



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

Appeal Number: HU/08369/2019

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On the 23rd September 2021

On the 20th October 2021

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MD RAKIB AHAMED
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the appellant: Ms A Everett, Senior Home Office Presenting Officer

For the respondent: Mr M Biggs, counsel, instructed by City Heights Solicitors

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Burnett (the judge) who, in a decision promulgated on 14 November 2019, allowed the human rights appeal of Mr Ahamed (the respondent) against the decision of the Secretary of State for the Home Department (“the appellant” or “SSHD”) dated 23 April 2019 refusing his human rights claim made on 8 February 2019.

Background

2. The respondent is a national of Bangladesh, born on 5 December 1991. He first entered the UK on 25 October 2009 with entry clearance as a Tier 4 (General) Student. He was 17 years old. He was granted further periods of leave to remain as a Tier 4 (General) Student, the last valid until 9 May 2015. He made an in-time application outside the immigration rules which was then varied to an application for further leave to remain as a Tier 4 (General) Student. This was refused on 11 September 2015, and on 24 September 2015, an Administrative Review upheld the refusal.
3. The decision dated 11 September 2015 was based on a belief that the respondent used a proxy test taker in respect of the speaking element of an TOEIC English language certificate issued by Educational Testing Service (ETS) upon which he relied on an earlier application for leave to remain made on 3 October 2012. The SSHD additionally refused the application on the basis that the respondent relied on a letter from the NCC Bank in Bangladesh confirming that he had been give a loan of 1,400,000 taka, but this was not a loan provided by the national government, the state of regional government or a government sponsored student loan company, or part of an academic or educational loans scheme, as required by the Immigration Rules. The Administrative Review maintained both limbs of the decision of 11 September 2015.
4. The respondent challenged these decisions by way of judicial review proceedings, but he was not granted permission. No papers relating to the substance of the judicial review challenge has been provided to me.
5. In her decision of 23 April 2019 refusing the respondent's human claim, the SSHD relied on the ETS allegation to support her finding that the human rights claim fell to be refused under the Suitability requirements set out in Appendix FM to the Immigration Rules. The SSHD also refused the human rights claim, which had been made on the basis of the private life established by the respondent in the UK, under paragraph 276ADE(1) of the Immigration Rules. The SSHD rejected the respondent's contention that the refusal of his human rights claim would result in a disproportionate interference with his Article 8 private life rights. The respondent appealed the appellant's decision pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

The decision of the First-tier Tribunal

6. The judge had before him bundled of documents that included, inter alia, a statement from the respondent, copies of the decisions of 11 September 2015 and 23 September 2015, copies of the respondent's

Bachelor of Arts certificate and his Post-Graduate Diploma certificate, additional educational certificates and documents, reference letters from friends, and a psychiatric report indicating that he had symptoms of a moderate depressive episode.

7. At [14] of his decision, in a section dealing with the appeal hearing, the judge stated:

“At the start the parties agreed that the issue of the fraud in respect of the English language certificate would be determinative of the article 8 issue.”

8. At [19] of his decision, under the heading ‘*Hearing*’, the judge stated:

“There was an initial discussion regarding the appeal. I have set out above that it was agreed between the parties that in this case the fraud allegation would be determinative of the article 8, human rights appeal. The focus of the appeal was thus the alleged fraud.”

9. The judge then focused on the allegation of fraud. In his decision the judge summarised the submissions of the parties, accurately directed himself according to the appropriate burden and standard of proof, referred to relevant authorities relating to ETS litigation, and evaluated the evidence before him, including the respondent’s oral evidence. The judge concluded that the SSHD failed to discharge the burden of proof to show that the respondent used a proxy tester. No challenge had been raised by the SSHD in respect of this factual finding.

10. At [54] the judge stated:

The parties agreed that if the deception allegation issue was determined in favour of the [respondent], the human rights appeal should be allowed. I have not analysed this aspect very much in the circumstances. Mr Biggs pointed to the decision in *Ashan* at paragraphs 119 to 121 for support that if the deception decision was decided in the [respondent’s] favour, he should be treated as having law for leave for the entire time he has been in the UK. In my judgement I cannot go that far. The [SSHD] needs an opportunity to look at the [respondent’s] immigration history again in the light of this decision and consider the Court of Appeals comments in those paragraphs. Also, the [SSHD] should be allowed to look at the APPG report and the recommendations made therein as to whether this [respondent] might be granted a period of leave. I note that the Court of Appeal stated that its conclusions were tentative given it was not fully argued before that. I also note that it was acknowledged that not in every case should discretion be exercised in a particular appellant’s favour.”

11. At [55] the judge concluded that the SSHD’s decision was a disproportionate interference with the respondent’s private life in its reliance upon deception. The judge expressed a hope that the SSHD

would look again at the respondent's immigration history and decide whether discretion could be exercised in his favour, as invited to do by the Court of Appeal in Ashan & Ors v SSHD [2017] EWCA Civ 2009.

The challenge to the judge's decision

12. The grounds of appeal noted that the respondent's Tier 4 (General) Student application was refused in 2015 on the basis that he used a proxy test taker and because of an issue with his funding. The respondent's leave had never been curtailed or invalidated, it had simply not been renewed because he didn't meet the Immigration Rules. The grounds state that, "The erroneous concession by the PO, should not have prevented the Judge from considering [the respondent's] Article 8 claim fully, and the judge made no attempt to do so, and expressly does not address it."
13. The grounds further contend, although in a rather confusing manner, that the judge erred in law when suggesting that the SSHD should look at the respondent's immigration history and decide whether discretion should be exercised in his favour in line with Lord Underhill's comments in Ashan at paragraph 119 to 121. The grounds submit that it was the role of the First-tier Tribunal to make a finding on any period of leave to be granted and the onus should not be on the SSHD.
14. In her characteristically clear and concise submissions, made in response to a skeleton argument provided by Mr Biggs for the 'error of law' hearing, Ms Everett submitted that although a Presenting Officer has the power to concede things, there could not be a concession which narrowed the scope of Article 8 ECHR. In respect of a Home Office policy - 'Educational Testing Service (ETS): casework instructions', version 4.0, published on 18 November 2020 ("the ETS policy"), which stated, under the heading 'Implementing appeal findings', "*If the appeal is dismissed on human rights grounds but a finding is made by the Tribunal that the appellants did not obtain the TOEIC certificate by deception, you will need to give effect to that finding by granting 6 months leave outside the rules. This is to enable the appellant to make any application they want to make or to leave the UK*", her enquiries indicated that the policy was restricted to situations where a person's application for leave to remain had only been refused on the basis that they used deception in obtaining the TOEIC certificate. In her submission the extract of the policy set out above was a response to the obligation on the Home Office identified by Underhill LJ at paragraph 120 of Ashan.

15. Mr Biggs relied on his skeleton argument and resisted the SSHD's appeal on three bases. Firstly, the ETS policy was clear in its construction and did not contain any proviso or exception in respect of the approach to take to individuals who were found, on appeal, not to have obtained their TOEIC certificates by deception. The terms of the ETS policy indicated that there was no sufficient public interest in the respondent's removal, and it followed that the judge correctly allowed the appeal on Article 8 grounds. The ETS policy reflected the SSHD's view of the public interest and was therefore effectively dispositive in the respondents favour of the public interest balance. Although the ETS Policy referred to by both parties was dated after the judge's decision, both Mr Biggs and Ms Everett believed that an earlier iteration had been published in 2019.
16. In his 2nd line of defence Mr Biggs submitted that the judge was entitled, at [54] and [55], to conclude that it would be disproportionate to remove the respondent in at least partial reliance upon a false allegation of dishonesty without the SSHD considering how to remediate the injustice caused to the respondent by that allegation, pursuant to her obligation under paragraph 120 of Ahsan v SSHD [2017] EWCA Civ 2009. The belief that the respondent used deception was central in the SSHD's decision and, in light of the judge's findings that the respondent did not cheat, it was for the SSHD to then exercise her own discretion in terms of the duration of any leave to be granted to the respondent and he could not be lawfully removed until this was done.
17. Mr Biggs thirdly submits that the SSHD should not be permitted to resile from her concession and that the judge made no material error of law in light of that concession. The SSHD was entitled, through her Presenting Officer, to conclude that the respondent could not be compatibly removed with section 6 of the Human Rights Act 1998 as the SSHD would need to reconsider her decision-making in light of the judge's findings. The Upper Tribunal, in any event, has a discretion to allow the withdrawal of a concession. The grounds of appeal did not explain how the alleged mistake in making the decision occurred, or even what the mistake was.

Discussion

18. Having read the judge's decision with care I am in no doubt that a concession was made by the Presenting Officer that, if the respondent was found not to have used a proxy test taker in respect of his TOEIC test, the refusal of his human rights claim would breach Article 8 ECHR.
19. The SSHD's concession, made by her representative empowered to do so, was one rationally open to the Presenting Officer on the evidence before the tribunal relating to the respondent's particular

circumstances. It was not a concession on a matter of law but one in respect of the factual matrix supporting this particular respondent's Article 8 human rights claim. Nor can I discern any basis for concluding that the concession involved an unlawful narrowing of the scope or parameters of Article 8. The decision does not indicate that the Presenting Officer focused on narrow elements relevant to the Article 8 proportionality assessment. In her Reasons for Refusal Letter the SSHD had already accepted that, having resided in the UK for over 10 years since the age of 17, the respondent had established an Article 8 private life. The evidence upon which the respondent relied in his appeal, which included friends attesting to the degree of his integration and his various educational certificates and awards, amply supported this acceptance. The respondent's statement referred to matters particular to him relating to the nature and quality of the private life he established in this country, the erosion of his ties to Bangladesh, and his concerns on being a Humanist in Bangladesh. None of this was challenged by the Presenting Officer.

20. Although there is no reference in the judge's decision to the maintenance issue raised in the decision of 11 September 2015, this decision, as well as the Administrative Review of 23 September 2015, were included in the respondent's bundle of documents, and the judge made specific reference to these decisions in his decision (at [16]). There is no adequate basis, on the face of the documents before me, to suggest that the Presenting Officer at the First-tier Tribunal hearing or the judge were unaware of the full basis of the 11 September 2015 decision. The Presenting Officer must be taken to have read all the papers in the case and to be aware of the full immigration background, including the dual basis for the September 2015 decisions. There is, for example, no letter or statement from the Presenting Officer indicating that she was unaware of the basis of the 2015 decisions or that her concession was made in error. At [19] the judge referred to a discussion between the parties regarding the appeal and noted their view that "in this case" the fraud allegation would be determinative of the Article 8 human rights appeal. This indicates that the concession was made on the basis of the particular facts of this appeal. The SSHD may now disagree with the concession that was made, but I am not persuaded that the concession was erroneous or a mistake. Applying the principles relating to concessions in AM (Iran) v SSHD [2018] EWCA Civ 2706, and having regard to the guidance and principles summarised by the Court of Appeal in Notting Hill Finance Ltd v Sheikh [2019] EWCA Civ 1337 and Crane v Sky In-home Limited and Anr [2008] EWCA Civ 978, I do not permit the SSHD to resile from her concession.
21. The judge explained that he did not analyse the Article 8 claim 'very much' precisely because the SSHD accepted that the Article 8 claim would succeed if the ETS aspect of the appeal was determined in the respondent's favour. In these circumstances, and in the absence of

any prima facie irrationally or unlawfulness in the making of the concession, there was no need for the judge to engage in a detailed proportionality assessment or, as the grounds suggest, to have considered the Article 8 claim more fully. Whilst it may be unfortunate that the judge did not summarise the basis for the SSHD's concession, and he would be advised to do so in the future, the factual matrix of the respondent's appeal was not such that no reasonable Presenting Officer, properly directing her mind as to the facts of the case and the relevant legislative framework and legal principles relating to Article 8, would have been entitled to make the concession. Nor can it be said that no reasonable judge, properly directing him or herself on the facts and the law, would have been entitled to allow the appeal on Article 8 grounds.

22. Nor can I detect any legal error in the judge's comments at [54] and [55] relating to the SSHD's discretion in granting leave to remain pursuant to the obligation identified at [120] of Ahsan. Contrary to the assertion in the grounds, it is not the role of the First-tier Tribunal (or indeed the Upper Tribunal) to make a finding on any period of leave that may be granted to an individual whose appeal is allowed; that is a matter for the SSHD. All the judge was saying was that any period of leave that may be granted by the SSHD should take full account of the respondent's immigration history and the nature of the obligation identified in paragraphs 119 to 121 of Ahsan.
23. Having accepted Mr Bigg's third line of defence, it is not necessary for me to determine consider his other arguments.

Notice of Decision

The making of the First-tier Tribunal's decision did not involved the making of an error on a point of law.

The Secretary of State for the Home Department's appeal is dismissed.

Signed D.Blum

Date: 24 September 2021

Upper Tribunal Judge Blum