Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/08788/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 February 2019	**On 13 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SUJASH MITRA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mrs L Kenny, Senior Home Office Presenting Officer
For the Respondent: Mr D Coleman of Counsel instructed by Thamina Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a decision of Judge L K Gibbs (the judge) of the First-tier Tribunal (the FTT) promulgated on 18th December 2018.

2. The Respondent before the Upper Tribunal was the Appellant before the FTT and I will refer to him as the Claimant.

3. The Claimant is a citizen of Bangladesh born 5th December 1976. He entered the UK on 27th April 2007 as a student. He had lawful leave to remain until 5th December 2016.

4. On 16th December 2016 he applied for leave to remain in the UK on the basis of his private and family life. This application was varied on 10th April 2017, to an application for indefinite leave to remain on the basis of ten years' lawful residence in the UK.

5. The application was refused on 28th March 2018. The Respondent did not accept that the Appellant had acquired ten years' continuous lawful residence in the UK and therefore did not meet the requirements of paragraph 276B(i)(a) and (v) of the Immigration rules.

6. The Respondent found that paragraph 322(5) of the Immigration Rules applied in relation to a TOEIC test taken with Educational Testing Service (ETS) on 22nd August 2012, as the Respondent was satisfied that the Appellant used a proxy test taker.

7. The appeal was heard by the FTT on 19th November 2018. The judge did not accept that the Secretary of State had proved that the Claimant had acted dishonestly and did not accept that it had been proved that a proxy test taker had been used. The judge noted that the Appellant had taken a second TOEIC test on 26th September 2012, five weeks after the disputed test, which was not disputed, and scored 200 in speaking and 160 in writing, which was an improvement on both of his previous scores in the disputed test. Because of this the judge found that the Appellant had not used a proxy test taker on 22nd August 2012.

8. With reference to long residence the judge was persuaded by the Claimant's counsel that paragraph 39E(2) of the Immigration Rules applied. The Secretary of State accepted that the Claimant had continuous valid leave from 27th April 2007 to 5th December 2016 which amounted to nine years seven months nine days. The Claimant became appeal rights exhausted on 5th December 2016 and his section 3C leave expired on that date. He then submitted a fresh application on 16th December 2016 and the judge was persuaded that because this fresh application was made within fourteen days of the expiry of section 3C leave, this meant that the 3C leave continued and therefore the Claimant still had valid leave to remain, which meant that he had ten years' continuous lawful leave.

9. Because the judge found that paragraph 322(5) did not apply, and the Claimant had ten years' continuous lawful residence, the appeal was allowed on the basis that the Claimant's removal would be in breach of the UK's obligations under section 6 of the Human Rights Act 1998.

The Application for Permission to Appeal

10. The Secretary of State applied for permission to appeal to the Upper Tribunal relying upon two grounds. Firstly it was submitted that the judge had made a material error of law in considering paragraph 39E(2). The Secretary of State's case was that this paragraph permits applicants to submit out of time applications which will be considered and will not be refused simply for being out of time. Paragraph 39E(2) does not extend the Claimant's leave under section 3C. The Claimant became appeal

rights exhausted on 5th December 2016, and therefore the judge was wrong to find that thereafter he continued to have continuous lawful residence by virtue of section 3C.

11. The second ground contended that the judge made a material error of law and failed to give adequate reasons for findings on a material matter in relation to paragraph 322(5). It was submitted that the judge had not given an adequate explanation as to why it was accepted that the Claimant had provided an innocent explanation for the conclusion that he had used a proxy test taker. It was submitted that the judge had placed undue weight on the Claimant's ability to speak English and reliance was placed in particular upon paragraph 57 of MA Nigeria [2016] UKUT 450 (IAC). It was submitted that the judge had erred by failing to give adequate reasons for concluding that a person who speaks English would have no reason to secure a test certificate by deception.

12. Permission to appeal was granted by Judge Loke of the FTT in the following terms;

> "2. Ground 1 asserts that the judge misapplied paragraph 39E(2) of the Rules. I find that this is arguable. Under paragraph 276B of the Immigration Rules, paragraph 39E(2) only applies where 276B(v) is raised, namely applications which are less than 28 days out of time will be permitted, and not counted as a breach of Immigration Rules. In this case the issue is 276B(i), whether the Appellant had at least ten years' continuous lawful residence. Paragraph 39E(2) does not permit a period of overstaying to be viewed as lawful residence.
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> 3. Ground 2 asserts that the judge failed to give proper reasons for finding that the Appellant had not practised deception in the context of obtaining a TOEIC certificate. The judge gave reasons at [16-17] however it is arguable that these were insufficient.
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> 4. Ground 1 is stronger than Ground 2 but permission is granted on all grounds."

13. Following the grant of permission directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FTT had erred in law such that the decision must be set aside.

My Analysis and Conclusions

14. At the oral hearing Mrs Kenny relied upon the grounds upon which permission to appeal had been granted.

15. Mr Coleman, who had not appeared before the FTT relied upon a skeleton argument prepared by his colleague who had appeared before the FTT.

16. A preliminary issue was raised, contending that the application for permission to appeal had been made out of time, and without an application to extend time, and therefore permission to appeal should not have been granted.

17. I find this submission to be misconceived. The FTT sent the decision to the parties on 18th December 2018. The deadline to appeal was 1st January 2019. The Secretary of State's application was received on 2nd January 2019. Rule 11 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 explains how time is calculated. Rule 11(2) provides as follows;

> "2. Subject to the Tribunal directing that this paragraph does not apply, if the time specified by these Rules, a Practice Direction or a direction for doing any act ends on a day other than a working day, the act is done in time if it is done on the next working day."

18. 1st January 2019 was not a working day. The application for permission to appeal was received on the next working day, that being 2nd January 2019 and therefore the application was made in time.

19. It was conceded by the author of the Claimant's skeleton argument, who had appeared before the FTT, that the judge may have erred in her findings as to the long residence rules, those findings being contained at paragraphs 20-21 of the FTT decision. This point related to the judge's findings on paragraph 39E(2). Mr Coleman did not however accept that the judge had erred, and submitted that the Claimant's section 3C leave was extended by paragraph 39E(2), and therefore he continued to have lawful residence which meant that he accrued ten years' continuous lawful residence.

20. I reject that submission.

21. The Claimant's leave in the UK as a Tier 4 Student was curtailed on 28th September 2014. According to the Secretary of State's records he applied on 29th September 2014 for further leave to remain as a Tier 4 Student which application was refused with no right of appeal on 18th March 2015. However an appeal was lodged on 1st April 2015, which must have been accepted as valid, as there was an FTT hearing and the Claimant's appeal was dismissed on 22nd June 2016. The Claimant then submitted an application for permission to appeal to the FTT on 14th October 2016 which was refused. He then submitted an application for permission to appeal to the Upper Tribunal which was refused on 5th December 2016, and therefore he became appeal rights exhausted on 5th December 2016 and his section 3C leave ended on that date.

22. I do not find that paragraph 39E(2) extends to the Claimant's section 3C leave. Section 3C relates to continuation of leave pending a variation decision. In summary if a person who has limited leave to remain in the UK applies for variation of that leave, and the application for variation is made before the leave expires, and the leave expires without the application for variation being decided, leave is extended during any period when the application for variation is neither decided nor withdrawn. Leave is extended while an appeal could be brought and while an appeal is pending.

23. Section 3C(4) provides that a person may not make an application for variation of his leave to enter or remain in the UK while that leave is extended by virtue of section 3C.

24. I am satisfied that the Claimant's section 3C leave ended on 5th December 2016. Thereafter he made a fresh application for leave to remain. I am satisfied that paragraph 39E(2) does not operate to extend the Claimant's section 3C leave in this case. In my view the judge was therefore wrong to be persuaded otherwise (a point which appears to be conceded by Counsel who made the submission before the FTT, and who drafted the skeleton argument) and the judge therefore erred in finding that the Claimant had acquired ten years' continuous lawful residence.

25. I find this to be a material error of law as the judge at paragraph 22 records that the conclusion that the Claimant had acquired ten years' continuous lawful residence "carries significant weight in my assessment of the appeal under Article 8 ECHR and the public interest in the Appellant's removal."

26. Turning to the second ground and paragraph 322(5) I find that the judge erred at paragraph 15 in recording that the Secretary of State had discharged the legal burden of proof. That however is not a material error, as it is clear that the judge meant to record in that paragraph that the evidence submitted by the Secretary of State discharged the evidential burden of proof, and therefore the Claimant had to provide an innocent explanation.

27. I find that inadequate reasons have been given by the judge for concluding that the Claimant provided an innocent explanation. At paragraph 16 the judge records the Claimant's evidence was that he attended the test on 22nd August 2012 and took it. As far as he was concerned the test was properly taken. There is no further explanation as to why ETS concluded that a proxy test taker was used. The judge places significant weight upon a second test taken on 26th September 2012 with improved marks, which was not disputed. No explanation is given in the decision, as to why the Claimant decided to take a second test. I find inadequate reasons have been given for concluding that the taking of a second test meant that a proxy test taker had not been used in the first test. I find that paragraph 57 of MA has some relevance in which the Upper Tribunal found that there are a number of reasons why a person proficient in English may engage in TOEIC fraud.

28. As I conclude that the judge materially erred in law in consideration of paragraph 39E(2), and paragraph 322(5) I find that the decision is unsafe and is therefore set aside. I find it appropriate, having considered paragraph 7 of the Senior President's Practice Statements, to remit this appeal back to the FTT because of the nature and extent of judicial fact-finding that will be necessary in order for this decision to be remade.

29. The appeal will be heard by the FTT by a judge, other than Judge L K Gibbs. The parties will be notified of the time and date in due course.

Notice of Decision

The decision of the FTT discloses a material error of law and is set aside. The appeal is allowed to the extent that it is remitted to the FTT with no findings of fact preserved.

Anonymity

The FTT made no anonymity direction. There has been no request made to the Upper Tribunal for anonymity and I see no need to make an anonymity order.

Signed Date 28th February 2019

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The Upper Tribunal makes no fee award. The issue of any fee award will need to be considered by the FTT.

Signed Date 28th February 2019

Deputy Upper Tribunal Judge M A Hall