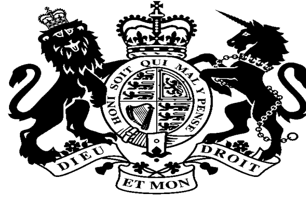

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/14521/2015**

THE IMMIGRATION ACTS

Heard at Bradford
On 20 July 2016

Sent to parties on:
On 28 July 2016

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MD HARUN MIAH

(NO ANONIMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr M Diwnycz (Senior Home Office Presenting Officer)
For the Respondent: Mr K Noor (Solicitor)

DECISION AND REASONS

1. This is the Secretary of State's appeal to the Upper Tribunal, brought with the permission of a judge of the First-tier Tribunal, against a decision of the First-tier Tribunal (Judge Saffer hereinafter "the Judge") allowing the appeal of the claimant against a decision of the Secretary of

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State of 20 March 2015 to remove him from the UK under section 10 of the Immigration and Asylum Act 1999.

2. By way of brief background, the claimant is a national of Bangladesh who was born on 18 March 1984. He entered the UK on 16 September 2010 as a Tier-4 (General) Student Migrant and subsequently obtained further leave, until 31 May 2015, on a similar basis. During the currency of his leave he married one Amina Begum. There was an Islamic marriage on 3 May 2013 and a registry office marriage on 17 July 2013. According to the claimant he and Amina Begum have, since marriage, lived together as man and wife. She has a minor child born on 29 September 2006 and it is said he is a father figure to that child.

3. It is to be noted that on 16 May 2012, in connection with the application he had made for further leave as a Tier-4 (General) Student Migrant he passed an Educational Testing Service (ETS) English language test which resulted in the issuing of a TOEIC certificate and the grant of leave. The Secretary of State was to subsequently argue that that certificate had been obtained fraudulently. On 30 June 2014 the claimant applied for leave to remain on human rights grounds on the basis of his relationship with Amina Begum. The Secretary of State responded to that application by concluding that the English language test certificate had been obtained fraudulently and by deciding to remove him. He sought to appeal.

4. The Secretary of State contended that the claimant did not have an in-country right of appeal. A duty judge rejected that argument and the appeal was listed before the Judge who dealt with the matter, by way of an oral hearing, on 28 October 2015. He decided that there was an in-country right of appeal and in explaining why he said this:

> " 4. Having heard submissions, considered his application and covering letter (30/6/04), and considered the wealth of case law produced, I determined (as did Judge Freer [the duty judge] on 19/06/15) that the appellant had an in-country right of appeal as his human rights claim was made on 30/6/04 which was before the cancellation of his leave on 20/3/15 and as there had been no certification of the claim pursuant to s92(3) of the Nationality, Immigration and Asylum Act 2002."

5. The Judge then went on to deal with the allegation of fraud. The specific allegation was that a proxy test taker had been used. He rejected that claim noting, in effect, that the evidence presented by the Secretary of State was of a general nature and that the claimant had been able to provide detail regarding the circumstances involved in his taking the test. He also accepted that the relationship was a genuine one and concluded that, looking through the prism of the Immigration Rules, there were compelling circumstances such as to justify a grant of leave outside the rules under Article 8 of the European Convention on Human Rights (ECHR). Hence, the claimant's appeal succeeded.

6. That was not the end of the matter because the Secretary of State applied for permission to appeal to the Upper Tribunal. The first contention in the grounds was to the effect that the Judge had erred in deciding that there was an in-country right of appeal. It was also contended that he had erred in failing to adequately explain why he was rejecting the Secretary of State's evidence regarding fraud; in effectively imposing an incorrectly high standard of proof upon the Secretary of State and in considering the human rights aspects in an overly simplistic manner.

7. Permission to appeal was granted by a judge of the First-tier Tribunal who, in granting permission, suggested that the first ground (the one about whether there was an in-country right of

appeal) was arguable but that the others were probably not. However, the grant of permission was not expressed to be limited.

8. Permission having been granted there was a hearing before the Upper Tribunal (before me) to consider whether the Judge had erred in law and, if so, what should flow from that. Representation at that hearing was as stated above. Both representatives agreed that the applicable law concerning the right of appeal argument was contained within sections 82 and 92 of the Nationality, Immigration and Asylum Act 2002 before amendments made by the Immigration Act 2014. It seemed to me, as I suggested to the parties, that the Judge's analysis as to this matter was correct. Mr Diwnycz did not seek to dissuade me from that initial view. In fact, Section 82(2)(g) does indicate that a decision to the effect that a person is to be removed from the United Kingdom by way of directions under section 10 of the 1999 Act is one which carries a right of appeal. Section 92(2) appears to suggest that that type of decision does not, however, attract an in-country right of appeal. However, the position is then affected by section 92(4) which does confer an in-country right of appeal in respect of a decision where a human rights claim has been made by a person whilst in the UK. Here, as the Judge pointed out, a human rights claim had been made by the claimant prior to the decision under appeal having been made. Accordingly, the Judge did not err and Mr Diwnycz, as indicated, did not in fact seek to persuade me that he had.

9. This left the remaining grounds. Mr Diwnycz did not address me as to them. They are, it seems to me, merely a disguised attempt to disagree with the short but properly reasoned and adequately explained findings of the Judge regarding the fraud issue and regarding the merits of the human rights arguments. There is nothing to suggest the Judge had erroneously applied an incorrect standard of proof and the Judge's explanations concerning all matters was adequate which is all it needed to be. As such, those grounds fail to identify an error of law on the part of the Judge.

10. In the above circumstances the Secretary of State's appeal to the Upper Tribunal fails.

Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and shall stand.

Anonymity

I make no anonymity direction.

Signed **Date 28 July 2016**

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed **Date 28 July 2016**

Upper Tribunal Judge Hemingway