Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08705/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 November 2019	**On 11 November 2019**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

CHINYERE NWARU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Jorro, Counsel, instructed by Sunrise Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Abebrese (the judge) who, in a decision promulgated on 11 July 2019, dismissed the appellant's appeal against the respondent's decision of 29 April 2019 to refuse her Indefinite Leave to Remain (ILR) human rights claim.

Background

2. The appellant is a national of Nigeria born on 21 June 1985. She entered the UK on 6 October 2006 as a student. She was granted further leave to remain in the same capacity, the last period being valid until 14 October 2013.

3. On that date she applied for further leave to remain as a Tier 4 (General) Student. Thereafter the chronology of decisions and applications becomes complex. It is not necessary for the purposes of this 'error of law' decision to set out the chronology in any detail. It is sufficient to note that the respondent initially refused the application on 5 December 2013 but withdrew that decision a day prior to an appeal hearing listed in August 2014. The respondent thereafter decided to remove the appellant because she purportedly used a proxy tester to obtain a TOEIC English language certificate. The appellant lodged judicial review proceedings and made a human rights claim and an appeal to the Court of Appeal was ultimately dismissed by consent in an order sealed on 27 March 2019 following the decision in **Ahsan v SSHD** [2017] EWCA Civ 2009 as a certificate issued under s.94 of the Nationality, Immigration and Asylum Act 2002 in relation to the human rights claim was withdrawn by the Secretary of State. Both the appellant (in Mr Jorro's helpful skeleton argument dated 30 October 2019) and the respondent have produced useful chronologies. There is a dispute between the parties as to when, if at all, the appellant's leave to remain under s.3C of the Immigration Act 1971 expired (the appellant maintains that it has not expired since her application for further leave was made on 14 October 2013; the respondent contends that the appellant's s.3C leave came to an end by way of a decision dated 3 October 2014 [which has not been provided to the appellant] or possibly a decision dated 15 December 2014 taken under s.10 of the Immigration and Asylum Act 1999 [although there is an issue as to whether this decision was lawfully taken under the iteration of s.10 prior to the amendment wrought by the Immigration Act 2014]). As will become apparent from this decision it will be for the First-tier Tribunal, if necessary, to determine whether the appellant has accumulated 10 years continuous lawful residence for the purposes of paragraph 276B of the immigration rules in light of its assessment as to whether the appellant used a proxy test taker in obtaining a TOEIC certificate.

4. Central to the respondent's decision under appeal is the belief that the appellant fraudulently obtained a TOEIC test certificate from Educational Testing Service (ETS) and used that certificate in her application for leave to remain submitted on 14 October 2013. The respondent refused the ILR/human rights claim, inter alia, under paragraph 322(5) of the immigration rules. The appellant appealed the refusal of her human rights claim pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

Decision of the First-tier Tribunal

5. The appeal was on a float list and the judge did not have the benefit of a Presenting Officer. Crucially, the respondent's bundle of documents prepared for the appeal did not contain the 'generic' witness statements of Rebecca Collings, Peter Millington and Michael Sartorius that usually accompanied ETS appeals and there was no ETS lookup tool relating to the appellant's actual test results. The judge heard oral evidence from the appellant and submissions from her legal representatives to the effect that the appellant had not exercised deception and had accumulated 10 years continuous lawful residence.

6. In the section of his decision headed 'Evidence and Findings' the judge, in a confused and inadequately reasoned manner, concluded that the appellant's leave had not been extended by s.3C after 3 October 2014. Then, at [16], the judge stated,

> "I am of the view that the respondents have provided evidence to establish their evidential burden I find the evidence of ETS to be credible and consistent with the appellant having acted fraudulently. ETS has a record of speaking test, voice verification software and they are able to detect when a single person is undertaking multiple test. I do not find that the appellant has provided an innocent explanation based on his [*sic*] oral and documentary evidence. I also find that the appellant has not provided sufficient evidence in respect of Article 3 of the European Convention of Human Rights the appellant in my view provided letters from the NHS but there are no medical reports. I am also of the view that she has provided the letters after the refusal of her application in order to bolster her application/appeal. The threshold in respect of Article 3 is high and the evidence provided does not meet the standard required."

7. At [17], and in light of his findings in respect of the paragraph 322(5) issue, the judge found that the appellant did not meet the requirements of paragraph 276ADE of the immigration rules and that there were no exceptional circumstances outside the immigration rules such that the appeal could be allowed on a 'free standing' Article 8 basis. The appeal was dismissed.

Challenge to the First-tier Tribunal's decision

8. The grounds of appeal took issue with the judge's assessment that the appellant failed to accrue 10 years continuous lawful residence and his conclusions on the TOEIC certificate issue. In granting permission the First-tier Tribunal found it was arguable that there was no evidential basis for the judge's finding that the respondent had discharged the initial burden in relation to the allegation of deception regarding the appellant's TOEIC certificate, and that it was arguable

that the judge provided inadequate reasons as to why the appellant's innocent explanation had not been accepted.

9. At the outset of the 'error of law' hearing Mr Melvin confirmed that the respondent's bundle of documents lodged with the First-tier Tribunal had not included any of the genetic witness statements and had not included the ETS look-up tool relating to the appellant's test results. Mr Melvin submitted that the generic statements were so well known that it was not necessary for them to have been provided. Mr Melvin indicated that he had with him the generic witness statements and the ETS look-up tool relating to the appellant. Mr Jorro drew my attention to a request dated 21 August 2014 from the appellant's then legal representatives seeking to obtain evidence of the use of deception from the respondent. He submitted that it was open to the respondent to have provided this evidence earlier and that it was too late for the Upper Tribunal to now accept the evidence and that it would be procedurally unfair to do so.

10. I indicated to the parties that I was satisfied the judge's decision contained serious and material legal errors and that it had to be set aside. I rejected Mr Jorro's submission that it would be procedurally unfair to accept the further evidence upon which the respondent now sought to rely in remaking the decision. There is no time limit for applying to admit fresh evidence pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and, although the generic witness statements and the ETS look-up tool should have been provided much earlier, they were important items of evidence. Both parties were agreed that, in light of the absence of any proper assessment of the appellant's evidence, it was appropriate for the matter to be remitted back to the First-tier Tribunal.

Discussion

11. The judge did not have any of the witness statements upon which the respondent relied to support her assertion that the appellant used a proxy-test taker to obtain her TOEIC certificate. Even more significantly, the judge did not have an ETS look-up tool relating to the appellant which would give details of the test she undertook (date, place, etc) and whether the test result was determined by ETS to be 'valid', 'invalid' or 'questionable'. All the judge had before him was a bold assertion in the Reasons for Refusal Letter that ETS undertook a check of the appellant's test and informed the respondent that there was significant evidence that her certificate was fraudulently obtained by the use of a proxy test taker. Following the decision in **SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof)** [2016] UKUT 00229 (IAC) this unsupported assertion was a wholly inadequate basis for concluding that the respondent had discharged the initial

evidential burden of proving the alleged fraud. There was no specific evidence at all to link the appellant to an 'invalid' test result.

12. The judge's unlawful approach was then further compounded by a complete failure to give coherent reasons for rejecting the appellant's 'innocent' explanation. Whilst the judge was not obliged to accept the explanation advanced by the appellant he was, at the very least, obliged to engage with that explanation and given comprehensible reasons for rejecting that explanation. Given the terms of the consent order from the Court of Appeal and the scope of the decision in **Ahsan v SSHD** [2017] EWCA Civ 2009 it cannot be said that, had the judge not erred in law, the decision on the human rights claim would inevitably have been the same. I am consequently satisfied that the judge's errors of law require the decision to be set aside.

13. Given that there has been no significant engagement with the evidence provided by the appellant, including her explanation in respect of her TOEIC certificate, it is appropriate for the matter to be remitted back to the First-tier Tribunal to be determined afresh by a judge other than judge of the First-tier Tribunal Abebrese).

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and requires the decision to be set aside.

The matter is remitted back to the First-tier Tribunal for a de novo hearing before a judge other than judge of the First-tier Tribunal Abebrese.

Directions

1. **The respondent is to provide all evidence in her possession relating to the alleged use of a proxy test-taker in respect of the appellant's TOEIC certificate, to be served on the appellant and the First-tier Tribunal within two weeks of the date this decision is sent.**

2. **The respondent is to serve on the appellant and the First-tier Tribunal, within 4 weeks of the date this decision is sent, copies of all relevant decisions relating to the appellant's immigration status following her application made on 14 October 2013, including the decision dated 3 October 2014.**

D.Blum 8 November 2019

Signed Date

Upper Tribunal Judge Blum