IAC-FH-CK-V2

IN THE UPPER TRIBUNAL

HEARING
via Skype for Business

JR/818/2016

Field House,
Breams Buildings
London
EC4A IWR

2 September 2020

THE QUEEN
(ON THE APPLICATION OF ARIF MIR)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE ALLEN

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Mr Z Malik and Mr A Rehman, instructed by Lawfare Solicitors appeared on behalf of the Applicant.

Ms N Barnes, instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

JUDGEMENT

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JUDGE ALLEN: The applicant has applied for a judicial review of the decision of the Secretary of State of 28 October 2015 revoking his indefinite leave to remain in the United Kingdom on the basis that it was obtained by deception.

2. The brief history of the applicant is that he came to the United Kingdom on 2 January 2010 with leave as a Tier 4 Student valid until 29 November 2011. He needed an English language certificate and he took a test at Alpha College on 19 October 2011. This was unsuccessful and he took a further test on 15 November 2011 at Richmond School of Management Studies. This was successful, and as a consequence he applied for an extension of leave to remain as a Tier 4 (General) Student on 24 November 2011. On 9 January 2012, the earlier application having been rejected as mandatory sections of the application form had not all been completed, he applied for an extension of leave to remain as a Tier 4 (General) Student, submitting the TOEIC certificate from Richmond School of Management Studies of 15 November 2011. On 2 February 2012 he was granted leave to remain as a Tier 4 Student until 30 September 2013. On 5 April 2012 he applied for leave to remain as the spouse of a settled person, again submitting the TOEIC certificate. On 18 September 2012 he was granted leave to remain as the spouse of a settled person, until 18 September 2014. He was subsequently successful with an application for indefinite leave to remain as the spouse of a settled person, made on 23 August 2014. He applied for British nationality as the spouse of a British citizen, on 15 April 2015. Thereafter the decision under challenge was made on 28 October 2015. He was issued on that same date with a Statement of Additional Grounds form. He made further submissions in respect of the decision on Article 8, on 4 November 2015, and the respondent reconsidered her decision on 24 November 2015, maintaining the decision to revoke the applicant's leave and advising him to

make an application for leave to remain on human rights grounds.

3. The applicant filed an application for judicial review challenging the revocation decision, on 25 January 2016. Permission to appeal was refused on 22 March 2016 and the claim was certified as being totally without merit. The Tribunal refused permission to appeal to the Court of Appeal and the appeal was subsequently stayed pending the court's decision in Hossain & Islam. Thereafter on 23 December 2019 the Court of Appeal allowed the applicant's appeal by consent and remitted the case to the Upper Tribunal.

The Law

4. There is no disagreement between the parties as to the relevant legal principles in this case.

5. It is clear from section 76(2) of the Nationality, Immigration and Asylum Act 2002 that:

> "The Secretary of State may revoke a person's indefinite leave to enter or remain in the United Kingdom if —
>
> (a) the leave was obtained by deception.
>
> …"

6. In Abbas v Secretary of State for the Home Department [2017] EWHC 78, it was held that in a judicial review challenge to a decision of the Secretary of State to revoke leave under section 76(2)(a) the question whether deception was used by the applicant is a precedent fact for the court itself to determine, because the very existence of the Secretary of State's power as exercised in such a case depends on deception having been used.

7. The legal burden of proving that the applicant used deception lies on the Secretary of State. There is a three stage process, namely that first, the Secretary of State must adduce sufficient evidence to raise the issue of fraud in relation to the TOE IC certificate; secondly, the appellant has a burden of raising an innocent explanation which satisfies the minimum level of plausibility; and if that burden is discharged, the Secretary of State must establish on the balance of probabilities that this explanation is to be rejected.

8. It is relevant to note that there is one civil standard of proof, the standard applicable for the present case. The seriousness of the consequences of an allegation does not require a different standard of proof, but flexibility in its application will involve consideration of the strength and quality of the evidence. The more serious the consequence, the stronger must be the evidence adduced for the necessary standard to be reached (see Abbas at paragraph 7, to be read in the light of Re B (Children) [2009] 1 AC 11). In Secretary of State for the Home Department v Shehzad and Chowdhury [2016] EWCA Civ 615 it was said that in order to meet the first stage the Secretary of State must adduce the generic evidence which should be accompanied by evidence showing that the individual under consideration's test was categorised as invalid. It is then for the applicant to put forward his explanation if the first stage has been met, and as in this case the Tribunal may be invited to accept that his explanation satisfies the minimum level of plausibility.

9. As regards the third stage, it was held by the Upper Tribunal in MA [2016] UKUT 450 (IAC), that the question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact–sensitive. The Court of Appeal in Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009 endorsed

this view and added that even in a case "where the impugned test was taken at an established fraud factory" and even "where the voice file does not record the applicant's voice (or no attempt has been made to obtain it)", the decision as to whether a person has cheated in the TOEIC test will be fact—specific.

Evidence

10. At paragraph 18 the Court of Appeal in Majumder and Qadir v Secretary of State for the Home Department [2016] EWCA Civ 1167 approved what had been said by the Upper Tribunal in those cases that when considering an allegation of dishonesty the relevant factors included the following: what the person accused had to gain from being dishonest; what he had to lose; what is known about his character; the cultural environment in which he operated; how the individual accused of dishonesty performed under cross-examination, and 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.

11. The applicant gave oral evidence, confirming that the contents of his statement of 14 July were true and he adopted it as his evidence today. He was referred to his wife's statement and said that she was at work today, working as a carer and she was not able to attend the hearing as they were very strict and short of staff as a consequence of the pandemic and she was unable to take a day off.

12. On cross-examination he was asked why prior to the statement he had not set out previously his explanation of the test and his claim to have sat it. He said that in 2015 he was with different solicitors and the Rules on judicial review were different then and they had never asked him for a witness

statement and the case was in the Court of Appeal behind other cases and he had never been asked for it before. It was put to him that he could have asked his representatives at any time over the five years and he said it was just because the case was pending and that was the only reason and there had been little correspondence for two or three years and it was pending for three years. It was put to him that representations had been made on a number of occasions initially after the refusal even though the case had been pending for a while and he said that the previous representatives had never really asked him to make a statement.

13. He agreed that the initial period of leave elapsed on 29 November 2011 and therefore he had to submit a further leave application before that leave expired. The application he had put in was for a level 5 course in hotel management and as part of the application he had to submit an English language test certificate. He thought he had needed a score of 150 to 160. He had taken that test at Alpha College at the end of October, 19 October 2011. That college was in Edgware. He was asked how he had got there and he said to the best of his recollection he had taken the train from his home in Folkestone to St Pancras and then went to Edgware. He had paid around £150. He said he had gone to do that test without preparation as he was full of confidence and also there had been background noise. He had probably been overconfident plus there was the factor of the noise. He was asked why he had not complained if he could not hear and said he was thinking it would be all right and the result was very disappointing and he had thought he would pass. He was asked why he had not complained and sought to redo the test under proper conditions and said as far as he remembered he raised concerns with the relevant person at the college and they said it was a usual

thing. He had rung them and had said this. He agreed he had not referred to this in his statement and did not know he had to mention it. He was asked whether he had not thought it relevant to mention it and he said he did refer to the noise and he thought that was enough. As to why he had not mentioned it before he said he only mentioned the noise, not raising concerns to the college. As regards their response, they had told him that sometimes this kind of noise was always around and this was the second time of a complaint he had been told. He had asked to do the test again there at a reduced fee but they were fully booked.

14. He did not have the results from the Alpha test with him. He was referred to the relevant page in the bundle (258) where he was recorded as scoring 120 on the speaking element and 60 in the writing element. It was put to him that that was significantly below the pass level and he said in the writing, yes. He agreed that he had gone to the Richmond college less than two weeks later to book a new test. It was put to him that that had given him almost no time to improve his writing skills and he said he thought there was enough time and he had gone with preparation. This contrasted with his absence of preparation before, but with preparation it was not hard to get this score. It was put to him that even if he did prepare, his skills at writing and grammar needed a marked improvement over a short period of time and he said he was doing nothing but prepare for the test. He thought that although he had to pass before the end of November there was enough time to pass.

15. He had been looking for a place where the test date was available and hence the distance away from his home. Travel was not a problem. He had looked on the website and there were none nearer to him. He could not remember the names of any other colleges that he had considered. He had chosen Richmond as there was special availability on his friend's advice. His

friend Shakil had put in an affidavit but was not available to give evidence as he was now in Pakistan.

16. As to how he had got to the Richmond college on the two occasions he went there, he had gone by train to St. Pancras and then the train to Victoria, to Vauxhall and then on to Richmond. He had walked about fifteen to twenty minutes at the other end and it was on the main road.

17. It was put to him that his writing score had improved by more than three times in less than a month and he said that, as he had said before, he had not prepared previously. It was put to him that the reason why he scored much better was because it was not he who had sat the test and he said he had sat the test himself. It was put to him that that was why he accepted that the voice on the recordings was not him and he said he did not know how it came to be on the certificate.

18. On re-examination the applicant agreed that he prepared for a couple of weeks after the first test and before the second test. He had gone through the material available from the ETS website and practised with his friend and there were many tests available on YouTube He had written it all down and had been very confident.

Discussion

19. I had full and helpful submissions from Mr Malik and Ms Barnes both orally and in their skeleton arguments, and as they were structured in essentially the same way it will I think be clearer to address the issues taking account of their submissions rather than setting out the submissions separately and then addressing them.

20. There are three grounds of challenge to the decision. The first is whether the UT can be satisfied that the applicant exercised discretion in the obtaining of the TOEIC

certificate. The second ground contends that the Secretary of State did not properly exercise her discretion, the third ground argues that the decision was procedurally unfair.

21. As regards the first ground, Ms Barnes concentrated her argument on seven points which were responded to by Mr Malik, and I shall address these in order. The Secretary of State's first point is that the applicant now accepts that the voice recordings provided by ETS are not his voice. Ms Barnes accepted that that was not conclusive, bearing in mind what was said by the Upper Tribunal in MA at paragraphs 13 to 17, where there is a detailed discussion as to the potential for breaches in continuity in the recordings, but nevertheless Ms Barnes argued that this should be the starting point. She referred to what had been said by the Court of Appeal in Ahsan (2017] EWCA Civ 2009 including what was said at paragraph 33 that where the impugned test was taken at an established fraud factory and also where the voice file did not record the applicant's voice (or no attempt had been made to obtain it), the case that he or she cheated would be hard to resist. Mr Malik argued that only if the voice matched that of the applicant it would be the end of the case and ETS would only invalidate if there were a problem with the voice recording and if it was to be said that if there were a mismatch it was strongly adverse to the applicant and would be a strong indication in every case as the case would only come before the First—tier Tribunal and the Upper Tribunal if the voices did not match and therefore it was not a strong indication and not a reason not to believe the applicant.

22. I do not consider that the point can be dismissed in this way. Although the existence of a discrepancy must be said to be a sine qua non of the ultimate finding of deception, it cannot be said to be a factor without weight in considering a case such as this. The fact that in every case that goes forward

there is a mismatch does not mean that no weight should be attached to the existence of a mismatch in any particular case.

23. The second point made in this regard on behalf of the Secretary of State was that the serial numbers on the voice recordings provided by ETS matched the serial number on the lookup tool and Ms Barnes took me to pages 140 and 298 to 299 to make the point good Mr Malik agreed that the numbers were the same but he contended that this meant nothing. Again, he argued that if they were not the same the case would not come before the Tribunal and if the Secretary of State had no evidence to show there was a test with the same serial numbers as had been indicated by ETS the matter would go no further, It did not show that a proxy had been used.

24. Again, I do not think the point can be reduced in the way in which Mr Malik argues. The existence of a correlation between the serial number on the lookup tool and on the voice recording is clearly relevant evidence that a careful process was followed and that a mistake was not made in linking the voice recording to the lookup tool. Again, it is evidence of relevance and part of the evidence that requires to be considered in the round.

25. Ms Barnes' third point was that the dramatic improvement in the test results over such a short period of time lacked credibility and the score had gone up from 120 to 190 in speaking and from 60 to 190 for writing. These scores were near perfect. She took me to the TOEIC handbook for the detail as to how the different categories were described and the clear differences between the level of speaking and writing skills indicated by the respective different scores. The difference was material and even more so for the writing. It was not credible that the applicant had improved his English

to such an extent in such a short time He had said it was because conditions at Alpha College were noisy and he could not hear well, as part of his explanation but that would have no impact on the writing aspect. It was also a very recent explanation and he had said today he had complained to the college but there was no reference to that in his statement, so there was an inconsistency.

26. Her next point (I set these both out at this stage as Mr Malik coupled the two together in the response) was that the results were improbably high in the circumstances where not a single test taken at the Richmond college on that day was found to be reliable, as could be seen at page 142 where 45 of 101 tests were found to have been taken by a proxy.

27. Mr Malik argued that the level of improvement was not incredible. The point was unattractive as there had never been a dispute about the writing element of the TOEIC test as could be seen from the decision letter, where it was said that the cancellation was on account of the speaking element. The voice comparison was irrelevant with respect to the written element and the Secretary of State had taken no point on that. The same could be seen in the PAP response. Also, Ms Barnes said the explanation of the improvement lacked credibility but there was nothing incredible in the applicant's explanation that he had done the first test without preparation and there were issues during the test and then he had gone through the materials and practised the test with his wife and online and his skills improved in two weeks and he sat the test. There was no reason to reject that evidence and it was not inconsistent. It was also relevant to mention, as noted at page 257, which was the result of the Alpha lookup test, the first test he had done, that it was said to be invalid on the second line, which meant a proxy had been used. Ms Barnes' argument collapsed at that point, as if he was perceived on

the basis of this evidence and it was accepted what the Secretary of State said, he had used a proxy in his first test to fail. The Secretary of State's evidence was that that also was deemed invalid by ETS and the implication from this was relevant to the reliability of the lookup tools.

28. I take Mr Malik's point about the lack of any challenge to the outcome of the written test. No issue was taken with that, and though it might have been regarded as relevant that there was such a very marked discrepancy between the two scores in less than a month, it is not a point that was taken against the applicant in the decision. Nevertheless there was a significant improvement in the speaking score It is not a sole matter of discrepancies, other than the discrepancy that Ms Barnes was entitled to emphasise between the absence of any reference to a complaint to Alpha College being made and the applicant's witness statement and what he contended today, but rather the inherent implausibility of such a significant increase in the applicant's score over such a short period of time. I find it hard to believe that someone would, so close to the deadline of the visa expiry, take such a cavalier approach to the Alpha test as the applicant claims to have done. To my mind it is incredible that someone so close to the expiry of his visa taking a crucial test upon which getting the new visa would significantly depend, would simply do no preparation and have the level of confidence that he claims to have had. His credibility is not assisted by the claim he now makes to have complained to Alpha, not having mentioned that in his witness statement. So, though I agree with Mr Malik that no adverse point was taken against him in the decision letter on the basis of the discrepancy in the writing scores, with regard to the speaking scores there is a point of relevance to credibility as noted above.

29. Ms Barnes' next point was that the applicant had clear reasons to cheat. This is one of the factors addressed at paragraph 18 of SM and Qadir, to which I have referred above. Clearly, what he had to gain from being dishonest was the enhancement of the opportunity to obtain a visa on the basis of a pass in the TOE IC test. It is also relevant to the final point on that list as to whether his or her academic achievements were such that it was unnecessary or illogical for them to have cheated. Clearly, in light of the earlier failure it was not unnecessary or illogical for the applicant to consider cheating to be the only way forward. Mr Malik made the point that any student would have to do a test if seeking further leave to remain so there would always be an incentive to do well in the test, but I do not consider that that weakens the force of the point that it is a relevant factor to be borne in mind when considering an allegation of dishonesty.

30. Ms Barnes's next point concerned the absence of oral evidence from the applicant's wife or Mr Shakil. She argued that less weight should be given to their written evidence, especially to that of Mr Shakil, who would be best placed to corroborate what the applicant said about the two trips to the Richmond college. if he had given live evidence she would have asked a lot more questions about the trip both of him and the applicant.

31. Mr Malik emphasised the evidence of the applicant as to why his wife did not attend but argued that it was not really relevant to the key issue. There was no reason to doubt his extensive evidence because there was no oral evidence from those two witnesses.

32. I agree with Ms Barnes that the absence of oral evidence from both of these witnesses does have relevance to the weight to be attached to that evidence. It is not a central point, but

the respondent has been denied the opportunity of cross—examination particularly of Mr Shakil, bearing in mind what he said in his evidence about having accompanied the applicant each time to his visits to the Richmond college (a matter which was not referred to in the applicant's witness statement). But of course he was not available, having returned to Pakistan.

33. Ms Barnes' next point was that caution should be placed in relying on the applicant's current competence in English, given that nine years have passed since he sat the test in dispute and he has been in the United Kingdom at all times. Mr Malik agreed that his present competence was not determinative, but argued that it could not be said that it was not relevant, bearing in mind what had been said in Qadir and SM. It was relevant to note also that there was nothing adverse known about the applicant's character, which was a relevant factor, and he had always complied with the law and the Immigration Rules and it should be questioned why he would risk all in reliance on a fraudulent TOE IC certificate. There was nothing adverse with regard to the cultural environment point, for example in ruling it a non-college or a fraud factory. In cross—examination he had answered all the questions and gave straightforward answers and was consistent. There was no reason to reject his evidence as incredible.

34. Mr Malik also made the general point that it was wrong to criticise the applicant for only having made a witness statement at the time when he did. The position in 2015 was very different from what was now accepted by the Secretary of State as being correct. In 2015 the Secretary of State's view was that judicial review was only available on conventional public law grounds, and the Upper Tribunal had agreed with this and it was thought not to have a fact-finding role. This could be seen from the acknowledgement of service and the

summary grounds in this case. It had only been accepted in 2016 that there was a fact—finding role for the Tribunal, and thereafter the appeal was pending in the Court of Appeal for some time and was ultimately remitted from the Court of Appeal in 2019. It was only after Upper Tribunal Judge Jackson's order on 13 April 2020 that the applicant was permitted to use further evidence. There was nothing adverse in making the statement when he had.

35. I see the force of this point. I do not consider it is adverse to the applicant that the statement was made at the time when it was.

36. However, having considered the points made on the Secretary of State's behalf and on the applicant's behalf with regard to the first ground, I consider that the Secretary of State has discharged the burden of proof and has rebutted the "innocent explanation" provided by the applicant. It is in my view clearly relevant that it is accepted that the voice recordings, which are properly identified by serial numbers, are not the voice of the applicant, and I do not find credible the explanation given for the dramatic improvement that appeared between the time of the October test and the November test, bearing in mind the significant incentive the applicant had to obtain a pass so as to be able to succeed in his visa application. Clearly, he had something to gain from being dishonest: i.e. the visa that he hoped to secure. In cross-examination, though his evidence was reasonably consistent, he raised a point about complaining to Alpha that he had not made in his statement or elsewhere, and his academic achievements, bearing in mind the previous failure, are not such that is was unnecessary or illogical for him to have cheated. In that regard I see no materiality to the fact that he seems to have been recorded as having an invalid result for the Alpha test. The fact that cheating had not assisted him in the past would

not be a good reason not to try cheating again in my view. Otherwise there is nothing adverse known about his character, there is nothing adverse to the cultural environment in which he operated and bearing in mind how long it is since he took the test, my assessment of his English proficiency, which is clearly good now, is of no materiality I think in relation to what it would have been in 2011. Bringing these matters together, I consider, as I say, that on a balance of probabilities the innocent explanation is to be rejected and as a consequence, that ground of appeal fails.

37. The second ground concerns whether or not the Secretary of State properly exercised her discretion. Ms Barnes argued that there was nothing in the decision letter to suggest that the Secretary of State thought her finding of deception compelled revocation of indefinite leave to remain and there was no need to state explicitly that she was exercising discretion but as she argued, the factors that were raised subsequently go to an Article 8 claim and the Secretary of State has made it clear from the start that that would be given proper consideration in due course.

38. As against that, Mr Malik argues that section 76 contains a clear discretion, and that it is clear from authorities such as Ukus [2012] UKUT 00307 (IAC) and Yaseen [2020] EWCA Civ 157 that where the respondent has a discretion as here the failure to conduct a balancing exercise will render the decision subsequent to that unlawful. He argued that there was no basis for contending as Ms Barnes did that the Secretary of State had exercised discretion, given the clear language of the decision letter, the use of deception was determinative and no balancing exercise had been carried out. He also referred to the respondent's policy, which made it clear that discretion is to be exercised in cases including those where deception had been found to exist. Nor was there any merit to the fact

that the Secretary of State had agreed to look at Article 8 as that could not be adequate or as an alternative remedy to revocation of indefinite leave to remain. If an Article 8 claim was successful the applicant would be granted 30 months' leave, and there was also the point made at paragraph 26(h) of Mr Malik's skeleton as to the hostile consequences the applicant would face following revocation of indefinite leave to remain until any future grant of limited leave to remain was made.

39. I see force in the applicant's points in this regard. There is no indication in the decision letter and it could not be implied into it that discretion was exercised in this case as the statutory provision clearly mandates as indeed does the respondent's policy. The offer, vague at best in the decision letter and more clearly set out subsequently, of an Article 8 claim being considered, does not, as Mr Malik argued, in any sense provide a realistic alternative in circumstances where indefinite leave to remain has been revoked. In my view, there was a clear failure on the part of the respondent to exercise discretion in this case and as a consequence, the decision is unlawful in that regard.

40. The third ground is an allegation of procedural unfairness. Mr Malik cited what had been said in Bank Mellat v HM Treasury [2013] UKSC 39 requiring a person who foreseeably would be significantly detrimentally affected by the exercise of a statutory power to be given the opportunity to make representations unless either this is forbidden in the statute in question or the circumstances in which the power is to be exercised would render it impossible, impractical or pointless. The applicant was given no notice of the Secretary of State's decision. Nor, Mr Malik argued, could it be suggested that the opportunity to make submissions arising after the service of the decision would be enough to meet the

public law obligations of the Secretary of State. Here he referred to what was said in Sinfield v London Transport Executive [1970] Ch 550, considering the value of the right to be consulted.

41. Ms Barnes relied on what was said in R v SSHD, ex parte Doody [1994] 1 AC 631, concluding that fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result or after it is taken, with a view to procuring its modification or both. She also argued that this reasoning was supported by what had been said by the High Court in Islam [2017] EWHC 3614 (Admin) at. paragraphs 14 to 17. She argued that Bank Mellat was to be distinguished as it involved a draconian measure against the bank in question. Even if the Tribunal concluded there was procedural unfairness, it was not material and judicial review is discretionary and relief should be refused as the applicant now had the opportunity to provide full representations including in evidence, so he was in at least as good a position as if he had been given full notice.

42. Mr Malik argued that the decision was effectually governed by what had been said by the Court of Appeal in Balajigari [2019] EWCA Civ 673, which meant that Islam was no longer good law. This case was even stronger as it was one where indefinite leave to remain had been revoked rather than it being a case of unfairness in respect of an application for indefinite leave to remain.

43. Again, I agree with the applicant's arguments in this regard. It does not seem to me that the procedural unfairness involved in the decision not having been adumbrated in advance and the applicant thereby being denied the opportunity to make

representations, can be said to be saved by the subsequent opportunities including the giving of evidence at a hearing. Balajigari is a more specific context for consideration of the relevant issues than the more general guidance in Doody which of course it applied. As a consequence, it seems to me that this ground is made out.

44. I therefore refuse the application in respect of ground 1 but I allow it in respect of grounds 2 and 3. I should be grateful if the parties can agree a form of order, and I will address their submissions on costs and any other matters at the handing down of this decision. ~~~0~~~~

JR6

JR/818/2016

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of Arif Mir

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Allen

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Mr Z Malik and Mr A Rehman, instructed by Lawfare Solicitors, on behalf of the Applicant and Ms N Barnes, instructed by the Government Legal Department, on behalf of the Respondent, at a remote hearing at Field House, London on 2 September 2020.

Decision: the application for judicial review is granted

(1) For the reasons set out in the judgment, I order that the judicial review application be granted.

Order

(1) The claim for judicial review is granted.
(2) The Respondent's decision of 28 October 2015, as upheld on 24 November 2015, is quashed.
(3) The Respondent shall pay 50% of the Applicant's reasonable costs, to be assessed if not agreed.

(4) The Respondent shall file and serve any application for permission to appeal, if so advised, within 7 days of the date of this Order, and any such application shall be determined on the papers.

As regards (3) above, the key issue in the case was the TOEIC issue, and the most appropriate reflection of the significance of that issue to the claim as a whole is properly reflected in the order made as to costs.

Signed: *David Allen*

Upper Tribunal Judge Allen

Dated: **13th October 2020**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on: 13/10/2020

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).