



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

Appeal Number: HU/15184/2018

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 11 February 2019**

**Decision & Reasons  
Promulgated  
On 05 March 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**MR KHURRAM SHAZAD  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr D Balroop, Counsel, instructed by 12 Bridge Solicitors  
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is a challenge by the Appellant to the decision of a panel of the First-tier Tribunal constituting of First-tier Tribunal Judges O'Keefe and Hughes (the panel), promulgated on 10 October 2018, whereby they dismissed the Appellant's appeal against the Respondent's decision of 2 July 2018. The Respondent's refusal of the Appellant's human right claim was based upon an allegation of deception practised by the Appellant in respect of an English language test taken in May 2012. In short, this was one of the very familiar ETS cases.

### **The panel's decision**

2. Importantly for the purposes of this appeal, the Respondent was not represented at the hearing (something I find to be somewhat odd given the importance of the issues to both parties).
3. On the evidence as a whole the panel concluded that the Respondent had discharged the initial evidential burden (see [20]). The panel then went on to consider whether or not the Appellant had been able to provide an innocent explanation to the allegation made by the Respondent.
4. In concluding that he had “manifestly failed” to do so, the panel relied on two matters: first, that the Appellant had failed to request and/or obtain a voice recording of the relevant English language test in question; second, that the Appellant had failed to provide detailed information about the format of the test or why he had chosen the particular college (see [22] and [27]).
5. In light of the Appellant's failure to rebut the allegation, the panel concluded that the Respondent had, in effect by default, discharged the legal burden of proof resting upon him. As a result of this the Appellant had practised deception in the past and this significantly undermined his Article 8 claim as a whole.

### **The grounds of appeal and grant of permission**

6. The grounds of appeal are succinct. The absence of a Presenting Officer, and therefore any specific challenge to the Appellant's evidence at the hearing, is emphasised. It is then said that the two points relied upon by the panel had not in fact been put to the Appellant at the hearing. It is also said that in the absence of any specific challenge to the Appellant's evidence by the Respondent as a result of the failure to provide a Presenting Officer, the Respondent could not have discharged the legal burden of proof and the panel erred in concluding otherwise.
7. Permission to appeal was granted by Resident Judge Zucker on 31 December 2018.

### **The hearing before me**

8. Following a pre-hearing discussion between the representatives Mr Tufan accepted that the panel had materially erred in law.
9. He accepted that neither of the two points relied upon by the panel had been put to the Appellant at the hearing and this, combined with the

absence of a Presenting Officer rendered the decision unsafe. He accepted that the appeal should be remitted to the First-tier Tribunal.

### **Decision on error of law**

10. In my view Mr Tufan's concession was quite properly made. In the absence of a Presenting Officer it was incumbent on the panel to raise any particular issues of concern (particularly if these were to form the basis of a finding of deception on the Appellant's part) and ensure that they were properly put to the Appellant at the hearing. This is so particularly where the contents of the witness statement may not contain a great deal of detail.
11. I have looked through the Record of Proceedings produced by both members of the panel. For my part I can see no reference to any question being asked about either a request for the voice recording or any details about the format of the test itself or why the Appellant chose the particular college that he did. I conclude that there was procedural unfairness in this regard.
12. I would add that I had considered whether it was necessary to adjourn and ask the panel for any comments on this particular challenge, but in view of the clarity of the Record of Proceedings and Mr Tufan's position, concluded that the hearing should proceed.
13. The failure to have sought specific explanations relating to matters of concern seriously undermined the panel's conclusion that the Appellant had failed to provide an innocent explanation to the Respondent's serious allegations against him. I bear in mind that the innocent explanation is not a particularly high threshold; it requires nothing more than rebuttal evidence that is capable of belief. Thus, there is a real danger that the panel had in effect placed a legal burden upon the Appellant in this case. This is a further error, connected to the first.
14. I set the decision of the panel aside.

### **Disposal**

15. This appeal must be remitted to the First-tier Tribunal for a complete rehearing. Both parties will be well aware of their evidential obligations.

### **Notice of Decision**

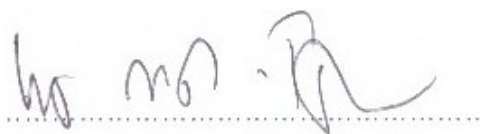
**The decision of the First-tier Tribunal contains material errors of law and I set it aside.**

**I remit this appeal to the First-tier Tribunal for a complete rehearing.**

**No anonymity direction is made.**

**Directions to the First-tier Tribunal**

- 1. The remitted appeal will take the form of a complete rehearing, with no preserved findings of fact;**
- 2. The appeal shall not be reheard by First-tier Tribunal Judges O'Keefe and Hughes.**

A handwritten signature in dark ink, appearing to read 'Norton-Taylor', written over a horizontal dotted line.

Signed

Date: 24 February 2019

Deputy Upper Tribunal Judge Norton-Taylor