Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/37628/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision given orally on 21 January 2016**
On: 21 January 2016	**Promulgated On: 29 February 2016**

Before

THE PRESIDENT, THE HON. MR JUSTICE MCCLOSKEY
UPPER TRIBUNAL JUDGE BLUM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ANDRU KISHORE DEBBARMAN

Respondent

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: Mr S Bellara, of Counsel, instructed by Immigration & Work Permit Ltd

DECISION

1. This is an appeal by Andru Kishore Debbarman, a citizen of Bangladesh aged 29 years, against a decision of the Secretary of State. There were three decisions altogether, all of them made on 6 September 2014. One of these decisions refused the Appellant's application under the Immigration Rules and Article 8 of the Human Rights Convention for leave to remain on family life grounds. The second of the decisions purported to curtail the Appellant's leave to remain and the third decision, which was

appealable to the First-tier Tribunal was a decision to remove the Appellant from the United Kingdom.

2. We are all agreed that the correct analysis is that while the First-tier Tribunal was seized of an appeal against the appealable removal decision the curtailment decision was a component of the decision under appeal. As a result the basis on which the curtailment decision was made properly developed into a key issue before the First-tier Tribunal and was examined and determined accordingly.

3. The curtailment decision contains the following statement:

> *"An administrative review process by Educational Testing Service has identified that the test score submitted by your client in a previous application was obtained by deception."*

It is clear from the text of this letter that the author was responding to the Appellant's solicitors' letter of 3 July 2014 accompanying the Appellant's application for leave to remain as the spouse of a settled person. It is this paragraph of the shorter of the letters of 6 September 2014 which explains and illuminates the context in which the First-tier Tribunal embarked upon the enquiries which it duly carried out.

4. In paragraph 21 the judge correctly noted that there was no evidence whatsoever of the certificate which formed the cornerstone of the curtailment of leave decision. The judge decided to deal with this in a particular way. At the conclusion of the hearing an opportunity was given to the Secretary of State to provide this key evidential proof. It was not, however, forthcoming.

5. Read fairly and as a whole, I considered it clear that the judge adopted the following approach. On the issue of alleged fraud on the part of the Appellant the burden lay on the Respondent. Furthermore, this is an onerous burden. All of that is very well settled by the decided cases and accordingly there is no trace of an error of law on the judge's part in that respect. Having embarked upon the inquiry of whether the Respondent had discharged its burden the judge then studied with some care the nature and quality of the evidence which the Respondent had adduced in its quest to discharge the burden in question. I consider it abundantly clear firstly from his description of the approach which he was applying, secondly from considering the evidence that was adduced in its totality and finally the conclusion reached in paragraph 44 of the determination that the key decision made by the First-tier Tribunal was that the Secretary of State had failed to discharge this onerous burden of proof.

6. One important context of this exercise was that the Appellant was making the case that he had never submitted a certificate of this kind [i.e. a TOEIC certificate] and secondly he was making the case through the medium of his evidence, and I refer particularly in this context to his witness statement, that he has been for some time a person skilled and well-qualified and competent in the English language.

7. I agree with Mr Wilding that the determination is unsustainable in one respect, namely insofar as the judge concluded that the decision making process was procedurally unfair. On the facts of the case the Appellant had ample opportunity to put his case to the Secretary of State and, in any event, as I pointed out in the leading ETS decision of this Tribunal, Gazi, complaints of procedural unfairness can be accommodated in the appeal process.

8. However, I am quite satisfied that the correct analysis is that that was not a material error in the circumstances. The fundamental reason for that is quite simple. Having conducted the exercise which I have outlined in a little detail a conclusion that the curtailment decision was unsustainable in law was, given the judge's impeccable finding that the evidence adduced was insufficient to discharge the Secretary of State's burden, inevitable. There is undoubtedly some confusion in the determination about curtailment versus cancellation and there is also a misdescription of the appealable decision. But the outcome is crystal clear. The judge allowed the appeal.

9. The parties are agreed, correctly in my view, that the effect of this is that the removal decision of the Secretary of State is unlawful, thereby triggering an obligation on the part of the Secretary of State to reconsider the family life application made under Appendix FM and, I am assuming, Article 8 outwith the Rules and to decide same afresh.

10. To recapitulate. The judge's examination of the evidence purporting to support the decision that the Appellant had engaged in fraud is unimpeachable, the judge's approach to the burden of proof is unimpeachable and the judge's conclusion that the burden of proof had not been discharged by the Secretary of State is also unimpeachable. The decision itself, namely to allow the appeal, was also a correct decision in law.

11. In these circumstances I concur with the brief assessment of the first permission judge, namely Designated Judge McClure, in paragraph 3 of the decision dated 15 May 2015, refusing permission to appeal. That decision pointed out, *inter alia,* a rather grievous error in the grounds of appeal regarding the burden of proof. I conclude accordingly that none of the grounds of appeal has been made out. Thus I dismiss the Secretary of State's appeal and I affirm the decision of the First-tier Tribunal.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed

THE HON. MR JUSTICE MCCLOSKEY

PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 24 February 2016

TO THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
FEE AWARD

As I have allowed Mr Debbarman's appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable for the following reason. The Secretary of State for the Home Department failed to produce any sufficient evidence required to overcome the onerous burden of proving fraud.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 24 February 2016