Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/06660/2019 (P)**

THE IMMIGRATION ACTS

Decided under Rule 34 without a hearing
On 6 November 2020

Decision & Reasons Promulgated
On 10 November 2020

Before:

UPPER TRIBUNAL JUDGE GILL

Between:

Mr Alamgir Hosein
(ANONYMITY ORDER NOT MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

This is a decision on the papers without a hearing. The respondent did not object. The appellant requested an oral hearing in the event that the Upper Tribunal was not persuaded to set aside the decision of the First-tier Tribunal. The documents described at para 4 below were submitted. A face-to-face hearing or a remote hearing was not held for the reasons given at paras 6-9 below. The order made is set out at para 37 below. *(Administrative Instruction No. 2 from the Senior President of Tribunals).*

Representation (by written submissions):
For the appellant: Mr M Biggs, of Counsel, instructed by Hubers Law.
For the respondent: Ms J Isherwood, Specialist Appeals Team.

DECISION

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1. The appellant, a national of Bangladesh born on 1 June 1989, appeals against a decision of Judge of the First-tier Tribunal P S Aujla (hereafter the "Judge") who, in a decision promulgated on 16 September 2019 following a hearing on 10 September 2019, dismissed his appeal on human rights grounds (Article 8) against a decision of the respondent of 29 March 2019 to refuse leave to remain on human right grounds (Article 8).

2. On 18 August 2020, the Upper Tribunal sent to the parties a "*Note & Directions*" by Upper Tribunal Judge Frances in which Judge Frances stated that she had taken the provisional view that it would be appropriate in the instant case to decide the following questions without a hearing:

    (a) whether the decision of the Judge involved the making of an error of law; and

    (b) if so, whether it should be set aside.

3. Judge Frances then gave directions which set a timescale for the appellant to make written submissions on questions (a) and (b), for the respondent to lodge submissions in reply and for the appellant to lodge further submissions in response. She also gave directions which provided for any party who considered that despite the foregoing directions a hearing was necessary to consider the Issues to submit reasons for that view within a certain timescale.

4. In response to the "*Note and Directions*", the Upper Tribunal has received the following documents:

    (i) on behalf of the appellant, a document entitled: "*Appellant's written submissions*" dated 1 September 2020 by Mr Biggs, submitted under cover of an email dated 1 September 2020 from Hubers Law timed at 16:40 hours;

    (ii) on behalf of the respondent, a document entitled: "*Secretary of State's response to the grounds of appeal under Rule 24*" dated 3 September 2020 by Ms Isherwood, submitted under cover of an email dated 3 September 2020 timed at 13:31 hours; and

    (iii) on behalf of the appellant, a document entitled: "*Appellant's further written submissions*" dated 18 September 2020 by Mr Biggs, submitted under cover of an email dated 18 September 2020 from Hubers Law timed at 16:39 hours.

The issues

5. I have to decide the following issues (hereafter the "*Issues"*),

    (i) whether it is appropriate to decide the following questions without a hearing:

        (a) whether the decision of the Judge involved the making of an error on a point of law; and

        (b) if yes, whether the Judge's decision should be set aside.

    (ii) If yes, whether the decision on the appellant's appeal against the respondent's decision should be re-made in the Upper Tribunal or whether the appeal should be remitted to the First-tier Tribunal ("FtT").

Whether it is appropriate to proceed without a hearing

6. At para 6 of his submissions dated 1 September 2020, Mr Biggs submitted that an oral hearing, conducted remotely if necessary, should be held to decide the Issues if the Upper Tribunal is not persuaded, on review of the papers, to set aside the Judge's decision and remit the appellant's appeal to the FtT.

7. At para 8 of her submissions, Ms Isherwood submitted that it was a matter for the Upper Tribunal whether to hold an oral hearing but that, given the assertions in the grounds, this may be an appropriate course of action.

8. In reaching my decision as to whether or not it is appropriate to decide the Issues without a hearing, I applied the guidance of the Supreme Court at para 2 of its judgment in Osborn and others v Parole Board [2013] UKSC 61 and the overriding objective.

9. Having considered the Judge's decision, the grounds and the submissions of the parties, I was of the view that it was necessary to set aside the Judge's decision and to remit the appellant's appeal to the FtT. Accordingly, I concluded that there would be no prejudice to the appellant if I were to proceed to decide the Issues without a hearing. As Ms Isherwood had not expressed any objection to the Upper Tribunal deciding the Issues without a hearing, I could not discern any prejudice to the respondent. In all of the circumstances, I decided to exercise my discretion and proceed to decide the Issues without a hearing.

Questions (a) and (b) - whether the Judge erred in law and whether his decision should be set aside

10. It is unnecessary to rehearse in detail the appellant's full immigration history. Suffice it to say that, on 30 October 2014, the respondent curtailed the appellant's leave that had been granted on 26 November 2013 because she considered that he had submitted, in support of his application of 18 June 2013 for leave to remain, a false TOEIC English language certificate issued by the Educational Testing System ("ETS"), in that, it had been obtained fraudulently by the use of a proxy test taker at a test on 17 October 2012 at Eton College International. The respondent therefore considered that the appellant's presence in the United Kingdom was not conducive to the public good and that he therefore did not meet the suitability requirement in para 276ADE(1)(i) of the Immigration Rules with reference to para S-LTR.2.2(a) and S-LTR.1.6 of Appendix FM.

11. Before the Judge, Mr Biggs confirmed that family life was not relied upon and that the appeal was based solely on the appellant's private life claim under para 276ADE(1) of the Immigration Rules and outside the Immigration Rules (para 13 of the Judge's decision).

12. Accordingly, a key factual issue before the Judge in relation to the appellant's Article 8 private life claim was whether he had acted dishonestly in connection with his application for leave to remain of 18 June 2013 by submitting a TOEIC certificate that had been obtained fraudulently.

The Judge's decision

13. The Judge directed himself on the applicable burden and standard of proof at paras 17-18 of his decision. At para 17, he said:

> "17. On 30 October 2014, the Respondent curtailed the Appellant's leave that was granted on 26 November 2013 on the basis that the Appellant had used a false TOEIC English language certificate issued by the Educational Testing System ("ETS") which he had obtained in a fraudulent manner by using a proxy test taker. **The burden of establishing that allegation was on the Respondent, on the basis of evidential burden if not on the balance of probabilities."**
>
> (My emphasis)

14. At paras 33 and 34, under the heading: "*Consideration and Findings of Credibility and Fact*", the Judge said:

> "33. The Respondent has provided documents in bundle RB2 together with witness statements. Annex Al in the bundle clearly identified the Appellant. It is stated that his certificate number 0044202169026019 which he claimed to have obtained through the test centre at the College was declared invalid. **Annex A2 showed that 37 candidates took the test on 17 October 2012. Out of the 37, 31 (84%) were declared invalid, 6 (16%) were declared questionable and none were released. It is clear from the documents that this was not a case where some of the results were released as valid so that there could be room for mistake or error. None of the tests taken on the day were found to be valid and they were all declared invalid or unreliable.** That evidence was supplied to the Respondent by ETS.
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> 34. **On the basis of the evidence that the Respondent had provided, together with the witness statements of the experts, I find that the Respondent has made out his case, on the balance of probabilities.**
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> 35. **It was open to the Appellant to provide credible evidence on the basis of which I could find that there was room for an error in the assessment made by ETS.** The only evidence that he provided was that his representatives had raised the issue with ETS. Copies of e-mail and other correspondence, which passed between ETS and the Appellant's representatives Hubers Law, are in the Appellant's bundle from pages 41 - 48. All that correspondence took place from May 2019 onwards."
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> (My emphasis)

15. At paras 36-39 of his decision, the Judge took into account, against the appellant's credibility, the fact that, although the appellant know from the respondent's decision of 30 October 2014 that the respondent considered that he had submitted a fraudulently obtained TOEIC certificate, he did not claim his innocence with ETS until May 2019, a period of 4 years and 7 months after his leave had been curtailed. At para 39, the Judge said:

> "39. Given the drastic consequences that curtailment of his leave would have on him, I find it implausible that the Appellant would not have protested his innocence and provided whatever evidence he had to the Respondent and ETS that he had relating to the day when he claimed he took the test soon after his leave was curtailed, if in fact he was innocent of having used a proxy test taker…."

16. The Judge then said, at paras 40-41 of his decision:

> "40. Having considered the totality of the evidence presented to me, I find that the Respondent has without doubt established, on the balance of probabilities, that the Appellant had used a proxy test taker on 17 October 2012. He therefore obtained the TOEIC certificate issued by ETS by fraud. The Respondent has established that the Appellant did not meet the suitability requirement in paragraph 276 ADE(1)(i) of the Immigration Rules.
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> 41. As the Respondent had established that the Appellant obtained the TOEIC certificate by fraud, it was incumbent upon the Appellant to provide some explanation to undermine the Respondent's case. I find that the Appellant has not provided an innocent explanation or evidence to contradict the evidence submitted by the Respondent."

17. The Judge therefore said, at para 42, that he found that the appellant did not meet the suitability requirement in para 276ADE(1)(i) of the Immigration Rules. He proceeded to consider the appellant's Article 8 claim outside the Immigration Rules at para 43 onwards and said (at para 45) that he found that the appellant's removal would be "*fully proportionate*".

The grounds

18. The grounds may be summarised as follows:

(i) Ground 1: The Judge erred by failing to apply the correct legal principles to which he was referred and which were explained in SM and Qadir v. SSHD [2016] UKUT 229 (IAC), MA (ETS - TOEIC testing) [2016] UKUT 00450 and Ahsan v. SSHD [2017] EWCA Civ 2009. The Judge failed to refer in terms or implicitly to these principles. Para 9 of the grounds draws attention, in particular, to para 15 of MA referring to substantial gaps in the evidence adduced by the respondent, in particular regarding evidence of 'continuity' linking the voice recordings provided to the appellant and to the impugned test performance. The Judge erred in failing to consider any of the factors set out at para 69 of SM and Qadir where the Upper Tribunal said:

> "We turn thus to address the legal burden. We accept Mr Dunlop's [counsel appearing for the Secretary of State for the Home Department] submission that in considering an allegation of dishonesty in this context the relevant factors to be weighed include (inexhaustively, we would add) what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated. Mr Dunlop also highlighted the importance of three further considerations, namely how the Appellants performed under cross examination, whether the Tribunal's assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic achievements are such that it was unnecessary or illogical for them to have cheated."

(ii) Ground 2: The Judge's adverse credibility assessment at paras 35-40 is based on a single point, i.e. that the appellant had not provided evidence of having challenged the respondent and ETS, including by providing his detailed evidence of having sat the TOEIC test himself.

(iii) Ground 3: The Judge erred by acting procedurally unfairly, in that, he failed to put to the appellant that he had failed to provide evidence of having

challenged the respondent and ETS, including by providing his detailed evidence of having sat the test himself.

Assessment

19. In relation to ground 1, whilst it is the case that judges are not obliged to set out or refer to relevant case-law, they are obliged to apply any relevant applicable principles. In the instant case, the applicable principles were explained in SM and Qadir, MA and Ahsan. There are three steps in considering whether the respondent has discharged the overall legal burden of proof upon her. The first step is to consider whether the respondent's evidence discharged the initial evidential burden on the respondent. If so, then the evidential burden shifted to the appellant to provide an innocent explanation. If this is shown, it will be for the respondent to prove otherwise. The overall legal burden remains upon the respondent to show to standard of the balance of probabilities that the appellant had used a fraudulently obtained TOEIC certificate.

20. It is not apparent from the Judge's decision that he followed this three-stage process. Although he referred at para 41 to the appellant not having provided an innocent explanation, the concluding words in the final sentence of para 17 do not make sense, i.e. that "(t*)he burden of establishing that allegation was on the Respondent, **on the basis of evidential burden if not on the balance of probabilities**"* (my emphasis). I therefore do not agree with Ms Isherwood's submission at para 3 that the Judge had directed himself correctly at para 17.

21. In any event, the final of para 17 suggests that the Judge conflated the various steps. Indeed, it is clear from paras 33 and 34 of the Judge's decision that he considered only one step at which he considered the evidence from ETS and that he turned to consider the appellant's evidence only after he had *already* reached his conclusion, based solely on the evidence from ETS, that the respondent had discharged the burden of proof upon her to the standard of the balance of probabilities. I therefore do not agree with Ms Isherwood's submission at para 7 that the Judge made his findings on the basis of the evidence as a whole, including the evidence of the appellant.

22. This error of approach is not therefore capable of being saved by the fact that the Judge subsequently said, at para 40, that: *"(h)aving considered the totality of the evidence presented to me, I find that the Respondent has without doubt established, on the balance of probabilities, that the Appellant had used a proxy test taker on 17 October 2012*".

23. Furthermore, I agree with the contention in ground 1 that the Judge failed to consider whether there were gaps in the respondent's evidence. In the instant case, the evidence was that 31 of the 37 tests were declared invalid, 6 were declared questionable and none were released. It is clear that he inferred from the fact that none were released that there were no valid tests, whereas the evidence was that there were 6 that were questionable. It is also clear from the Judge's reasoning in the text I have emboldened in the quote at para 14 above that he considered that the evidence from ETS was conclusive, in that, it was determinative of the ultimate question, whether the appellant had used a proxy test taker, whereas it is clear from SM and Qadir, MA and Ahsan that it is nonetheless necessary to evaluate the

evidence as a whole, following the three-stage approach to reach a fact-sensitive conclusion.

24. In these circumstances and taking into account the fact that the Judge did not refer at all to the relevant case-law, I cannot be confident that he applied the principles explained in SM and Qadir, MA and Ahsan.

25. I am therefore satisfied that the Judge erred in law as contended in ground 1. The failure to apply relevant principles in the assessment of the credibility of the appellant's evidence that he had not used a proxy test maker was plainly material to the outcome.

26. The key point raised in ground 3 is that the Judge's reliance upon the appellant's failure to provide evidence that he had challenged the respondent and ETS about the allegation of fraud before May 2019 was procedurally unfair.

27. Ms Isherwood disputes that there had been any procedural unfairness. She submits that the appellant was asked about whether he had complained and has helpfully produced an extract from the respondent's notes of the appellant's oral evidence. Mr Biggs has also attached to his submissions dated 1 September 2020 his notes of the appellant's oral evidence. These notes were helpful in enabling me to decipher the Judge's handwritten of the oral evidence.

28. Upon my careful examination of all of the notes, I am satisfied that the appellant was not asked why he had not challenged the respondent and ETS about the allegation of fraud before he did in May 2019. It is clear from the Judge's decision that he considered that this failure was determinative of the appellant's credibility, or lack thereof.

29. The appellant's failure to challenge the allegation of fraud sooner with the respondent and ETS is not a point that was reasonably obvious, in my view. Given the determinative weight that the Judge placed on it, I have concluded that the failure to put the point to the appellant was procedurally unfair.

30. Ground 3 is therefore established.

31. It is therefore unnecessary to consider ground 2.

32. For all of the above reasons, I set aside the decision of the Judge in its entirety.

33. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the “Practice Statements”) recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

> “(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party’s case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the

overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

34. In the instant case, I have found that there has been procedural unfairness. Accordingly, in my view, para 7.2(a) applies.

35. In addition, none of the Judge's findings can stand in view of the errors that have been established (grounds 1 and 3). It will be necessary to re-make the decision on the appellant's appeal on the merits. In addition, I have noted that Mr Biggs raised, on the appellant's behalf, issues concerning gaps in the respondent's evidence and the appellant gave evidence that the voice recording was not of his voice. In all of the circumstances, I am satisfied that the nature and extent of the judicial fact finding which is necessary in this case for the decision on the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the FtT. Accordingly, I am satisfied that para 7.2 (b) also applies.

36. Accordingly, I have concluded that this appeal must be remitted to the FtT.

Notice of Decision

37. The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision to dismiss the appeal is set aside. The appellant's appeal is remitted to the First-tier Tribunal for a fresh hearing on the merits on all issues by a judge other than Judge of the First-tier Tribunal Aujla.

Signed:

Date: 6 November 2020
Upper Tribunal Judge Gill

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email