Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/45277/2013

THE IMMIGRATION ACTS

Heard at Bradford Upper Tribunal	**Determination Promulgated**
On 5 June 2014	**On 20 August 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GHAZALA KOUSAR

Respondent

Representation:

For the Appellant: Miss C Johnstone, a Senior Home Office Presenting Officer
For the Respondent: Mr A Iqbal, Equity Law Chambers, Solicitors

DETERMINATION AND REASONS

1. The appellant Ghazala Kousar, was born on 29 June 1987 and is a citizen of Pakistan. The appellant had been granted leave until 17 March 2015 to enter the United Kingdom as the spouse of Mohammed Azhir Ayaz, a person present and settled here. On 15 October 2013, the respondent decided to curtail the appellant's leave with immediate effect so that no leave remained and also to make a direction to

remove her under Section 47 of the Immigration, Asylum and Nationality Act 2006. The appellant appealed against that decision to the First-tier Tribunal (Judge Upson) which, in a determination promulgated on 3 March 2014, allowed the appeal on the basis that the respondent's immigration decision was not in accordance with the law. The Secretary of State now appeals, with permission, to the Upper Tribunal. I shall hereafter refer to the appellant as the respondent and to the respondent as the appellant (as they were respectively before the First-tier Tribunal).

2. The appellant had submitted in support of her application for leave a English Language Testing Service Certificate which had been issued by Cambridge English Language Assessment. The refusal letter of 15 October 2013 records that Cambridge English Language Assessment had confirmed that they had,

> identified an unusual pattern of reading and listening tests responses for BULATS online candidates in Centre PK915, where you took your assessment. Cambridge English Language Assessment has therefore concluded that you showed insufficient engagement with their test to be able to confirm the validity of the scores with confidence".

3. At the hearing before Judge Upson, the appellant submitted that the respondent had not acted fairly towards her. The appellant relied upon the decision of the Tribunal in *Naved (student – fairness – notice of points)* [2012] UKUT 14 (IAC). The judge cited *Naved* at [15]:

> In our judgment the problem arises not with the terms of the section, which is in any event binding on us as primary legislation, but with the conduct of the respondent in examining the application and refusing it in the way she did. Given that the respondent was (or should have been) aware of the consequences of s. 85A when she made the decision in this case, the respondent is under a common law duty to act fairly in deciding immigration claims properly made to her. A failure to act fairly is a failure to act in accordance with the law and a failure to make a decision in accordance with the law is a ground of appeal to the tribunal under s.84(1)(e) of the Nationality Immigration and Asylum Act 2002.

4. The judge also refers to *Thakur (PBS decision – common law fairness) Bangladesh* [2011] UKUT 151 (IAC) finding that this case "declared that a decision taken in circumstances where the [student] could not have known about was "contrary to law". (*sic*) The judge found that the appellant did not appear

> to have been given any notice ... but this decision [to curtail their leave following a report from Cambridge English Language Assessment] had even been considered. She had not been provided with anything that could assist her in addressing the allegation that the test was dubious and the ECO accepted it as genuine and valid at the time entry clearance was granted. ... I do not accept the submission of the HOPO that the case of *Naved* can be distinguished as a PBS case. The principle of fairness is a principle applies throughout our legal system and, as pointed out in the case of *Naved*, it was further stated as a general principle in the case of Patel.

5. The grounds of appeal assert that the judge found, incorrectly, at [16] that there was any duty at all upon the respondent to provide the appellant with notice and she

"assist her in addressing the allegation". The respondent also relies upon a schedule of test certificates annexed to the decision at enclosure (B). That schedule appears to have been prepared by Cambridge English Language Assessment and is a list of "names and ID details of all candidates disqualified from Grafton College, Pakistan as a result of the recent investigation". The appellant's name appears on that list and the outcome of the investigation in respect of her was marked "DISQUALIFIED".

6. I find that the judge erred in law by allowing this appeal. I have reached that conclusion for the following reasons. First, the facts in *Naved* can be distinguished from those in the instant appeal. At [14], the Tribunal in *Naved* held:

> Nevertheless the appellant's treatment has been conspicuously unfair. His application for leave to remain is being refused because of his failure to produce a document that he was never asked to produce; that document only became relevant because of inquiries the respondent made on the application, but did not communicate the results to the appellant before the decision was made, or else she would have been made aware that the response from the appellant's previous college was inaccurate. None of this would have mattered if s.85(4) had remained in force unaltered. We cannot imagine that Parliament intended to produce so clearly unfair a result.

7. The treatment of the appellant in *Naved's* was conspicuously unfair because, as the Tribunal recorded at the outset of its determination at [2]

> > it is common ground that, if he had produced evidence [of the course he had attended in the United Kingdom] with his application for further leave to remain then he would have been entitled to be treated as having an 'established presence' here.

In other words, the appellant had to meet a requirement of which he had not been notified but which, crucially, with which he would have been able to have complied had he been notified of it. That is a circumstance wholly different from that of the appellant in the present appeal. The respondent does not accept that the appellant was entitled to entry clearance at all. Indeed, it seems that the respondent will herself become a victim of conspicuous unfairness if she is to be prevented from changing decisions when new and relevant evidence comes to light which indicates that entry clearance has been granted on a false premise.

8. Further, it is significant that the very opportunity to respond to the language provider's report, the denial of which opportunity Judge Upson found constituted the respondent's unfairness towards the appellant, has, even now, not been taken up by this appellant. If the appellant had evidence to adduce or arguments to put forward which might show that, in her particular case, her English language test results not tainted by the failings of the test provider, one would have expected her to have adduced that evidence or advanced those arguments by now. Indeed, Judge Upson heard evidence from the appellant given with the assistance of a Punjabi interpreter [5] and he recorded the appellant having told him that she believed that "she could pass that test again [in English language] if she had to" a statement which does not exactly inspire confidence in the appellant's English language abilities. I find that any suggestion that the respondent has behaved unfairly towards the

appellant by not giving her a chance to respond to her decision is, in the circumstances, wholly without merit. The facts in this appeal differ entirely from those in *Naved* where, if the appellant had been given the opportunity to submit the required evidence, both parties agreed he would have been entitled to leave to remain. Here, the appellant's inertia and reluctance, even at this stage of the proceedings, to prove that the respondent's opinion of her English language test result is telling.

9. I acknowledge that the refusal letter is not a model of clarity. The Secretary of State "expected [the appellant] to either leave the United Kingdom or submit a fresh application for leave to remain before your current leave to remain expires"; that was a somewhat empty offer given that, in the previous paragraph, the appellant's leave to remain had been terminated "with immediate effect". On the other hand, I accept Miss Johnstone's submission that the proper forum in which the appellant could have adduced evidence and advanced argument challenging the basis of the curtailment was the hearing before the First-tier Tribunal Judge. She chose not to take that opportunity.

10. In the circumstances, I find that the First-tier Tribunal's determination should be set aside. In the light of my findings and observations above, I find the appellant has not discharged the burden of proving that the decision to curtail her leave to remain was not in accordance with the law and, accordingly, I remake the decision by dismissing her appeal in respect of the Immigration Rules.

DECISION

11. The determination of the First-tier Tribunal promulgated on 3 March 2014 is set aside. I have remade the decision. The appeal in respect of the Immigration Rules is dismissed.

Signed Date 5 August 2014

Upper Tribunal Judge Clive Lane