



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: HU/17771/2019(P)

THE IMMIGRATION ACTS

Heard Remotely at Manchester Piccadilly
IAC
On 21 August 2020

Decision & Reasons Promulgated
On 25 August 2020

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

MD SHAHALAM
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr R Sharma, instructed by Hubers Law Solicitors
For the Respondent: Mr C Bates, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion of the hearing I reserved my decision and reasons which I now give. The order made is described at the end of these reasons.

DECISION AND REASONS (P)

1. The appellant, who is a Bangladeshi national born on 10.2.89, has appealed to the Upper Tribunal with permission against the decision of the First-tier Tribunal promulgated 9.4.20, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 15.10.19, to refuse his application made on 29.9.19 for

Indefinite Leave to Remain on the basis of 10 years' continuous lawful residence pursuant to paragraph 276B of the Immigration Rules and on private life grounds pursuant to article 8 ECHR.

2. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions made to me and the grounds of application for permission to appeal to the Upper Tribunal. I note that the appellant was present at the remote hearing but not called on to contribute.
3. The grounds assert that the First-tier Tribunal erred in finding that the appellant failed to meet the requirements of paragraph 276B; that the judge erred by failing to make a finding on the appellant's assertion that removal would be disproportionate; and that the appellant should have been put back into the position he would have been in had the allegation of cheating in an English language test not been made.
4. Permission to appeal was granted by First-tier Tribunal Judge Bulpitt on 6.5.20, finding the second ground only arguable.
5. Judge Bulpitt considered that there was little merit in the first ground. The evidence before the First-tier Tribunal was that the appellant's continuous lawful residence in the UK was less than 10 years and accordingly, following R (Ahmed v SSHD) [2019] EWCA Civ 1070, he could not meet the requirements of paragraph 276B.
6. In relation to the second ground, Judge Bulpitt considered it arguable that the appellant's case that it would be proportionate for him to be put back in the position he would have been had the allegation of cheating not been made was not engaged with by the First-tier Tribunal and no reasoned findings made in respect of it.
7. I was assisted by Mr Sharma's helpful and detailed grounds of application for permission to appeal. Mr Bates explained that the appellant had sought judicial review permission and the respondent had replied on 22.5.20 to the Pre-action Protocol. A copy of that response was emailed to me and to Mr Sharma.
8. In his submissions Mr Sharma largely relied on his helpful grounds and made further submissions in response to my queries and Mr Bates's submissions, as noted below.
9. In respect of the first ground, Mr Sharma accepted that on the basis of the law as it stands, the appellant is not able to take advantage of paragraph 39E to extend the period of his lawful leave. Mr Sharma did not concede the point, telling me that there is a pending case on the same subject before the Court of Appeal, but reserved his position. It follows that for the reasons outlined by Judge Bulpitt, no error of law is disclosed by the first ground.
10. In respect of the second ground, Mr Sharma relied on the finding of the Upper Tribunal decision in 2017 at [9] that it was reasonably likely to have been because of the unfounded allegation that the appellant was unable to provide a CAS. Mr Sharma's submissions and grounds do not in fact demonstrate that to be even likely.

For the reasons set out below, even without the ETS fraud allegation the application would have failed for want of a CAS. The submissions and the grounds do not adequately grapple with this point and reliance on case law where the sole reason for refusal was the ETS point does not help the appellant.

11. It was submitted to me that the more particular point made to the First-tier Tribunal, and which was not the subject of any previous decision, was that success on the ETS allegation ought to have afforded the appellant an opportunity to resolve his immigration status and, therefore, the respondent's decision was disproportionate. The complaint is that the impugned First-tier Tribunal decision did not address this argument at all.
12. In respect of this second ground, Mr Bates referred me to the PAP response of 22.5.20, where it was pointed out that the appellant's 2014 student leave application was refused in 2015 for both the ETS point and because no CAS had been submitted, whether valid or not. In respect of the point made in Absan that if an appellant is found not to have cheated, "the Secretary of State would be obliged to deal with him or her thereafter so far as possible as if that error had not been made, i.e. as if their leave to remain had not been invalidated," the respondent's case was that because the application had been refused in 2015 for an additional reason, the appellant was not entitled to the 60 days' grace period within which to find an educational sponsor and obtain a CAS. The 60 days discretion only applied where the sponsor loses its licence whilst the application was being considered; which was not this case. It follows that the appellant could not have used this period to add to his lawful leave or make a fresh application in time.
13. At the First-tier Tribunal appeal hearing, the judge at [48] accepted that the appellant had successfully established that he had not previously obtained an English language certificate by fraud. "However, it was also found that he did not submit a valid CAS certificate and therefore has not discharged the burden on him. The Appellant appealed to the Upper Tribunal but the appeal was dismissed. I am not satisfied as suggested on behalf of the Appellant that he would be remedied which should result in the grant of leave."
14. As Mr Bates submitted, even if put back to the position he would have been in, the appellant could never have succeeded under the Rules in his 2014 student application. He would not have qualified for any 60 day period of grace and it must follow that his valid leave expired on 19.11.18 (extended by his various attempts to appeal) and, therefore, that he cannot meet the 10 years' continuous lawful residence requirement. Mr Bates submitted that on that basis and without any evidence of compelling circumstances sufficient to justify granting leave outside the Rules so that the refusal decision would be unjustifiably harsh (as was found by the judge at [54] and [64] of the decision), there was no basis for the judge to consider the public interest of immigration control outweighed by the appellant's history, even including the unfounded ETS deception allegation. The judge followed the Razgar stepped approach, asked the correct questions, and applied section 117B of the

Nationality, Immigration and Asylum Act 2002 in respect of the appellant's private life developed in the UK, to which little weight was to be accorded. I can see no basis upon which the appellant could ever even arguably have succeeded on article 8 grounds outside the Rules. In the circumstances, if there was any error in this regard by the First-tier Tribunal, which I do not accept, it could not have been material to the outcome of the appeal.

15. In essence, it seems to me that Mr Sharma was inviting the First-tier Tribunal and me to forgive and overlook the appellant's failure to produce a CAS certificate. In reply to Mr Bates he submitted that it was not clear whether the appellant was in possession of his passport, which would have been necessary in order to take a further English language test. However, he could have asked for its return or forwarding to the test centre. As Mr Bates pointed out, I am satisfied that it was open to the appellant in the intervening period to take a different English language test and apply for a CAS. This he has not done.
16. In the circumstances and for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal so that it must be set aside.

Decision

The appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands and the appellant's appeal remains dismissed.

I make no order for costs.

I make no anonymity direction.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 21 August 2020

