



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/16659/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 26 September 2018

Decision & Reasons Promulgated  
On 05 October 2018

Before

**DR H H STOREY  
JUDGE OF THE UPPER TRIBUNAL**

Between

**MR MD MURSHED ALAM  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Z Khan, Counsel, instructed by Universal Solicitors  
For the Respondent: Mr C Bates, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant, a citizen of Bangladesh, has permission to challenge the decision of Judge Buckwell of the First-tier Tribunal (FtT) dismissing his appeal against the decision made by the respondent dated 21 June 2016 refusing to grant him leave to remain as a Tier 2 (General) Migrant. The respondent concluded he had used deception in a test he had taken on 17 April 2012 at Synergy Business College of London and that, since he had submitted a TOEIC certificate from ETS on the strength of this test, he stood to be refused under paragraph 322(2) of the

Immigration Rules. The respondent also refused him under paragraph 245HD(a) of the Immigration Rules as he had not provided a valid COS reference number; and had not provided adequate evidence of maintenance.

2. The appellant's grounds of appeal principally canvass that the judge erred in his treatment of the deception issue, in failing to apply the guidance given in **Majumber and Qadir v SSHD** [2016] EWCA Civ 1167 to the facts of the case which importantly were that the appellant had diplomas awarded in July 2011 and November 2012 and had an IELTS test certificate dated 5 October 2011 taken just six months before the TOEIC test in question demonstrating that the appellant had scored 7.0/9 in the speaking test (77.9% - the highest of all his scores in that test).
3. Having heard from both representatives I am persuaded that the judge materially erred in law. Pursuant to the guidance set out by the Court of Appeal in **Majumber**, two of the facts the judge was required to consider concerned whether "the Tribunal's assessment of that person's English language proficiency is commensurate with his or her TOEIC scores" and whether "his or her academic achievements are such that it was unnecessary or illogical for them to have cheated". The judge wholly failed to consider either of these factors. I am satisfied this had a knock-on effect in the judge's consideration of the appellant's position under the Immigration Rules generally and also in his assessment of Article 8 outside the Rules.
4. Accordingly I set aside the decision of the judge for material error of law.
5. I discussed with the parties what I should do in relation to disposal of the appeal. Both representatives were in agreement that the case should be remitted to the FtT to be heard afresh. It is accepted by the parties that the appellant's case stands to be considered under the old appeal's provisions and that it is possible for him to succeed under the Immigration Rules and if not successful under them to also argue Article 8 outside the Rules. I am persuaded by the parties' submissions that there needs to be a FtT hearing on two issues only:
  - (a) whether the appellant was entitled to succeed under the Immigration Rules (or on the basis of procedural unfairness); and
  - (b) whether he could show compelling circumstances outside the Immigration Rules.

I see no proper basis for remitting the issue of deception under paragraph 322(5). From the evidence before me I consider that the respondent cannot be said to have established deception. Given the appellant's educational qualifications and in particular his IELTS test certificate dated October 2011, he had no need to use a proxy for his April 2012 test. Further, his test results in the April 2012 broadly reflected those taken in the earlier test and hence the respondent's concerns about his high score in his speaking test fall away. On the respondent's own evidence, although Synergy Business College has been identified as one where a significant number of

tests have been taken by proxy test-takers, the invalidity figures are just under 50% and the appellant's explanations for why he took the test there was in my judgment a satisfactory one. Viewing the evidence as a whole, I consider he gave a satisfactory explanation of the circumstances under which he took the test. Mr Bates did not seek to submit that I should leave the issue of deception to be re-ventilated at the remitted hearing. Accordingly, the only issues before the FtT are the two already identified.

6. Issue (a) arises because as the respondent is no longer entitled to refuse on deception grounds the appellant is arguably entitled to argue that he should have been granted 60 days to find another sponsor. In turn, the issue of maintenance was not disputed earlier by the respondent.

7. To conclude:-

The decision of the FtT Judge is set aside for material error of law;

The case is remitted to the FtT (not before Judge Buckwell);

The issues are confined to those identified above as (a) and (b).

No anonymity direction is made.

Signed:

Date: 28 September 2018



Dr H H Storey  
Judge of the Upper Tribunal