



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

Appeal Number: HU/00286/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 15 August 2019**

**Decision & Reasons Promulgated
On 31 October 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

BADHAN PAUL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr P. Saini, instructed by Lawmatic Solicitors

For the respondent: Mr T. Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. For the sake of continuity, I will continue to refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.
2. The appellant (Bahdan Paul) appealed the respondent's decision dated 10 December 2018 to refuse a human rights claim. The respondent was not satisfied that the appellant met the 'Suitability' requirements of the immigration rules because it was alleged that he obtained a previous English language certificate by deception. The appellant fell far short of

the long residence requirement contained in paragraph 276ADE(1)(iii) of the immigration rules. The respondent found that there were no 'very significant obstacles' to the appellant's integration in Bangladesh, a country where he was still likely to have linguistic, cultural and familial ties. There were no other exceptional circumstances to justify granting leave to remain on human rights grounds.

3. First-tier Tribunal Judge Lucas ("the judge") allowed the appeal in a decision promulgated on 06 June 2019. The judge noted that the appellant had prepared a lengthy witness statement, which outlined his qualifications and gave details about the English language test he says he took in 2012 [5-10]. The judge heard evidence from the appellant and noted the submissions made by the parties [13-16]. He went on to make the following findings:

- "19. The Respondent has simply failed to discharge the burden of proving that the Appellant has deployed deception in this case. Due to the efforts of the Appellant himself there is a USB stick that purports to prove that the Appellant deployed a proxy for his test. Yet, there is absolutely no identity document or other way of referring this USB stick to the Appellant. It is evidentially useless. There is no other evidence other than the generic evidence that the tests for the 20th June 2012 were cancelled or invalidated due to cheating. There is no specific evidence relating to the Appellant at all. The burden of disproving dishonesty does not fall upon the Appellant.
20. In reality, the Appellant has provided cogent and detailed evidence of his participation in the tests on the 20th and 22nd June 20102 (sic). It is an oddity of this case that the Respondent appears not to take issue at all with the tests undertaken at the college on the 22nd June 2012.
21. Moreover, the Appellant has outlined his educational history in the UK over the period 2012-2015 and this includes achieving a BA and MBA. The Tribunal agrees, as a matter of common sense, therefore, that he would have no need to deploy a proxy to obtain a basic ETS qualification.
22. In the view of the Tribunal, the Respondent has failed to prove dishonest in this case (sic). It follows that the appeal of the Appellant relating to the issue of ETS is allowed.
23. Contrary to the assertion of Mr Turner, the Tribunal has no power to grant leave to remain in the UK. It is not the decision maker and the decision to grant or not to grant leave to be here is a matter for the Respondent.
24. However, so far as this appeal relates to the issue of ETS, it is allowed. It is then a matter for the Respondent to make a decision as to whether the Appellant is or should be granted further leave to remain in the UK (sic)."

4. The Secretary of State's original grounds were poorly pleaded and unparticularised. At the hearing, Mr Lindsay distilled the grounds into the following points:

- (i) The judge failed to assess the evidence according to the three stage approach outlined in *SM & Qadir (ETS - Evidence - Burden of Proof)* [2016] UKUT 229;
- (ii) The judge failed to take into account relevant evidence produced by the Secretary of State.

Decision and reasons

5. The judge did not approach the assessment in a structured way with reference to the relevant case law. That matters not as long as he identified the correct principles and applied them with reference to the relevant evidence. However, because he did not conduct a structured approach beginning with consideration of the evidence produced by the Secretary of State, in order to consider whether it met the evidential burden of proof, he failed to take into account evidence that was relevant to a proper assessment of the allegation of deception. Had he conducted a structured assessment he may have observed that in addition to the 'generic evidence' he noted, but did not refer to in any detail at [19], that there was other relevant evidence in the respondent's bundle that needed to be considered and weighed against the evidence produced by the appellant in response.
6. Had the generic evidence 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', it would have been sufficient to meet the initial evidential burden of proof and the judge could have gone on to consider whether the appellant had provided an innocent explanation in response: see *SM & Qadir*.
7. Clearly the judge considered the appellant's evidence detailed and credible [20]. However, the evidence produced by the respondent did not include entirely generic evidence relating to fraud in English language test centres. The respondent's bundle also contained a 'look up tool' print out relating to the specific college where the appellant says he took the test. The print out confirmed that out of 129 tests taken on 20 June 2012 53 were deemed 'questionable' (41%) and 76 were deemed 'invalid' (59%) by ETS. In other words, all the tests taken on that day at Seven Oaks College were cancelled and none were deemed to be valid. The judge failed to consider or give proper weight to this evidence when assessing the credibility of the evidence given by the appellant in response to the allegation. Having heard evidence from the appellant it is possible, but not inevitable, that the judge might have come to the same conclusion. Nevertheless, it was still necessary to demonstrate that he had weighed relevant evidence that supported the respondent's case as part of the overall assessment.
8. The mere fact that the appellant could speak English and had obtained a BA Hons degree and an MBA while studying in the UK was not necessarily a determinative factor. The judge failed to consider whether there could

be other reasons why a person might engage in fraud: see *MA (ETS - TOEIC testing)* [2016] UKUT 450 at [57].

9. Although it was not pleaded in the grounds of appeal, there is a further point that is so *Robinson* obvious that it cannot be ignored. The appellant appealed the respondent's decision to refuse a human rights claim. The only available ground of appeal was that his removal in consequence of the decision would be unlawful under section 6 of the Human Rights Act 1998. The judge's task was to make findings in relation to that sole ground of appeal. His findings at [22-24] failed to engage with that core task.
10. The parties also anticipated this point. I was referred to what was said at [37] in *Khan v SSHD* [2018] EWCA Civ 1684. It was suggested that the Secretary of State's statements in the note produced in that case might have informed the way in which the First-tier Tribunal approached this appeal. That case was brought in the context of an application for judicial review. The Secretary of State said that in cases where leave was curtailed and would in any event have expired without any further application being made, she would provide a further opportunity for the individual to apply for leave without holding any previous gap in leave caused by an erroneous ETS decision against the applicant.
11. If this was behind the reasoning given by First-tier Tribunal it was not explained with reference to the decision in *Khan*. The appellant's immigration and educational histories were not considered. He was able to complete a first degree and an MBA despite the curtailment of his leave. Even if it was open to him to make a further application without prejudice, given his existing qualifications, his plans for academic progression were somewhat unclear. The bundle included applications for MSc courses in Human Resource Management, International Business Management, Management (Entrepreneurship) and Digital Marketing and Analytics. On the face of it the appellant did not meet the private life requirements of the immigration rules. The appellant's witness statement did not attempt to argue that there would be 'very significant obstacles' to his integration in Bangladesh for the purpose of paragraph 276ADE(1)(vi) and the case did not appear to be argued on that basis. All of this needed to be taken into account in assessing the human rights claim. In purporting to allow the appeal based solely on the ETS allegation the judge failed to determine whether the appellant's removal in consequence of the decision would be unlawful under section 6 of the Human Rights Act 1998.
12. I conclude that the First-tier Tribunal decision involved the making of errors on points of law and must be set aside. The usual course of action would be for the Upper Tribunal to remake the decision unless the effect of the error has been to deprive a party of the opportunity for the case to be put to and considered by the First-tier Tribunal. The judge failed to determine the core issue in the appeal. In such circumstances, it is appropriate to remit the case to the First-tier Tribunal for a fresh hearing.

DECISION

The First-tier Tribunal decision involved the making of errors of law

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

Signed 
Upper Tribunal Judge Canavan

Date 30 October 2019