



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

Appeal Number: HU/04542/2016

THE IMMIGRATION ACTS

Heard at Bradford

On 1 May 2018

**Decision & Reasons
Promulgated
On 14 May 2018**

Before

UPPER TRIBUNAL JUDGE LANE

Between

**MUHAMMAD USMAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Mair, instructed by Prolegis Solicitors

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Muhammad Usman, was born on 20 April 1989 and is a male citizen of Pakistan. The appellant entered the United Kingdom on 5 October 2009 as a student. On 24 May 2012, he was granted discretionary leave to remain on the basis of his family life. On 20 May 2015, he applied to extend that discretionary leave but his application was refused by a decision dated 28 January 2016. The appellant appealed to the First-tier Tribunal (Judge Thorne) which, in a decision promulgated on 30 January 2017, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. *Inter alia*, the appellant's application was refused under paragraph 322(1) of HC 395 (as amended) on the basis that the appellant had perpetrated deception during a TOEIC English language test in 2011. During an interview in connection with his most recent application in December 2015, the appellant had shown a poor proficiency in the English language. In consequence, the Secretary of State was of the view that the appellant had cheated in his TOEIC language test and that his test certificate had been fraudulently obtained by the use of a proxy.
3. Although he dismissed the appellant's appeal on Article 8 ECHR grounds, Judge Thorne considered at considerable length the allegations of deception pursuant to paragraph 322. Before determining the appeal on the only ground (Article 8), the judge found at [77] that, "In light of my analysis and a myriad of difficulties with the respondent's evidence outlined above, I conclude that the Secretary of State has failed to discharge the burden of proof in fraud on the part of the appellant. I am further fortified in this conclusion by my analysis of A's own oral testimony outlined below." The judge concluded the appellant had, as he had claimed, been living in the United Kingdom for a number of years and he noted also that he gave evidence before the Tribunal in English. Those findings of the judge have not been challenged by the Secretary of State.
4. Miss Mair submitted that the Secretary of State was in breach of her own policy by refusing to grant the appellant an extension of his discretionary leave. The policy in question is Asylum Policy Instruction: Discretionary Leave (V7.0: 18 August 2015). At 10.1, the policy document provides that:

Caseworkers must consider whether the circumstances prevailing at the time of the original grant of leave continue at the date of the decision. If the circumstances remain the same, the individual does not fall within the restrictive leave policy and the criminality thresholds do not apply, a further period of three years DL [discretionary leave] should normally be granted. Caseworkers must consider whether there are any circumstances that may warrant departure from the standard period of leave.

If there had been significant changes that mean the applicant no longer qualifies for leave under the DL policy or the applicant falls for refusal on the basis of criminality, the further leave application should be refused.
5. Notwithstanding that the appellant is an adult, he had been granted discretionary leave on the basis of his family life with his family members in the United Kingdom. Those family members are British citizens. Miss Mair submitted that there was no evidence at all to suggest that the appellant's circumstances had changed since the previous grant of discretionary leave; he continues to reside with his United Kingdom family members. The only change in his circumstances had been the allegation that he had committed deception in obtaining the ETS certificate. Miss Mair acknowledged that, had the judge upheld that allegation, then the Secretary of State would not have breached her own policy by refusing a further grant of discretionary leave; the deception would have constituted a change in the appellant's circumstances justifying refusal. However, the

effect of the judge's decision is that the appellant did not commit any deception either as alleged or at all. As a consequence, his circumstances remain unaltered and, in compliance with her own policy, the Secretary of State should have granted a further period of discretionary leave to the appellant.

6. Mr Diwnycz, for the Secretary of State, made no submissions in opposition to those advanced by Miss Mair. In my opinion, he was correct not to do so. Good administration continues to rely upon the Secretary of State putting into effect her published policies in individual applications (see *SF and Others (guidance: post-2014 Act) Albania* [2017] UKUT 00120 (IAC)). Judge Thorne should not have proceeded with the Article 8 appeal on the basis that he was faced with a *tabula rasa*. Not surprisingly, having ignored the Secretary of State's policy, the judge concluded that the adult appellant was not entitled to the protection of his family life in the United Kingdom under Article 8. However, the terms of the policy are quite clear. I accept Miss Mair's submission that the mere fact that the appellant is now older than he was at the time of the last grant of discretionary leave cannot, for the purposes of the application of the policy, constitute a change of circumstances. It follows that the judge should have allowed the Article 8 appeal.
7. I set aside the decision of the First-tier Tribunal. I have remade the decision and, in the light of what I say above, I allow the appeal on Article 8 ECHR grounds.

Notice of Decision

The decision of the First-tier Tribunal which was promulgated on 30 January 2017 is set aside. The Tribunal's finding as regards paragraph 322 of HC 395 is preserved. I have remade the decision on Article 8 ECHR grounds. I allow the appeal on Article 8 grounds against the decision of the Secretary of State dated 28 January 2016.

No anonymity direction is made.

Signed

Date 6 MAY 2018

Upper Tribunal Judge Lane