being the balance of probabilities, was discharged in this case.

3. The appellant came to the UK as a student in 2011. He was granted leave to remain as a student until April 2015. It is the respondent's case the appellant obtained a fraudulent English language certificate from ETS, using a proxy test taker, which he submitted with his application for leave to remain made on 17 December 2013. The appellant's student leave was curtailed to end on 18 August 2014 because his sponsor's licence was revoked. It was not the respondent's case that she was put on notice of the fraudulent ETS certificate following the BBC Panorama documentary.

4. On 15 August 2014, the appellant applied for leave to remain outside the immigration rules. This application was rejected as invalid and he remained in the UK without leave from 18 August 2014. His subsequent application for leave to remain on Article 8 grounds was refused and certified in January 2016 because the appellant could not meet the requirements of Appendix FM, specifically the suitability requirements as a result of the fraudulent ETS certificate.

5. The appellant claimed asylum on 15 March 2016 which was refused and his appeal dismissed. The judge found that the appellant had fabricated his claim to be gay in order to frustrate removal from the UK.

6. The appellant met his wife in 2017 and they married in 2018. He applied for leave to remain under Appendix FM in February 2019. The respondent accepted the relationship was genuine and subsisting and that the financial requirements were

satisfied. The application was refused, in March 2019, on suitability grounds and because the appellant could not meet the immigration status requirement. The appeal against that decision was allowed on human rights grounds and is the subject of this appeal in the Upper Tribunal.

**Submissions**

7. Mr Tufan submitted the burden was on the appellant to provide an innocent explanation. The judge failed to give reasons for finding in the appellant's favour on this issue. There was insufficient credible evidence before the judge to allow her to find that the appellant had provided an innocent explanation given the appellant had fabricated his asylum claim.

8. Mr Tufan submitted the APPG report could not be relied on. He accepted this was not pleaded in the grounds and submitted the point was obvious. He applied to amend the grounds on the basis the decision of DK and RK (India) [2021] UKUT 61 (IAC) was not reported at the time the grounds were drafted. Mr Tufan submitted the judge failed to properly consider the appellant's invalid test result. The respondent was criticised about the chain of evidence and the judge wrongly concluded the appellant's inaction went in his favour.

9. In relation to Article 8, the judge failed to consider the situation was likely to change. The restrictions on travel because of the pandemic were now lifted and the judge failed to adjust the weight she attached to the temporary situation.

10. Ms Harris submitted the pandemic could amount to an insurmountable obstacle and the respondent did not apply for an adjournment on the grounds the situation was likely to change. In this case, the appellant could return to Pakistan, but his wife could not go with him. The judge was entitled to rely on the matters existing at the date of hearing. The judge appreciated the travel restrictions were not permanent, but it was not possible to predict how long they would last. At the date of hearing, the appellant's wife could not travel to Pakistan. Ms Harris submitted the judge considered her pregnancy and concluded there were insurmountable obstacles to family life continuing in Pakistan. The appellant's wife was shielding and was not able to be vaccinated. At the date of hearing, basic health services were not available in Pakistan. There was no challenge to this finding.

11. Ms Harris submitted the judge was aware of the burden and standard of proof and properly concluded the initial evidential burden on the respondent was discharged. The appellant had met the threshold of providing an innocent explanation which was not undermined in cross-examination. The judge analysed the account in detail at [61] and [62]. The judge correctly concluded the burden reverted to the respondent.

12. Ms Harris submitted the judge balanced all the evidence. She was mindful of the findings of Judge Ransley in the appellant's asylum appeal and found there was no evidence to disturb those findings. However, they were not determinative of this

appeal. The judge treated the appellant's evidence with caution and her finding that he was a credible witness was open to her on the evidence before her. The judge found the appellant did not embellish his claim and accepted he had tried to obtain the voice recordings.

13. Ms Harris submitted the judge's assessment of the evidence was entirely balanced. She did not find that the respondent was obliged to obtain the voice recordings. There was no evidence from the respondent why crucial evidence was not produced. The judge expressed her concerns about the chain of evidence and gave adequate reasons for finding the respondent had not established the legal burden of proving deception. In any event, this finding was not material to the judge's ultimate conclusion that, notwithstanding the deception, there were exceptional and compelling circumstances which outweighed the public interest in removal.

14. Ms Harris submitted the judge properly dealt with the APPG report and the decision in DK and RK (India) was not promulgated until after the hearing. The report did not affect her overall conclusion. The judge decided the Article 8 claim at the date if hearing. She did not speculate. The respondent did not challenge the judge's credibility findings. There was no error of law.

**Conclusions and reasons**

15. At [74] the judge concluded "On balance and taking all the evidence in the round, the evidence was not sufficient to establish deception." Having made this finding, the judge then looked at the APPG and other reports. We are of the view that the judge's findings at [75] to [78] did not affect the judge's ultimate conclusion to allow the appeal for the reasons given below. We refuse Mr Tufan's application to amend the grounds.

Ground 1

16. The judge's findings at [37] and [54] demonstrate that she considered the findings of Judge Ransley who found the appellant to be an untruthful and unreliable witness. At [38], the judge did not accept the appellant faced insurmountable obstacles to the exercise of family life in Pakistan by reason of his previous asylum claim. It is apparent from these paragraphs that the judge relied on the findings in the previous appeal and treated the appellant's evidence with caution given he had fabricated his asylum claim.

17. The judge recognised that these findings were relevant but not determinative of the appeal before her because the deception allegation was not raised or considered in the previous appeal.

18. The judge gave adequate reasons at [61] and [62] for finding the appellant to be a credible witness. It was open to the judge, on the evidence before her, to conclude that the appellant had provided an innocent explanation. The judge is best placed to

make this assessment having seen and heard the appellant giving oral evidence. The grounds disclose no error of law in the judge's finding that the appellant had provided an innocent explanation and she adequately explained why she accepted his account at [52] to [63].

Ground 2

19. The judge's finding that there were insurmountable obstacles to family continuing in Pakistan (at [43]) was open to her on the evidence before her and she gave adequate reasons for coming to that conclusion at [38] to [42]:

    (a) The Pakistani government was refusing admission to any arrivals from the UK and anyone who did not hold a valid Pakistani passport. These travel restrictions were unlikely to be permanent, but as at the date of hearing, it was not possible to predict how long they would last;

    (b) It was reasonable for the appellant and his pregnant wife to take every precaution to protect their unborn child;

    (c) It was understandable that they chose to shield given that they had lost previous pregnancies. The appellant's wife had been told the vaccine had not been approved for use in pregnancy;

    (d) The FCO guidance stated that health services in Pakistan were under strain. The appellant's wife would be living away from her family and support network. She and her pregnancy may be at additional risk where it was questionable what access she would have to basic health care and services for the birth, antenatal and post-natal care;

    (e) The appellant's wife would not go to Pakistan and would not risk exposing her baby to infection or lack of health care;

20. The restriction on travel was only one of the reasons for concluding there were insurmountable obstacles to family life continuing in Pakistan. Further, the judge appreciated that even if the travel restrictions improved, it was not possible to predict how long it would take for the strain on healthcare and services to ease. It was open to the judge to conclude that, in the exceptional and unusual circumstances existing at the time, the appellant's wife could not safely relocate to Pakistan with her husband.

21. There was no material misdirection in the judge's assessment of insurmountable obstacles and her conclusion that they existed at the date of hearing was open to her on the evidence before her.

Ground 3

22. We are of the view the judge made the required structural findings that the respondent's evidence was sufficient to meet the initial evidential burden at [51] and that the burden fell upon the appellant to provide a reasonable explanation in response at [52]. For the reasons given above, we find there was no error of law in

her conclusion that the appellant had provided an innocent explanation. However, we find the judge did err in her approach to weighing up the evidence and assessing the legal burden.

23. We have been particularly concerned by the judge's apparently self-directed observations permeating through [69] [72] and [73]. In those paragraphs, inter alia, the judge expresses deep concern at the fact that the respondent has not listened to the relevant voice recording and has provided no explanation for why this crucial piece of evidence has not been disclosed. We observe the caselaw is clear that ETS has long refused to provide the voice recordings to the Home Office 'absent judicial compulsion': SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC) at [22].

24. Additionally, the judge also seeks to inculcate ETS itself into the cheating scandal by finding that "they are not an independent, expert or impartial source of evidence" at [69] and "there are real doubts about the reliability of the respondent's evidence from ETS" at [72]. The judge also concluded that the fairness of the proceedings was impeded by the respondent's failure to provide the recordings (amongst other things) [73]. These findings were made by the judge during the third stage of assessment (applying the 'evidential boomerang' as described in MA (ETS - TOEIC testing) [2016] UKUT 450(IAC) at [44]).

25. We note at the this point that Ms Harris told us during discussion that the appellant had not argued that ETS were themselves complicit in the cheating. In our view, the judge has gone too far and applied a level of cynicism and scepticism about the motives of ETS which were not the subject of any evidence or argument before her and which play no material part in the conclusions of the applicable authorities of the Upper Tribunal.

26. The judge stated at [74] that the appellant's evidence did not significantly outweigh the respondent's case even though the judge had real doubts about the respondent's evidence from ETS at [72]. This finding again infers a lack of veracity on the part of ETS and the Home Office which is not a conclusion reached by the Upper Tribunal in previous reported judgments on these issues, although we would of course accept that issues to do with the chain of evidence for instance, could go to the weight to be given to the respondent's overall case.

27. The conclusion at [73] that the respondent had not provided full disclosure of the evidence against the appellant strongly implies that this was a deliberate act by the Home Office, hence the judge's reference to the fairness of the proceedings. Again, we consider this conclusion to be unjustified on the available evidence and the authorities.

28. We therefore find that the judge erred in law in finding the respondent had failed to discharge the legal burden.

29. However, this error was not material to the decision to allow the appeal on human rights grounds. At [80] to [87] the judge considered Article 8 on the basis that

paragraph S-LTR 4.2 of the immigration rules (suitability requirements) was engaged. She found that, even if the allegation of deception was made out, there were exceptional circumstances, existing at the date of hearing, which outweighed the public interest. This finding was open to the judge on the evidence before her, notwithstanding that a positive finding under the insurmountable obstacles test is not in itself determinative of the Article 8(2) balancing exercise under GEN.3.2. of Appendix FM and the evaluation of exceptional circumstances. The respondent did not challenge this alternative finding.

Summary

30. There was no material error of law in the decision dated 25 January 2021 allowing the appellant's appeal on human rights grounds given the exceptional and compelling circumstances which existed at the date of hearing. We dismiss the respondent's appeal. The appropriate grant of leave is a matter for the respondent.

**Notice of decision**

**Appeal dismissed**

*J Frances*

Signed Date: 7 December 2021
Upper Tribunal Judge Frances

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**NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email**