IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01612/2020**

THE IMMIGRATION ACTS

Heard at Field House
On the 14th June 2021

Decision & Reasons Promulgated
On the 29th June 2021

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

SHAZEDUR RASHID
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr Saini, Counsel instructed by Brit Solicitors
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Microsoft Teams (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

© CROWN COPYRIGHT 2021

Background

2. The appellant is a citizen of Bangladesh born on 15 December 1978, who entered the UK in October 2010 as a Tier 4 student.

3. On 19 February 2016 an application by the appellant for further leave was refused under paragraph 322(5) of the Immigration Rules on the basis that he had fraudulently obtained a TOEIC certificate from ETS on 23 May 2012.

4. The appellant appealed against that decision and his appeal came before Judge of the First-tier Tribunal Majid. The decision of Judge Majid was set aside by the Upper Tribunal with no findings of fact preserved and the appeal was remitted to the First-tier Tribunal to be considered afresh. The appeal then came before Judge of the First-tier Tribunal Cassel. In a decision promulgated on 19 February 2019, Judge Cassel dismissed the appeal, finding that the appellant fraudulently obtained the test result in 2012 by use of a proxy. The appellant became appeal rights exhausted, in respect of the decision by Judge Cassel, on 18 July 2019.

5. On 30 July 2019 the appellant submitted an application for indefinite leave to remain on the basis of his private life. In this application he submitted, inter alia, that he had lived in the UK for nine years, was of good character, and that he wished to work and take part in charitable work. It was not argued in his application that he satisfied the conditions of paragraph 276B of the Immigration Rules.

6. The application was refused by the respondent 9 January 2020. The refusal decision made no reference to the ETS/fraud issue and it was stated that the application did not fall for refusal on grounds of suitability in section S – LTR of Appendix FM. There was no consideration in the decision of paragraph 276B.

7. The appellant appealed against the respondent's decision. On 18 June 2020 a case management hearing was held by telephone by Judge of the First-tier Tribunal O'Keefe. The decision, following the case management hearing, states, inter alia, that

   > "A previous appeal by the appellant was refused by the First-tier Tribunal on 19 February 2019; the Tribunal found that the appellant had used deception to obtain a TOEIC certificate. The principles of *Devaseelan* therefore apply to those findings."

8. The appeal then came before Judge of the First-tier Tribunal Karbani ("the judge"). In a decision promulgated on 15 December 2020 the judge dismissed the appeal.

Decision of the First-tier Tribunal

9. In paragraph 10 of the decision, the judge noted that the appellant submitted amended grounds arguing that, at the date of the hearing, he satisfied the conditions of paragraph 276B of the Immigration Rules (continuous lawful residence). The judge stated that the respondent considered this to be a new matter and that she consented to it being considered.

10. The focus of the decision was paragraph 276B. The judge considered each of the five subsections of paragraph 276B that need to be satisfied, as follows:

    a. Subsection (i) requires that the appellant has accrued 10 years of continuous lawful residence in the UK. The judge found that this was satisfied.

    b. Subsection (ii) requires that it would not be undesirable for a person to be given indefinite leave to remain. The judge found that this was not satisfied because the appellant had been found by Judge Cassel to have engaged in deception and there was no basis to depart from the finding of Judge Cassel.

    c. Subsection (iii) requires that an appellant does not fall for refusal under the general grounds for refusal. The judge found that this subsection was satisfied as the respondent did not submit any grounds for general refusal.

    d. Subsection (iv) requires an appellant to have demonstrated sufficient knowledge of the English language and life in the UK. The judge found that this was not satisfied because the appellant had not taken the life in the UK test.

    e. Subsection (v) requires that the appellant must not be in breach of immigration laws unless paragraph 39E applies. The judge found that paragraph 39E applied and that this was satisfied.

11. Having found that the appellant did not meet the conditions of paragraph 276B because subparagraphs (ii) and (iv) were not satisfied, the judge proceeded to consider paragraph 276 ADE and article 8 ECHR outside the Rules. The judge found that there would not be very significant obstacles to the appellant integrating into life in Bangladesh and that his removal to Bangladesh would not be disproportionate under article 8 ECHR.

The grounds of appeal

12. There are 7 grounds of appeal. They argue as follows:

a. Ground 1. The judge followed the decision of Judge Cassel but not Judge Majid.

b. Ground 2. The decision of the respondent did not mention the ETS/TOEIC issue and therefore it was not at issue before the judge.

c. Ground 3. The judge could have made an "unless order" with respect to the appellant's life in the UK test, which he was booked to take; and the judge should have taken into account the effect of covid 19 on the appellant's ability to take the test earlier.

d. Grounds 4-7. These grounds, in summary, submit that the judge failed to properly consider evidence (or the absence thereof) relating to the question of whether the appellant engaged in fraud in respect of the TOEIC test.

Submissions

13. Mr Saini's submissions focused entirely on the second ground of appeal. He argued that the respondent could not rely on a conduct/suitability argument as a reason to oppose an appellant's appeal when that conduct/suitability argument had not been raised by the respondent in her refusal letter (or in an addendum letter/decision). In the absence of a written decision raising suitability, Mr Saini maintained that it was not a "live" issue for the judge to determine.

14. He relied on paragraph 79 of *Mahmood (paras. S-LTR.1.6. & S-LTR.4.2.; Scope)* [2020] UKUT 00376 to support this argument, where it states.

> The two separate basis upon which the respondent may exercise discretion to refuse an application for leave to remain can be summarised as i) the use of false representations or a failure to disclose any material fact in a previous application and ii) the use of false representations in order to obtain a document required to support such an application. Consequent to their independent nature, the Tribunal is satisfied that reliance upon one or both of the elements must be specifically pleaded and reasoned by the respondent in her decision letter, or if upon becoming aware of further information the respondent seeks to exercise her discretion during the course of the subsequent appeal process it should be by means of an addendum decision providing reasons with an appellant being given sufficient time to counter the serious nature of the underlying allegation as to conduct.

15. Mr Saini acknowledged that the appellant had raised paragraph 276B for the first time shortly before the hearing and therefore there was no reason for the respondent to have addressed it in the refusal letter. But he argued that the respondent should not have consented to the Tribunal considering the new

matter without first making a written addendum decision. He argued that this position is supported by the respondent's guidance on rights of appeal (version 10, dated 18 December 2020).

16. Ms Everett expressed sympathy for the appellant's position because suitability/conduct was not raised in the refusal letter but noted that it was the appellant who had raised the new matter which brought conduct/suitability into play. She also referred to paragraph 21 of the decision which makes clear that suitability was addressed during submissions.

Analysis

1. Shortly before the hearing the appellant raised a new matter: that he was entitled to ILR on the basis of long residence under paragraph 276B of the Immigration Rules. Paragraph 276B contains five distinct subsections, all of which must be satisfied. Two of the subsections (subsections (ii) and (iii)) involve suitability/conduct issues.

2. Requesting that the Tribunal consider paragraph 276B at the hearing, even though the respondent had not had sufficient time to consider it prior to the hearing, was course of action that was open to the appellant. See *OA and Others (human rights; 'new matter'; s.120 : Nigeria)* [2019] UKUT 65 (IAC). Sections 85(4)-(6) of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act") permit a judge to accede to such a request if the respondent consents. In this case, the respondent consented and therefore the judge had jurisdiction, and was entitled, to hear the new matter.

3. There is no requirement under the 2002 Act (or in other legislation) on a judge to refuse to hear a new matter if the respondent has not made a written decision in respect of it prior to the hearing. Nor is there a requirement on the respondent to refuse to consent to a new matter being considered if she does not have time to issue a written decision before the hearing. Mr Saini relied on the appellant's guidance dated 18 December 2020 on "rights of appeal" but no such obligation on the respondent is stated in (or can be inferred from) this guidance which in fact says (on page 29) that consent should be given unless it would prejudice the respondent.

4. That said, where the respondent refuses to grant leave on the basis that a person has engaged in deception, the fraud allegation needs to be put to the appellant in sufficient detail, and with sufficient specificity, for the appellant to understand what he has been accused of so that he can seek to counter it. Ordinarily, this will involve a written decision (or addendum decision if the issue has come to light after the initial decision). This point was made in paragraph 79 of *Mahmood* and is consistent with numerous authorities considering procedural fairness including, for example, *Pathan, R (on the application of) v Secretary of State for the Home Department* [2020] UKSC 41.

5. However, this is not a case where the appellant faced an unparticularised or unanticipated allegation of deception that took him by surprise at the hearing, and in respect of which he has not had an opportunity to prepare a response. On the contrary, even though the fraud issue was not raised in the respondent's decision of 9 January 2020, it could not have been more clear to the appellant that, at the hearing, his alleged fraud would be at issue. Nor could the appellant have been in any doubt as to the nature of the allegation. This is because:

    a. Judge O'Keefe, at the case management review hearing on 18 June 2020, stated in clear terms that the principles of *Devaseelan* would apply to Judge Cassel's findings on the use of deception to obtain a TOEIC certificate;

    b. it was an inevitable consequence of expanding the scope of the appeal to encompass consideration of paragraph 276B (which was done at the appellant's request) that the Tribunal would need to consider the fraud allegation (as all five sub-paragraphs of 276B must be met and it would not be possible to decide sub-paragraphs (ii) and (iii) without considering the fraud issue); and

    c. the appellant knew in detail the nature and extent of the allegations against him, as well as the gaps/shortcomings in his evidence to refute the allegations, because these were considered in detail by Judge Cassel in the decision promulgated on 19 February 2019.

6. For these reasons, the appellant cannot succeed on ground 2.

7. The other grounds, which were not pursued at the hearing, are lacking in merit. I will address them briefly:

    a. The judge could not have relied on the findings of Judge Majid because his decision was set aside; and the judge, pursuant to *Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* * [2002] UKIAT 00702, was required to have regard to – and treat as a starting point – the decision of Judge Cassel. Therefore ground 1 has no merit.

    b. Ground 3 is misconceived because an appeal cannot be allowed conditionally. See *HH ('conditional' appeal decisions : Somalia)* [2017] UKUT 490 (IAC).

    c. The appellant cannot succeed under grounds 4 - 7 because in the absence of any new evidence or submissions that had not already been considered by Judge Cassel there was no basis for the judge, who was bound to follow the principles enunciated in *Devaseelan*, to depart

from Judge Cassel's conclusion that the appellant had engaged in fraud.

8. The appeal is therefore dismissed.

Notice of decision

9. The decision of the First-tier Tribunal did not involve the making of an error of law and stands. The appeal is dismissed.

Signed

D. Sheridan
Upper Tribunal Judge Sheridan
Dated: 16 June 2021