



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/19037/2018**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Bradford
On 23 August 2019**

**Decision & Reasons
Promulgated
On 09 September 2019**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MUHAMMAD UMAR FARAZ
(ANONYMITY NOT DIRECTED)**

Respondent

Representation:

For the Appellant: Mrs R Pettersen (Senior Home Office Presenting Officer)
For the Respondent: Mr Semega-Janneh (Counsel)

DECISION AND REASONS

1. This is the Secretary of State's appeal to the Upper Tribunal, brought with the permission of a judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (the tribunal) which it made on 01 May 2019. The tribunal decided to allow the claimant's appeal against a decision of the Secretary of State of 04 September 2018 refusing to grant leave to remain on human rights grounds.
2. By way of background, the claimant is a national of Pakistan. He was born on 25 February 1992. He entered the United Kingdom on 03 June 2011 in

possession of a Tier 4 Student Visa valid until 21 March 2014. He studied accountancy. Prior to the expiry of his leave he says he undertook some Test of English for International Communication (TOEIC) tests in reading, writing, speaking and listening in the English language. He says he attended the School of Economics test centre in Manchester on 14 January 2014 to take those tests. He passed but the Secretary of State has alleged that he used a proxy test taker. On 21 March 2014, the last day of his leave, he applied for further leave to remain but that application was refused. He appealed that decision and was initially successful but the Upper Tribunal then set aside the tribunal's initial decision for want of jurisdiction. On 30 November 2016 the claimant applied for leave to remain on human rights grounds but the Secretary of State refused and, in so doing, relied upon his view that the claimant had indulged in deception with respect to the TOEIC tests. As to Article 8 on the European Convention on Human Rights (ECHR) the Secretary of State took the view that there were no 'exceptional circumstances' such as to justify allowing leave outside of the Immigration Rules.

3. The claimant's appeal was heard by the tribunal on 01 May 2019 (the date of its written reasons). Both parties were represented before the tribunal and the claimant gave oral evidence. The claimant asserted, or it was asserted on his behalf, that he had not used a proxy test taker and that he should, in all circumstances, be granted a period of leave under Article 8.
4. The first thing the tribunal had to consider was whether or not the claimant had used deception as alleged. The tribunal resolved that important matter in the claimant's favour. It did so notwithstanding written evidence which had been supplied by the Secretary of State in support of her contention. The tribunal, in explaining its reasoning, said this:

'17. I find that the appellant has provided a consistent and plausible account of the steps that he has taken to properly undergo testing of his competence in English. The appellant in oral evidence gave a detailed account of why he chose the test centre that he did, how he got there and its location. I find that his claimed level of English is consistent with the standard of English presented by the appellant in giving oral evidence before me, without the use of an interpreter; and that he has undertaken other examinations that are also commensurate with his claimed level of English.

18. I find that the evidence relied on by the respondent is insufficient to show that on the balance of probability the appellant engaged in deception in obtaining an English language certificate from ETS. That is because the evidence before me on which the respondent relies is almost wholly generic in nature with only limited consideration given to the individual circumstances of this appellant.

19. To the extent that the respondent has adduced evidence that relates to this appellant, it is limited to a single line entry from an ETS database and a summary document known as a Lookup Tool, which contains figures with no commentary. I find that limited dataset provided carries little probative weight in the absence of a narrative explanation of the figures and the absence of supporting substantive evidence. I find that the generic witness statements provide limited assistance in support of the respondent's claim that the

appellant deployed a proxy test taker in respect of the examination 14 January 2014.

20. I accept that the respondent's evidence shows that there has been widespread abuse at certain ETS centres but that in itself is not a sufficient basis on which to make a finding that this particular appellant, in relying on test certificates issued by ITS, engaged in deception in obtaining them.

21. In looking at the evidence as a whole, I find that the appellant is a credible witness. I therefore find the appellant's narrative of events to be reliable.'

5. The tribunal then turned its attention to Article 8 of the ECHR and asked itself whether the claimant could successfully benefit from it. Again, it resolved that matter in the claimant's favour. It said this:

'24. In considering the appellant's circumstances and the application of the human rights convention, I am aware of a number of cases that give guidance as to the correct approach when considering the relationship between the immigration rules and article 8 of the human rights convention. I do not consider it necessary to recite that guidance here. It is not disputed that the appellant in any event does not meet the requirements of the immigration rules so far as they relate to article 8 issues.

25. I also take into account of the guidance provided by the Court of Appeal in the cases of **Ahasan** and **Khan** which deal specifically with matters of deception and language testing. I also take account of the Nationality, Immigration and Asylum Act 2002 as noted above.

26. In the present case, I find that the appellant has been in the United Kingdom since 2011 and that over that period he has developed private life of sufficient depth to engage article 8. The appellant has developed his relationships with his family and has a network of friends.

27. I find that the respondent's refusal to grant leave has consequences of such gravity as to engage article 8 of the human rights convention and that such interference is in accordance with the law.

28. In considering if such an interference is necessary, in a democratic society, and in the interests of maintaining a fair and effective immigration policy, I take account of the fact that the immigration rules together with the amendments to the 2002 act show that considerable weight is to be attached the respondent's view that removal is in the public interest when undertaking the balancing exercise inherent in considering article 8.

29. In considering whether or not such interference is proportionate, I find that the appellant has not engaged in deception in obtaining his language test results. I further find that the Secretary of State was wrong to have refused his application for leave to remain as a student on the basis that the appellant had engaged in deception.

30. To the extent that it is necessary to consider section 117 of the 2002[sic] Act, I find that the appellant is able to speak English to a satisfactory level and as such would be able to integrate into society and is less likely to be a burden taxpayer in the light of prospects of employment. The appellant in the past has been successful in accessing the job market lawfully and when

unable to do so has not been a burden on the taxpayer by virtue of the financial support provided by his family.

31. I take into account the appellant's immigration history and that he arrived in the United Kingdom lawfully. I attach significant weight to the fact that the appellant arrived the United Kingdom in 2011 to pursue his studies and had taken steps to ensure that he complied with the immigrations rules in the light of concerns being raised in 2014 about the reliability of ETS certificates. I also attach significant weight to the fact that the appellant has suffered an injustice at the hands of the respondent who failed to properly weigh the evidence in the appellant's case and wrongly concluded that the appellant had engaged in deception in obtaining his language certificates from ETS.

32. I find that the appellant has developed a private life which for a period of time was enjoyed, whilst his immigration status was precarious. I attach limited weight to this aspect of the appellant circumstances because the appellant's immigration status has been undermined by the respondent's wrongful decision in this case and through no fault of the appellant.

33. I find that in the present case there are compelling reasons to show that the respondent's decision is disproportionate. Given the respondent's wrongful refusal of leave on the basis of the appellant having engaged in deception, I follow the guidance in the Court of Appeal cases that show that, in appropriate cases, an appellant should be afforded a reasonable opportunity of securing new leave.

34. In the circumstances of the present case, I find that refusal of the appellant's application, to the extent that it engages private life as noted above, would amount to a disproportionate interference. There are compelling reasons showing that leave should be granted outside the rules: the appellant has at all times sought conscientiously to comply with the immigration rules; has suffered unfairness at the hands of the respondent; and if he were returned, the appellant would be deprived of the opportunity of seeking new leave to study and of obtaining an accountancy qualification gained in the United Kingdom with all the subsequent advantages that would flow from that in the advancement of his career.

35. I therefore allow the appeal on the grounds of a claimed breach of article 8 of the human rights convention.

6. An application for permission to appeal to the Upper Tribunal, lodged by the Secretary of State, followed. Essentially, it was argued that the tribunal had failed to 'assess correctly the burden of proof'; had not properly assessed or understood the Secretary of State's evidence; had failed to consider the possibility that a person who spoke good English might nevertheless have reason to use a proxy test taker; had attached too much weight to the claimant's apparent ability to recall details of his journey to the test centre and the examination process; and had used Article 8 'as a general dispensing power'. Permission to appeal was granted on those grounds.
7. Permission having been granted there was a hearing before the Upper Tribunal (before me) so that it could be decided whether the tribunal had erred in law and, if it had, what should flow from that. Representation at that hearing was as stated above and I am grateful to each representative. I have taken what each of them said into account in deciding this appeal.

8. As to the attack upon the tribunal's decision with respect to the alleged use of a proxy test taker, whilst the tribunal did not clearly set out the shifting burden of proof, it clearly did proceed, correctly, on the basis that ultimately it was for the Secretary of State to demonstrate that there had been deception and that that had to be done to a balance of probabilities. It did not materially misdirect itself. It did not, as the grounds seem to suggest, simply proceed on the basis that all it had to be satisfied of was the claimant's ability to speak English. It clearly appreciated that what it had to decide, notwithstanding his competence or otherwise in English, was whether there had been deception. It said nothing to indicate that it thought a person who was competent in English would not or might not have reason to be tempted to use a proxy test taker. It simply did not think, on all the evidence, that that is what this claimant had done. It was for the tribunal to evaluate the weight to be given to the evidence relied upon by the Secretary of State and that is what the tribunal did. It was entitled not to accord significant weight to the written evidence of the Secretary of State for the reasons it gave notwithstanding a contrary view being expressed in the written grounds. It was entitled to attach some weight (which is all it did) to the claimant's ability to recall details of his journey to the test centre and the examination process. It did not regard the matter as being determinative or anything close to it. In short, it does not seem to me that the various arguments deployed by the Secretary of State go beyond disagreement with the tribunal's findings and conclusions as to this aspect of the appeal.
9. As to article 8, Mrs Pettersen initially pursued the 'general dispensing power' point before me. However, during the course of discussion she accepted that the way the tribunal had expressed itself at paragraph 34 of its written reasons suggested that all it had in mind was the granting of limited leave under article 8 to enable the claimant to obtain an accountancy qualification which it appeared he was seeking. Having accepted that she was, it is fair to say I think, much more reticent in pursuing the particular point about article 8 taken in the written grounds. In short, she accepted that that weakened the point.
10. It might be that, on one view, the tribunal's conclusions on article 8 were generous. But the tribunal has reasoned out how it arrived at its decision and I am satisfied its conclusion as to article 8 was open to it, was otherwise lawful, and has been adequately explained. It does seem to me that the tribunal did only have in mind the grant of a relatively short period of leave albeit sufficient to enable the claimant to undertake some further studies and, indeed, Mr Semega-Janneh confirmed that was all the claimant himself was seeking. No doubt that will be taken into account by the Secretary of State when considering how to proceed with respect to any grant of leave which may now follow in light of my decision that the tribunal did not err in law and that, in consequence, its decision must stand.
11. It follows from the above that the Secretary of State's appeal to the Upper Tribunal is dismissed.

Decision

The Secretary of State's appeal is dismissed.

No anonymity direction is made. None was sought and there doesn't appear to be any reason for making one.

Signed

**M R Hemingway
Judge of the Upper Tribunal
1 September 2019**

Dated