



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

Appeal Number: HU/14471/2019 (V)

THE IMMIGRATION ACTS

**Heard at : Field House
On : 11 March 2021**

**Decision & Reasons Promulgated
On : 19 March 2021**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABU SHAHDAT MD SAYEM GAZI

Respondent

Representation:

For the Appellant: Mr S Kandola, Senior Home Office Presenting Officer

For the Respondent: Mr N Armstrong, instructed by Bindmans LLP

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was skype for business. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing

2. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Gazi's appeal against the Secretary of State's decision to refuse his human rights claim.

3. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Gazi as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

4. The appellant is a citizen of Bangladesh, born on 4 May 1981. He entered the UK on 17 June 2007 with leave to enter as a student and was granted further periods of leave as a Tier 4 student until 30 October 2015. The respondent considered curtailing the appellant's leave and on 25 July 2014 issued a notice of liability for removal, followed by a further removal notice on 19 January 2015 after it was decided not to pursue curtailment. On 10 April 2015 the appellant submitted an Article 8 human rights claim which was refused and certified as clearly unfounded on 15 April 2015. A further notice of liability to removal was served on the appellant on 14 April 2015 and a judicial review claim challenging that decision was refused and finally concluded on 4 June 2019.

5. The appellant then made a further human rights claim on 28 June 2019, on Article 3 and 8 private life grounds. That was refused on 9 August 2019. The respondent considered that the application fell for refusal on grounds of suitability under paragraph S-LTR.1.6 of Appendix FM of the immigration rules on the basis that the appellant's presence in the UK was not conducive to the public good owing to his reliance, in his previous application of 4 November 2013, on a fraudulently obtained TOEIC English language certificate. The respondent considered that the appellant did not, in any event, meet the eligibility requirements of paragraph 276ADE(1) and that there were no compelling circumstances outside the rules. The respondent also considered the appellant's medical and mental health problems, but concluded that there was appropriate medication and treatment available in Bangladesh and that he had his family in that country who could provide him with support. It was not considered that there was a risk of suicide if the appellant were returned to Bangladesh or that the Article 3 threshold would be met.

6. The appellant appealed against that decision and his appeal was heard by Designated First-tier Tribunal Judge Shaerf on 29 September 2020. The appellant gave oral evidence before the judge, remotely. The judge also had before him extensive evidence in relation to the TOEIC deception allegation, including six witness statements which covered the appellant's education in Bangladesh, his academic studies in the UK and his attendance at college for the ETS tests, as well as his medical and psychological issues and the birth of his child by his wife, a Bangladeshi national present in the UK with leave to enter as a student.

7. On behalf of the appellant it was submitted that the appeal turned on a single issue, namely whether the respondent had discharged the burden of proving that the appellant had cheated in his English language test. Reference was made to a Court Order of 4 June 2019 in the Court of Appeal settling the judicial review proceedings, in which it was accepted that if the appellant was found not to have cheated, he was to be treated as having had continuous leave since 17 June 2007 when he arrived in the UK as a student. Judge Shaerf

concluded that the respondent had not discharged the initial burden of proof or, if she had, then the appellant had provided an explanation which was sufficient to discharge the burden of proof upon him. He concluded that the appellant had not been shown to have exercised deception and allowed the appeal under Article 8 on the basis of the appellant's private life.

8. The Secretary of State sought permission to appeal Judge Shaerf's decision on the basis that he had failed to give adequate reasons for concluding that the respondent had not discharged the initial burden of proof or, alternatively, for concluding that the appellant had provided an innocent explanation sufficient to discharge the burden of proof upon him. The grounds asserted further that once the ETS had withdrawn its certificate, the basis of the appellant's leave had been removed; that there was nothing preventing the appellant from returning to Bangladesh and applying for the correct entry clearance; and that the judge had failed to have regard to the time critical requirements of paragraph 276ADE and the requirements for a continuous period of ten years' lawful residence.

9. Permission was refused in the First-tier Tribunal, whereby Upper Tribunal Judge Martin, sitting as a First-tier Tribunal Judge, said of the last ground:

"The second ground the judge erred in allowing the appeal under the long residence provisions is misguided. It is clear that the Secretary of State accepted that, if the appellant had not used deceit, he was entitled to succeed on long residence grounds."

10. The Secretary of State, however, renewed her application for permission to the Upper Tribunal and permission was granted on 3 December 2020, essentially on the last ground, albeit not excluding the first part of the grounds. The matter then came before me for a remote hearing conducted through Skype for Business.

11. There was some discussion at the hearing about the Secretary of State's position, in light of the written submissions made by Mr Armstrong dated 3 March 2021 and the Court of Appeal judgement and Consent Order annexed thereto. Ultimately, Mr Kandola's main concern was the issue of costs which he agreed could be dealt with by way of written submissions and he did not object to my preliminary view that the appeal ought to be dismissed and the judge's decision upheld.

12. In light of the agreement reached, I have kept my decision brief, as follows.

13. The challenge to Judge Shaerf's findings on the issue of fraud and deception, although forming the largest part of the grounds, was not in fact the main basis for the grant of permission, and indeed I consider it to be little more than a disagreement by the Secretary of State with the judge's decision. The decision is a detailed and careful one based upon a full and careful assessment of all the evidence. In so far as the grounds refer to the case of MA (ETS - TOEIC testing) [2016] UKUT 450 to challenge the judge's

reliance upon the appellant's English language qualifications and ability, that case does not preclude any weight being given to such matters, and certainly not in the face of the extensive evidence which was before the judge in that regard. The judge assessed the evidence with care and provided detailed and cogent reasons for concluding that the appellant had provided an innocent explanation in response to the respondent's concerns and for concluding that the respondent had not met the burden of proving deception and fraud. The judge was fully and properly entitled to conclude as he did.

14. As for the issue upon which permission was eventually granted, I agree with the reasons provided by Upper Tribunal Judge Martin for refusing permission on the grounds in the First-tier Tribunal. The respondent's grounds, and the grant of permission completely overlook the terms of the Consent Order agreed by the Secretary of State in the Court of Appeal on 4 June 2019, whereby it was accepted that if the appellant was found by the First-tier Tribunal, in a human rights appeal, not to have cheated, the relevant removal decisions would be rescinded and the appellant would be treated as having continuous leave to remain since 25 July 2014 and the earlier period when he had leave, which was the date of his entry to the UK, 17 June 2007. The appellant therefore succeeded on the basis of 10 years' continuous lawful residence and there was no need to consider his private life under paragraph 276ADE(1) of the immigration rules. In suggesting that there was such a need, the grounds of appeal, and the grant of permission, were misguided.

15. In all of the circumstances it seems to me that the judge was perfectly entitled to make the decision that he did. His decision was based upon a full and careful assessment of the evidence and a proper application of the relevant legal provisions and caselaw. I do not find any material errors of law requiring the decision to be set aside.

DECISION

16. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to allow the appeal stands and the Secretary of State's appeal is dismissed.

Directions

In the absence of agreement by the parties, the following shall apply:

1. No later than 14 days from the date this decision is sent out, the appellant shall file and serve written submissions as to costs;
2. No later than 14 days from receipt of the appellant's costs submissions, the respondent shall file and serve her costs submissions in response;
3. The submissions will then be put before an Upper Tribunal Judge to make a decision on costs.

Signed: S Kebede
Upper Tribunal Judge Kebede

Dated: 11 March 2021