



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

HU/02820/2019 (V)

THE IMMIGRATION ACTS

Heard by *Skype for Business*
on 13 January 2021

Decision & Reasons
Promulgated
on 9 February 2021

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

Md HABIBUL ISLAM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A Sayem, of Uzma Law Ltd
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh, born on 18 December 1986.
2. By a decision dated 28 January 2019, the respondent refused the appellant's human rights claim (a) on suitability grounds, because he had used deception in an English language (ETS) test taken on 22 February 2012; (b) because he did not meet the requirements of paragraph 276ADE of the rules on private life; and (c) because there were no exceptional circumstances or unjustifiably harsh consequences warranting a grant of leave outside the rules.

3. FtT Judge Farrelly dismissed appellant's appeal by a decision promulgated on 24 August 2019, concluding that the appellant had used deception in the test, and there was nothing in his private life, including his business interests, to give him a right to remain; particularly in light of the 2002 Act, section 117B, on the little weight to be given to that private life.
4. The appellant sought permission to appeal to the UT. Grounds [1 - 5] challenge the finding on deception for failing to apply the shifting burden of proof, for overlooking case law and evidential points favourable to the appellant (including the fact that he had never relied upon the ETS certificate), and for speculation; [6] says that case law justified more weight being given to his businesses in assessing the appellant's private life; and [7] alleges inadequate consideration of "insurmountable obstacles" to reintegration into Bangladesh.
5. FtT Judge Simpson granted permission on all grounds on 17 December 2019, adding the observation that since the hearing the respondent had stated to Parliament that operational guidance was to be updated:

... to ensure we are properly balancing a belief that deception was committed some years ago against other factors that would normally lead to leave being granted ... to ensure no further action is taken in cases where there is no evidence of an ETS certificate ... [being] used in an immigration application.
6. In a response dated 18 May 2020 to UT directions, the appellant sought to rely on the ministerial statement and on the "APPG report", published on 18 July 2019, which describes evidence of cheating in ETS tests as "confusing, misleading, incomplete and unsafe". The appellant said that guidance had been updated on 6 March 2020 (presumably in line with the statement, although no direct citation was given). The response finally submits that as the appellant has resided in the UK for over 10 years, and is "running a successful business with his team-mate", the damage caused by the adverse decision "will be irreparable".
7. The appellant filed a skeleton argument dated 19 October 2020, modifying the grounds into [1] error in circumstances where the ETS certificate was never used [2] failure to apply the correct legal test (shifting burden, and standard of proof) [3] failure to have regard to material factors [4] unsustainable findings in light of the APPG report and [5] erroneous finding on article 8 outside the rules. The UT is asked to find that the FtT materially erred in law, and that the case should be remitted to the FtT for a fresh hearing before another judge.
8. The SSHD did not file responses to the UT's various directions.
9. The technology enabled an effective remote hearing.
10. Mr Howells said that considering the ministerial statement, and there being no evidence that the appellant had tried to use deception to obtain leave, the respondent entirely withdrew the ETS allegation, and the FtT should be taken to have erred in law on that point.

11. Such error of law is, at highest, on a retrospective and constructive basis. Although the hearing proceeded on the basis of the concession, without further analysis, I rather doubt, on reflection, if this is a legal error. Ministerial statements and changes of Home Office policy are not of the same nature as case law, subsequent to a hearing, which is deemed authoritatively to state the law as it should always have been understood. However, as well as the concession, there was some apparent merit in parts of the appellant's "ETS grounds", particularly on the APPG report. After the concession by Mr Howells, the hearing proceeded as if the ETS allegation was entirely irrelevant, so those matters were not developed. The matter may be academic, but I record a finding that the concession and the grounds, taken together, disclose error of law in the finding of deception.
12. Mr Howells said that the respondent's concession should not lead to the decision being set aside, for these reasons. The effect of withdrawal of an ETS allegation depended on the circumstances of the case. The previous decision against the appellant in 2013 was based not on a fraudulent certificate, but on breach of employment conditions, which he had admitted. As the alleged fraud had not been held against him in any decision prior to the one leading to these proceedings, he did not qualify for the benefit of the policy. The ETS matter made no difference to the article 8 outcome. The decision should stand.
13. Mr Sayem expanded upon the grounds and skeleton argument. He submitted that the error was material; the FtT's decision should be set aside; the appeal should be allowed, based on the appellant's entitlement under policy to 6 months leave; if not, the case should be remitted.
14. I am obliged to both representatives for their assistance. The concession by Mr Howells was well considered. Mr Sayem has pursued every available point for the appellant, both in the FtT and in the UT. Having heard their submissions, I reserved my decision.
15. It was common ground that the period of 60 days mentioned in the skeleton argument had since been extended to 6 months. Neither representative took me to the source. I have identified it as *Educational Testing Service (ETS): casework instructions Version 4.0*, at page 9:

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.
16. The appellant is now entitled to a decision as if the allegation of deception had never been made.
17. The FtT's finding on deception played a significant part in its conclusion on proportionality – see [50] and [56]. The outcome might have been against him, even without that finding, but it cannot confidently be said that it must have been so. The point is so material as to require the decision to

be set aside (without any reflection on the judge, being based on significant matters which have emerged since his decision.)

18. There was some force in Mr Howell's point that the appellant did not benefit from the ministerial statement, because his application, even without that feature, would not normally have led to leave being granted; but the case turns on the policy, rather than on the statement. Mr Sayem stressed the value of the appellant's business interests to the community, but he appears to have fallen well short of the rules to remain in that capacity. On the evidence which was before the FtT the argument that his is an exceptional case in terms of private life is weak, if not fanciful. So is the suggestion of any real difficulty re-integrating in Bangladesh. Attention has not been drawn to anything to show a right to remain in the UK in the longer term, other than through some application meeting the requirements of the immigration rules. However, in all the circumstances, and given the history of these proceedings, policy, fairness, and proportionality require that he should have 6 months leave to enable him to make any such application as may be open to him (or to leave the UK).
19. The decision of the FtT is set aside. The appeal, as originally brought to the FtT, is allowed on human rights grounds, to the extent explained in the previous paragraph.
20. No anonymity direction has been requested or made.

Hugh Macleman

22 January 2021
UT Judge Macleman

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.