



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

Appeal Number: HU/01752/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 25 February 2020**

**Decision & Reasons Promulgated
On 17 March 2020**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

**MR AMIR JAFAR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Khalid, Lords Solicitors LLP

For the Respondent: Ms A Fijiwala, Senior Presenting Officer

DECISION AND REASONS

(Given orally at the hearing of 25 February 2020)

Introduction

Underpinning this appeal is a decision of the Secretary of State for the Home Department issued on 15 January 2019, refusing a human rights claim made by the appellant on, it is said, 3 July 2017.

Secretary of State's Decision

In her decision letter, under the heading of 'Suitability', the Secretary of State says as follows:

"Your application falls for refusal on grounds of suitability under Section S-LTR because of the following reason:

ETS has a record of your TOEIC speaking test taken on 15 May 2013 at the Manchester College of Accountancy and Management. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a test of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker. ... Your application is therefore refused under paragraph S-LTR.1.6 of the Immigration Rules."

There then follows nearly three pages of reasoning said to support the contention that the appellant has acted dishonestly.

Thereafter, there are two further subheadings. Under the heading "Eligibility" the Secretary of State concludes that the appellant does not meet the requirements of the paragraph 276ADE of the Rules and under a heading "Exceptional Circumstances" - which is effectively considering an Article 8 outside the Rules - the Secretary of State also reaches a conclusion adverse to the appellant.

Decision of the First-tier Tribunal

The appellant appealed against the Secretary of State's decision to the First-tier Tribunal. The appeal came before First-tier Tribunal Judge Talbot on 19 July 2019 and was, thereafter, dismissed in a decision dated 6 August 2019. The appellant did not appear at that hearing, having requested that the appeal be determined on the papers.

The First-tier Tribunal concluded, in paragraph 7 of its decision, that the appellant does not meet the requirements set out in paragraph 276ADE and in paragraph 8 said as follows in relation to the dishonesty issue:

"Respondent also refuses his claim on suitability grounds on the basis of his deception in the taking of an English language test on 15.3.13. The appellant denies this but has chosen not to attend the hearing to allow his evidence on this matter to be tested in cross-examination. In any event, it is not necessary for me to make findings on the matter."

Subsequently, in paragraph 9, the FtT undertakes the Article 8 assessment outside the Rules, concluding that the Secretary of State's decision does not breach the appellant's Article 8 rights.

Appeal to the Upper Tribunal

The appellant sought and was granted permission to appeal to the Upper Tribunal, such grant being limited by Resident Judge Zucker to one ground. i.e. *“in respect of the failure of the judge to make any specific finding on the issue of deception”*.

Significantly, the appellant has not sought to renew to the Upper Tribunal, as he could have done, those grounds upon which permission was refused. We are, therefore, left with only the single challenge identified above.

On 21 November 2019, I issued directions to the parties that they should file a skeleton argument addressing three issues:

- (1) whether in the circumstances of the instant case the First-tier Tribunal erred in law in failing to make a finding on the issue of whether the appellant used deception in 2013 to obtain an English language test certificate;
- (2) the jurisdiction of the Upper Tribunal to set aside a part of the First-tier Tribunal’s decision (on the deception issue) that was immaterial to the outcome of the appeal before the First-tier Tribunal; and,
- (3) assuming (1) and (2) are resolved in the appellant’s favour, the jurisdiction of the Upper Tribunal to remake the decision on the deception issue when to do so could have no material bearing on the outcome of the appeal.

Both parties responded to these directions with skeleton arguments addressing broadly the issues which the Tribunal requested they address. However, in her skeleton argument, of 8 January 2020, the Secretary of State indicated that she *“withdraws the allegation of deception”*. At the hearing today Ms Fijiwala on behalf of the Secretary of State confirmed that the Secretary of State would not subsequently rely upon the allegation of deception relating to the events of 15 May 2013 in determining any future applications made by the appellant. We are, therefore, now in a position where (i) the only ground of appeal relates to the issue of deception and (ii) the issue of deception is no longer relevant to these proceedings.

Moving on, the Tribunal’s jurisdiction derives from the Tribunals, Courts and Enforcement Act 2007. Section 12 of that Act applies when the Upper Tribunal is deciding whether the First-tier Tribunal made an error on a point of law. If it concludes that it did then the Upper Tribunal may (but need not) set aside the decision of the First-tier Tribunal, see section 12(2)(a)(i) of the 2007 Act.

In this case, it seems to me as though the First-tier Tribunal plainly erred in not dealing with the issue of deception. Whilst that was not the only a live issue before the FtT, it was nevertheless a significant issue; indeed, it took up the majority of the Secretary of State’s reasons for refusing the application in the first place. Determination of that issue could have had a tangible benefit to the

appellant because if it had been determined in his favour he could then (even if he had lost the appeal) have made further application for leave without that matter being taken against him.

Nevertheless, given that the Secretary of State now withdraws the allegation of deception and has indicated that such allegation (in respect of the events of 15 May 2013) will not be raised in response to any future applications made by the appellant, there is no longer a tangible benefit to the appellant to have the issue, of whether of he committed such a deception, determined.

In those circumstances, it seems to me that the most appropriate course is to find that the First-tier Tribunal erred in law but not to set aside its decision. This is so because it cannot be said that the error was either material to the outcome of the appeal or that there is a tangible benefit in having the deception issue determined.

Notice of Decision

For the reasons given above, the decision of the First-tier Tribunal stands.

Signed

Mark O'Connor
Upper Tribunal Judge O'Connor

Date: 6 March 2020