IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-000478

First-tier Tribunal Nos: HU/06217/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 29 August 2023

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

Md Solayman Bhuyan
(no anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr M Biggs, Counsel instructed by Hubars Law Solicitors
For the Respondent: Ms H Gilmour, Senior Home Office Presenting Officer

Heard at Field House on 16 June 2022

DECISION AND REASONS

1. The appellant appeals against the decision of the First-tier Tribunal dismissing the appellant's appeal against a decision of the respondent on 20 March 2019 to refuse his application for leave to remain on "private and family life" grounds. In September 2019 the appeal was determined unsatisfactorily and the decision was subsequently set aside and the appeal was reheard and dismissed in a Decision and Reasons promulgated on 9 July 2021. It is an appeal against that decision of the First-tier Tribunal that is before me.

2. Permission to appeal was given by the Upper Tribunal.

3. As the grant of permission explains, the appellant had been identified as a person who had relied on a certificate of competence in a Test of English for International Communication (TOEIC) obtained by cheating. The certificate was cancelled by Educational Testing Service (ETS). The appellant's results had been identified as having been obtained by impersonation.

4. The appellant denies being a cheat and the respondent failed to satisfy the judge making the 2021 decision that that the appellant had cheated. Nevertheless the judge dismissed the appeal.

5. The appellant entered the United Kingdom with permission as a student in 2010. His leave expired on 31 January 2013. On 27 December 2012 he applied for further leave to remain as the husband of a British citizen but he declined to attend an interview and or respond to a letter dated 4 November 2013. The respondent refused his application and explained her decision in a letter dated 14 November 2013. He appealed that decision. His appeal was dismissed by the First-tier Tribunal in a Decision and Reasons promulgated on 2 July 2014. His appeal rights were exhausted on 10 December 2015.

6. He remained in the United Kingdom.

7. On 13 March 2015 he applied for leave to remain on "private and family life" grounds but the application was refused on 21 September 2015, mainly because he was identified as a TOEIC cheat. That decision was challenged by Judicial Review. The application was reconsidered and refused again. The decision after reconsideration was explained in the letter dated 20 March 2019 and mentioned above.

8. There the respondent said that the appellant had used deception in his earlier application for leave to remain as spouse when he relied on a TOEIC certificate that had since been cancelled by ETS. The respondent considered the appellant to be a person whose presence in the United Kingdom was not conducive to the public good.

9. The First-tier Tribunal heard the appeal against that decision on 23 June 2021.

10. The appellant's request to rely on a "new matter" arising from an allegation of domestic violence against the appellant was refused.

11. The appellant denied cheating.

12. The appellant said that he and his wife enjoyed a subsisting relationship when he applied for permission to remain in 2012 and 2015 but the marriage became unhappy, mainly because his wife was ill.

13. His wife had made an excuse not to support his appeal when it was heard in 2014 and their marriage broke down completely after an incident on 12 April 2021 when they had a violent argument.

14. At paragraph 46 of the Decision and Reasons the judge found that the respondent had **not** satisfied her that the appellant had cheated in his language test.

15. The judge further found that the appellant's marriage was not subsisting when she heard the appeal.

16. As stated above, the appellant had previously been refused leave on 14 November 2013 and an appeal against that decision was dismissed by the First-tier Tribunal in a Decision and Reasons promulgated on 2 July 2014. In that Decision and Reasons the Tribunal found that the appellant had entered into a sham marriage. The appellant's wife did not attend and the appellant explained her absence by unsupported and inconsistent evidence. The judge disbelieved the appellant and concluded that the appellant's marriage was a sham.

17. The judge in the 2021 Decision and Reasons found that the facts before her did not differ materially from those that were found in July 2014. In both cases it was found that the appellant had never had a subsisting marriage.

18. As there was not a subsisting marriage there was no "family life" and the judge found that the interference with the appellant's "private life" consequent on refusal was proportionate.

19. Before dismissing the appeal the judge recorded a submission from Mr Biggs (who also appeared before me) to the effect that there was policy that provided that a person who was shown not to be a TOEIC cheat but whose TOEIC certificate had been cancelled was entitled to 6 months leave "to enable the appellant to make any application they want to make or to leave the UK." The judge found that the terms of any leave granted was a matter for the respondent.

20. Before me the appellant was permitted to argue each of his four grounds of appeal. I begin by considering the Upper Tribunal's grant of permission.

21. Ground 1 alleges that the First-tier Tribunal erred by not allowing the appeal in the light of a policy. Having decided that the appellant was not a cheat it was argued that he was plainly entitled to 6 months leave and so the appeal should have been allowed on article 8 grounds. The terms of the grant of permission on this ground was exceedingly tepid, the judge granting permission pointing out that if the respondent had granted leave there would be no question of the appellant having a successful claim on article 8 grounds because, by reason of the grant of leave, there would not be any interference.

22. Ground 2 complained that the judge erred in finding that the was no material difference between the facts before her and before the earlier tribunal when it was not accepted that there had been a subsisting marriage. Permission was granted on ground 2 primarily because it complemented ground 3. Ground 3 was a general complaint that the First-tier Tribunal had not explained adequately how the appellant had failed to displace the adverse findings in the 2014 decision.

23. Ground 4 complained that the judge was wrong to find that the appellant's spouse had not provided anything to confirm that the marriage was genuine.

24. The respondent's "Rule 24 notice" asserts that there is no material error in the decision but, importantly, it does not criticise or challenge the First-tier Tribunal's finding that the appellant was not a TOEIC cheat.

25. Mr Biggs relied substantially on his skeleton argument dated 15 June 2022 which was based on, but did not simply copy, the Grounds of Appeal. He handed me a paper copy of the skeleton argument to correct an obvious error in the version originally served.

26. His first point was that, given the finding that the appellant was not a TOEIC cheat, there was not sufficient public interest in the appellant's removal to justify a finding that any interference with the appellant's "private and family life" was proportionate. This argument was supported by the Respondent's policy of granting limited leave to people whose leave was cancelled because of TOEIC related problems but who were not in fact TOEIC cheats.

27. In his submissions, Mr Biggs drew attention to the relevant policy. Its terms are clear. It states:

> "If the appeal is dismissed on human rights grounds but a finding is made by the Tribunal that the appellant did not obtain the TOEIC certificate by deception, you will need to give effect to that finding by granting six months leave outside the rules.
>
> This is to enable the appellant to make any application they want to make or to leave the UK."

28. In some senses this is irrelevant as it deals with the obligation on the Respondent after an appeal has been finally determined and this appeal has not yet reached that stage.

29. However I agree with Mr Biggs that this policy illuminates the article 8 balancing exercise. Read simply, the appellant is entitled under the terms of the policy to leave to remain and if in fact the appellant is entitled to leave to remain it is hard to conclude that there is any public interest in the appellant's removal.

30. There is, however, an obvious complicating factor which Mr Biggs recognises in his skeleton argument. The policy does not apply unless an appeal has been dismissed but if Mr Biggs is right then no appeal could be dismissed. I do not wish to be facetious but my observation is intended to underline the point that policy guides but does not control the article 8 balancing exercise. I return to his point below.

31. His second point, which combines grounds 2 and 3, was that the Judge was not entitled to conclude, at least for the reasons given, that "the facts are not materially different from those considered [in 2014]."

32. Under grounds 4 it was said that the error in failing to appreciate that the facts had changed since the 2014 decision, it was said, was compounded by finding that the appellant's wife had "never provided anything in writing to confirm that the marriage was genuine" when in fact the appellant's wife had provided written and oral evidence in the first hearing of this appeal that was determined in September 2019. That the appellant's wife did provide a statement as well as give evidence in the earlier hearing is tolerably plain from paragraph 20 of the judge's decision and I find that the judge in 2021 was just wrong to say, as she did at paragraph 58, that the appellant's wife had "never provided anything in writing to confirm that the marriage was genuine and subsisting."

33. It does not follow from this that the error was material. The judge's underlying concern was that there was no evidence before her that the marriage was subsisting at the date of hearing and that is consistent with the appellant's case.

34. Having reflected on these matters I am not persuaded that any material error has been made out in the judge's findings about the marriage.

35. Clearly when she decided the appeal the marriage was not subsisting and the fact that judge said, wrongly, that the appellant's wife had not ever supported his case is immaterial to that conclusion. I doubt that the material before the Tribunal in 2019 was before the judge in 2021. I cannot find it in the papers before me.

36. The judge has looked for new evidence and has not found it impressive. It does not matter for the purposes of the article 8 balancing exercise that the marriage was, perhaps, a genuine partnership from the beginning. The appellant has not lived in the United Kingdom lawfully and continuously for long enough to be entitled to stay and was not able to show that he could not go back. These clearly permissible findings are not undermined by error in the evidence about the past history of the marriage.

37. However it flows from this that the finding in 2021 that there was no new evidence capable of undermining the finding that the appellant's was never a genuine supportive marriage is not to be given great weight. It was made in part because the judge wrongly thought that the appellant's wife had never supported the appellant's case and she plainly did. This does not mean that the marriage was ever other than a shell only but it does mean that the 2021 finding that nothing had changed included a factual of error that undermines any weight that can be given to the decision in so far as it relates to the nature of the marriage from its inception.

38. I appreciate that there is reference to evidence of the appellant being the victim of a violent argument. Although I do not claim to know the details I accept that

there is a policy that provides for leave to be given to the victims of domestic violence. I do not know if the appellant can benefit from the policy and I accept that the appellant has not been permitted to raise "victim of domestic violence" as a new matter. I agree with Mr Biggs that some regard to the policy and the facts of the incident could be relevant to the article 8 balancing exercise but I have not seen any evidence that the First-tier Tribunal should have considered that might have made a difference.

39. It is clearly open to the appellant to raise the new matter now if he is so minded.

40. I do, however, find myself impressed by the appellant's argument that the policy applying to people who been accused of cheating but who have not found to have cheated is relevant. That fact that the policy applies when an appeal is dismissed does not mean that the appeal *should* be dismissed. It is very hard to see a strong (or any) public interest in the appellant's removal in the event of the appellant, according to public policy, being entitled to leave to remain and there is nothing before me to indicate that the policy does not apply.

41. In short, although the judge was entitled to conclude that the appellant could reestablish himself in his country of nationality, and had not established a right to remain by reason of his "private and family life" (realistically, private life in this case) I do not see how the judge could have dismissed the appeal when, having found that the appellant was not a cheat, public policy permitted him to stay.

Notice of Decision

42. The First-tier Tribunal erred in law. I set aide its decision and substitute a decision allowing the appellant's appeal.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 August 2023