



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

Appeal Number: HU/12022/2018

**THE IMMIGRATION ACTS**

**Heard at the Royal Courts of Decision & Reasons Promulgated  
Justice**

**On 28<sup>th</sup> October 2019**

**On 05 November 2019**

**Before**

**UPPER TRIBUNAL JUDGE JACKSON**

**Between**

**MD SAIFUL ISLAM  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr B Poddar, Solicitor from Hamlet Solicitors LLP

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Cohen promulgated on 17 April 2019, in which the Appellant's appeal against the decision to refuse his human rights application dated 15 May 2018 was dismissed.
2. The Appellant is a national of Bangladesh born on 8 February 1981, who originally entered the United Kingdom with leave to remain as a student in

2009, initially valid to 28 February 2013 and extended to 8 September 2015. The Appellant's leave to remain was curtailed on 1 October 2013 to expire on 30 November 2013, during which time he made a further application for leave to remain which was granted until 16 January 2017. The Appellant most recently made an application for leave to remain on the basis of his private life established in the United Kingdom.

3. The Respondent refused the Appellant's human rights application the basis that he did not meet the suitability grounds for a grant of leave to remain, specifically that he had relied on a fraudulent TOIEC English language test in 2013: and on the basis that the substantive requirements of paragraph 276ADE of the Immigration Rules were not met. This was because the Appellant had not been in the United Kingdom for long enough and there were no very significant obstacles to his reintegration in Bangladesh given he still speaks the language, has family there and has spent the majority of his life there. The Respondent did not find any exceptional circumstances to warrant a grant of leave to remain outside of the Immigration Rules.
4. Judge Cohen dismissed the appeal in a decision promulgated on 17 April 2019. There was a finding in the Appellant's favour in relation to the suitability criteria and the TOIEC allegation made against the Appellant, which was found not to have been established by the Respondent who relied on the wrong English language certificate number, the wrong date of birth and the wrong test centre such that the Judge was not satisfied that this Appellant had used deception as claimed. However, the appeal was dismissed on human rights grounds as in any event the Appellant did not meet the requirements of paragraph 276ADE of the Immigration Rules, it was not accepted that he had lost contact with his family in Bangladesh and he would be able to re-establish his private life there utilising the skills and qualifications he had obtained.

### **The appeal**

5. The Appellant appeals on four grounds. First, that the First-tier Tribunal materially erred in law in failing to follow the Court of Appeal's decision in Khan & Ors v Secretary of State for the Home Department [2018] EWCA Civ 1684 by allowing the appeal following the positive finding which would have required the Respondent to have granted the Appellant 60 days leave to remain in order to regularise his immigration status. Secondly, that the First-tier Tribunal materially erred in law in failing to give adequate reasons for separating the decision under appeal into a suitability part and a distinct substantive part when the former is inexorably linked to the refusal as a whole. Thirdly, that the First-tier Tribunal materially erred in law by failing to have regard to the considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002, specifically that the Appellant could speak English, is financially independent and formed his private life at a time when he was in the United Kingdom unlawfully. Finally, that the First-tier Tribunal

materially erred in law in attaching no weight to evidence based on a discrepancy, a conclusion which does not follow logically.

6. At the appeal hearing, Mr Poddar on behalf of the Appellant was unable to coherently expand upon the first ground of appeal or explain in what way the Court of Appeal's decision in Khan assisted the Appellant's case, or identified a material error of law in the decision of the First-tier Tribunal. Rather than making any reference to the specific facts or details of the consent agreements reached by the parties in Khan, Mr Poddar made repeated and un-evidenced factual assertions of what essentially amounted, at their highest, to substantive unfairness to the Appellant who is said to have suffered because of a false allegation made against him meaning that he was unable to finish his studies in the United Kingdom.
7. There was however no evidence before the First-tier Tribunal or before me in the Upper Tribunal that this Appellant had been unable to continue or complete any of his studies, to the contrary there was evidence that he completed his previous course in 2015. There is nothing to suggest any further studies were commenced, nor any application for further leave to remain as a student was made prior to or since the expiry of his leave to remain in January 2017. Nor was there any evidence of any difficulties encountered by the Appellant in obtaining a CAS because of TOIEC other issues as also claimed by Mr Poddar.
8. On behalf of the Respondent, Mr Kotas noted that there was a reference by the Appellant in the cover letter to his most recent application for leave to remain to being unable to complete his studies in the United Kingdom because of the previous revocation of his sponsors licence, although that appears to relate to the situation in 2013, following which the Appellant was granted further leave to remain as a student and did in fact complete his course in 2015.
9. In relation to the case of Khan, Mr Kotas noted that this argument was not raised before the First-tier Tribunal and in any event was of no assistance to the Appellant in this appeal as it is not authority for the proposition that an appellant who is successful having had a right of appeal, would be given any further period of leave to remain to regularise his or her immigration status. The appeals in Khan specifically related to the situation where a person had no remedy against a curtailment or section 10 decision and in which it was accepted fairness required a right of appeal should be given to enable a challenge to be made to an allegation of deception in English language test.
10. Neither party made any oral submissions on the second, third or fourth grounds of appeal.

### **Findings and reasons**

11. The grounds of appeal advanced in this case are, on all grounds, wholly without merit and it is notable that the Appellant's solicitor, Mr Poddar was

unable to advance any coherent argument in support of any of them at the oral hearing.

12. In relation to the first ground of appeal, the Appellant's reliance on the Court of Appeals decision in Khan is wholly misplaced. That decision concerned individuals who had pursued applications for Judicial Review against decisions by the Respondent to curtail their leave to remain, refuse further leave to remain and/or made section 10 removal decisions against them solely on the basis of an allegation of deception in a TOIEC English language test, against which there was no statutory right of appeal or suitable remedy including a fact-finding determination on the issue of deception. In such cases, agreement was reached between the parties and the Respondent accepted that it was appropriate for this issue of deception should be determined within the context of a statutory human rights appeal. The further consequences were set out in paragraph 43 of the decision, quoting paragraph 8 of the note from the Respondent which was as follows:

*“Nonetheless, for the avoidance of doubt, the SSHD confirms that:*

*(v) For those individuals whose leave was curtailed, and where that leave would still have time to run as at the date of an FTT determination that there was no deception, subject to any further appeal to the UTA, the curtailment decision would be withdrawn and the effect... Would be that leave would continue and the individuals would not be disadvantaged in any future application they chose to make;*

*(vi) For those whose leave has been curtailed, and whether leave would in any event have expired without any further application being made, the Respondent will provide a further opportunity for the individuals to obtain leave with the safeguards in paragraph (iii) below.*

*(vii) For those whose leave had expired, and who have made an interim application for further leave to remain which was refused on ETS grounds, the effect of an FTT determination that there was no deception would be that the refusal would be withdrawn. The applicant in question was still have an outstanding application for leave to remain and the Respondent will provide them with a reasonable opportunity to make any further changes to the application which would be considered on the basis of the not having employed any deception in the obtaining of their TOIEC certificate, and they would in no way be disadvantaged in any future application they chose to make.*

*(viii) (iii) In all cases, the Respondent confirms that in making any future decision he will not hold any previous Leave caused by any erroneous decision in relation to ETS against the relevant applicant, and will have to take into account all the circumstances of each case.*

*(ix) However, the Respondent does not accept that it would be appropriate for the Court now to find him to the approach that he would take towards still further applications in the future, for example by stating that each applicant has already accrued a certain period of lawful leave. The potential factual permutations of the cases that may need to be considered are many and various. In some cases, for example, it will be apparent that, whilst on the facts as presented at the appeal and appellant's human rights claim is successful, he would not been able to obtain leave at the previous states. Again, this issue will have to be dealt with on a case-by-case basis."*

13. The Appellant's situation is markedly different from those appellants in Khan in respect of whom and their cohort agreement was reached. Although there was an earlier curtailment decision in 2013 in relation to this Appellant, it was not in relation to any TOIEC or deception issue which was first raised by the Respondent only in 2018. The earlier curtailment appears to be due to the loss of the sponsor's licence and the Appellant's circumstances were relatively unaffected given that he was able to successfully apply for further leave to remain as a student during which time he completed his course in 2015. The Appellant has not made any further applications for leave to remain as a student and has only made an application for leave to remain on human rights grounds, which carried with it a statutory right of appeal. Although an initial decision on 24 January 2018 was certified meaning that such a right of appeal was exercisable only out of country, that decision was withdrawn and replaced with a decision dated 15 May 2018, which provided an in-country right of appeal, which is the subject of these proceedings. The Appellant has therefore been provided with an effective remedy and determination of the TOIEC deception issue, upon which findings were made in his favour by the First-tier Tribunal. His circumstances do not fall within any of the scenarios set out above in Khan, which in any event relate to the effect of and consequent actions of the Respondent following a successful appeal and are not directed to any action or result required by the First-tier Tribunal.
14. The Appellant's case appears to be that following a finding in his favour on the allegation of deception, his appeal should have been allowed on human rights grounds, further to which the Respondent should have granted him a further period of leave to remain. That approach is flawed as a ground of appeal and in establishing a material error of law by the First-tier Tribunal for the following reasons. First, any period of leave to remain following a successful appeal is a matter for the Respondent and could not in any event constitute a material error of law by the First-tier Tribunal, who have no power to direct any particular grant of leave to remain. Secondly, the Appellant has not been disadvantaged at all by an unappealable decision from the Respondent, but in fact has always had a right of appeal against refusal of his human rights claim, which he has exercised. Thirdly, the respondent's refusal of leave to remain was not solely on TOIEC/deception grounds but also on the basis that the Appellant could not meet the other requirements of

paragraph 276ADE of the Immigration Rules for a grant of leave to remain. The decision of the First-tier Tribunal goes on to similarly find that the Appellant cannot meet the requirements of the Immigration Rules for a grant of leave to remain, nor that in any event his removal from the United Kingdom would be a disproportionate interference with his right to respect for private life under Article 8 of the European Convention on Human Rights. For the reasons set out below, the second, third and fourth grounds of appeal establish no material error of law in the assessment of the First-tier Tribunal on human rights grounds and as such, it was inevitable that the appeal would have to be dismissed even with positive findings for the Appellant on the deception issue.

15. For these reasons, the Court of Appeal's decision in Khan does not provide any assistance to this Appellant and there is no material error of law in the First-tier Tribunal not expressly considering or following it, particularly in circumstances where it was not raised relied upon by the Appellant at first instance. Khan primarily deals with the consequences of an appeal by the Respondent in certain situations where findings made in the course of an appeal against the refusal of a human rights application impact on an earlier decision based on an allegation of deception which did not itself generate a right of appeal. It does not expressly require or direct a First-tier Tribunal to take any particular course of action in cases such as the present one.
16. The second ground of appeal is framed as a reasons challenge but which in fact suggest that the Respondent's reasons for refusal cannot be lawfully separated into two distinct parts. There is no legal basis for such an assertion and it was incumbent upon the First-tier Tribunal to deal with all of the reasons for refusal, which in this case clearly raised two distinct issues under the Immigration Rules. The Appellant's application did not fail solely for suitability reasons based on the allegation of deception, but also on other grounds; as did his appeal. There is no error of law in the decision of the First-tier Tribunal on this basis.
17. The third ground of appeal suggests that the First-tier Tribunal erred in failing to give any positive credit to the Appellant in the balancing exercise for his ability to speak English, his financial independence and his private life being formed when he was in the United Kingdom lawfully, pursuant to section 117B(2), (3) and (5) of the Nationality, Immigration and Asylum Act 2002. However, that is contrary to the decision in Rhuppiah v Secretary of State for the Home Department [2010] EWCA Civ 803 that at best, such factors as English language and financial independence are neutral. There is no error of law on this ground.
18. Finally, the fourth ground of challenge amounts only to a disagreement with the findings in paragraph 18 of the decision in which it was not accepted that the Appellant had lost all connections with his family members. It does not identify any error of law in the decision, let alone one which would be material to the outcome of the appeal.

19. For all of these reasons, there is no error of law in the decision of the First-tier Tribunal and the decision to dismiss the appeal on human rights grounds is therefore confirmed.

**Notice of Decision**

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed   
2019  
Upper Tribunal Judge Jackson

Date 31<sup>st</sup> October