



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

Appeal Number: IA/33681/2014

THE IMMIGRATION ACTS

**Heard at Centre City Tower Birmingham
On 26th March 2015**

**Decision & Reasons
Promulgated
On 1st April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

**SAJAD HUSSAIN
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Najma of Kher Solicitors

For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DECISION AND REASONS

1. On 12th August 2014 the Appellant was refused leave to enter the United Kingdom and his extant leave, as a Tier 4 (General) Student, was cancelled. It was alleged that he had employed deception in order to gain entry. Those decisions were made under paragraphs 321A(2), 320(5) and 320(7A) of the Immigration Rules. The Appellant's appeal, which at his request was decided on papers, was dismissed by First-tier Tribunal Judge L S L Mensah in a decision promulgated on 7th November 2014.

2. The Appellant, who at the time was representing himself, applied for permission to appeal, contending amongst other matters that the judge had erred in the application of the burden of proof and that if she had doubts as to his English language qualification she should have adjourned for the Appellant to give evidence. I granted permission on 26th January 2015 noting that it did appear that the judge had erred in stating that the burden of proof was upon the Appellant, which was at variance with various guiding cases including **JC (Part 9 HC 395 - burden of proof) China [2007] UKAIT 00027**. She did not find fraud established but dismissed the appeal, stating that she was not satisfied that the appellant had shown that he had passed an English language test. That arguably placed the burden upon the Appellant, where it did not lie under the paragraphs of the Rules in question. The Respondent served a response under Upper Tribunal Procedure Rule 24, contending that the decision was sustainable and questioning why, in the light of the documents before her, the judge had not found fraud established.

3. In her decision the judge set out the burden of proof in the following terms:

"The Law

- (a) The decision of the officer to refuse the application, specified paragraphs 321A(2) and 320(5)(7A) of HC 395 as amended of the Immigration Rules as follows:

As set out above.

- (b) I reminded myself that the burden of proof lies on the Appellant, to satisfy me on the balance of probabilities on all matters contained within specified paragraphs 321A(2) and 320(5)(7A) of the said Immigration Rules."

4. At the hearing before me Mr Smart accepted immediately that the Judge had wrongly stated the burden of proof. However initially he submitted that the error was not material because she had provided reasons for not accepting English language documents as genuine. He said that there were documents before the judge, including statements by officials from the Home Office R Collins and P Millington which addressed the matter of fraud. I pointed out at this stage that these documents were not on the file and it was not apparent that they had been seen by the Judge. She did not make specific reference to them. Ms Najma for her part said that from what she had seen it was unclear as to what documents had been before the judge and there was no clear indication that the documents referred to by Mr Smart had been considered.
5. In those circumstances Mr Smart did not persist with his submission that there was no material error and suggested that the appropriate route was for the matter to be further considered by the First-tier Tribunal. Ms Najma for the Appellant concurred in that suggestion.

6. I agreed with that proposed course of action. In my view there was a clear error of law in the decision of the First-tier Tribunal Judge as referred to in the grant of permission which was material to the outcome. I set aside her decision, in accordance with Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b). Directions are given below. There was no request made for an anonymity order and I can see no reason for any such order to be made.

Notice of Decision

The decision of the First-tier Tribunal contained an error on a point of law and has been set aside.

The case is remitted to the First-tier Tribunal with directions.

Signed

Date 31 March 2015

Deputy Upper Tribunal Judge French

Directions (Sections 12(3)(a) and 12(3)(b) of the Tribunals, Courts and Enforcement Act 2007

- (1) The members of the First-tier Tribunal who are to reconsider the appeal should not include Judge L S L Mensah.
- (2) None of the findings of Judge Mensah are preserved and the appeal is to be heard afresh.
- (3) The appropriate hearing centre is Birmingham. No interpreter is requested.
- (4) Both representatives shall serve upon the Tribunal and upon each other at least seven days before the hearing copies of all witness statements and other documents on which they seek to rely.

Signed

Dated 31 March 2015

Deputy Upper Tribunal Judge French