



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2021-000321**  
**First-tier Tribunal No:**  
**HU/04302/2020**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 25 June 2023**

**Before**

**UPPER TRIBUNAL JUDGE O'CALLAGHAN**

**Between**

**SOHEL AMIN**  
(NO ANONYMITY ORDER MADE)

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Z Malik KC, instructed by Lawmatic Solicitors  
For the Respondent: Mr S Walker, Senior Presenting Officer

**Heard at Field House on 25 May 2023**

**DECISION AND REASONS**

**Introduction**

1. The appellant appeals with permission against the decision of Judge of the First-tier Tribunal Krish ('the Judge'), sent to the parties on 21 June 2021, dismissing his human rights (article 8 ECHR) appeal.
2. Both the First-tier Tribunal and the Upper Tribunal refused the appellant permission to appeal. He sought a Cart review (CPR 54.7A). By a decision dated 11 March 2022 he was granted permission to apply for judicial review by Mr. Justice Sweeting on one of the three grounds advanced.
3. By an order of Master Gidden sealed on 11 October 2022, the decision of the Upper Tribunal to refuse the appellant permission to appeal was quashed.

4. The Vice-President granted permission to appeal by a decision dated 6 February 2023.

**Brief Facts**

5. The appellant is a national of Bangladesh and is presently aged 35.
6. He entered the United Kingdom on 30 September 2009 with entry clearance as a Tier 4 (General) Student valid from 20 August 2009 until 30 April 2012. He subsequently varied his leave on two occasions, with leave to remain last being granted until 15 November 2014. His leave was curtailed with no right of appeal on 19 May 2014, consequent to which he enjoyed leave until 22 July 2014. In deciding to curtail leave, the Secretary of State concluded that a TOEIC certificate issued on 17 April 2012, which accompanied an application for leave to remain dated 21 July 2014, was invalid.
7. The appeal before the First-tier Tribunal and this Tribunal is founded upon the appellant's application for indefinite leave to remain dated 24 November 2019, where he relied upon ten years long residence. The application was refused by the Secretary of State, who concluded that the appellant was unable to satisfy the requirements of paragraph 276B(ii) of the Immigration Rules. Further, it was considered that the appellant's application did not satisfy the requirements of the general grounds of refusal: paragraph 276B(iii) of the Rules, with consideration of paragraphs 322(1A) and 322(2) of the Rules. The application was therefore refused under paragraph 276D of the Rules.
8. The appeal came before the Judge sitting at Taylor House on 27 May 2021. The appellant attended and gave evidence.
9. Relevant to this appeal, the Judge self-directed herself at [9] of her decision:  

'9. ... However, where (as here) there is an allegation by the respondent that the appellant has acted dishonestly, then there is an evidential burden on the respondent in the first instance; if she provides evidence demonstrating there are reasonable grounds to conclude that the appellant used deception, **the burden shifts onto the appellant to provide an innocent explanation**. If the appellant does so, the burden shifts back to the respondent to demonstrate how, in light of that explanation, the allegation of deception is made out to the balance of probabilities standard: SSHD v. Shezhad and Chowdhury [2016] EWCA Civ 615, at [3].'

[Emphasis added]
10. The Judge concluded that the appellant did submit a fraudulent document in connection with an earlier application, and so could not meet the suitability requirements of the Rules. Though the appellant did not rely upon article 8 private life, the Judge considered this issue and concluded that no unjustifiably harsh circumstances arose.

**Grounds of Appeal**

11. The appellant relies upon three grounds of appeal drafted by Mr Malik KC, who did not represent before the First-tier Tribunal:
  - (i) The First-tier Tribunal erred in relation to the burden and standard of proof.
  - (ii) The First-tier Tribunal erred by failing to make a finding as to whether the appellant was dishonest in submitting an allegedly false bank statement.
  - (iii) The First-tier Tribunal erred in by failing to conduct a balancing exercise under paragraphs 322(2) and 276B(ii)(c) of the Immigration Rules.

**Discussion**

12. Mr Walker accepted on behalf of the respondent that though the Judge had endeavoured to carefully grapple with the complications of the appeal before her, there was material error of law in respect of all three grounds. In those circumstances the respondent accepted that the challenged decision should be set aside. For the reasons detailed below, I agree with Mr Walker.
13. From the outset I would say that the Judge endeavoured with care to address the issues advanced over the course of a detailed decision running to ninety-eight paragraphs over nineteen pages. It may properly be said that the Judge was not aided by the representatives before her, who in the view of this Tribunal failed to focus upon key issues and to aid the Judge in her consideration. A judge sitting in the First-tier Tribunal can properly expect clarity as to the issues between the parties by the date of the substantive hearing of the appeal. The parties were obliged by rule 2(4) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 to help the Judge to further the overriding objective, and to cooperate with the Tribunal generally. The parties were therefore required to engage in the process of defining the issues in dispute, being mindful of their obligations to the First-tier Tribunal. Such required steps were not undertaken before the Judge.
14. Mr Walker accepted that the Judge erroneously self-directed herself to law at [9] of her decision as to the burden being placed upon the appellant to provide an innocent explanation, without more. The self-direction was repeated at [60], [62] and [64] of the decision.
15. The approach to the burden and standard of proof in appeals concerning allegations of dishonesty was explained in *Secretary of State for the Home Department v Shehzad* [2016] EWCA Civ 615. Beatson LJ, with whom Black and King LJ agreed, observed at [3]:

'3. ... It is also common ground that the Secretary of State bears the initial burden of furnishing proof of deception, and that this burden is an "evidential burden". That means that, if the Secretary of State provides *prima facie* evidence of deception, the burden "shifts" onto the individual to provide a plausible innocent explanation, and that if the individual does so the burden "shifts back" to the Secretary of State ...'

16. In *R (Abbas) v. Secretary of State for the Home Department* [2017] EWHC 78 (Admin), William Davis J considered the dicta in *Shehzad* and formulated the principle to be applied as:

'7. ...

- The legal burden of proving that the Claimant used deception lies on the Secretary of State albeit that there is a three stage process. The Secretary of State first must adduce sufficient evidence to raise the issue of fraud. The Claimant has then a **burden of raising an innocent explanation which satisfies the minimum level of plausibility**. If that burden is discharged, the Secretary of State must establish on a balance of probabilities that this innocent explanation is to be rejected.

...'

[Emphasis added]

17. Contrary to the self-direction that the appellant was to provide 'an innocent explanation', with no more, the appellant was only required to provide a plausible innocent explanation. His account is therefore required to satisfy the minimum level of plausibility. I am satisfied that the Judge placed, by means of her self-direction, too high a burden upon the appellant and so materially erred in law.
18. As to ground 2, Mr Walker accepted, as do I, that despite the care and time the Judge clearly expended upon considering the matters raised before her, she did not adequately, if at all, address the issue of dishonesty which arises in this matter.
19. It is well-settled, as established in *Adedoyin v Secretary of State* [2010] EWCA Civ 773, [2011] 1 W.L.R. 564, that dishonesty is the touchstone when considering the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or to remain. The consideration in this matter was whether the appellant had submitted a false document in support of a previous application, and so the current application was only to be refused under paragraph 276B (iii) of the Rules if the submission of the false document previously was deliberate and dishonest. Consequently, there was a requirement for the Judge to consider whether dishonesty arose. As Mr Walker candidly accepted, this vital consideration is absent from the Judge's decision.
20. Turning to ground 3, I have sympathy for the Judge in respect of the challenge to her failing to undertake a balancing exercise, as it appears

that neither party drew her attention to such requirement. It is notable that the appellant's counsel at the hearing failed entirely to address this issue. I observe the judgment of the Court of Appeal in *Yaseen v Secretary of State for the Home Department* [2020] EWCA Civ 157, [2020] 1 WLR 1359, where it was held that before a decision maker dismisses an application for indefinite leave to remain on the grounds of an appellant's character and conduct, pursuant to paragraph 276B(ii)(c) of the Immigration Rules – character and conduct – procedural fairness requires that, in all but the most extreme cases where the conduct complained of was such that on any view, the balance had to fall against the applicant, the decision maker should perform a balancing exercise, taking into account any positive factors. As Mr Malik observes, even if the Judge found the appellant to be dishonest, which he denies, when proceeding to consider the balancing exercise the Judge was still required to consider the appellant's length of residence, strength of connections, and positive contributions in the United Kingdom. I accept, as does Mr Walker, that the Judge materially erred in law at paragraph [85] in concluding that following her finding that the appellant used false documents he simply could not meet the suitability requirement of the Rules, because the failure to undertake a balancing exercise was clearly contrary to the authority of the Court of Appeal in *Yaseen*.

### **Resumed Hearing**

21. The representatives were both in agreement that because of the failure to abide by procedural fairness, particularly the failure to undertake the balancing exercise, the only appropriate approach to adopt was to set aside the decision of the First-tier Tribunal and remit this matter back to the First-tier Tribunal sitting at Taylor House.
22. It is unfortunate that this aging appeal has to return to the First-tier Tribunal. However, I accept both that there will be a considerable amount of fact-finding to be undertaken, and more importantly, in the light of the breach of procedural fairness as identified by the Court of Appeal judgment in *Yaseen* the appellant has not yet had an appropriate consideration of his appeal. In those circumstances it is entirely proper that this matter be remitted to the First-tier Tribunal.

### **Notice of Decision**

23. The decision of the First-tier Tribunal dated 21 June 2021 is subject to material error of law and is set aside in its entirety. No findings of fact are preserved.
24. The appeal is remitted to the First-tier Tribunal sitting at Taylor House, to be heard by any Judge other than Judge Krish.

*D O'Callaghan*  
**Judge of the Upper Tribunal**  
Immigration and Asylum Chamber

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**16 June 2023**