



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/28422/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 17<sup>th</sup> May 2018

Decision & Reasons Promulgated  
On 07<sup>th</sup> June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR MD JAFFAR ULLAH  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Biggs, Counsel  
For the Respondent: Ms Kenny, a Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh born on 1<sup>st</sup> January 1992. This matter has an extensive history. The Appellant first landed in the United Kingdom as a Tier 4 (General) Student Migrant on 20<sup>th</sup> January 2010 in possession of a visa that conferred leave to enter until 31<sup>st</sup> December 2012 subject to a condition restricting employment and recourse to public funds. The Appellant on 28<sup>th</sup> December 2012 made a combined application for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the point-based system and for a biometric residence permit. That application was refused by a Notice of Refusal dated 30<sup>th</sup> July 2015. It is, and has been expressed before during the course of these proceedings, regrettable that it took the Secretary of State over two and a half years to issue the Notice of Refusal.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Stewart sitting at Taylor House on 23<sup>rd</sup> June 2016. In a decision and reasons promulgated on 4<sup>th</sup> July 2016 the Appellant's appeal was allowed under the Immigration Rules. On 15<sup>th</sup> July the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. Permission to appeal was refused by First-tier Tribunal Judge Astle on 21<sup>st</sup> November 2016. The Secretary of State lodged renewed grounds for permission to appeal and on 6<sup>th</sup> January 2017 Upper Tribunal Judge Blum granted permission to appeal. On 3<sup>rd</sup> February 2017 the Respondent responded to the grant of permission under Rule 24.
3. The matter then came before Upper Tribunal Judge Southern sitting at Field House on 7<sup>th</sup> February 2017. The hearing before Judge Southern considered whether there was a material error of law in the decision of the First-tier Tribunal Judge. The hearing centred on the failure of the Secretary of State to provide a representative for the appeal and the conclusion made by Judge Southern that the judge was or should have been aware that the evidence relied upon by the Secretary of State for the Home Department was not limited to "generic" evidence but included evidence specifically related to Mr Ullah's test which had been considered specifically and declared to be invalid. Upper Tribunal Judge Southern concluded that in short it was a material error of law for the judge to determine the appeal without having proper regard to the key aspects of the case of one of the parties to the appeal and to proceed on the basis of a mistake of fact as to the content of the Secretary of State for the Home Department's bundle which was available to him and that it cannot be assumed that the outcome would have been the same had the judge had proper regard to the evidence before him. Judge Southern therefore remitted the matter to the First-tier Tribunal to be reheard.
4. That remitted hearing came before Judge of the First-tier Tribunal Scott-Baker sitting at Taylor House on 4<sup>th</sup> August 2017. In a decision and reasons promulgated on 1<sup>st</sup> November 2017 the Appellant's appeal was dismissed. On 24<sup>th</sup> October 2017 the Appellant's solicitors lodged Grounds of Appeal back to the Upper Tribunal. On 27<sup>th</sup> March 2018 First-tier Tribunal Judge Kelly granted permission to appeal. Judge Kelly concluded that it was arguable that the Tribunal had made a material error of law in its approach to the question of whether the Appellant had employed deception in obtaining his TOEIC English language certificate by assuming that it was for the Appellant to prove that he had not done so, rather than for the Respondent to prove that he had.
5. No Rule 24 response has been filed to the grant of permission to appeal. It is following that very lengthy and extensive process which since the date of application has taken over five and a half years that this matter appears before me. On this occasion the Appellant appears by his instructed Counsel, Mr Biggs. The Secretary of State appears by her Home Office Presenting Officer, Ms Kenny.

### **Submissions/Discussion**

6. Mr Biggs contends that the issue is relatively straightforward and refers me to the finding made by Immigration Judge Kelly when granting permission (recited above). He submits that it is incumbent upon the First-tier Tribunal Judge to make a finding

of fact on the Appellant's credibility and that if he finds the Appellant credible the appeal should be allowed and if not it should be dismissed. He submits that the judge has failed to take into account a material matter and erred in law in concluding at paragraph 31 of the determination that there was no evidence of the Appellant's ability in English language prior to completion of the ETS test. He points out that the judge had ignored the Appellant's level 5 diploma in management by AABPS that was taught and examined in English on the basis that this qualification had been doubted by the Respondent previously. He submits that this was based on an error and disregarded the fact that any doubt as to the authenticity of this certificate had been dispelled previously by the First-tier Tribunal Judge. He submits that this contention is supported by paragraph 37 of Judge Scott-Baker's determination and that the finding and conclusion therein at paragraph 37 is fundamentally wrong.

7. He further submits that the judge has erred in his approach to the burden of proof, pointing out that in cases of this nature the burden of proof is on the Secretary of State. He submits that this has clearly not been the approach adopted by the judge as is shown by the judge's analysis and findings at paragraphs 31 to 35 inclusive. He submits that the judge's analysis is unsustainable and asks me to remit the matter back to the First-tier Tribunal with none of the findings of fact to be preserved.
8. In response Ms Kenny submits that the judge did have in mind the relevant case law and has laid down the Respondent's case at paragraphs 21 to 26. She submits that the burden of proof has been discharged and that the burden of proof therefore has swung back to the Appellant. She points out that the judge has between paragraphs 31 and 37 shown that he finds the Appellant's evidence to be lacking and she asks me to dismiss the appeal.

### **The Law**

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of

significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

### **Findings on Error of Law**

11. This matter has a very long history and on that basis alone in some respects I am loathe that the matter should continue further. This case requires finality. However it is the responsibility of the Upper Tribunal to consider whether there is a material error of law in the First-tier Tribunal Judge's decision and to apply principles of fairness. I therefore cannot be influenced in any way by the length of time this matter has taken if I am not satisfied that the decision is one that can be sustained. I am not so satisfied and I find that there are material errors of law in the decision of the First-tier Tribunal. It is important that I give my reasons. This is a case which turns on the credibility of the Appellant's testimony and whether or not the Appellant was fundamentally dishonest with regard to his English language test. Whilst the First-tier Tribunal Judge is correct on a general principle with regard to his statement of the burden of proof, that does not specifically apply in cases of this nature where such fundamental dishonesty is alleged. The initial burden of proof in such cases is on the Secretary of State. Once that burden of proof has been discharged the burden then switches to the Appellant. I am satisfied that the findings at paragraphs 31 to 37 show that the judge has applied the wrong burden of proof throughout. The decision is unfortunately undermined by the failure to distinguish between the legal and evidential burden and despite the finding of the judge at paragraph 30 there is documentary evidence available which has not been considered to show that the Appellant has discharged that burden. Thereafter the judge has assessed the legal burden of proof as being on the Appellant.
12. The issue in this matter was whether or not the Appellant cheated and I accept the submission being made by Mr Biggs that on that issue the Respondent bears the legal burden throughout and that it is insufficient for the Secretary of State to discharge the legal burden by mere generic evidence. Further the judge failed to give due consideration to the Appellant's level 5 diploma in management by AABPS and the judge has failed to make a finding with regard to the credibility of the Appellant's testimony.
13. For all the above reasons I find that there are material errors of law that taint the decision of the First-tier Tribunal Judge. In such circumstances, and with some regret bearing in mind the length of time this matter has gone on, I conclude that the correct approach is to set aside the decision of the First-tier Tribunal Judge and to remit the matter back to the First-tier Tribunal for rehearing with none of the findings of fact to stand. Due to the length of time this matter has been ongoing I would urge that listing be expedited.

### **Notice of Decision and Directions**

The decision of the First-tier Tribunal Judge contains material errors of law and is set aside. Directions are given for the further hearing of this matter

- (1) That on finding that there are material errors of law in the decision of the First-tier Tribunal Judge the decision of Judge Scott-Baker is set aside with none of the findings of fact to stand.
- (2) That the appeal is remitted to the First-tier Tribunal sitting at Taylor House on the first available date 28 days hence with an ELH of two hours.
- (3) That the remitted hearing is to be before any Judge of the First-tier Tribunal other than Immigration Judge Stewart or Immigration Judge Scott-Baker.
- (4) That due to the length of time that this matter has been extant it is requested that if possible the administration expedite the rehearing of this matter.
- (5) That there be leave to either party to file and serve an up-to-date bundle of evidence upon which they seek to rely at least seven days prior to the restored hearing.
- (6) That in the event of the Appellant requiring an interpreter at the restored hearing his instructed solicitors must notify the Tribunal within seven days of receipt of these directions setting out the language requirement of the interpreter.

No anonymity direction is made.

Signed

Date 6 June 2018

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT  
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date 6 June 2018

Deputy Upper Tribunal Judge D N Harris