Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15170/2018

THE IMMIGRATION ACTS

Field House	**Decision & Reasons Promulgated**
On 11th February 2019	**On 12th February 2019**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

USMAN ZAHID
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Ms S Akinbolu, of Counsel, instructed by Elaahi & Co Solicitors

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Pakistan born in 1991. He arrived in the UK in February 2011 as a Tier 4 student migrant and had leave in that capacity until 1st October 2014 when he was served with notice as a person liable to removal. On 2nd September 2016 he made a human rights claim. That claim was refused in a decision dated 28th June 2018.

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His appeal against the decision was allowed on human rights ground by First-tier Tribunal Judge Graham in a determination promulgated on the 7th November 2018.

2. Permission to appeal was granted to the Secretary of State on the basis that it was arguable that the First-tier judge had erred in law in two ways. Firstly, the First-tier Tribunal may have erred in finding that the claimant had leave to remain at the time of application at paragraph 9 of the decision and thus in not weighing the public interest in his removal when considering proportionality; secondly the First-tier Tribunal may have failed to identify the type of leave to remain that the claimant was entitled to within the UK. Whilst the First-tier Tribunal was entitled to conclude the claimant had not falsely obtained his TOEIC certificate there was a failure to show why his removal was a disproportionate interference with his private life.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

4. The Secretary of State's grounds are as set out in the grant of leave. Mr Whitwell argued, in response to submissions from Ms Akinbolu, that it was not clear that Ahsan & Ors v SSHD [2017] EWCA Civ 2009 had been before the First-tier Tribunal, and any argument based on this case had not been set out explicitly with sufficient reasoning in the decision. He accepted however that what was said in Ahsan could be seen as meaning that the lack of reasoning in the decision of the First-tier Tribunal was not a material error.

5. In a Rule 24 notice Ms Akinbolu accepts that it is wrongly stated at paragraph 9 of the decision that the claimant had leave to remain when he made his human rights application. However, it is argued that the findings at paragraph 21 (where it was found that there was no public interest in the removal of the claimant despite his not being able to meet the requirements of the Immigration Rules) was not based on that incorrect factual statement, and was in fact legally correct as it would be disproportionate to remove the claimant given what is said by the Court of Appeal in Ahsan at paragraphs 120 and 121. As the Secretary of State does not challenge the decision of the First-tier Tribunal that the claimant had not cheated in his TOEIC test that meant that the decision to remove him was not lawfully made, and in accordance with Ahsan he was entitled to be placed in the same position he would have been had that decision not been made, and thus to a short period of leave to remain to make a new application.

Conclusions – Error of Law

6. The claimant's immigration history is set out at paragraph 3 of the decision, and includes the fact that the claimant's leave was ended on 1st October 2014 by the notice of removal, and that it would in any case have ended on 19th December 2014, and that no human rights claim

was made until 2nd September 2016. It was clearly therefore a factual error to conclude at paragraph 9 of the decision that the claimant had limited leave when the human rights application was made in September 2016. I do not find however that this factual error lead to a material error of law.

7. The Secretary of State accepts that the First-tier Tribunal was entitled to conclude that the claimant had not cheated in his TOEIC examinations for the reasons set out at paragraphs 10 to 20 of the decision. It is also accepted by the Secretary of State, and the claimant, that the First-tier Tribunal correctly concluded that the claimant could not meet the requirements of the private life Immigration Rules at paragraph 276ADE.

8. The First-tier Tribunal finds at paragraph 21 of their decision that the error in making the removal decision means that there is no public interest in the removal of the claimant as the Secretary of State had acted unlawfully in making the removal decision. It would have been helpful if the First-tier Tribunal had set out or referred to what is said at paragraphs 120 and 121 of Ahsan, which I find was probably before the First-tier Tribunal as a copy was in the file and reference is made to the case in documents before the First-tier Tribunal, for instance at pages 14 to 15 of the bundle. I find that it was anticipated by the Court of Appeal in Ahsan that a claimant should be placed in the same position as if the s.10 decision to remove had been quashed following a successful human rights appeal in this factual context, as is stated at paragraph 120: “The starting-point is that it seems to me clear that if on a human rights appeal an appellant were found not to have cheated, which inevitably means that the section 10 decision had been wrong, the Secretary of State would be obliged to deal with him or her thereafter so far as possible as if that error had not been made, i.e. as if their leave to remain had not been invalidated. In a straight forward case, for example, she could and should make a fresh grant of leave to remain equivalent to that which had been invalidated.”

9. It was correct therefore for the First-tier Tribunal to make a careful finding that it would be disproportionate to require the claimant to leave the UK, reflecting the unlawfulness of the removal decision, but not to set out the leave to be granted which would have to be assessed to the Secretary of State as simply sufficient to put the claimant, in so far as this is possible, in the same position as if the erroneous section 10 removal decision had not been made.

10. For these reasons I find that the decision of the First-tier Tribunal does not contain a material error of law as I find that the decision is legally correct in the circumstances of this case.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

2. I uphold the decision of the First-tier Tribunal allowing the appeal on human rights grounds.

Signed: Fiona Lindsley Date: 11th February 2019
Upper Tribunal Judge Lindsley