



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/18803/2018

**THE IMMIGRATION ACTS**

Heard at Birmingham  
On 2<sup>nd</sup> September 2019

Decision & Reasons Promulgated  
On 12<sup>th</sup> September 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR HARJIT SINGH  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms I. Hussain (Counsel)

For the Respondent: Ms H. Aboni (Senior HOPO)

**DETERMINATION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Broe, promulgated on 13<sup>th</sup> May 2019, following a hearing at Birmingham on 5<sup>th</sup> April 2019. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellant**

2. The Appellant is a male, a citizen of India, and was born on 17<sup>th</sup> February 1987. He appealed against the decision of the Respondent dated 30<sup>th</sup> March 2015 refusing his application for leave to remain in the UK on the basis that he had submitted a fraudulent TOEIC certificate.

### **The Appellant's Claim**

3. The Appellant's claim is that there was no evidence to prove the Respondent's case that he had engaged in fraudulent activity in procuring his TOEIC certificate. He had always been a genuine student. The Respondent had checked all his applications. He had come to this country to follow a three year course in international tourism hospitality.
4. This required him to speak, write and read English. Indeed, he had in 2011 decided to pursue a business studies course at TCL College in London and in 2012 gained a level 5 advanced diploma. He had no reason to cheat in the test. He had never used a proxy. On top of the TOEIC certificate there was a photograph of him which was taken on the day of the test. There was CCTV cameras outside the building to which he went. It was an old building. He believes the tests were on the second floor. (See paragraphs 8 to 9).

### **The Judge's Decision**

5. The judge set out the case law (at paragraph 20) which applied to cases of this kind where it was alleged that a proxy had been used to undertake a ETS test. The judge explained that the burden of proof lay initially upon the Secretary of State so that the latter had simply to put forward a prima facie case (paragraph 21). This had been done (paragraph 22).
6. Thereafter the burden shifted to the Appellant, and the Appellant was able to put forward "a plausible innocent explanation" (paragraph 24). That being so, given that all that the Respondent was then reliant upon was the generic statements from Mr Peter Millington and Ms Rebecca Collings, the Respondent had not been able to discharge the burden upon him that the Appellant had engaged in fraudulent contact. The appeal was allowed.

### **Grounds of Application**

7. The Respondent's ground of application, however, alleged that the judge had failed to give proper reasons for the conclusion that the Appellant had offered a "innocent explanation" because all he had done was simply describe a process that was to be followed. This was something that was in the public domain and could easily have been learnt by the Appellant in this case.
8. On 10<sup>th</sup> June 2019 permission to appeal was granted by the Tribunal.

## Submissions

- At the hearing before me on 2<sup>nd</sup> September 2019, Ms Aboni submitted that there were two strands to the Respondent Secretary of State’s appeal. First, there was the issue of deception. This raised the question as to whether the Appellant was guilty of fraud. The judge failed to give adequate reasons for the conclusion that the Appellant had given a “innocent explanation”. This was because the Appellant failed to say what occurred at the test centre. Even if his photograph was attached this did not discharge the burden of proof that was upon him because the photograph could have been fraudulently attached by deception.
  - Second, if I was not with Ms Aboni on the first point, then the second point was that the judge had materially erred in allowing the appeal under the Immigration Rules. The Rules had no application whatsoever. The application by the Appellant had been on the basis of Article 8 right to remain in the UK. The judge gave no proper consideration to Article 8 and did not undertake a balancing exercise in terms of proportionality under Article 8. Therefore, this was an error. In fact, the judge’s observation “at the hearing it was agreed that if I found the test to be genuine the appeal should be allowed. If not, I should go on to consider Article 8” (paragraph 11), could not be correct. The appeal could not be allowed under the Immigration Rules. If the judge was to consider Article 8 he had to consider where the balance of considerations fell.
9. For her part, Ms Hussain submitted that she would have to agree that the judge had failed to apply Article 8 properly. He had wrongly allowed the appeal under the Immigration Rules. This was a material error of law. However, to the extent that the judge had found there to be no deception by the Appellant, these findings should be preserved in his favour, and the matter should be remitted back to the First-tier Tribunal to enable the judge to hear further evidence so as to come to a clear conclusion as to where the balance of considerations fell.
10. In reply, Ms Aboni submitted that the Appellant had no family or children in the UK. He had made his applications purely on the basis of private life. He had to demonstrate that there were exceptional circumstances and that there were compassionate circumstances. This meant that the judge had to give proper consideration to matters going beyond a mere finding as to whether the Appellant had been guilty of deception or not.

## Error of Law

11. Given that both parties agree that the judge erred in law in stating that the appeal stood to be allowed under the Immigration Rules, which could not have been the case, I have decided to make a finding of an error of law and to remit this case back to the First-tier Tribunal to be determined by a judge other than Judge Broe. I had put it to Ms Hussain that although this is a case where the judge ended his determination with the words that “on the totality of the evidence before me, I find that the Appellant has discharged the burden of proof and the reasons given by the Respondent do not justify the refusal.

12. Therefore, the Respondent's decision is not in accordance with the law and the applicable Immigration Rules" (paragraph 26), that this was simply a formulaic recital of the statement at the end of every decision in times past, and that it was not a material error, such that the appeal should be preserved intact. Ms Hussain, however, had submitted that it would be better to conclude that there was an error in the manner that the decision had been reached, without consideration of the Appellant's exceptional circumstances, so that the matter should be remitted back to the First-tier Tribunal.
13. Whilst I do so, given that the two sides before me are in agreement, I should make it clear that the judge was absolutely correct in coming to the conclusion that the Appellant had put forward a "plausible innocent explanation" (paragraph 24) and that the Respondent had not been able to discharge the burden of proof "to rebut the Appellant's explanation" (paragraph 25). This is because the judge had come to the conclusion that the Appellant had been able to describe the way in which he took the test. Not only was it the case that there was a photograph of him which was taken on the day of the test, but the Appellant had explained that the photograph was taken in the same room where he undertook the test.
14. Moreover, he described the test by stating "the test each lasted about an hour except for the speaking test which was shorter" (paragraph 9). Furthermore, the judge observed that "after taking the TOEIC test he took a City & Guilds test which he passed" (paragraph 13). The judge was entitled to come to the conclusion that, "I note that his photograph is attached to the test certificate and I find that to be persuasive. I am satisfied that he has discharged the second stage burden of proof" (paragraph 24).
15. These findings, accordingly, are preserved intact. It now remains to the judge upon reconsideration, to decide whether the Appellant succeeds on the basis of Article 8, given his Article 8 rights in this country.

### **Notice of Decision**

16. The decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed pursuant to practice statement 7.2(a) of the Practice Direction.
17. No anonymity order is made.
18. This appeal is allowed.

Signed

Date

Deputy Upper Tribunal Judge Juss

10<sup>th</sup> September 2019