IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000067

First-tier Tribunal No: HU/55785/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 16th of November 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

MUHAMMAD NADEEM
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Iqbal, Counsel instructed by Hamilton Rees Solicitors
For the Respondent: Ms S Lecointe, Senior Home Office Presenting Officer

Heard at Field House on 11 September 2023

DECISION AND REASONS

Background and scope of the appeal

1. By a decision promulgated on 23 June 2023, I found an error of law in the decision of First-tier Tribunal Judge Bunting, allowing the Appellant's appeal. I set aside Judge Bunting's decision in consequence and gave directions for a hearing to remake the decision in this Tribunal.

2. The factual background to this case is set out in full in my error of law decision at [1] to [9], which I replicate below for ease of reference:

"The appellant is a citizen of Pakistan who was born on 12 June 1982. On 14 May 2011 he arrived in the UK with entry clearance as a Tier 4 (General) Student Migrant valid until 22 August 2013 (recorded in error as 11 January 2010 and 31 August 2013 respectively by the FtT).

On 26 April 2012 the respondent sent a notice of curtailment to the appellant's sponsor. Before the FtT the respondent did not rely on that notice as she accepted the appellant had no knowledge of it.

On 21 August 2013, the appellant applied to extend his leave to remain as a student.

On 13 May 2021 (recorded in error as 18 June 2021 by the FtT), the respondent sent a 'minded to refuse' letter to the appellant informing him that she was considering refusing his application because she believed that the TOEIC certificate he submitted with his Tier 4 application was fraudulently obtained by the use of a proxy test taker. The appellant was invited to respond and make further representations under section 120 of the Nationality, Immigration and Asylum Act 2002 "the 2002 Act").

The appellant's solicitors responded on his behalf on 25 May 2021. The appellant denied the allegation that he used a proxy and averred he personally attended the college and took the test himself. It was noted the respondent had not served any evidence to prove the allegation and it was stated that the appellant was not in a position to provide evidence relating to events that took place some nine years ago.

The appellant's application was then refused by the respondent in a decision dated 10 September 2021 (recorded in error as 9 August 2021 by the FtT). In refusing the application, the respondent confirmed that he had not achieved the relevant points under Appendix A and C of the Immigration Rules as he did not have a valid Confirmation of Acceptance of Studies (CAS), since his Tier 4 sponsor was not on the relevant register of sponsors. He therefore could not meet the requirements of the Immigration Rules as a Tier 4 (General) Student Migrant. In addition it was considered that the test results for the English language test taken on 5 December 2012 at South Quay College had been confirmed by ETS as having been obtained through deception, by the use of a proxy test taker. The data from ETS confirmed that 57% of the tests taken at that college on the same day had been deemed invalid and 43% were questionable and, accordingly, none of the test results for the college were "released".

The respondent further considered that the appellant had failed to provide evidence to support his claim to have attended and undertaken the test himself. The respondent therefore concluded that false representations had been made in relation to the appellant's application and he was refused further leave to remain under paragraph 322(1A) of the Immigration Rules and by reference to paragraphs 245ZX(a), (c) and (d) and paragraph 116 (e) of Appendix A thereof.

The appellant's appeal was heard by the FtT on 24 November 2022. Both parties were represented by Counsel. The appellant gave oral evidence in English. He maintained that he did not cheat, took the test himself and to the extent that the evidence showed that a proxy was used, there must have been an error. He further contended that he had now accrued 10 years lawful residence and was entitled to Indefinite Leave to Remain

> pursuant to paragraph 276B of the Immigration Rules. In respect of that issue, the respondent considered that to be a "new matter" under the 2002 Act and refused to give consent for that to be argued before the FtT.
>
> The FtT accepted, on the basis of the evidence before it, that the respondent had met the evidential burden of proof, but found that the appellant had provided a plausible innocent explanation and accepted his evidence of having taken the test himself without a proxy. The FtT therefore found that the respondent had not proved the allegation of deception and found that in those circumstances his appeal fell to be allowed under article 8 of the ECHR. The FtT accordingly allowed the appellant's appeal."

3. At the error of law hearing the parties were represented by Ms Lecointe and Mr Iqbal (as they are before me at this resumed hearing). I found Judge Bunting did not err in law in his consideration of the allegation of deception, but I agreed with the representatives that he did err in law in allowing the appeal under Article 8 ECHR, and it was this part of his decision that I set aside. Two matters of significance arose at that hearing. First, there was no dispute between the parties, and this was the agreed position before Judge Bunting, that the grounds of appeal available to the Appellant were those in force at the date of application in 2013 and not the date of decision in 2021. The significance of that, being, the Appellant could avail himself of the grounds of appeal available prior to the Immigration Act 2014 coming into force.

4. Second, and in consequence of this appeal being governed by the legislative provisions in force preceding the implementation of the Immigration Act 2014, Ms Lecointe conceded the Appellant did not require the Secretary of State's consent to argue in this appeal that he qualified for settlement under paragraph 276B of the Immigration Rules. Ms Lecointe was not, however, in a position to make submissions on that issue, and as the Secretary of State's position thereunder was unclear, I acceded to her request without objection to list the appeal for a resumed hearing for the purposes of remaking the decision. The parties were on written notice that the Tribunal expected them to be fully prepared at the resumed hearing to deal with the issue of disposal, and were reminded that the scope of the appeal was limited to that issue alone. The parties were directed *inter alia* to file skeleton arguments setting out their respective position(s) on disposal.

The Resumed Hearing and Submissions

5. The agreed position of the parties at the hearing was that it was not necessary to call the Appellant to give evidence and the appeal proceeded on submissions alone.

6. At the outset of the hearing I did not need to call upon Mr Iqbal as the Appellant's case on the issue of disposal is set out in his skeleton argument. In short, Mr Iqbal commended to the Tribunal that the appeal should be allowed on the basis that the requirements of paragraph 276B of the Immigration Rules had been met (i.e. that the appellant has 10

years' continuous lawful residence in the United Kingdom). He submitted that the Tribunal has jurisdiction to allow the appeal on that basis and referred to section 120 of the 2002 Act, and cited the judgments in AS (Afghanistan) v SSHD [2009} EWCA Civ 1076 approved in Patel & Ors v SSHD [2013] UKSC 72.

7. Rather unsatisfactorily, the Respondent did not comply with the Tribunal's directions and without explanation. This left the Tribunal in no better position in understanding the stance of the Secretary of State on the issue of disposal following the error of law hearing. So I turned to Ms Lecointe first to address the Tribunal.

8. Without any disrespect intended, at first, I had some difficulty in understanding Ms Lecointe's submissions. She did not initially appear to have an understanding of the scope of the appeal despite this being clearly explained in my earlier decision. She then embarked on a circuitous and confused submission. The tenor of Ms Lecointe's initial submission was, that whilst she did not dispute the Appellant had accrued 10 years' lawful residence in the United Kingdom, she contended the appeal should be dismissed. She referred to the Respondent's curtailment notice and the Appellant's reliance on false bank statements lodged with his application made on 21 August 2013.

9. As to the former, Ms Lecointe was reminded that the Respondent expressly averred reliance on the curtailment notice before the First-tier Tribunal because she accepted the Appellant was not made aware of it. Ms Lecointe did not therefore pursue that point. As to the latter, when Ms Lecointe was pressed on her assertion regarding the bank statements and, after allowing her time to discuss the issue with Mr Iqbal who was not on notice of the same, she accepted that she was mistaken in her reliance on this matter. Ms Lecointe had drawn the information from undisclosed Home Office notes and accepted that this matter did not feature in the Secretary of State's refusal letter. She properly withdrew it.

10. Having dealt with the matters Ms Lecointe initially relied upon, the Tribunal started where it began and invited her again to set out the Respondent's position. She asserted, that whilst she was "in difficulty" as the Appellant had completed 10 years' continuous lawful residence, the Tribunal should simply conclude that the Secretary of State's decision "was not in accordance with the law" - the Secretary of State not yet having considered this issue and in particular not having considered whether to exercise the discretion to grant leave identified within the Immigration Rule itself. Mr Iqbal submitted to the contrary.

Remaking and Conclusions

11. The Appellant's immigration history (as set out in my error of law decision) is not in dispute. In brief, he arrived in the United Kingdom with entry clearance conferring leave to enter as a student on 14 May 2011 valid until 22 August 2013. He made a subsequent in-time application on

21 August 2013 for further leave to remain as a student. The Respondent did not refuse that application until 10 September 2021. There is no dispute between the parties that, by that date, the Appellant had accrued 10 years' continuous lawful residence in the United Kingdom.

12. Before the First-tier Tribunal the Appellant sought to argue pursuant to section 120 of the 2002 Act, that as he had accrued 10 years' continuous lawful residence and, there not being any other reasons to refuse, he was entitled to Indefinite Leave to Remain under the Immigration Rules. That argument was cut short by the Respondent who considered that to be a "new matter" and refused consent for that to be argued. Ms Lecointe concedes on behalf of the Respondent that that position was wrong for the reasons I explained earlier.

13. Mr Iqbal contends that the Tribunal is seized of the paragraph 276B issue and has jurisdiction to allow the appeal under the Immigration Rules. I did not understand Ms Lecointe to dispute that. Indeed, it is inherent in her submission that the appeal should be allowed on the limited basis that the Secretary of State's decision was not in accordance with the law is an acceptance that the Tribunal does have jurisdiction. In the event that I have misunderstood her, I shall deal with Mr Iqbal's helpful submissions on the point, which can be shortly stated.

14. Mr Iqbal places emphasis on the following passages from Lord Carnworth's decision in Patel & Ors v SSHD [2013] UKSC 72, the conclusions in which were given in relation to the issue of:

> *"Whether the conclusion of the majority in AS (Afghanistan) v SSHD [2009] EWCA Civ 1076, that an appeal to the FTT covers not only ground before the Secretary of State when she made the decision under appeal but also any grounds raised in response to a one-stop notice issued under section 120 of the 2002 Act, even if they had not been subject of any decision by the Secretary of State and did not relate to the decision under appeal, is correct."* [paragraph 10(iv)].
>
> "[41] The broader approach of the majority seems to me to gain some support from the scheme of section 3C, under which (as is common ground) the initial application for leave to remain, if made in time, can later be varied to include wholly unrelated grounds without turning it into a new application or prejudicing the temporary right to remain given by the section. Thus the identity of the application depends on the substance of what is applied for, rather than on the particular grounds or rules under which the application is initially made. The same approach can be applied to the decision on that application, the identity or "substance" of which in the context of an appeal is not dependent on the particular grounds first relied on.
>
> [42] It is of interest that, at an earlier stage, the broader approach seems to have accorded with the reading of those responsible within the Home Office for advice to immigration officers. The Immigration Directorate's Instructions, issued in September 2006, noted that it was not possible under section 3C to make a second application, but continued:

> "On the other hand, it is possible to vary the grounds of an application already made, even by introducing something completely new. A student application can be varied so as to include marriage grounds. If an application is varied before a decision is made, the applicant will be required to complete the necessary prescribed form to vary his application. If an application is varied post decision, it would be open to the applicant to submit further grounds *to be considered at appeal*… Once an application has been decided it ceases to be an application and there is no longer any application to vary under section 3C(5). So any new information will fall to be dealt with *during the course of the appeal* rather than as a variation of the original application." (para 3.2 emphasis added)

[43] The same approach is supported by the current edition of *Macdonald's Immigration Law & Practice* 8th ed (2010) para 19.22 (under the heading "The tribunal as primary decision maker"). The only implicit criticism made of the majority approach in *AS* is that it did not go far enough. They observe that even without a section 120 notice the tribunal should be free to consider any matter –

> "… including a matter arising after the decision which is relevant to the substance of the decision regardless of whether a one-stop notice has been served. The 'substance of the decision' is not the decision maker's reasoned response to the particular application or factual situation that was before it but is one of the immigration decisions enumerated in section 82 and a 'matter' includes anything capable of supporting a fresh application to the decision maker…"

Whether or not such an extension of the majority's reasoning can be supported, that passage indicates that the broader approach in itself is not controversial.

[44] In the end, although the arguments are finely balanced, I prefer the approach of the majority in *AS*. Like Sullivan LJ, I find a broad approach more consistent with the "coherence" of this part of the Act. He noted that the standard form of appeal, echoing the effect of the section 120 notice, urged appellants to raise any additional ground at that stage, on pain of not being able to do so later, and observed:

> "... it seems to me that appellants would have good reason to question the coherence of the statutory scheme if they were then to be told by the AIT that it had no jurisdiction to consider the additional ground that they had been ordered by both the Secretary of State and the AIT to put forward." (para 99)"

15. In his judgment in Patel & Ors Lord Mance (with whom Lord Kerr, Lord Reed and Lord Hughes also agreed) also concluded that the majority decision in AS (Afghanistan) had been correct [paragraph 63], albeit he also observed that his decision on this issue was *obiter* [paragraph 62].

16. In AS (Afghanistan), the Court of Appeal had to consider the effect of responses (hereinafter referred to as a statement of additional grounds) made by the appellants to notices served by the Secretary of State

pursuant to section 120 of the 2002 Act. It was concluded that the effect of a section 120 notice, and subsequent response thereto, was that the Tribunal had to determine not only any ground that was before the Secretary of State when she made the decision under appeal but also any ground raised in the statement of additional grounds, even if such a ground had not been the subject of a decision by the Secretary of State and did not relate to the decision under appeal.

17. Moore-Bick LJ considered, at paragraph 81, that all the material provisions of the 2002 Act pointed towards a procedural scheme under which the Appellant was required to put forward all his grounds for challenging the decision against him for consideration in one set of proceedings, and the Tribunal was placed under a corresponding duty to consider them. It followed, he concluded, that the section 120 notice was not intended to be restricted to matters relating to the original grounds of application or that the decision being challenged could be defined by reference to the particular facts on which it was based.

18. Sullivan LJ, who agreed with Moore-Bick LJ, considered it to be clear that the underlying legislative policy was to prevent successive applications, and emphasised that the words “against the decision appealed against” at the end of subsection 85(2) were properly interpreted as being the decision to refuse to vary the Appellant’s leave to remain in the United Kingdom rather than the decision to refuse to vary leave to remain under a particular paragraph of the Rules.

19. Drawing all of this together, given all that is said in AS Afghanistan about the underlying legislative policy, the approval in Patel of the majority’s broad approach in AS (Afghanistan), and not having heard any submissions from the Secretary of State to the contrary in this case (in so far as I understood Ms Lecointe’s submissions), I conclude that the issue of paragraph 276B having been raised in the response to the section 120 notice, it is incumbent upon the Tribunal to consider it.

20. The only matter now left for consideration is Ms Lecointe’s submission that paragraph 276B of the Immigration Rules imports a discretion and that, given that the Secretary of State has not yet considered the exercise of such discretion under the Immigration Rule, the Tribunal should not impose its conclusion in relation to this on the Secretary of State but rather allow the appeal on the basis that her decision was not in accordance with the law.

21. Whilst there is a legal foundation underpinning such a submission (see Ukus (discretion: when reviewable) [2012] UKUT 00307(IAC)), this presupposes that paragraph 276B of the Immigration Rules contains within it a discretion of the type relied upon by Ms Lecointe, it does not. Ms Lecointe fixed her submissions with particular reference to the terms of paragraph 276B (ii) of the Immigration Rules; however, I can detect no operative discretion within that subparagraph of the Rule. That subparagraph requires no more than a consideration of all of an

applicant's circumstances in the context of performing an assessment of whether there are reasons why it would be undesirable for the applicant to be given Indefinite Leave to Remain.

22. Ms Lecointe further submitted that the Secretary of State would need to undertake a suitability check, but she has had ample opportunity to do so, and the evidence does not suggest that there is anything of any consequence adverse to the Appellant, bearing in mind that I found there is no error in Judge Bunting's conclusion that the Respondent had not discharged the legal burden of proof in this case that he cheated and took the TOEIC test by proxy. I conclude in the circumstances that there is simply nothing on the evidence before me that would make it undesirable for this Appellant to be granted Indefinite Leave to Remain. This is not a consideration of the exercise of discretion but a determination of an issue of fact.

23. There being no dispute that all other aspects of the Immigration Rule are met by the Appellant – he has completed the requisite tests required under the Immigration Rule to establish that he has sufficient knowledge of life in the United Kingdom and sufficient knowledge of the English language, I agree with the position adopted by Mr Iqbal and conclude that the Appellant meets the requirements of paragraph 276B of the Immigration Rules.

24. If subsequent to this decision the Secretary of State discovers a matter of potential significance relating to this Appellant that is thought to be adverse to the public interest then, no doubt, she will give consideration to such a matter when deciding whether to exercise the discretion inherent in paragraph 276C of the Immigration Rules. The existence of the discretion in paragraph 276C of the Immigration Rules is not though a matter relevant to my decision.

Notice of Decision

25. Upon re-making the decision I find that the Appellant meets the requirements of paragraph 276B of the Immigration Rules. Accordingly, I conclude that the decision of the Secretary of State was not in accordance with the Immigration Rules.

No anonymity direction is made.

R.Bagral
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 November 2023