Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08556/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 March 2015	**On 17 April 2015**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHAHZAD YOUSAF

Respondent

Representation:
For the Appellant: Mr A Brocklesby-Weller, Senior Presenting Officer
For the Respondent: No attendance

DECISION AND REASONS
Given orally at the hearing of 20 March 2015

Introduction

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department. I shall refer to Mr Yousaf as the claimant herein.

2. Notice of the hearing before the Upper Tribunal was sent to the claimant's legal representatives on 10 February 2015. Despite this, neither the claimant nor his representatives appeared at the hearing today. However, on the morning of the hearing and in breach of Directions the Tribunal received a Rule 24 response *"and submissions"* from the claimant, the terms of which make it clear that the he is aware of the date of the

hearing and that he has chosen not to attend (see paragraph 9 thereof). In all the circumstances I admitted the Rule 24 response, without objection, and concluded it to be just and appropriate to proceed with the hearing in the absence of the claimant or his legal representatives.

3. The claimant is a national of Pakistan born on 14 June 1985. He was originally granted leave to enter the United Kingdom as a student until 20 November 2010, such leave being subsequently extended on numerous occasions and last being conferred until 25 March 2012.

4. On 24 March 2012, i.e. the day before the claimant's leave expired, he made an application for further leave to remain as a Tier 4 (General) Student. When doing so he relied, *inter alia*, upon an English language test certificate provided by ETS ("TOEFL test").

5. The Secretary of State refused this application in a decision of 21 December 2012, stating as follows when doing so:

> "The March 3, 2012 TOEFL test scores for Shahzad Yousaf have been placed on hold by ETS because of inappropriate activity in the test centre. No specific evidence of wrong doing was found for Shahzad Yousaf, however to ensure the validity of TOEFL scores, the test taker is being asked to sit the test again at no additional cost. Therefore you should not consider these scores provided by the applicant as valid."

6. The claimant appealed this decision to the First-tier Tribunal. That appeal was heard by Judge M A Khan on 8 April 2013 and allowed in a decision promulgated on 16 April 2013. In his determination Judge Khan concluded that the Secretary of State's decision was vitiated by common law unfairness because (i) the claimant had not been informed of the irregularities regarding his English language results prior to his application having been refused and (ii) in such circumstances the claimant ought to have been given an opportunity to re-sit this test prior to a decision having been made on his application. As a consequence, Judge Khan 'remitted' the matter back to the Secretary of State to lawfully consider the claimant's application of 24 March 2012.

7. It is prudent to observe at this stage that in a skeleton argument provided for the purpose of the hearing before Judge Khan the claimant said as follows:

> "As the appellant is innocent of any practice that led to invalidation of his English test results, and was ignorant for the factual situation that led to the invalidation until after he was served with a decision, he should be offered a reasonable time within which to sit and provide evidence of proficiency in the English language at the required level. The appellant has arranged to sit a test on 11 May 2013 and it is respectfully requested that the appellant be allowed 28 days after that date of the test for him to provide the evidence." (emphasis added)

8. Judge Khan does not state that he found the claimant's original English language test to be valid. Had he found them to be so it is difficult to understand how, and why, he would have allowed the appeal on the basis

he did, rather than simply concluding that the claimant met the requirements of the Immigration Rules without the need to undertake a further English language test.

9. Moving forward in time, the claimant's application was once again refused by the Secretary of State in a decision of 28 January 2014, which stated as follows:

> "You have claimed 30 points for your Confirmation of Acceptance for Studies (CAS). However, the Secretary of State is not satisfied that you are either competent in English language at minimum level B2 of the Common European Framework of reference for languages (CEFR) or that you are a person who meets an alternative requirement. The Secretary of State is therefore not satisfied that you have met the requirements for 30 points to be awarded under Appendix A and Appendix O of the Immigration Rules."

10. Later in this same decision the following is said:

> "At your allowed appeal promulgated on 16 April 2013 the Immigration Judge determined that you should be allowed a further opportunity to take another English language test.
>
> On 12 August 2013 you were sent a letter confirming you had 3c leave whilst the appeal was still outstanding and you were also requested to provide details of your new English language test.
>
> Royal Mail Track and Trace shows that this letter was delivered on 20 August 2013 - this letter would enable you to obtain a new passport as you requested and thus enable you to take a new English test.
>
> Five months have passed since this letter was delivered and we have still not received any details of a new English language test taken by yourself.
>
> Therefore you have not met the requirements and 0 points have been awarded for your CAS."

11. On the same date the Secretary of State made a decision to remove the claimant pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

12. Undeterred by the aforementioned rationale the claimant again appealed to the First-tier Tribunal. This appeal was heard on 14 October 2014 by Judge Hussain and allowed in a determination promulgated on 26 November 2014. There are a number of pertinent features to the determination of Judge Hussain:

    (i) There is no reference within this determination to the original decision of Judge Khan;

    (ii) There is no reference within the determination to the fact that the Secretary of State had sent a letter to the claimant on 12 August 2013 requesting details of the *"new English language test":*

    (iii) There is no reference in the determination to the 28 January 2014 refusal decision i.e. the decision under appeal.

13. In his determination Judge Hussain concluded, in paragraphs 10 and 11, as follows:

> "10. There is nothing to suggest that on the face of it, any of the appellant's documents are not reliable. The appellant's CAS very clearly records the documents against which he was offered a place which includes his TEOFL results. The respondent seeks to undermine these results relying on some result of a verification check.
>
> 11. I have considered the respondent's bundle page by page and was not able to find any evidence of correspondence between the respondent and TOEFL. Mere assertion in the refusal letter in view (sic) is not enough to undermine the appellant's evidence that the document is reliable."

14. For this reason the judge concluded at paragraph 14 that the claimant met the requirements of the Immigration Rules.

15. In an alternative finding, set out in paragraph 13 of his determination, the judge also concluded that the Secretary of State had acted unfairly in determining the claimant's application prior to him having sat for a further English language test; stating as follows when doing so:

> "The appellant's life cannot be kept on hold until that situation is clarified. In my view, the proper decision would either have been to hold on to the appellant's application until the results of that testing is known or to have granted the appellant's application."

16. The Secretary of State sought and obtained permission to appeal to the Upper Tribunal, such permission being granted by Designated Judge Garratt in a decision of 27 January 2015. Thus the matter came before me.

Error of Law

17. The grounds of appeal make two discrete points. First, in paragraph 4 of the grounds, it is said;

> "The appellant in this case previously provided a test of English as a foreign language (TOEFL) certificate in support of his application, however, TOEFL have verified the scores as invalid and require the appellant to retake the TOEFL English language test. As such, the English language requirement could not be satisfied and the appellant's application was refused."

18. Second, in paragraph 8 of the grounds the Secretary of State asserts:

> "The findings made at [12] and [13] make clear that the FTT made an error of fact. The FTT clearly understood that the appellant had not been given the opportunity to retake the English language test. This is factually incorrect."

19. Having carefully considered the facts of the case as a whole, the submissions made on behalf of the Secretary of State and the written Rule 24 response submitted by the claimant, I conclude that the First-tier

Tribunal's determination contains an error of law capable of affecting the outcome of the appeal.

20. I do so for the following reasons. First, having considered the determination as a whole I find that there is a clear failure by the First-tier to correctly identify, or consider, the decision under appeal in these proceedings i.e. that of 28 January 2014. Paragraph 1 of the First-tier Tribunal's determination sets out the relevant history of the claimant in the United Kingdom. There is no mention therein of the decision under appeal. Paragraph 2 of the determination reads as follows:

> "The respondent's grounds and reasons for the decision are set out in the refusal letter of 21 December 2012."

21. This is not accurate and no reference is made thereafter to there being a further decision made by the Secretary of State on the 28 January 2014.

22. Second, there is no reference in the determination to the conclusions of First-tier Tribunal Judge Khan. This may be symptomatic of the First-tier Tribunal misunderstanding the decision that was under challenged before it. Nevertheless, it fell into error by failing to take account of the fact that there had already been a judicial decision made in relation to the Secretary of State's refusal of 21 December 2012. In particular the First-tier Tribunal failed to address the issue of whether there had been any explicit or implied acceptance in Judge Khan's determination of the invalidity the TOEFL results of March 2012. Absent identifying the appropriate starting point for such consideration, any conclusion by the Tribunal in 2014 must be founded on an error and be unsustainable.

23. It is to the aforementioned two matters that paragraph 4 of the Secretary of State's grounds of appeal go.

24. Third – and relating to an alternative finding made by the First-tier Tribunal in paragraph 12 of its determination - the Tribunal further erred in failing to take account of the fact that a letter was sent by the Secretary of State to the claimant on 12 August 2013. The provision of this letter goes directly to the consideration of whether the Secretary of State acted in a manner which can be categorised as procedurally unfair.

25. For the aforementioned reasons I conclude that the First-tier Tribunal's determination is vitiated by legal error and I set it aside.

Re-making of Decision

26. Moving on, I see no necessity to adjourn this hearing in order to undertake the remaking of the decision under appeal. The claimant has chosen not to attend the hearing and relies on written representations made on his behalf. The directions sent to the parties with the grant of permission on 29 January 2015 make clear that the parties should prepare for the hearing before the Upper Tribunal: *"on the basis that, if the Upper Tribunal decides to set aside the determination of the First-tier Tribunal, any*

evidence, including oral evidence, that the Upper Tribunal may need to consider if it decides to re-make the decision can be so considered at the hearing." The claimant has not sought to produce any additional evidence before me and in my view justice does not require an adjournment either for the claimant to appear at the hearing or for further evidence to be produced.

27. The first question I must ask myself is whether, on the balance of probabilities, the claimant satisfies the requirements of the Immigration Rules.

28. It is not in dispute that the claimant is required by the Rules to submit to the Secretary of State a valid English language test certificate of the type identified in the two refusal decisions. The claimant produced, with his application of 24 March 2012, an English Language test certificate from ETS - an approved English language test provider at that time - dated 3 March 2012. However, by the time the Secretary of State considered this application on 21 December 2012 ETS had treated these test scores as being *"not valid"*. This was not as a consequence of any reason directly attributable to the claimant, but rather because of *"inappropriate activity at the test centre"* at which the claimant undertook his English language test.

29. In his Rule 24 response the claimant asserts that it was wrong for the Secretary of State to accept the test provider's request for the claimant's English language test results to be treated as withdrawn, when there was no evidence of wrong doing on his behalf. I find this submission to be misconceived.

30. As of the date of the Secretary of State's initial consideration of the claimant's application i.e. on 21 December 2012, the English language test certificate provided by the claimant was not valid. The validity of this test certificate was not a matter for the Secretary of State but for the author of the test certificate. The Secretary of State merely acts on the information before her, which was that the test provider had treated the claimant's test results as being not valid, pending him undertaking a further test. As regards the available and appropriate remedy against the decision of 21 December 2012, that is precisely as identified by Judge Khan in his determination.

31. Judge Khan did not allow the claimant's appeal against the decision of 21 December 2012 on the basis that the English language certificate of 3 March 2012 was valid, but because the Secretary of State had acted unfairly in not giving the claimant an opportunity to obtain a further English language test certificate (undertake a further test) prior to the determination of his application of 24 March 2012. This was exactly the position the claimant advocated in his skeleton argument before Judge Khan's Tribunal and it is the invalidity of the 3 March certificate that underpins the entirety of the conclusions on the issue of fairness made by Judge Khan.

32. The fact that Judge Khan allowed the appeal against the decision of 21 December 2012 does not somehow reinvigorate the validity of the English language test certificate of 3 March 2012 that was otherwise not valid.

33. The claimant has had ample opportunity since the determination of Judge Khan to obtain a further relevant English language test certificate but he has chosen not to take such opportunity. As of the date of the decision under appeal i.e. 28 January 2014, the Secretary of State did not have before her a valid English language test certificate relating to the claimant.

34. Consequently, the claimant could not at that time, and still cannot, meet the requirements of the Immigration Rules and the appeal brought on this ground must be dismissed.

35. Turning to the issue of fairness, the claimant must have been well aware as of the date of the determination of Judge Khan in April 2013, that he was required to submit a further English language test certificate to the Secretary of State.

36. In a letter sent to the claimant on 12 August 2014 the Secretary of State confirmed to the claimant that he had section 3C leave, and requested details of the new English language test that the claimant sought to rely upon in his outstanding application; the Secretary of State therein reminding the claimant of the need to provide further English language test results. She also acknowledged her awareness of the need for the claimant to obtain a new passport, but observed that the letter of 12 August would be sufficient to allow him to do so.

37. The refusal decision of 28 January 2014 identifies that the letter of 12 August 2013 was sent by *"Royal Mail track and trace",* which had shown the letter to have been delivered on 20 August 2013. The fact of this letter having been delivered has not been the subject of dispute in these proceedings.

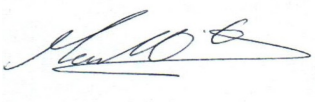
38. The Secretary of State subsequently waited a further five months before making the decision of 28 January 2014 refusing leave. In such circumstances it cannot be said, in my view, that the Secretary of State acted unfairly in making a decision on 28 January 2014 absent any further provision by the claimant of a relevant English language test certificate. This is particularly so in light of the constraints on the procedural fairness grounds when deployed in Points Based System cases, as identified by the Court of Appeal in EK (Ivory Coast) v SSHD [2014] EWCA Civ 1517. For this reason I dismiss the appeal brought on procedural fairness grounds.

39. There were no other grounds pursued at the hearing before the First-tier Tribunal and it is not said in the Rule 24 response that the claimant pursues any other ground before the Upper Tribunal. In particular, it is not said that the claimant pursues any human rights grounds. I conclude in all the circumstances that no other grounds are now being pursued.

Notice of Decision

The determination of the First-tier Tribunal is set aside. Upon remaking the decision under appeal for myself I dismiss the claimant's (Mr Yousaf's) appeal against the Secretary of State's decisions of 28 January 2014.

Signed:



Upper Tribunal Judge O'Connor
Date: 26 March 2014