



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/07389/2019

**THE IMMIGRATION ACTS**

**Remote hearing heard  
at Field House on 20 August 2020  
(V)**

**Decision & Reasons Promulgated  
On 26 August 2020**

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

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

Appellant

**and**

**WAQAR HUSAIN SYED**

Respondent

**Representation:**

For the appellant:

Mr T. Melvin, Senior Home Office Presenting Officer

For the respondent:  
Solicitors

Mr Z. Raza, instructed by Marks and Marks

**DECISION AND REASONS**

1. For the sake of continuity, I shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the Upper Tribunal.
2. The appellant (Mr Syed) appealed the respondent's (SSHD) decision dated 03 April 2019 to refuse a human rights claim on the ground that the

appellant did not meet the 'Suitability' requirements of the immigration rules because of an allegation of ETS fraud and did not meet any other requirements of the immigration rules in any event.

3. First-tier Tribunal Judge Cockerill ("the judge") allowed the appeal in a decision promulgated on 25 February 2020. The judge summarised the appellant's immigration history and the respondent's reasons for refusal [1-11]. He summarised the evidence given and the submissions made at the hearing [17-37]. The judge made his findings relating to the key aspects of the appeal from [39] onwards.
4. The judge began his analysis by considering the appellant's submission that he had accrued 10 years' continuous lawful residence. This was not a matter that had formed part of the original human rights claim and was arguably a 'new matter' that should have been considered first with reference to section 85(5)-(6) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"). It is unclear from the face of the decision whether the judge considered whether it was a new matter, and if it was, obtained the respondent's formal consent to determine it. The respondent's position was that the appellant entered the UK on 06 December 2009, but his lawful leave came to an end when he was refused further leave to remain on 11 June 2014 with no right of appeal. The appellant's position was that he had made an in-time application for further leave to remain on 09 June 2014 but had never received a decision rejecting the application as invalid. The judge concluded that there was evidence to show that the appellant replied to the respondent's correspondence asking for further documents and that there was no evidence to show that the application was voided. He concluded that the application was outstanding, and that the appellant's leave was extended under section 3C of the Immigration Act 1971 ("the IA 1971") while the application was pending [39-42].
5. The judge turned to consider the allegation of fraud and deception relating to an English language test that was said to have been taken on 18 April 2012 at Premier Language Training Centre. The judge currently identified the three-stage approach to the legal framework [44]. He accepted that the generic evidence produced by the Secretary of State was sufficient to discharge the initial evidential burden of proof [45]. He went on to consider the appellant's evidence in response to the allegation and made the following findings:

"46. The critical point then arises as to whether or not the appellant has provided a plausible and innocent explanation for what has taken place. I have clearly had the benefit of seeing the appellant and have heard his oral evidence. I have also been able to study the papers lodged in this appeal. I accept, looking at the totality of the material, that the appellant has given an honest and clear account of sitting that test in person and he did not use a proxy. I find that he is a reliable witness on that critical feature. I can say that with some confidence because round about that time when there was this impugned TOEIC the appellant was a student at Oxford Brookes University. That in itself tells me a good deal about the appellant's capacity to speak English. Although he only gained

a third class degree he nevertheless gained a degree from that universityin (sic) applied accounting where of course the medium of instruction was English. Whilst that is not dispositive of this appeal it does help me in a significant way to understand how well the appellant grasped English at that time.

47. The overall picture that has been presented to me, and I stress this, is that the appellant has provided enough information about how he sat the test to persuade me that he has provided an innocent and plausible account.

48. The third stage then needs to be examined and I stress that the respondent has not answered the point at all that was raised by the appellant. The respondent has not provided any further evidence that would challenge and rebut what the appellant has been saying. The respondent has not met the test that lies on her. She has not discharged the burden at that third stage.

49. Looking then at the matter overall the appellant in my respectful judgment has shown that he had leave. The appellant has also shown that he did not use deception, that he obtained this TOEIC by going and sitting the test personally.

50. In all the circumstances there is nothing which can really be held against the appellant and in my judgment the requisite tests set in Paragraph 276B have indeed been met.”

6. The Secretary of State appealed the First-tier Tribunal decision on the following grounds:

- (i) The judge failed to take into account relevant considerations when calculating whether the appellant accrued a continuous period of 10 years' lawful residence, including the fact that the appellant was served with an IS.151A decision dated 20 March 2015, the effect of which was to curtail any existing leave including leave extended under section 3C IA 1971.
- (ii) The judge failed to give adequate reasons and failed to make findings relating to relevant evidence produced by the respondent regarding the scale of the fraud at Premier Language Training Centre.

7. A face to face hearing was not held because it was not practicable due to public health measures put in place to control the spread of Covid-19. The appeal was heard by way of a remote hearing by Skype for Business with consent of the parties. All issues could be determined in a remote hearing. The documents before the Upper Tribunal include those that were before the First-tier Tribunal:

- (i) The respondent's bundle (SSHD) before the First-tier Tribunal;
- (ii) The appellant's bundle (Mr Syed) before the First-tier Tribunal;
- (iii) The First-tier Tribunal decision;
- (iv) The respondent's grounds of appeal to the Upper Tribunal;

- (v) Written submissions on behalf of both parties before the Upper Tribunal.

### **Decision and reasons**

8. Having considered the written arguments and oral submissions I am satisfied that the First-tier Tribunal decision involved the making of an error of law and must be set aside. Although many of the judge's findings were open to him to make, I have come to the conclusion that it is the omissions that give rise to errors of law.
9. The question of whether the judge should have considered the 10 years continuous residence point as a 'new matter' was not raised in the grounds of appeal or the respondent's rule 24 response. However, the First-tier Tribunal's findings relating to that issue cannot stand in any event. Although it was open to the judge to consider the evidence relating to the application for an extension of leave to remain made on 09 June 2014, even if he was satisfied that there was no evidence to show that the application was deemed invalid, the decision is silent as to the effect of the service of the IS.151A form dated 20 March 2015.
10. The evidence was material to a proper assessment of whether the appellant had established 10 years' continuous lawful residence. The service of the IS.151A was highlighted in the summary of the appellant's immigration history in the decision letter and a copy of both parts of the form including the Statement of Reasons was contained in the respondent's bundle. The IS.151A form was a formal notice of immigration decision to remove the appellant under section 10 of the Immigration and Asylum Act 1999 ("IAA 1999") because it was alleged that he used deception in seeking leave to remain. The Statement of Reasons made clear that the decision was based on the information obtained from ETS, who confirmed that the English language certificate was cancelled because there was evidence to indicate that the appellant used a proxy test taker. The Part 2 notice that accompanied the decision made clear that the service of the decision curtails any existing leave (including leave extended under section 3C IA 1971) and there was no need to consider any outstanding applications as a result. The appellant had a right to appeal the decision from outside the UK.
11. Although Mr Raza accepted that the judge failed to consider the impact of the IS.151A notice in assessing the 10 year period of lawful residence, he argued that in light of the decision in *Ahsan v SSHD* [2017] EWCA Civ 2009 the error would make no material difference to the outcome if the judge's findings relating to the allegation of fraud were sustainable. It is not necessary to go into the detail of this argument before considering whether those findings involved the making of an error of law.
12. Mr Raza made detailed submissions relating to the respondent's evidence to explain why, in his submission, the judge was entitled to come to the

conclusions that he did. However well expressed those arguments were, the task I am asked to consider was whether the judge himself gave adequate reasons for finding that the evidence did not discharge the overall legal burden of proof.

13. It was open to the judge to find that the initial evidential burden of proof was discharged by the Secretary of State with little further explanation given that the courts have found that the 'generic material' produced by the respondent is sufficient to meet the initial burden: see *SM & Qadir (ETS - Evidence - Burden of Proof)* [2016] UKUT 229 and *SSHD v Shehzad* [2016] EWCA Civ 615. However, the 'generic material' considered in those cases consisted solely of the witness statements of Rebecca Collings and Peter Millington, combined with the 'look up tool' print out confirming the cancellation of the test as 'invalid'.
14. In this case the respondent produced further evidence including a 'look up tool' print out for the particular day the test was taken, showing the wider pattern of tests taken at the college. She also produced a copy of a report outlining statistics that were relevant to an assessment of how widespread the fraud might have been at the Premier Language Training Centre. Although the judge noted some key elements of this evidence when he summarised the decision letter at [5], at no point in the decision did he evaluate what weight should be placed on the evidence.
15. The more widespread the evidence of potential fraud, the more important it is for a judge to engage with the evidence. In this case the 'look up tool' print out for 18 April 2012 showed that 68% of test results for that day were cancelled as 'invalid' and 32% cancelled as 'questionable'. In other words, none of the tests for that day were deemed to be valid by ETS due to evidence of widespread fraud. The report relating to Premier Language Training Centre dated January 2017 concluded that the majority of tests taken at the Premier Language Training Centre during the period between 06 March 2012 and 05 February 2014 were not conducted under genuine test conditions. When ETS conducted voice analysis upon the speaking element of the 5,055 speaking tests taken it deemed 75% to be invalid (3,780/5,055). The other 1,275 speaking results were deemed 'questionable'. This evidence suggested that persistent and widespread fraud may have taken place at the Premier Language Training Centre over a period of nearly a year.
16. The evidence relating to the potentially widespread nature of the fraud was relevant to a proper assessment of (i) the credibility of the appellant's evidence; and (ii) whether the respondent had discharged the legal burden of proof as a whole.
17. The judge was impressed by the evidence given by the appellant at the hearing, but when one considers his findings at [46] he fails to place the appellant's account in the context of the evidence produced by the respondent. Although the fact that a person might be able to speak

English is a factor that could be taken into account, the judge gave no consideration to what was said in *MA (ETS - TOEIC testing)* [2016] UKUT 450 at [57], where the Upper Tribunal observed that there may be a range of reasons why a person who can speak English might still cheat. In this case, the judge recorded at [28] that the appellant said that he did not have time to take an IELTS test, which was why he opted to take the TOEIC test before he applied for further leave to remain. The judge failed to consider whether this might have acted as an incentive for the appellant to cheat even if he spoke English.

18. Although many of the judge's findings were open to him to make, I find that his failure to consider the appellant's credibility in light of the respondent's evidence and/or to engage with the evidence of apparently widespread fraud at the particular test centre in question, were material omissions that amount to errors of law. Because I have found that there is also an error in the judge's findings relating to the allegation of ETS fraud it is not necessary to deal with the arguments made with reference to *Ahsan*. The judge failed to consider whether service of the IS.151A 'stopped the clock' for the purpose of continuous lawful residence.
19. The usual course of action would be for the Upper Tribunal to remake the decision even if it involves making further findings of fact. Although there was some discussion as to whether the judge's findings relating to the application for leave to remain made in June 2014 should be preserved, I decided that there would need to be a fresh hearing and that no findings should be preserved.
20. The issue of whether the appeal should include consideration of the appellant's claim to 10 years lawful residence is yet to be determined. The matter did not form part of the original application and has not been formally considered by the respondent. The success of this aspect of the case is likely to be inextricably linked to the allegation of ETS fraud given my observations about the effect of the section 10 decision and the fact that a grant of leave to remain on that basis is reliant on there being no reasons why it would be undesirable to grant ILR and there being no reason to refuse the application under the general grounds for refusal.
21. I note that the appellant's solicitors purported to make a "Statement of Additional Grounds under s.120" before the First-tier Tribunal hearing, but this disclosed a fundamental misunderstanding of the relevant procedure. A Statement of Additional Grounds under section 120 NIAA 2002 is a form issued by the respondent. The plain wording of section 120(2) makes this clear. Merely stating it on correspondence generated by the solicitor does not engage the wider scope of matters to be considered by the First-tier Tribunal under section 85(2) NIAA 2002. As far as I can see, there is no evidence to suggest that the respondent has issued a section 120 notice in this case.

22. Although the respondent has now been on notice of the issue for some time and should not be disadvantaged if it is relied on, it is a 'new matter' that has not been considered and is likely to engage the operation of section 85(5) NIAA 2002. Because it is not clear whether the First-tier Tribunal had consent to determine the matter, I consider that there is no utility in preserving a single finding. It will be a matter for the next First-tier Tribunal judge to assess once the respondent has confirmed whether she gives consent for it to be considered in compliance with the direction made below.

### **Direction**

23. **The respondent** shall confirm in writing at least 14 days before the First-tier Tribunal hearing whether she gives consent for paragraph 276B of the immigration rules to be considered.

### **DECISION**

The First-tier Tribunal decision involved the making of an error on a point of law

The case is remitted to the First-tier Tribunal for a fresh hearing

Signed M. Canavan                      Date 26 August 2020  
Upper Tribunal Judge Canavan

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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**