Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01547/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 February 2020	**On 17 March 2020**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

ZESHAN SARWAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Wells, OISC
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan, born on 1 June 1987. He appeals against a decision of First-tier Tribunal Judge Ripley promulgated on 23 August 2019 dismissing his appeal against a decision of the respondent dated 28 December 2018 to refuse his application for further leave to remain on the basis of his private life.

Factual Background

2. The respondent refused the appellant's application on two bases.

3. The first was that pursuant to paragraph S-LTR.1.7 of Appendix FM of the Immigration Rules, he had failed on two occasions to attend an interview with the Secretary of State. The Secretary of State invited the appellant to an interview because she was concerned that he had relied on a possibly fraudulently obtained English language certificate in an earlier application for leave to remain, made in December 2012. The English language certificate he had obtained had been marked as "questionable" by the Educational Testing Service and, as such, the respondent was concerned that the appellant may have been involved in irregularities when taking that test.

4. The other basis upon which the appellant's application was refused was that he would not face very significant obstacles to his integration in Pakistan if he were to return pursuant to paragraph 276ADE(1)(vi) of the Immigration Rules.

Grounds of appeal

5. The appellant appeals with the permission of First-tier Tribunal Judge Appleyard on the following bases.

6. Judge Ripley accepted the respondent's account that the appellant had been invited to an interview on two occasions. That had been a matter of dispute before the First-tier Tribunal, and the appellant contends that Judge Ripley failed to give sufficient reasons for accepting the respondent's version of events.

7. There is no challenge to Judge Ripley's dismissal of the appeal on the separate limb upon which the appellant's application was refused namely that there would be no very significant obstacles to his integration in Pakistan.

Submissions

8. The appellant submits that the respondent had failed to discharge the evidential burden to which she is subject in order to establish suitability based concerns for refusing her application for leave to remain. The appellant had given an account before the judge in which he stated that, although had received many items of correspondence from the Home Office over a period of years, he had not received the letters inviting him to an interview.

9. It is for the respondent to establish that suitability-based concerns are made out, not for an applicant under the Immigration Rules to establish that there are no suitability-based concerns. The respondent must satisfy an initial evidential burden to demonstrate that there is a case to answer. The appellant is then expected to respond to those allegations, provided the respondent has met the initial evidential burden.

10. Before examining the appellant's account of the arrangements in his shared home for receiving post (something the judge considered in her decision), it is necessary to consider whether the respondent had discharged the initial evidential burden demonstrating that the letters had been sent in the first place.

11. Before me, Mr Bramble relies on the fact that the letters were provided to the First-tier Tribunal and had been available to the judge to consider. However, there was an additional document which had been produced before the First-tier Tribunal, namely an extract from the respondent's CID system, in which the letters were said to have been sent via First Class post inviting the appellant to an interview on 27 March 2017.

12. Before the First-tier Tribunal, the presenting officer on that occasion placed no reliance on this document, and Mr Bramble did not seek to withdraw that concession.

13. The reason the presenting officer placed no reliance on CID document, as recorded by the judge at [14] of her decision, was because the interview dates specified on the document were dates in March *2019*. The interview date was in March *2017*. The CID copy, which had been provided to the First-tier Tribunal, had been amended by hand so that the 2019 dates, which had been typed on the extract provided to the Tribunal, now read 2017.

14. In my view, the presenting officer in the First-tier Tribunal was right to concede that this is a document upon which no reliance may be placed. There is no explanation from the individual who amended the details on the extract by hand. There is no explanation as to the provenance of the need for the amendments to be made. It is simply a document which looks as though it has been altered after the event and, while I do not suggest that there was any bad faith on the part of the respondent, in view of the nature of the suitability based allegations which were made against the appellant, it is necessary for the respondent to establish an evidential case which is able to withstand scrutiny. As the presenting officer below and before me on this occasion realistically concede, no reliance may be placed on that document.

15. Against that background, therefore, it is necessary to consider the findings of the judge.

16. At [26] the judge examined the appellant's account of the arrangements for the post being delivered to his shared home and considered the likely probability of these two letters in isolation being unsuccessfully sent or not sent at all against a background of many successful postal deliveries.

17. The difficulty with the judge's analysis, is that she jumped straight to examining the appellant's explanation for post reception arrangements at his home and his account of not having received them, without considering whether there was sufficient evidence adduced by the Secretary of State in order to discharge the initial evidential burden. In my view there was not, and there was no material before the judge which reasonably could have permitted that conclusion.

18. I recall the fact that (i) an error is only possible to the Upper Tribunal on an error of law; and that (ii) the judge had the advantage of considering all the evidence in the case. As the Supreme Court stated in Henderson v Foxworth Investments Ltd [2014] UKSC 41; [2014] 1 WLR 2600 at [62]:

> "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

19. For the reasons I have already outlined, the CID extract was a document upon which no reliance could properly be placed. The judge's view of the inherent probability of the respondent not sending these two letters is difficult to sustain in view of the fact that the single document which purportedly demonstrates that the documents were sent in the first place stated on its face that they were sent in *2019*, some two years after the interview was scheduled to take place.

20. I find that the judge did not give sufficient reasons for making the findings that she reached. I also consider that the finding in [26] was one which was not reasonably open to the judge on the facts. The judge fell into error by reaching an irrational decision on this point.

21. The question then arises as to where this leaves the decision of the First-tier Tribunal. There has been no challenge to the judge's findings that the appellant would not face very significant obstacles upon his return to Pakistan.

22. There has been no challenge to the judge's conclusion that there would be no exceptional circumstances such that it would be unjustifiably harsh for the application to have been refused.

23. However, there is an error of law and I consider that the error is material because the appellant had made against him allegations of deception relating to irregularities with an English language test and although that was only on the basis of a "questionable" certificate rather than a "invalid" certificate nevertheless, the allegation has been made.

24. I set aside the decision of Judge Ripley and substitute my own findings as follows.

25. I preserve the findings of Judge Ripley in relation to very significant obstacles and the absence of exceptional reasons outside the Rules for the application to succeed. I substitute my own findings in relation to the interview matter as follows. I find that the appellant was not required to provide any explanation for why he contends he had not received the letters for the simple reason that the respondent had not discharged the burden that she bore to demonstrate that the letters inviting him to interview had been sent accordingly.

26. Although this appeal still must ultimately be dismissed, it is dismissed on the sole basis that the appellant failed to meet the requirements of paragraph 276ADE and that there were no exceptional circumstances meriting a grant of leave outside the

Rules. It was not and is not dismissed on the basis that there are any suitability concerns against the appellant.

Notice of Decision

The decision of Judge Ripley involved the making of an error of law and is set aside. I substitute my own decision dismissing the appeal.

No anonymity direction is made.

Signed *Stephen H Smith* Date 2 March 2020

Upper Tribunal Judge Stephen Smith