Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05550/2015

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 11 July 2017	**On 14 July 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ARSALAN ASHRAF
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: in person.
For the Respondent: Mrs Petterson - Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Devlin who in a comprehensive and detailed decision promulgated on 29 September 2016 dismissed the appellant's appeal against the refusal of his leave to remain in the United Kingdom on human rights grounds.

Background

2. The appellant is a national of Pakistan born on 17 September 1991. He entered the United Kingdom on 18 August 2006, lawfully, as a student. Such leave was extended to 28 February 2009 but thereafter two applications for extensions of leave in 2009 in 2010 were refused and an application for leave to remain on the basis of family and private life was refused on 20 April 2013, which was reconsidered, but on 8 September 2014 maintained with a right of appeal.

3. On 7 October 2015, the appellant was served with a notice of a decision to make a deportation order and detained. The appellant's human rights claim was refused in a decision dated 3 September 2015 it being the respondents view that deportation was conducive to the public good and the appellant was not entitled to any of the exceptions to deportation contained in paragraph 399 or 399A of the Immigration Rules.

4. The Judge noted the nature of the appellant's offending which led to his conviction and set out at [24] to [28] the sentencing remarks of Her Honour Judge Manley when sentencing the appellant on 3 July 2015. The Sentencing Judge noted that the appellant pleaded guilty at the case management stage to two offences of assisting unlawful immigration to an EU member state by taking examinations on multiple occasions for other people. At [25 – 28] the Judge writes:

> "25. The judge observed that "[the Appellants] offending [undermined] public confidence in the Visa system; and that "[whilst he was] low down the scale is compared with those who [organised] this illegal activity… It will be impossible to carry out such activity [without people like him]".
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> 26. The judge accepted that the appellant was "naive young man", and noted that the character references showed "a thoroughly otherwise decent young man, hard-working with many positive attributes". She described it as "a tragedy that as a young man who [had] not been in trouble before the police, [he had] clearly brought shame on [himself] and [his] family".
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> 27. However, the judge reminded herself that "previously character and personal circumstances are fairly limited value, cases have to be sentenced on a deterrent basis". She found that the offences were so serious that a sentence of immediate custody was "inevitable". She notes the fact that "[the Appellant was] not helping people in difficulty, [but doing] the tests… For financial gain" as an "aggravating factor".
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> 28. The judge described the sentence of 10 months imprisonment as "mercifully short then one which she could have… Passed on someone older and perhaps more criminally experienced [the Appellant was]"."

5. The Judge was referred to a decision of a differently constituted First-tier Tribunal promulgated on 31 October 2014 which allowed an appeal by the appellant's brother against a decision by the respondent, dated 12 June 2014, to

refuse his application for leave to remain on private life grounds. That appeal was allowed and the findings referred to at [31 – 32] which the appellant in this appeal sought to adopt as his reasoning for why he should succeed in this appeal.

6. The Judge considered the written and oral evidence before setting out the correct legal self-direction in relation to appropriate legal provisions, applicable at that time. The Judge's findings and reasons commence from [81] of the decision under challenge which can be summarised in the following terms:

i. The appellant is not a British citizen and has been convicted in the United Kingdom of an offence. He falls within section 117D(2)(a) and (b). The question is whether he falls within section 117D(2)(c) [82].
ii. The appellant does not fall within section 117D(2)(c)(i) since he has not been sentenced to a period imprisonment of at least 12 months and nor is there any suggestion that he is a "persistent offender" [83].
iii. The question is whether the appellant has been convicted of an offence that has caused serious harm [84].
iv. Both parties conceded that the appellant had been convicted of an offence that had caused serious harm [85].
v. The Judge therefore found the appellant was a "foreign criminal" as defined by section 117D(2)(a), (b) or (c) of the 2002 Act [91].
vi. In relation to the Immigration Rules, the Judge found the appellant does not fall within paragraph 399(a) as he does not claim to have a genuine and subsisting parental relationship with a child under the age of 18 [93].
vii. The appellant claims to have a genuine and subsisting relationship with a partner who is in the UK, a British citizen, and who settled in the UK [94]. Even if the named individual is the appellant's "partner" and they have genuine subsisting relationship, the evidence is they did not become 'boyfriend' and 'girlfriend' until January 2014 [96]. As the appellant's leave to remain expired on 9 October 2009 did not have settled status when he entered into that relationship [98]. The relationship was not formed as a time the appellant was in the United Kingdom lawfully and his immigration status was not precarious for the purposes of paragraph 399(b)(i) [99].
viii. As the appellant does not meet the requirements of 399(b)(i) he does not fall within 399(b) making it not necessary to consider whether he meets the requirements of subparagraphs (ii) or (iii) [100].
ix. The appellant was only lawfully in the UK between 18 August 2006 and 9 October 2009, three years and two months, [103].

x. As the appellant cannot satisfy 399A(a) it is not necessary to consider the requirements of (b) and (c). The appellant does not fall within paragraph 399A [107 – 108].

xi. In relation to paragraph 398, i.e. whether there are very compelling circumstances over and above those described in 399 and 399A, such an assessment must be preceded by ascertaining the extent to which the factors identified in those paragraphs apply [109].

xii. The appellant entered the United Kingdom when he was aged 14 years and 10 months and has spent his entire childhood and a significant part of his minority outside the United Kingdom [111 – 112].

xiii. The appellant has spent just under half his minority and all of his adult life in the United Kingdom [114]. This equates to 9 years 10 months; approximately 40% of his life [5]. Only three years and two months of that period constitute lawful residence although the appellant was a minor throughout that period [116]. All of the appellant's adult life in the United Kingdom has been spent here unlawfully [117].

xiv. The Judge accepts the appellant failed to regularise his immigration status over a period of three years and the commission by him of criminal offences can be characterised as demonstrating a want of due regard for the law as well as the legal system of the United Kingdom which may be relevant in determining whether the appellant is socially and culturally integrated into the UK, but was not found to be determinative, on the facts [120]. The appellant has a level of social and cultural integration into the United Kingdom [121].

xv. The appellant speaks English fluently and has obtained qualifications in English. His family and many relatives live here. His personality and mannerisms and tastes to some extent reflect the Western lifestyle he has enjoyed [122] although the Judge states "it is important not to overstate the evidence of social and cultural integration before me "[123].

xvi. There is relatively little evidence from persons who know the appellant or his circumstances in the United Kingdom outside his immediate family members [124] the appellant did not lead any close friends or acquaintances before the Judge nor did he produce affidavits, statements, or letters from such person or produce independent evidence of community activities over and above those alluded to by an Imam who referred to the appellant being a great support in helping them raise money for the construction of a mosque and dedicating many hours to it [126 – 127].

xvii. Documentary evidence of the appellant's educational attainments in the United Kingdom is "somewhat sparse" [128]. At [130] the Judge writes "It seems clear from the Record of Interview, that the Appellant's academic career in the United Kingdom cannot

properly be described as "illustrious" and indeed, it is difficult to be satisfied as to what his intentions really were".

xviii. Little evidence was before the Judge as to how the appellant had occupied himself since 2010 [131].

xix. Whilst the Judge was satisfied there was a level of social and cultural integration in the United Kingdom, the evidence was neither comprehensive nor particularly compelling which is relevant to the weight given to this aspect of the claim. The Judge considered he was bound to have regard to the appellants disregard for the laws and legal system within the United Kingdom [132].

xx. In considering whether there were very significant obstacles to the appellant's integration into Pakistan, the Judge treated the determination of the appellant's brother as his starting point as there was an overlap in the evidence between the two appeals and it is stated they arise out of the same factual matrix [135 – 136].

xxi. The hearing of the appellant's brother's appeal predates the conviction and also the arrest of the appellant and his brother on assisting unlawful immigration by taking English language tests for other people and the appellant's interview with immigration officers 3 March 2015, during the course of which evidence emerged that the appellant's brother had also sat English language tests on behalf of the other people, had done so for much longer than the appellant, and had suggested the appellant might make some money by sitting English language tests on behalf of other people [138 – 141]. The Judge notes the appellant's brother was interviewed but gave a "no comment" response to questions asked as a result of which he was bailed to a future date [142]. The Judge notes the brother has been charged in respect of the said matters [143]. The Judge noted the matters were relevant as they go directly to the credibility of the appellant and his brother and other facts that had not been brought to the attention of the First-tier Tribunal Judge considering the brother's appeal [145 – 146].

xxii. The Judge notes a number of concerns in relation to the appellant's brother's appeal on matters arising from the evidence at [147 – 156].

xxiii. In relation to the number of tests the appellant sat, the Judge expressed concerns about the credibility of the appellant's claim in relation to the number of tests he sat [160 – 172] leading to a conclusion at [173] that "the impression I have formed is that the Appellant was trying to minimise his wrongdoing, and effectively to rewrite history".

xxiv. The Judge found the finding of the First-tier considering the brothers appeal in relation to family connections within Pakistan was largely predicated on the evidence of the appellant, his brother, and his father [176] and that there was no truly independence evidence to show the appellant's grandparent's home had been sold or that he had no close family living in Pakistan [178].

xxv. The Judge concluded he was not bound to treat issues as having been settled by the decision of the First-tier Tribunal judge as the Judge was not satisfied the previous judge would have reached the same findings on the basis that he did had he been aware of the evidence now being considered [179 – 180].

xxvi. The original judge clearly took on trust much of what he had been told by the appellant, his brother and his father [181].

xxvii. The appellant had not produced any truly independent evidence to show that the address shown in his, his brothers or his father's passport, has been sold, or that the persons by whom it is currently occupied are unrelated to the appellant and his family [185].

xxviii. The appellant has not produced any independent evidence to show that he has no close relatives in Pakistan or that it would be impractical to produce such evidence. There was nothing to suggest it would be impractical for the appellant to locate family members or produce affidavits, statements, or letters, to confirm the state of their relationship with the appellant and his family [186].

xxix. The appellant's claim in his CV that he could speak Urdu and Punjabi, which he later admitted was false as his Urdu and Punjabi was very limited, was found not to be conducive to a finding regarding his generally credible [193].

xxx. All persons who provide references for the appellant's father's application, appear to be of Pakistani descent as is the appellant's girlfriend [199].

xxxi. The Judge was not prepared to assume that the appellant will be required to return to Pakistan alone [204].

xxxii. The Judge found he was not satisfied in [205] that:

a. The appellant is practically unable to speak, and does not read or write Urdu or Punjabi;
b. He has no familiarity with Pakistani culture;
c. The appellant has only visited Pakistan on three occasions in 2005, and spent 38 days of his entire life there;
d. He would be returning to Pakistan alone, with without his family;
e. Neither he nor his family own any property in Pakistan;
f. He has no close relatives to whom he could reasonably be expected to turn to for support, in Pakistan.

xxxiii. The Judge accepted relocation would occasion hardship to the appellant and that his lifestyle will be very different from that which he has been familiar with in Dubai and the United Kingdom, but the Judge was not satisfied these conditions, whether taken individually or cumulatively, would constitute significant obstacles to integration in Pakistan [206].

xxxiv. The Judge was not satisfied the appellant's religion or the security situation in Pakistan would constitute such obstacles. There was no sufficient evidential basis to conclude otherwise [206-7].

xxxv. There are no very significant obstacles to the appellant's integration into Pakistan [208].

xxxvi. In relation to the question whether the appellant has a genuine subsisting relationship with a qualified partner, it is accepted the lady concerned is a British citizen and settled in the United Kingdom who gave oral evidence to the Judge [212 and 215]. The witness described herself and the appellant as "boyfriend and girlfriend" [216]. There is no formal engagement and no steps to show they have taken steps towards marriage [218]. The lady concerned is 19 years of age and lives at home with her parents [219]. The lady concerned had not informed her father of the relationship knowing he would disapprove [221]. The Judge found this witness honest and sincere but found she is unlikely to defy her parents if they called upon her to end the relationship [225].

xxxvii. At [228] the Judge finds "looking at all the evidence in the round, I find that I cannot be satisfied that there exists that level of commitment between the Appellant and Miss Rehman, that characterises what might properly be described as a "partnership" or "a genuine relationship". Nor am I satisfied that the relationship is a durable one".

xxxviii. No signs of emotional dependency were identified by the Judge and it was also found there was no financial dependency, leading to a conclusion that there was no question of undue harshness [231].

xxxix. The Judge concluded that none of the factors in paragraph 339 and 339A of the Rules applied leading to consideration of whether there were any very compelling circumstances over and above those factors. [232].

xl. The Judge considered the sentencing remarks together with Pre-sentence Report assessing the appellant as low risk of harm and reconviction, and the appellant's evidence regarding the remorse he feels for his actions which was corroborated by his brother [234 – [252]. The Judge however notes at [258] "looking at everything in the round, I am satisfied that, not only did the Appellant to seek to minimise his wrongdoing in his latest statement, he told deliberate lies in an attempt to do so".

xli. Thus, the Judge found himself unable to be satisfied that the appellant was "very remorseful", had matured since his offending or learned from his behaviour as submitted in the skeleton argument, nor that he presents a low risk of reoffending [259 – 260].

xlii. The impact upon society as a whole of the appellant's offending was a point forcibly made by the Sentencing Judge which was found to weigh heavily against the appellant. At [226] the Judge concluded that the appellant had failed to prove there were any very

compelling circumstances over and above those identified in paragraph 399 and 399A, sufficient to outweigh the public interest in deportation in this case.

7. The Judge, at [267], found: "I remind myself that the part of the Immigration Rules dealing with deportation forms a complete code. In any event, I am satisfied that there are no considerations that have not been dealt with in my consideration under the Rules, that, might tell in the Appellant's favour".

8. The appellant sought permission to appeal on a number of grounds which was initially refused by another judge of the First-tier Tribunal. Following a renewed application to the Upper Tribunal permission to appeal was granted by Deputy Upper Tribunal Judge Chapman limited to [5] of the application for permission to appeal which is in the following terms:

> "5. However, in light of the judgment in *Hesham Ali* [2016] UKSC 60, which post dates the decision of the First-tier Tribunal Judge, it is arguable that the Judge erred in failing to make an assessment of the proportionality of the Appellants deportation, in light of the test in *Jeunesse v Netherlands vis* whether a fair balance has been struck between the interests of the Appellant and those of the community. Whilst no compelling circumstances were identified or addressed by the Judge and ultimately consideration of the proportionality of the Appellants deportation may not make any material difference to the outcome, I consider that fairness requires that the Appellant to be permitted to have his case considered with regard to Article 8 of ECHR."

Error of law

9. The appellant, who appeared in person, applied for the hearing to be adjourned to enable him to instruct new solicitors. The appellant had been represented before the First-tier Tribunal but was not currently assisted.

10. The appellant claimed that he had seen a new representative two weeks prior to the hearing who claimed not have enough time to provide representation as the appellant did not have his file with him at the meeting. When asked when he did gather his papers and took them to the proposed new representative the appellant claimed it was some 8 to 10 days ago and that the representative asked if the appellant could get the date of hearing adjourned so they could check if they were able to provide cover on a resumed hearing date.

11. The appellant, in response to questioning, confirmed the solicitors were not acting for him and that they had only said that if he can sort out a date they might be able to act for him. In response to questioning the appellant confirmed there was no evidence from the firm of solicitors corroborating this claim i.e. no letter from any proposed representative.

12. The appellant was asked why he delayed seeking alternative solicitors, as permission to appeal to the Upper Tribunal had been granted on 2 April 2017, to

he claimed that he tried to obtain assistance but could not afford it and that when he went to the Citizens Advice Bureau they advised him to obtain private representation. The appellant stated his family were unable to help with the costs of instructing a solicitor at that time but claimed they were now able to help. When asked how much money was involved appellant indicated he had been quoted about £5,000 although, again, provided no evidence to corroborate this claim.

13. The appellant was asked why, in light of the adverse credibility findings made by the Judge including those relating to the appellant's alleged lying in his evidence and the dishonest nature of the criminal offences he should be believed, in response to which the appellant only claimed that he had not done anything since, but provided no satisfactory assurance that any weight could be placed upon the claim.

14. The application for an adjournment was refused as the interests of justice and fairness did not require the same to be granted. The appellant appears to have delayed in seeking alternative representation, if indeed he has done so in light of the lack of evidence of a solicitor willing to represent him.

15. It was not accepted that there is any element of complexity in relation to the issues to be considered at the Error of Law hearing in light of the limited nature of the grant and the reading of the determination as a whole, which admits only one conclusion on the facts which is that the Judge has made no error of law material to the decision to dismiss the appeal.

16. When the appellant was asked what elements of his case were not considered by the Judge he claimed that his family did not live in Pakistan and that he would not be able to survive in that country if he was removed there, but there are issues already considered.

17. The difficulty for the appellant is simply this, that although the Judge followed the structured approach he was required to take prior to the handing down of the judgment in *Hesham Ali*, in which it was accepted the Immigration Rules form a complete code for the purposes of deportation appeals, the Judge also considered the matter outside the Rules in the final sentence of [267] 'that there were no considerations that have not been dealt with under the Rules that might tell in the Appellant's favour'. This statement is factually correct.

18. The Immigration Rules set out the Secretary of States policy in relation to how article 8 should be interpreted/applied in relation to a challenge to a deportation decision. It is accepted the Supreme Court found that the jurisdiction of the Tribunal is a human rights jurisdiction in which the structured approach set out in the decision in *Razgar* should be followed, which will include a consideration of the merits of the claim under the Immigration

Rules when considering whether it is unlawful decision and as part of the proportionality exercise.

19. The matters the appellant claimed to place reliance on before the Upper Tribunal are precisely those matters placed before the Judge upon which findings have been made. The findings under the Rules are preserved findings as there is no grant of permission to appeal against the same. I find no arguable legal error material to the decision to dismiss the appeal has been made out for even if it was accepted the structure of the decision should have been different, in light of the later decision of the Supreme Court, this is an issue of form over substance as the Judge clearly considered not only the requirements of the Rules but also whether there was anything outside the Rules that warranted a finding in the appellant's favour, i.e. that despite having found the appellant failed under the Rules the decision could still be found to be disproportionate.

20. It must be remembered that part of the public interest consideration within a proportionality assessment includes the nature of the offending. The Judge found the appellant was seeking to minimise his culpability and indeed being dishonest about certain aspects of his evidence. Although the sentence may not seem a substantial sentence when compared to other offences it must also be remembered that this is a case in which there is an extremely strong public interest deterrent element.

21. There has been much written in the printed press and showed on television, as one of the Panorama programs, about the use of proxies to take English language tests on behalf of migrants applying for leave to remain in the United Kingdom to try and enable such persons, who may not have the required command of English, to appear as if they are able to meet the required standard. There are a number of cases both in the Upper Tribunal and Court of Appeal relating to the use of a proxy to take an English language test following indication of an invalid test as a result of computerised and other checks undertaken by ETS. The appellants was a proxy paid to take such tests on behalf of others.

22. An offence of this nature can completely undermine the credibility of an important element of the United Kingdom's immigration system, namely the imposition of minimum standards of ability to speak read and write English which has been identified as an important element enabling a person to integrate into society within the UK. Had the appellant not been caught and had those tests in which he was involved not been identified, individuals may have succeeded in obtaining settlement based upon their fraudulent activities. Those who consider attempting to defraud the Secretary of State or organisations appointed on her behalf to establish that the necessary criteria have been shown to have been satisfied, must appreciate that such action shall not be tolerated and that those who are caught acting in such a manner are likely to be deported from the United Kingdom unless very strong reasons are shown to exist that

establish that such a decision is, on the facts, disproportionate. No such facts have been shown to exist in relation to this matter indicating that the finding that the appeal should be dismissed, i.e. that the decision is proportionate to the legitimate aim relied upon is, in reality, the only decision that is likely to be made on the facts. Accordingly, no useful purpose, in accordance with the overriding objectives, would be achieved in adjourning the matter to a later date.

23. I conclude by finding the appellant has failed to establish that the Judge has made any arguable legal error material to the decision to dismiss the appeal.

Decision

24. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

25. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.
I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 13 July 2017