Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31120/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 February 2019	**On 12 March 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR MOEEZ NASEER ABBASI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr L Lourdes of Counsel
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Pakistan, has permission to challenge the decision of Judge McIntosh of the First-tier Tribunal (FtT) sent on 9 July 2018.

2. On 15 May 2012 the appellant applied for leave to remain as a Tier 4 (General) Student Migrant. On 8 September 2015 the respondent refused his application. The refusal letter stated that the respondent was not satisfied he had a valid CAS because the Tier 4 Register was checked on 8 September 2015 and Scott's College London was not listed on the Sponsor

Register on that date. The letter further noted that on 11 February 2015 the appellant was informed of the result of the Register check and allowed 60 days to obtain a new sponsor and CAS. Within the same letter he was informed that due to irregularities uncovered by ETS, his language test score had been cancelled and he had been advised that he needed to submit a new test score within the same 60 day period. It was noted that he had not provided a new CAS within that period.

3. What happened next is recorded by Judge McIntosh at paragraphs 15–22 as follows:

> "15. After initial administrative difficulties requiring fee payment, Standard directions were given for the appeal to be considered on the papers by the First Tier Tribunal on a date after 19 November 2015.
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> 16. On the 28 April 2015, the Home Office wrote to the Appellant's then legal representatives, in response to their request for the return of the Appellant's passport for the purposes of undertaking a further English test.
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> 17. On the 10 November 2015 the Appellant wrote to the First Tier Tribunal requesting an oral appeal hearing. The Appellant was advised of the need to pay an additional fee for an oral hearing. Further directions were made for the Appellant to submit evidence upon which he relied, to the First Tier Tribunal by 23 August 2016 for the hearing listed on the 16 December 2016.
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> 18. On 16 December 2016 Deputy Immigration Judge Freer gave the directions including, 'The Respondent will release the original passport of the Appellant by delivery to the Appellant's representative within 14 calendar days of 17 December 2016'.
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> 19. The appeal hearing of the 16 December 2016, was adjourned to be heard on the 07 July 2017. On the 07 July 2017 the Appellant appeared before Judge B A Foulkes-Jones of the First Tier Tribunal. The Appellant appeared represented by Mr L Lourdes of counsel and the Respondent was represented by Mr I Briant, Home Office Presenting Officer. On the 07 July 2017 the appeal hearing was adjourned with directions for Mr Briant to write to the Appellant and his representatives confirming and detailing what was required of the Appellant as outlined in the letter of Ravi Khosla dated 13 September 2016. The Appellant was directed to provide all further evidence upon which he intended to rely, to be served at least 14 days prior to the next hearing.
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> 20. On the 08 August 2017 the Appellant and the Respondent were notified of the adjourned hearing date to be listed on the 10 November 2017. On the 10 November 2017 the Appellant attended represented by Mr L Lourdes and the Respondent represented by Mr Moore. The matter was listed before Immigration Judge KSH Miller of the First Tier Tribunal. On that occasion the appeal hearing was adjourned, the letter from the Respondent only being seen on the 08 November 2017, leaving insufficient time for the Appellant to submit and sit for another SELT test. A further adjournment was granted on that occasion.

> 21. Immigration Judge K S H Miller directed that the Appellant apply to take SELT test forthwith, with the assistance of the letter from the Home Office dated 08 November 2017. There was an added direction that there should be no further adjournment.
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> 22. On the 29 December 2017 the Notice of Adjournment Hearing was sent to the parties, confirming that the hearing of the 10 November was adjourned to the hearing on 16 May 2018."

4. The judge went on to record that at the date of hearing the appellant said that he had received a letter from the Home Office dated 13 September 2016 outlining what action he needed to undertake to take a requisite English language test but each tester he had approached had requested the production of his passport, which was still with the Home Office. However, he also accepted that he had not followed the steps set out in this letter, but would if given more time. On the strength of this evidence, his representative then applied for a further adjournment. This was opposed by the Presenting Officer. At paragraph 29 the judge recorded his response to this application as follows:

> "29. Having considered the proposition of an adjournment towards the end to the Appellant's evidence, I decided to continue with the appeal hearing as the reasons put forward for the adjournment was exactly the same reason for which the adjournment had been granted on the previous occasions. To continue with the appeal hearing would not prejudice the appeal in respect of either party."

5. The appellant's grounds contend that the judge erred (1) in failing to consider the appellant's account met the minimum level of plausibility required to shift the burden of proof back to the respondent; (2) by allowing the respondent to argue factors that were not raised in the refusal letter; and (3) in failing to agree an adjournment in relation to directions made for the release by the respondent of the original passport with reference to the case of **Patel [2011]** UKUT 00211 (IAC).

6. I am grateful for the submissions I heard from both representatives.

Analysis

7. Ground (1) is devoid of arguable merit. Whilst it is correct that the appellant was informed by the respondent on 11 February that she considered the appellant's ETS was invalid, the decision made on 8 September 2015 did not rely on any allegation of deception. It relied simply on the failure of the appellant to produce a valid CAS. Further, in challenging this decision the appellant's grounds did not argue that the appellant's ETS test was valid, nor did his representative at the hearing raise such an argument. The appellant had ample opportunity when informed about the ETS results in February 2015 to challenge the Home Office position, but failed to do so.

8. As regards ground (2), it is wholly misplaced. The crux of the refusal letter was that the appellant had failed to produce a valid CAS and had failed to

obtain a new sponsor and CAS within the 60 day period granted him, on 11 February 2015. The respondent's arguments at the hearing were entirely consonant with those set out in the refusal decision. At paragraph 31 the judge records these submissions as follows:

> "31. Relying on the Reasons for Refusal dated 08 September 2015, Mr Jones submits that this is a straight forward case in which the Appellant was unable to provide a valid CAS. Referring to the case Sandeep Kaur (Patel fairness: respondent's policy) [2013] UKUT 344 (IAC), the appellant was notify of the 60 day policy for an alternative CAS. Referring to the concerns of the Respondent, Appellant maintains that at no time did use TOEIC certification in support of his application."

9. At paragraph 38 the judge went on to find that the respondent "acted in accordance with its 60 day policy and that the appellant had been allowed additional time to meet the requirements of providing an English Test Certificate".

10. The appellant's grounds contain several paragraphs that simply ignore the fact that the appellant was given 60 days. Reconstructing them as best one can, they also seek to argue that the appellant should have been allowed more than 60 days, as it was felt that the appellant had been obstructed from obtaining a fresh ETS by the respondent refusing to release to him his passport. The difficulty with that contention is that the appellant produced no evidence to show that in the 60 day period from 11 February – 8 April 2015 he had tried to obtain a new ETS and had only failed because he did not have a passport.

11. So far as concerns the appellant's position under the Immigration Rules, it will be apparent from what I set out above, that the judge was entirely justified in concluding that the appellant had failed to meet the relevant requirements (under paragraph 245ZX(d) with reference to paragraph 116(e) of Appendix A and paragraph 245ZX(d) of the Rules).

12. I turn then to the issue of the relevance of the appellant's evidence concerning attempts post-decision to obtain an ETS. Its only relevance can be to the issue of whether the decision was in breach of the appellant's right to respect for private and family life, an issue which the judge was required to decide at the date of the hearing (in May 2018).

13. Two things need to be said about the appellant's evidence. First, a significant amount of it related to efforts he had made since the date of hearing and decision. Mr Lourdes, for example, adduced evidence to show that the appellant has now obtained an ETS, having sat his test on 30 October 2018, by which time he had got a new Pakistani ID card and a new passport. However, evidence that has come into being after the hearing and after the decision of the FtT Judge cannot assist in establishing an error of law.

14. Second, insofar as the appellant's evidence pertained to efforts he made prior to the date of hearing, it was his own evidence that although he spoke about a number of efforts he had made, he had not followed the advice given to him by the Home Office in the letter of 13 September 2016.

15. In the discussions before me there was some confusion about what the precise terms of the guidance given in this letter were. It is necessary, therefore, to set out the relevant parts:-

> "However, I can confirm the arrangements in place around SELT identity requirements and the return of passports as requested.
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> When attending a test centre to sit a SELT test a candidate must provide evidence of their identity before being allowed to take the test. The only acceptable forms of identification for in the UK are:
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> - a valid passport or travel document;
> - a valid EU Identity Card;
> - a valid Biometric Residence Permit.
>
> The documents must be originals and include a photograph. Any candidate who is unable to prove their identity will not be allowed to take the test. Photocopies of a passport cannot be accepted, as the test centre staff will not be able to confirm that the document is a genuine document, including checking the security features of the passport.
>
> You have asked for an explanation as what would the Home Office position if a request is made for the return of an identity document to take a SELT test in the following scenarios:
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> 1. the applicant has extant leave;
> 2. the applicant has leave under section 3C of the Immigration Act 1971;
> 3. the applicant has permission to remain under the Free Movement Directive;
> 4. the applicant is an overstayer / illegal entrant.
>
> In the first three scenarios, the identity document should be returned by the Home Office in order to allow the individual to sit the SELT test.
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> In the last scenario the Home Office may not return the passport to allow the individual to sit the SELT test, as they would be in the UK illegally and the passport would assist in the individual's removal. Guidance on the power to retain passports is available at https://www.gov.uk/government/publications/retaining-valuable-documents
>
> Also, where an individual has requested the return of the identity document after the application has been refused, the Home Office

> may not return the document as it would assist in the individual's removal.
>
> In cases where an immigration appeal has been held or is in progress the Home Office will make a decision whether to return the passport or not. In the majority of cases the passport should be returned. In exceptional cases where there are serious concerns that the applicant may abscond if the passport is returned, the Home Office will request that the applicant books a SELT test, then will scan the passport and send this with the booking details to the SELT provider to allow the applicant to sit the test. In these cases the Home Office will confirm to the SELT provider that the passport has been checked and there are no concerns about it being genuine."

16. It is clear that the relevant parts of this guidance applicable to the appellant (given that it is agreed he had leave under Section 3C of the 1971 Act) was that "… where an individual has requested the return of the identity document after the application has been refused, the Home Office may not return the document as it would assist in the individual's removal", but that where an immigration appeal is in progress, in the majority of cases the Home Office will return the passport but where it will not the procedure is that the Home Office will request that the applicant books a SELT test and then scans the passport and sends this with the booking details to the SELT provider. As the appellant himself acknowledged, he did not follow this guidance. In particular, having asked for his passport back but not received it, he did not request that the Home Office requests him to book a SELT producing this request to the SELT provider.

17. Accordingly, the judge did not err in concluding that the appellant (not the Home Office), was responsible for him not being able to obtain a SELT test by the time of the hearing.

18. Turning to ground (3), Mr Lourdes submitted that the judge should have adjourned the hearing because she herself accepted that the appellant had been active in pursuing and completing the English test. However, that submission appears to misread the last sentence of paragraph 33 which states that "I note also that the Appellant appeared in active in pursuing and completing the English test". That is clearly a typo for "inactive". For it to be read as "active" would be contrary to the judge's conclusion at paragraph 38 that the appellant "has not been proactive in ensuring that he followed the instructions of what he needed to do to take his English test at an appropriate test centre"; see also paragraph 32 which notes that "there have been a number of adjournments in this case with no real progression".

19. Even if the last sentence of paragraph 33 were to be read as meaning "active", that could only, as Mr Lourdes acknowledged in the submission, refer to his application dated 18 May 2018. This application was responded to by the Home Office on 13 June 2018 setting out how he

could apply even though he did not have a passport. But this activity was two days after the date of hearing before the judge and even though the judge did not promulgate her decision until 9 July 2018, there is nothing to indicate that the appellant notified the Tribunal of these efforts or the response they elicited.

20. Accordingly I consider the judge properly refused the application to adjourn.

21. To conclude:

The appellant's grounds do not disclose an error of law on the part of the judge and accordingly her decision to dismiss the appeal must stand.

No anonymity direction is made.

Signed Date: 8 March 2019

Dr H H Storey
Judge of the Upper Tribunal