



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/02182/2019**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 13 September 2019**

**Decision & Reasons Promulgated
On 2 October 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

**MR MD MOHIUDDIN BAHADDA CHOWDHURY
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel
For the Respondent: Mr L Tarlow, HOPO

DECISION AND REASONS

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Lodge dismissing his appeal against the respondent's decision dated 21 January 2019 refusing him leave to remain in the UK.
2. The respondent's position was that the appellant failed to meet the suitability requirements having obtained a TOEIC certificate fraudulently. Consequently, the appellant did not meet paragraph 276ADE(1)(vi) and outside the Rules there are no exceptional circumstances that would warrant a grant of leave.
3. Looking at the evidence in its totality, the judge was satisfied that the appellant had discharged the burden of proof upon him to rebut the

respondent's prima facie case. The judge was not satisfied that the respondent has established that the appellant obtained his TOEIC certificate fraudulently.

4. The judge turned to consider the appellant's submission that it would be disproportionate to require him to be removed to Bangladesh in the light of the fact that he is living in the UK with his partner and young child. His partner is presently studying in the UK. The judge found that the only paragraph applicable to the appellant is paragraph 276ADE(1)(vi).
5. The appellant's evidence was that he had come to the UK as a student in 2010. He had stopped studying after the award of a Postgraduate Diploma. He had stopped studying when he was served with his IS151 notice. He had been studying up to March 2015.
6. He was in a relationship with a girl he had met in Bangladesh in 2015. She had been studying in Bangladesh. She came to the UK in February 2017 to study. They started living together when she came here. The plan was for her to complete her studies and they would both return to Bangladesh. He had not returned and did not want to return before he had obtained his MBA. His parents had passed away. His intention all along had always been to leave when he had passed his course. If he had passed his exams, he would have gone back.
7. The reason he cannot go back is because of the ETS issue. His partner could not continue studying in the UK because she now had a 1 year old baby. He looked after the baby while she studied. His partner had brothers and sisters in Bangladesh. His partner's visa lasted until October 2020.
8. He had a level 5 Business Diploma, a postgraduate qualification from Plymouth University. He needed at least an MBA in Bangladesh or he would not be able to get the job he wanted.
9. The judge rejected the appellant's submissions that he had meaningful no ties to Bangladesh, his parents have died and there would be significant obstacles to his reintegration, having lived in the UK for a number of years. The judge found that even accepting that his father and mother are dead, it is unlikely he does not have wider family in Bangladesh. His partner who is here on a student visa has family in Bangladesh. Whatever the position, the judge found that the appellant has the resources to re-establish himself and his family in Bangladesh. The judge considered that the appellant made reference in his witness statement to having inherited valuable property along with cash from his parents.
10. The judge found that the partner does not have indefinite leave to remain in the UK. She is here on a student visa. There is nothing stopping her returning with the appellant. It is clearly in the best interests of the child for her to remain in the family unit. Ultimately, it will be a matter of choice for the appellant and his partner whether she remains here with the baby and completes her course or whether they are returned to Bangladesh.

11. The judge found that any private life the appellant has established in the UK has been established whilst his immigration status is precarious and he attached little weight to it. The judge found that the appellant speaks English and on the evidence is financially independent, but those are neutral factors.
12. The judge was satisfied that there are no very significant obstacles preventing the appellant's integration into Bangladesh. The judge found that the appellant does not meet paragraph 276ADE(1)(vi).
13. In the light of his findings the judge held that there were no exceptional circumstances which required him to consider Article 8 outside the Rules.
14. Mr Karim argued that the appellant was the subject of an earlier Section 10 decision which had ended his lawful residence/leave in the UK on the basis of an ETS allegation. The judge accepted having regard to all the factors that the respondent had not proved that the appellant had cheated and that the appellant had discharged the burden on him.
15. Mr Karim argued that the judge, however, erred in law when he proceeded to consider the appeal like an ordinary human rights claim. It was argued before the judge that in the light of the earlier unlawful ETS decision of the respondent, which unlawfully brought an end to the appellant's lawful status, the appeal ought to be allowed following the guidance given by the Court of Appeal in **Khan and Others [2018] EWCA Civ 1684**, as well as **Ahsan [2017] EWCA Civ 2009**. He argued that the judge failed to recognise the guidance given by the Court of Appeal in several judgments. The judge failed to appreciate that but for the ETS allegation the appellant's lawful leave would not have been curtailed or ended and because of the ETS decision in 2015, the appellant found himself without leave and having to pursue a human rights claim and a judicial review.
16. Mr Karim argued that the appellant should be returned to the position he was in in 2015 when he had lawful leave to remain as a student.
17. Mr Karim relied on an unreported case by Deputy Upper Tribunal Judge Storey (HU/09477/2018 plus 3) in which Judge Storey had accepted a similar argument from him. Judge Storey had allowed that appeal under Article 8 using the **Razgar** approach to the third question that the decision by the Secretary of State was not in accordance with the law and to the fifth question finding that the decision by the Secretary of State was disproportionate.
18. Mr Karim relied on paragraph 120 of the Court of Appeal's decision in **Ahsan** where the Court of Appeal held

"120. The starting point is that it seems to me clear that if on a human rights appeal an appellant were found not to have cheated, which inevitably means that the Section 10 decision had been wrong, 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, that is as if their leave to remain had not been invalidated ...”.

19. Mr Karim relied on the Court of Appeal’s decision in **Khan**, paragraph 37, which relied on the Secretary of State’s confirmation that

“(i) For those individuals whose leave was curtailed, and where that leave would still have time to run as at the date of an FtT determination that there was no deception, subject to any further appeal to the UT, the curtailment decision would be withdrawn and the effect ... would be that leave would continue and the individuals would not be disadvantaged in any future application they chose to make; ...”.

20. The Secretary of State further stated that

“ For those whose leave had expired, and who had made an in time application for further leave to remain which was refused on ETS grounds, the effect of an FtT determination that there was no deception would be that the refusal would be withdrawn. The applicant in question would still have an outstanding application for leave to remain and the respondent will provide them with a reasonable opportunity to make any further changes to their application which would be considered on the basis of them not having employed any deception in the obtaining of their TOEIC certificate, and they would be in no way disadvantaged in any future application they chose to make.

(iii) In all cases, the respondent confirms that in making any future decision he will not hold any previous gap in leave caused by any erroneous decision in relation to ETS against the relevant applicant, and will have to take into account all the circumstances of each case”.

21. Mr Karim relied on the consent orders in **Khan** and **Islam** which had been endorsed by the Court of Appeal where

“Upon the respondent agreeing that if the appellant succeeds on that appeal, on the basis that he did not commit a TOEIC fraud then, in the absence of some new factor justifying a different course, the respondent will rescind her decision and

(1) grant the appellant a reasonable opportunity, be not less than 60 days to submit an application for further leave ...”.

22. Mr Karim submitted that in the light of the stated case law, the appellant’s appeal should be allowed. He has cleared his name. Had it not been for the ETS case, the appellant would have enjoyed legal status.

23. Mr Karim submitted that the appellant's wife and child have lawful leave. He submitted that as the appellant's appeal on the ETS case has been allowed, it is for the Secretary of State to determine the leave to be granted to the appellant.
24. Mr Tarlow accepted the submissions made by Mr Karim as being the appellant's position. He confirmed that the Secretary of State did not challenge the judge's decision that the appellant did not cheat in the ETS test. He said as a consequence the appellant should be put back in the position he was in 2015 without prejudice.
25. In the light of the submissions made by Mr Karim and the acceptance of those submissions by Mr Tarlow, I find that the judge materially erred in law in considering this application simply as an appeal under Article 8 of the ECHR without looking at the case law, in particular, the decisions made by the Court of Appeal which favoured the appellant as a result of the judge's decision that he did not cheat in his ETS test.
26. I set aside the judge's decision and remake it.
27. I rely on the decisions made by the Court of Appeal. I find that the appellant should not be disadvantaged by the Secretary of State's decision. He has cleared his name and therefore he should be put back in the position he was in 2015. I therefore find that the appellant had discharged the burden of proving that the respondent's decision was not in accordance with the law and that the respondent's decision was disproportionate.
28. The appellant's appeal under Article 8 ECHR is allowed.
29. No anonymity direction is made.

Signed

Date: 30 September 2019

Deputy Upper Tribunal Judge Eshun