



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

Appeal Number: HU/20215/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 8<sup>th</sup> July 2019**

**Decision and Reasons Promulgated  
On 12<sup>th</sup> July 2019**

**Before**

**UPPER TRIBUNAL JUDGE COKER**

**Between**

**BISHNU PRASAD KAFLE**

Appellant

**And**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr S Karim, Direct Access

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. By a decision promulgated on 1 May 2019, First-tier Tribunal Judge Cary dismissed the appellant's appeal against the decision of the respondent refusing his human rights claim. The judge found that the appellant's ETS language test was "bogus" and had been submitted by the appellant to obtain an immigration advantage, that he obtained the result dishonestly and that his marriage to Ms Apreti, who has leave to remain in the UK as a Tier 2 (General) Migrant, was not such as to render the decision to refuse his human rights claim disproportionate.

2. Permission to appeal was granted on all grounds pleaded, namely:
  - (i) the First-tier Tribunal judge erred in law in failing to recognise that an ETS score considered 'questionable' was unlikely to meet the evidential threshold;
  - (ii) the First-tier Tribunal judge made a material error of fact in categorising the appellant's test score as 'invalid' as oppose to 'questionable';
  - (iii) the First-tier Tribunal judge erred in law in placing weight on the extracts from the interview transcript cited in the reasons for refusal letter, in the absence of the transcript when the transcript had been requested by the appellant;
  - (iv) In the context of a 'questionable' ETS score, the judge erred in law in failing to consider and make findings in respect of factors set out in [69] of *SM and Qadir*;
  - (v) The findings on Article 8 have been infected by the inaccurate findings on ETS but in any event the First-tier Tribunal judge failed to undertake a balancing exercise as required.
3. There was no Rule 24 response by the SSHD.
4. Mr Karim did not make submissions on the 5<sup>th</sup> ground upon which he was granted permission to appeal, save to say that he was not abandoning the ground; his strongest submissions were on the ETS issue which, if the appellant were successful on those grounds and in the appeal generally on those issues, would result in him being in the position he was before the s10 notice was served and thus that impacted upon his Article 8 claim overall.
5. Mr Tarlow referred me to [12] of the First-tier Tribunal decision which reads as follows:

“The appellant was reminded that in his interview he had accepted that he had used deception. He disputed that. He said the Home Office were either lying or alternatively had made a mistake in their recollection of what he had said. He could remember being asked about the test and he had told them that as it was a long time ago there were “things” he could not remember. He said he had told the Home Office that he had used the same agency as he had used in Nepal to organise his studies in the United Kingdom ...”
6. I drew Mr Tarlow's attention to the fact that this part of the decision was a record of the appellant's evidence and was not an admission of deception but a refusal to accept that he had exercised deception. Mr Tarlow made no other submissions other than to say that the grounds were no more than a disagreement with the outcome of the appeal.

#### Error of law

7. The reasons for refusal of the appellant's claim dated 24<sup>th</sup> September 2018 refers to an interview undertaken by the respondent because his result had been withdrawn by ETS and declared questionable because “widespread fraud was known to have occurred at the test centre in question.” Verbatim extracts

from the interview are not quoted in the refusal letter. Despite the appellant requesting a copy of the interview record, the respondent has not provided it. When this, together with the appellant's evidence regarding his attendance at the test, is considered in the context of the mis-categorisation of the test by the First-tier Tribunal Judge as 'invalid' the judge has erred in law. The judge placed weight on an inaccurately recorded fact, failed to weigh into his consideration the lack of a transcript of evidence which the respondent had failed to provide and of which not even extracts were provided, and failed to have regard to other evidence relating to the appellant personally and his language skills. It is also notable that in [50] of the decision, the judge says

“... Although the burden of proof is on the respondent the appellant has produced little evidence to contradict the respondent's assessment ...”

The judge has in effect reversed the burden of proof on a 'questionable' test result.

8. I am satisfied the judge erred in law in his findings on the appellant's test result. This impacted significantly upon the findings with regard to the Article 8 decision given that if he is ultimately successful he would no longer be subject to a s10 Immigration Act 1999 decision.
9. I set aside the decision to be remade.

*Remaking the decision*

10. When a decision of the First-tier Tribunal is set aside, s.12(2) of the TCEA 2007 requires me to remit the case to the First-tier Tribunal with directions or remake it for ourselves. In this case, the fundamental factual matrix is disputed, and I am satisfied the nature and extent of judicial fact finding necessary is such that, having regard to the overriding objective in rule 2 of the Practice Direction, it is appropriate to remit the case to the First-tier Tribunal.

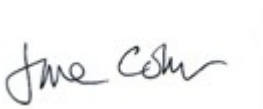
Conclusions:

The making of the decision of the First-tier Tribunal did the making of an error on a point of law.

I set aside the decision and remit it to the First-tier Tribunal (Taylor House) to be re-heard, no findings preserved.

To be heard by a judge other than First-tier Tribunal Judge Cary; no interpreter required.

Date 9<sup>th</sup> July 2019



Upper Tribunal Judge Coker