



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

Appeal Number: HU/05330/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 17 February 2020**

**Decision & Reasons Promulgated
On 5 March 2020**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

**MR AKMAL SHAHZAD
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Khan, Legal Representative, Lincolns Solicitors
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

The appellant is a citizen of Pakistan born on 1 September 1983. He appeals with permission against the decision of First-tier Tribunal Judge Rose sent on 11 September 2019. Permission to this Tribunal was granted on 30 December 2019 by Resident Judge Phillips.

Appellant's Background

The appellant has a lengthy immigration history. In summary, he entered the United Kingdom on 17 December 2009 with Tier 4 Student leave valid until 28 June 2011. His Tier 4 (General) Student leave was subsequently extended until 31 July 2014. On 31 July 2014 the appellant submitted an application for leave

to remain as a Tier 4 (General) Student which was refused with no right of appeal on the basis that the appellant had used a proxy test taker in order to obtain a TOEIC certificate from Education Testing Services (ETS). The appellant subsequently lodged a pre-action Protocol letter challenging the decision of 10 September 2014 and was informed that his letter would be treated as an Article 8 ECHR claim. An application for Judicial Review was closed by the court for failure to comply with the Procedure Rules. On 5 December 2018 the appellant submitted further evidence in support of his human rights claim. On 6 March 2019 the respondent refused the appellant's human rights claim on the basis that the suitability criteria applied to the appellant because his presence in the United Kingdom was not conducive to the public good.

First-tier Tribunal Decision

First-tier Tribunal Judge Rose found that the appellant had not used fraud in obtaining the TOEIC certificate. The appellant was completely exonerated of the allegation of wrongdoing with respect to obtaining his English language qualifications. Nevertheless, in considering whether the appellant's removal from the United Kingdom would constitute a disproportionate breach of Article 8 ECHR, the Judge concluded that the appellant would not encounter very significant obstacles on returning to Pakistan and that, when considering his application outside of the Immigration Rules, the appellant's removal from the UK would not be unduly harsh despite his disability.

The Grounds of Challenge

It is asserted that the Judge misdirected himself and erred in law in failing to take into consideration the guidance in TOEIC cases given in **Khan, Islam and Hossain v Secretary of State for the Home Department [2018] EWCA 1684** by Lord Justice Singh, who held that the respondent would follow the guidance given in **Ahsan v SSHD [2017] EWCA Civ 2009**. Where an appellant's original application had been refused as a result of a false TOEIC allegation which was subsequently shown to be erroneous, the respondent gave an undertaking to withdraw the refusal and place the appellant in the situation in which he would have been had his application not been refused on the ETS grounds in order that the appellant would not be disadvantaged in any way.

Permission to appeal was granted on the basis that, having found that the appellant had provided an innocent explanation and that the respondent had not proven fraud, the Judge had not taken into consideration the authority of **Khan.**

Decision

Ms Everett for the respondent indicated at the outset of the appeal that she would not seek to go behind the concession in **Khan.** The grounds are made out in that the Judge has misapplied the law. Since the appellant has prevailed on the ETS point the Secretary of State must grant limited leave for 60 days in order for the appellant to be placed in a position where he would not be

disadvantaged. Ms Everett conceded that the Article 8 ECHR private life point was not cross-appealed and that the appellant should be put back to the position in which he would have been had the allegation not been made. I am in agreement.

On this basis, I set aside the decision of First-tier Tribunal Rose as the decision is vitiated by a material error of law in that the Judge has misapplied the guidance given in **Khan** and failed to take into consideration this guidance in carrying out the Article 8 ECHR proportionality exercise.

There was some discussion about the appropriate way in which to proceed. It was agreed that I should remake the decision, allowing the appeal on the basis that since the Secretary of State is obliged to grant the appellant a period of 60 days' leave in order for him to make a further application to remain in the United Kingdom as a student and to remedy the prejudice caused to him by the erroneous allegation, it would be a disproportionate breach of his Article 8 ECHR right to private life for the appellant to be removed from the United Kingdom.

I therefore find that the removal of the appellant from the United Kingdom is a disproportionate breach of his Article 8 ECHR right to private life and remake the decision to allow this appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law.

The decision is set aside and I re-make the decision.

I allow the appeal on human rights grounds.

No anonymity direction is made.

Signed R J Owens

Date 26 February 2020

Upper Tribunal Judge Owens