



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

Appeal Number: HU/17551/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 1 July 2019**

**Decision & Reasons Promulgated
On 11 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

**MR AYAN ALI MALIK
(Anonymity direction not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Lee, Counsel instructed by ATM Law Solicitors
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on 18 March 1992. He applied for leave to remain on the basis of his private life on 19 June 2018. The application was refused on 10 August 2018. Judge Cameron (“the Judge”) heard the appeal on 11 March 2019. He found that the Appellant had taken the ETS test himself and had not used deception in either a previous application or in the current application. The Judge went on to dismiss the appeal.
2. Permission to appeal was granted by Judge Hollingworth on 14 May 2019, in essence saying it was arguable the Judge had attached insufficient

weight to the consequences of the previous incorrect refusal bearing in mind the Appellant had not cheated.

3. The Respondent issued a Rule 24 notice on 17 June 2019 saying he did not oppose the application for permission to appeal.
4. It is clear to me that the representatives are correct that the Judge materially erred in the way he dealt with the relevance of the fact the Appellant had not cheated. I am satisfied there is a material error of law and I need say no more about that.
5. The issue is whether I should remit the matter to the First-tier Tribunal for the matter to be considered afresh or to hear the matter or determine the matter again now. Mr Bramble submitted that it should be remitted because the balancing exercise has not been undertaken. Mr Lee submitted that remittal is not required because as explained in **Ahsan** [2017] EWCA Civ 2009 the starting point is that if a person had not cheated it inevitably means the Section 10 decision had been wrong and the Respondent was obliged to deal with him thereafter so far as possible as if that error had not been made.
6. I raised the relevance of **Mostafa** (Article 8 in entry clearance) [2015] UKUT 00112 (IAC). The representatives agreed that it may provide some useful guidance on the ability to satisfy the rules being capable of amounting to a weighty factor when deciding whether a refusal is proportionate bearing in mind the legitimate aim of enforcing immigration control.
7. I am not satisfied the balancing exercise that is required within Article 8 has been undertaken, as the only ground of appeal is within an Article 8 context. The only factor that was considered in any depth was whether or not the ETS issue had been made out. There is little about any other element of the Appellant's circumstances. It is only referred to in [41] where it deals with a lack of dependency on his sister going beyond normal emotional ties, and in [48] when it notes the precarious nature of his status, the Appellant saying he does not want to return to Pakistan without completing his education, and the Judge finding he had the ability to establish his private life in Pakistan on return.
8. That in my view is an inadequate assessment of the factors that have to be considered in an Article 8 claim. It is a proportionality balancing exercise and the balance has not been undertaken. In those circumstances I am not satisfied either party had a fair hearing in the First-tier Tribunal.
9. The matter will be remitted to be heard at Taylor House but not by Judge Cameron. Any further consequential directions will be issued by the First-tier Tribunal.
10. No anonymity direction is made.
11. No fees order of costs order is made.

Deputy Upper Tribunal Judge Saffer
5 July 2019

A handwritten signature in black ink, appearing to read 'Saffer', written over the printed name.