Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17558/2018

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 22 July 2019	**On 31 July 2019**

Before

UPPER TRIBUNAL JUDGE BRUCE
DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES

Between

SAFEER AHMAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation;
Appellant: Mr Farhat, Solicitor, Gulbenkian Andonian Solicitors
Respondent: Mr Bramble, Home Office Presenting Officer

DECISION AND REASONS

The Appellant, a citizen of Pakistan, entered the UK lawfully as a student with leave to enter expiring on 31 August 2008.

The Appellant made an in time application to vary his leave as a Tier (Post Study Work) Migrant, but that application was refused on 16 January 2009 for dishonesty, by reference to paragraph 322(1A) of the Immigration Rules, the Appellant having relied upon a Post Graduate Diploma in IT purportedly issued to him by the Cambridge College of Learning [“CCOL”]. His appeal was initially allowed by decision of Immigration Judge Flynn of 24 March 2009, but that

decision was set aside for error of law, and upon reconsideration the appeal was dismissed by decision of Senior Immigration Judge Kekic of 8 December 2009. In so doing she noted that the Appellant relied upon documents said to have been generated during his studies as course-work and assignments, but they were unmarked, and did not bear his name. Further that he had claimed to have been taught at the CCOL by the same Mr Malik, who had denied in other litigation that the course the Appellant had claimed to have successfully completed was never offered, or taught, by the College. She concluded that he had never earned, or been awarded with, the qualification that he claimed to have legitimately earned and been awarded with [NA & Others (Cambridge College of Learning) Pakistan [2009] UKUT 11]. The exhaustion of the Appellant's appeal rights following this decision only occurred on 23 April 2010 as a result of a delay in the service of the decision to refuse him permission to appeal of 19 February 2010.

The Appellant made an application to the Respondent for the issue of a Certificate of Approval for marriage to a British citizen, Ms R, on 21 June 2010, which was issued on 19 October 2010.

It is common ground before us that the Appellant had no leave to remain in the UK between 23 April 2010, and 19 October 2011; he was then granted discretionary leave to remain as a spouse for three years following his marriage to Ms R. That leave expired on 19 October 2014.

Although the Appellant accepts that the marriage to Ms R had broken down before the expiry of this leave on 19 October 2014, it is not clear to us precisely when it failed, or, when it was formally terminated by divorce. However we note that Upper Tribunal Judge Kekic recorded in her decision of 17 January 2017 that it had failed in 2011-2, although it was only terminated by divorce in June 2014, and that the Appellant had initially failed to disclose the failure of this relationship to the Respondent [ApB p43 #1], when he applied on 17 October 2014 for a further grant of discretionary leave to remain outside the Immigration Rules.

The 17 October 2014 application was refused on 26 January 2015. The appeal against this refusal was dismissed by decision of First tier Tribunal Judge Plumptre after a hearing held in the Appellant's absence. Despite a grant of permission to appeal to the Upper Tribunal his appeal rights against that decision were exhausted on 10 April 2017, following the dismissal of his complaint by decision of Upper Tribunal Judge Kekic of 16 January 2017 [ApB p42], and the subsequent refusal of permission to appeal to the Court of Appeal.

In the meantime the Appellant is recorded as having claimed to have enjoyed a relationship with a further British citizen, Ms B, from 2011, but save for the potential effect upon his relationship with Ms R, and the potential for damage to his general credibility, nothing turns upon this. It was accepted before us that this relationship never led to marriage, and was itself ended some time ago. The Appellant denies having relied upon any relationship with Ms B in making his 17 October 2014 application, although that denial begs the

question (which we do not seek to answer) of how the Respondent knew of it, and felt obliged to deal with it, in the course of his decision of 10 August 2018.

On 14 October 2016 the Appellant made an application for ILR on the basis of his claim that he had accrued ten years continuous lawful residence in the UK. At the time he was pursuing an appeal against the decision of 26 January 2015, which was itself made upon the application for DLR of 17 October 2014. He did not formally withdraw the application for DLR in order to lodge the application for ILR, and he could not of course vary the application for ILR because a decision had already been made by the Respondent upon it; JH (Zimbabwe) [2009] EWCA Civ 78. It does not appear from the papers before us that he sought to use the section 120 (one stop) notice process in order to place a claim for ILR based upon paragraph 276B before the Tribunal in the course of his appeal against the decision of 26 January 2015.

On 10 August 2018 the Respondent refused the application of 17 October 2014, and accepted that he was thereby refusing a human rights claim. This prompted a further appeal, which was heard, and dismissed, by First tier Tribunal Judge NMK Lawrence in a decision of 4 April 2019. It is this decision which is the focus of the current challenge. The Appellant's application for permission to appeal was granted by First-tier Tribunal Judge Andrew on 14 June 2019. The Respondent has not replied to that grant with a Rule 24 response, and neither party has applied pursuant to Rule 15(2A) to introduce further evidence.

The complaint

The Appellant advances two complaints; although distinct, they are each founded in procedural unfairness. As indicated to the parties at the hearing we are satisfied that each is made out, and that their individual, and combined, effect, is that the Appellant did not receive a fair hearing of his appeal because his case was not adequately engaged with, and resolved.

As to the first. The Respondent's decision of 10 August 2018 stated in clear terms that he accepted the 14 October 2016 application for ILR did not fall for refusal by reference to the "suitability" requirements of S-LTR of Appendix FM. However when the appeal was called on for hearing before Judge Lawrence, the presenting officer indicated that he intended to rely upon the decision of SIJ Kekic of 8 December 2009 to show that the Appellant's dishonesty meant that he did not meet the requirements of paragraph S-LTR either when he submitted his application, or, at the date of the hearing. This was a matter that it was said should be weighed in the Respondent's favour in the assessment of the proportionality of the decision. Faced with this change in stance, which was a withdrawal of a concession, of which he had been given no notice, the Appellant sought an adjournment in order to; (i) place evidence before the Tribunal to show that he had genuinely and innocently studied at the Cambridge College of Learning, and that he was therefore the innocent victim of a fraud, and, (ii) research the litigation over the Cambridge College of Learning, subsequent to the decision in NA, the evidence relied upon, and the content of the decisions that were made. (With hindsight it appears that this is

a reference to at least the reported decisions in Khan and Tabassum [2011] UKUT 249, and TR (CCOL applications) Pakistan [2011] UKUT 33.) This application was refused, apparently on the sole basis that the Appellant could be taken to be familiar with the decisions that had been made against him in the past [4]. The "ambush" point was not overtly addressed. We are satisfied, and indeed we understand Mr Bramble ultimately to have agreed that to withdraw a concession in this way was to all intents and purposes an ambush of the Appellant, and, that the Judge's approach to that ambush deprived the Appellant of a fair hearing.

The second complaint concerns the Judge's approach to the break in the chain of continuous lawful residence between 23 April 2010 and 19 October 2011. It was the Appellant's case that "but for" the operation by the Respondent of the unlawful scheme for the issue of approvals before marriages could be undertaken, he would have married Ms R, and he would then have been able to successfully apply for leave to remain as her spouse, in late 2009. In that event, he argues, there would have been no break in the chain of continuous lawful residence. He relies, with hindsight, upon the guidance as to the relevant policy to be found in Masum Ahmed [2019] EWCA Civ 1070

It is accepted before us that the details of the "but for" argument emerged very late, and that its constituent parts could not be discerned from the grounds of appeal. Indeed we are satisfied that in reality it only emerged in the Appellant's witness statement dated 12 March 2019 filed at the hearing.

The constituent assertions of primary fact that underpin this argument are that he and Ms R had tried to marry in 2009, but they had been refused by a Registrar because he had no immigration status, and they did not have the Respondent's approval to do so [#14-20]. Because the application for leave as a spouse that he did make in 2011, that was based upon his later marriage to Ms R was successful, the Appellant's argument as framed by Mr Farhat before us was that an application of this nature would similarly have been successful if it had been made in 2009.

The constituent assertions of primary fact are uncorroborated by any evidence from Ms R, the Registrar who is said to have refused to marry them, or, the lawyers who were in 2009 retained by the Appellant to advise him upon his ongoing immigration appeal (although one might have expected the Appellant to have that available to him at least, if he had consulted them upon his ability to marry Ms R). There was no application made to the Respondent in 2009 for the discretionary issue of an approval for the marriage he proposed to Ms R, although it is accepted before us by Mr Farhat that it would have been open to the Appellant to make one. Nor is there any corroboration of the Appellant's claim that he was advised by the immigration lawyers that he then retained that there was no point in making an application for the discretionary issue of an approval to the marriage because it would fail.

Nor has there been any attempt to demonstrate through relevant evidence that an application for leave to remain as the spouse of Ms R would have been successful if he had been in a position to make such an application in late 2009

– the Appellant simply relies on the proposition that since the application he made two years later was successful, then an application made in 2009 must have succeeded. That proposition strikes us as somewhat speculative. As we indicated to Mr Farhat during the course of the hearing the Appellant has yet to produce any evidence in the course of this appeal to show that save for the inability to marry because of the lack of a certificate of approval, he was otherwise in a position to make a successful spouse application in late 2009, because Ms R was then in a position to sponsor such an application successfully. This proposition may, or may not, be capable of being discerned from the evidence that was supplied in support of the 2011 application for leave to remain as a spouse, but which was not served in support of this appeal. It is however unnecessary for us to engage with the evidence relied upon in support of these various assertions and proposition, that must be for another day.

Moreover, the Appellant's general credibility as a witness of fact will in due course need to be viewed and assessed through the lens of (a) the finding by Upper Tribunal Judge Kekic in 2017 that he had not disclosed the breakdown of his marriage to Ms R when making his 2014 application, and, (b) since the concession over paragraph S-LTR is now withdrawn, whatever findings will ultimately be made in relation to his case that he was an innocent victim of a fraud concerning CCOL. As to the latter, the starting point must be the decision of SIJ Kekic of 2009 that he had relied upon a false document, and, the decision in NA that CCOL never offered the course the Appellant claimed to have undertaken. We note the "innocent explanation" relied upon by the Appellant, and the Appellant's application to the Judge for an adjournment in order that he might file evidence in its support. The assessment of the weight that can be given to the evidence he relies upon must be for another day, and we say no more about it.

What is however clear to us, is that the Judge failed adequately to engage with the evidence that was before him, and that was relied upon by the Appellant in support of his argument that "but for" the Respondent's unlawful scheme, he would have had no break in the chain of continuous lawful residence.

It is accepted before us that if the Respondent made out his case in relation to paragraph S-LTR then there would be an enhanced public interest in removal. Even without that, if the Appellant failed to make out his case on the "but for" argument, then it is accepted before us by Mr Farhat in the light of Onwuje [2018] EWCA Civ 336 that a "private life" appeal based essentially upon the commercial interests he claims to have established in the UK would be likely to carry little weight against the prevailing public interest. The issue of where the balance of proportionality may lie must however be one that falls to be decided upon another day in the light of all the relevant facts, and after a procedurally fair hearing. It is not possible for us to make that assessment, not least because there is no finding of fact one way or the other as to whether the Judge was satisfied on the balance of probabilities that the Appellant had become engaged to Ms R in November 2009, that they had visited their local Registrar together, that they had been refused a marriage, or, that he had been advised by his then lawyer that there was no point his applying for a

certificate of approval because it would be refused. There is also no finding of fact to record whether the Judge was satisfied, or not, that the second proposition was made out.

We have noted Mr Bramble's argument that none of this is material because the Appellant could not have varied his 2008 Tier 1 (PSW) application in late 2009 to rely upon a marriage to Ms R, because a decision had already been made upon it; JH (Zimbabwe). We also note his argument concerning the operation of section 3C, that the effect of any withdrawal of the appeal against the refusal of the 2008 application, would serve only to extend the length of the break in the chain of continuous lawful residence. We also note the decision in Masum Ahmed [2019] EWCA Civ 1070. These arguments may have significant force, but we are satisfied that they must await resolution for another day. This is a human rights appeal, and the Tribunal must first make findings in relation to the relevant assertions of fact relied upon by both parties in a procedurally fair hearing, and this has not yet taken place. The Appellant has been on notice since the hearing below that the Respondent does rely upon paragraph S-LTR of Appendix FM, and that any concession otherwise is withdrawn. That position was confirmed before us. Whilst it will be for him to choose how to engage with the assertion that he was knowingly dishonest in his reliance upon a CCOL diploma, findings must be made in relation as to whether the Respondent has discharged the legal burden of proving his dishonesty.

Whilst we should not be taken to be giving any indication of the findings of fact that may ultimately be made by the Tribunal, we are satisfied that a fresh hearing is the only pragmatic course open, because it cannot be said that the Appellant has yet had a fair hearing of his appeal. In circumstances such as this, where it would appear that the relevant evidence has not properly been considered by the First Tier Tribunal, the effect of that error of law has been to deprive the parties of the opportunity for their case to be properly considered by the First Tier Tribunal; paragraph 7.2(a) of the Practice Statement of 13 November 2014. Moreover the extent of the judicial fact finding exercise required is such that having regard to the over-riding objective, it is appropriate that the appeal should be remitted to the First Tier Tribunal; paragraph 7.2(b) of the Practice Statement of 13 November 2014.

> To that end we remit the appeal for a fresh hearing by a judge other than First-tier Tribunal Judge NMK Lawrence, at the Hatton Cross Hearing Centre.
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> No interpreter is required.
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> The Appellant is now aware that the Respondent has withdrawn any concession to this effect, and does assert that he dishonestly relied upon a CCOL Post Graduate Diploma in IT, and that as a result he does not meet, and has never met, paragraph S-LTR of Appendix FM. It is for him to decide what evidence to file in support of his assertion that he has an innocent explanation for his possession and use of that document but any

further evidence that he seeks to rely upon in support of his appeal shall be filed and served by 5pm 24 August 2019.

The remitted appeal may be listed on the first available date after 29 August 2019.

Notice of decision

1. The decision did involve the making of an error of law sufficient to require the decision to be set aside on all grounds, and reheard. Accordingly the appeal is remitted to the First Tier Tribunal for rehearing, with the directions set out above.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

No direction was made in the First tier Tribunal, and none is requested of us.

Signed Date 23 July 2019
Deputy Upper Tribunal Judge J M Holmes