



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

Appeal Number: HU/11963/2018

THE IMMIGRATION ACTS

Heard at Field House

On 2nd May 2019

**Decision & Reasons
Promulgated
On 16th May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

**MR MD RAFIQUEL ISLAM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Jorro, Counsel instructed by M & K Solicitors
For the Respondent: Ms S Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Bangladesh, appealed to the First-tier Tribunal against a decision made by the Secretary of State on 17th May 2018 to refuse his application for leave to remain in the UK on the basis of his private life. First-tier Tribunal Judge Khan dismissed the appeal in a decision promulgated on 8th January 2019. The Appellant appealed to this

Tribunal with permission granted by First-tier Tribunal Judge Landes on 21st February 2019.

Grounds of appeal

2. The Grounds of Appeal put forward four grounds. It is contended that the judge failed to apply the approach to the burden and standard of proof set out in **SM and Qadir (ETS - Evidence - Burden of proof) [2016] UKUT 229(IAC)** which requires that the Respondent bears an evidential burden and thereafter the Appellant is required to raise an innocent explanation which meets the minimum level of plausibility before the legal burden reverts to the Secretary of State. It is contended in the second ground that the judge erred in reversing the burden of proof where at paragraph 23 he indicated that the Appellant was required to provide an explanation as to how his details had come to appear in the ETS documents whereas the Appellant was simply required to raise an innocent explanation rather than discharge the entire burden of proof. The third ground contends that the judge erred in failing to give reasons for his conclusions on material matters, it is contended that the judge failed to take into account the Appellant's evidence as set out in the decision before reaching the conclusion at paragraph 20 that the Appellant's evidence was vague. The fourth ground contends that the judge failed to apply the approach mandated by the Court of Appeal in **Majumder v SSHD [2016] EWCA Civ 1167** in assessing the relevant factors in the Tribunal's assessment of the allegation of dishonesty.

Error of Law

3. At the hearing Mr Jorro submitted a skeleton argument. Mr Jorro highlighted a further preliminary point relating to how the judge approached Article 8. He contended that the judge made a number of factual errors in his consideration of Article 8. The Appellant is a single man but at paragraph 30 the judge referred to his wife. He entered as a student but at paragraph 30 the judge said that he had limited leave to remain in the UK as a visitor. The Appellant does not have any children but at paragraph 32 the judge referred to the Appellant's daughter. Also, he pointed out that the Appellant is from Bangladesh but the judge referred to him returning to Pakistan and making an application for entry clearance as a spouse. At the hearing before me Ms Jones accepted that these are clear mistakes and accepted that these may indicate that the judge had not taken proper care and attention in his approach to the Appellant's appeal.
4. I accept that the issues in relation to the treatment of Article 8 were not specifically referred to in the grounds or the grant of permission. However, in my view these are obvious factual errors. In my view these errors go to the heart of the appeal in that, although the main issue in this appeal was the assessment of the ETS issue, the appeal was a human rights appeal therefore the assessment of the ETS issue was only in the context of a human rights appeal. In assessing the human rights appeal it

is important for the judge to get the factual basis of the Appellant's circumstances right otherwise the entire assessment on human rights is undermined.

5. I also accept that there was some confusion in the judge's approach to the ETS documents. The ETS document put forward by the Appellant related to a test taken on 19th September 2012 at London College of Media and Technology however in the ETS information it is alleged that the Appellant undertook a second English language test on 16th October 2012 at Bfluent School of English. The Appellant did not submit any certificate in relation to the latter test in connection with any application and it appears that no look-up tool was provided by the Secretary of State in relation to that test. In my view it was clear from paragraph 23 that the judge conflated the two ETS tests and did not apply the proper approach as set out in **SM and Qadir** to each test.
6. I accept also that the judge erred in his approach to the burden and standard of proof as set out in **SM and Qadir**. At paragraph 22 the judge found that the Respondent through the witness statements provided "has established that the Appellant used a proxy for his English language test". It is not clear whether the judge was referring to the initial evidential burden on the part of the Respondent or to the legal burden having considered the Appellant's explanation. I accept that at paragraph 23 the judge appears to have placed the burden on the Appellant to explain how his details came to appear in the ETS document. I also accept that at paragraph 20 (which is the only place where the judge assessed the Appellant's evidence) the judge gave insufficient reasons for rejecting the oral evidence set out at paragraphs 11 to 14 of the decision. There the Appellant had given explanations as to when he registered, the fees he paid, when his photograph had been taken and as to the details and contents of the tests. Whilst it was open to the judge to reject that evidence the judge failed to give adequate reasons for so doing.
7. In light of the errors identified above I find that the judge made material errors of law in his approach to the burden and standard of proof and to the overall human rights appeal. As these errors go to the heart of the issues to be determined in this case I set aside the decision in its entirety pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). I agree with the view of both parties that, in light of the Presidential Practice Statements the nature and extent of the judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is appropriate to remit the asylum appeal to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal Judge contains a material error of law and I set it aside. The appeal is to be remitted to the First-tier Tribunal.

No anonymity direction is made.

Signed

Date: 14 May 2019

A Grimes

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT

FEE AWARD

The issue of fees is to be determined on remittal to the First-tier Tribunal.

Signed

Date: 14 May 2019

A Grimes

Deputy Upper Tribunal Judge Grimes