



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

Appeal Number: IA/38690/2014

**THE IMMIGRATION ACTS**

**Heard at UT(IAC) Birmingham  
On 17 February 2016**

**Determination  
Promulgated  
On 13 April 2016**

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER**

**Between**

**MR SHAHBAZ IMAM**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Miah, Counsel, instructed by Lee Valley Solicitors  
For the Respondent: Mrs R Petterson, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal

Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellant appeals against the decision of the First-tier Tribunal (Judge Wedderspoon) dismissing the appellant's appeal against a decision taken on 23 September 2014 to refuse an application for further leave to remain and to remove the appellant from the UK.

### **Introduction**

3. The appellant is a citizen of Pakistan born on 21 April 1991. He entered the UK in January 2011 with valid entry clearance as a student from 31 December 2010 until 31 May 2014. On 17 October 2013 the appellant submitted an application for leave to remain as a student and on 19 November 2013 leave to remain was granted until 30 August 2015. On 6 June 2014, the appellant married JEJ, a British citizen, and on 14 July 2014 he submitted an application for consideration as the spouse of a settled person.
4. The Secretary of State accepted the appellant's identity and nationality but concluded that his English language test scores with ETS were obtained by deception and there were no insurmountable obstacles for the appellant and JEJ to live in Pakistan.

### **The Appeal**

5. The appellant appealed to the First-tier Tribunal and attended an oral hearing at Stoke IAC on 18 May 2015. He was represented by Ms Bull of Counsel. The First-tier Tribunal found that the respondent had proved that the test scores were obtained by deception and that the test results amounted to false information because the appellant used a proxy test taker in 2013. The fact that the appellant was fluent in English and passed a further test in English with distinction at another test centre did not establish that he attended the ETS test centre in London in 2013. The appellant was not a suitable person under Appendix FM. The judge accepted that the appellant had established a private life in the UK but JEJ was not at risk in residing in Pakistan because she would not practise Christianity there. The appellant was an intelligent, articulate young man who was likely to find work in Pakistan. JEJ could take reasonable steps to learn Urdu and could keep in regular telephone contact with her parents and family and friends in the UK. There were no insurmountable obstacles to the appellant and JEJ residing in Pakistan. The appeal was dismissed under the Immigration Rules.

### **The Appeal to the Upper Tribunal**

6. The appellant sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law because the evidence of the respondent did not prove that ETS had cancelled the test scores due to a proxy test taker, there was no positive confirmation that deception was

used, there were inconsistent First-tier decisions in relation to ETS cases, the judge had failed to make any decision in relation to the Article 8 claim outside the Rules and the judge had failed to exercise discretion to grant leave to remain outside the Rules.

7. Permission to appeal was granted by First-tier Tribunal Judge Bird on 28 August 2015. It was arguable that the judge erred in accepting that the respondent's generic evidence was sufficient to prove that dishonesty or deception had been practised and the assessment of deception may have raised an arguable error of law in relation to the assessment of Article 8. Permission to appeal was not refused on any ground.
8. Thus, the appeal came before me

### **Discussion**

9. Mr Miah submitted that what should have happened was a request for a voice recording and then expert evidence obtained. However, the first ground of appeal was relied upon in any event. Insufficient consideration was given to family and private life in the UK; just paragraph 18 of the decision. There was an absence of relevant consideration under section 117B of the 2002 Act and the decision was not safe.
10. Ms Petterson submitted that the grounds were simply a disagreement. The judge decided to admit the ETS test results. There was no reason to go through every requirement of the Rules. The judge did deal with private and family life at paragraph 18. Effectively, the judge carried out a proportionality assessment. The discretion to consider the application outside the Rules rested with the respondent.
11. Mr Miah submitted in response that there was no explanation as to why the appellant's evidence had been rejected in favour of the generic evidence. The Article 8 consideration was woefully lacking. This was not simply a matter of disagreement with the findings.
12. I am satisfied that the consideration of Article 8 was inadequate. There was no proportionality assessment under Razgar or consideration of the SS Congo test; i.e. were there compelling circumstances such as to justify the grant of leave to remain outside the Rules. That is a material error of law. There was also no consideration of section 117B of the 2002 Act and that is a further material error of law under Forman (ss 117A-C considerations) [2015] UKUT 412 (IAC). The judge did not make a decision under Article 8 at paragraph 19; which only refers to dismissal of the appeal under the Rules.
13. I find that the judge did not give any detailed consideration as to why the appellant would arrange a proxy test taker given his proficiency in English or to his explanation for attending an ETS centre in London. The failure to give adequate reasons is a further material error of law. This issue is

particularly significant in light of the recent Upper Tribunal decision of SM and Qadir v SSHD (ETS - Evidence - Burden of Proof [2016] UKUT (IAC).

14. The burden of proof was improperly reversed at the end of paragraph 16 of the decision. The judge stated that, "*The fact that the Appellant is fluent in English and passed a further test centre does not establish that he attended the ETS test centre in London in 2013 and I reject this submission*". There was no burden of proof on the appellant and the form of words used by the judge is a further material error of law.
15. Thus, the First-tier Tribunal's decision to dismiss the appeal under the Rules involved the making of an error of law and its decision cannot stand.

### **Decision**

16. Both representatives invited me to order a rehearing in the First-tier Tribunal if I set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. I find that the errors of law infect the decision as a whole and therefore the re-hearing will be de novo with all issues to be considered again by the First-tier Tribunal.
17. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined *de novo* by a judge other than the previous First-tier judge.

Signed



Date 6 April 2016

Judge Archer

Deputy Judge of the Upper Tribunal