Upper Tribunal
Immigration and Asylum Chamber

R (on the application of Jakhu) v Secretary of State for the Home Department (ETS: legitimate expectations) IJR [2015] UKUT 00693 (IAC)

Judicial Review Decision Notice

The Queen on the application of

Guarav Sat Paul Jakhu

Applicant

v

Secretary of State for the Home Department

Respondent

The Honourable Mr Justice McCloskey, President
Mr CMG Ockelton, Vice President

Application for permission to apply for judicial review

Having considered all documents lodged and having heard the parties' respective representatives, Mr A Swain (of Counsel), instructed by Eagles Solicitors, on behalf of the Applicant and Mr R Harland (of Counsel), instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 02 and 05 October 2015.

The demonstration of an unambiguous promise or representation devoid of any relevant qualification is an essential prerequisite to establishing a substantive legitimate expectation to which the tribunal will give effect.

Judgment

delivered on 09 December 2015

McCLOSKEY J

(1) This case belongs to the relatively large *corpus* of what have come to be known as "ETS/TOEIC" cases. The broader landscape is set out in Gazi, R (on the application of) v Secretary of State for the Home Department (ETS – Judicial Review) (IJR) [2015] UKUT 327 (IAC) (hereinafter "Gazi").

(2) Following promulgation of its decision in Gazi, the Upper Tribunal made a general order staying all judicial review cases belonging to this group, pending the then imminent decisions of the Court of Appeal in Mehmood and Ali v SSHD [2015] EWCA Civ 744. Judgment having been delivered in Mehmood and Ali, followed by Sood v SSHD [2015] EWCA Civ 831 ("Sood"), the general stay was terminated by order of this Tribunal dated 30 July 2015. Both orders are annexed hereto. This was followed by a direction, made in every case, couched in the following terms:

> "*Your case has been reviewed following the decision of the Court of Appeal in Sheraz Mehmood & Shahbaz Ali v SSHD [2015] EWCA Civ 744 and the following directions are made:-*
>
> *(1) If the Applicant considers that his claim has merit, he is to lodge within 7 days from the date this order is sent amended grounds (with application fee) presenting his claim in the light of the authorities binding on the Tribunal;*
>
> *(2) Failure to comply with paragraph (1) will have the effect that this claim will be struck out automatically under Rule 8(1) (a);*
>
> *(3) Costs reserved.*
>
> ***Please note that the Tribunal will not consider it discourteous if you do not send in any reply to this direction, in order to allow paragraph (2) above to take its course.***"

The response which this elicited from the Applicant's solicitors in the present case was the provision of amended grounds of challenge.

(3) The decision of the Secretary of State which the Applicant seeks to challenge arose in the following way. By letter dated 25th November 2013, the Applicant was informed:

> "***Curtailment of leave***
>
> *You were granted leave to enter/remain as a Tier 4 General Student until 12 April 2015 in order to undertake a course of study at Vista Business College. On 29 October 2013 the sponsor licence for Vista Business College was revoked ….*
>
> *The Secretary of State has therefore decided to curtail your leave to enter or*

remain as a Tier 4 Migrant so as to expire on 24 January 2014. Your leave has been curtailed under paragraph 323A(b)(i) of the Immigration Rules."

This stimulated an application by the Applicant for permission to remain in the United Kingdom. This application was acknowledged in a further letter on behalf of the Secretary of State dated 31 January 2014:

"*Thank you for your application for permission to stay in the UK. We will decide your application within eight weeks from the date you submitted it ….*

We will notify you by letter if we are not able to decide your application within eight weeks from the date you submitted it and will advise you of the new timeframe for deciding your application."

(4) By a further letter, also dated 31 January 2014, the Applicant was advised that he must have his "*biometric information*" registered as soon as possible. The next development was a further letter on behalf of the Secretary of State, dated 10 February 2014, informing the Applicant as follows:

"*I am writing in regard to your Tier 4 Student application. As part of your application you submitted test evidence for the English language requirement from ETS TOEIC. We have identified discrepancies with some evidence from this test provider and so will not be able to process your application and have placed it on hold while we investigate. Although we would normally decide your application within eight weeks from the date it was submitted, unfortunately this is not going to be possible in your case. This is because your application raises exceptionally complex issues and we require further time to consider your case thoroughly and reach a decision. As such, it falls outside our normal service standards for deciding leave to remain/settlement applications. Please be assured that we will make a decision on your case as quickly as possible.* ***If you are concerned about the delay to your application you can choose to take a new English language test at one of the other providers listed on our website at …… and submit this alternative test evidence to us. This will enable us to progress your application.*** *If you decide to take a new test you must take this letter and the endorsed copy of your passport enclosed to your chosen provider ….*

We will not accept new evidence from ETS; new evidence must be from a different provider. You must send your new English language evidence, along with this letter, to …….

We will not take removal action as a result of the contents of this letter ……..

We are working to resolve this issue and, as soon as we have an update, will write to you again."

[Emphasis added.]

This letter was accompanied by a document entitled "Frequently asked Questions". This contains the following salient passages:

"*Where can I get an update on this issue? We will update you in writing as soon as we are able …..*

What happens if I don't want to take a new test? You don't have to take a new test but this does not mean that your application may not be decided quickly. We will hold your application until such time that we are able to make a decision …..

My test is genuine: why have you held my application? We are holding all cases with ETS TOEIC and TOEFL English tests until we have fully resolved the discrepancies that have been identified. ….

What if I need to travel urgently whilst my application is on hold? If you need to travel urgently, you may consider withdrawing your application and requesting that your passport be delivered to your port of departure."

(5) Subsequently, the Applicant received a further letter, dated 19 June 2014, together with a completed Form IS151A, both dated 19 June 2014. The letter stated, in material part:

"*Dear Mr Jakhu*

Application to remain as a Tier 4 (General) Student Migrant

On 24 January 2014 you made [the] *application …..*

We have considered your application on behalf of the Secretary of State and your application has been refused under the Immigration Rules …. In your application you submitted TOEIC certificates from Educational Testing Service (ETS) ……

ETS is obligated to report test scores that accurately reflect the performance of test takers. For that reason, ETS routinely reviews testing irregularities and questions test results believed to be earned under abnormal or non-standard circumstances ….

During an administrative review process, ETS have confirmed that your test obtained was through deception. Because the validity of your test results could not be authenticated, your scores from the test taken on 01 May 2013 at Eden College International have been cancelled. As deception has been used in relation to your application, it is refused under paragraph 322(1A) of the Immigration Rules. Therefore you do not satisfy the requirements of the Immigration Rules for this category and it has been decided to refuse your application for leave to remain as a Tier 4 (General) Student Migrant under paragraph 245ZX(a) and paragraph 322(1A) of the Immigration Rules ……

For the above reasons, I am also satisfied that you have used deception in this application ……"

In the accompanying Form IS151A the Applicant was notified that he was liable to be removed from the United Kingdom on the grounds that he had engaged in deception in seeking leave to remain, in these terms:

> "*You made an application for further leave to remain in the UK which was refused based on inconsistencies with your TOEIC test.*"

(6) These proceedings were initiated by the Applicant on 22 August 2014. In the grounds the Applicant identifies the target of his challenge as the Secretary of State's decision to remove him from the United Kingdom under section 10 of the Immigration and Asylum Act 1999 (the "*1999 Act*") on the ground of deception. The relief sought is an order declaring the impugned decision unlawful. In his grounds the Applicant acknowledges that, given the availability of an out of country appeal, he would have to satisfy the test of special or exceptional factors. The key passage which follows is this:

> "*…. It is strongly arguable that the Respondent's act in seeking to remove the Applicant on the basis of deception is premised on unparticularised and general evidence of deception having been used within an English test centre and not on evidence of the Applicant having used deception himself. Therefore the Respondent's conduct can be said to be reprehensible and/or a serious abuse of its powers to remove a person with no in-country right of appeal under the 1999 Act. These matters give rise to exceptional or special factors …..*"

As noted above, the Applicant has been permitted to amend his grounds. The effect of the amendment is to allow the inclusion of a further ground based on the doctrine of substantive legitimate expectations.

(7) At the hearing we invited Mr Swain, representing the Applicant, to formulate with precision the expectation on which the Applicant's challenge is founded. He did so in the following terms. The impugned decision frustrates the Applicant's substantive expectation ***that there would be no decision to remove him from the United Kingdom on the basis of the discrepancies mentioned in the first paragraph of the Secretary of State's letter dated 10 February 2014***. When pressed, Mr Swain acknowledged that the expectation advanced by the Applicant is one of indefinite duration and, further, that during the period of its existence, which is not susceptible of measurement, the Applicant will be immune from removal action.

(8) This Tribunal had occasion to summarise the main principles relating to substantive legitimate expectations in Mehmood (Legitimate Expectation) [2014] UKUT 00469 (IAC), at [13] – [16]. The fundamental prerequisite to a substantive legitimate expectation is a clear and unambiguous promise, or representation, devoid of any ambiguity, conveyed directly or indirectly to the beneficiary. We have recorded in [7] above the terms of the substantive legitimate expectation advanced by the Applicant. This is said to have been aroused by the terms of the Secretary of State's letter of 10 February 2014. We have reproduced in [5] above the salient contents of this letter, including the passages upon which the Applicant places particular reliance. It being trite that this letter must be evaluated in its full context, we have also outlined the surrounding correspondence and events.

(9) We are in no doubt that the letter of 10 February 2014 did not have the effect of engendering the expectation upon which the Applicant's case is based. Evaluated fairly, as a whole and within the context to which it belongs, we consider that this letter yields the following analysis. First, it signalled clearly to

the Applicant that his continued stay in the United Kingdom is in jeopardy, having regard to the "*discrepancies*" mentioned and described. Second, it conveyed to him that by reason of this matter a decision on his quest to extend his sojourn in the United Kingdom would be delayed. Third, it highlighted that his case was anything but straightforward: it raised "*exceptionally complex issues*". Fourth, it made clear that the complications attendant upon the Applicant's case had widespread recriminations. Next, it informed the Applicant of steps which he could take for the purpose of securing updated information on the processing of his application thereafter. One of the central messages conveyed by the letter and attachment was that the Applicant's application for further leave to remain in the United Kingdom was "on hold". The letter is, fundamentally, a holding communication. It is the antithesis of something final or conclusive.

(10) The above analysis provides the framework within which the two passages in the letter upon which the Applicant places most reliance fall to be considered. The first is the paragraph which mentions the possibility of the Applicant undertaking a further English language test. This option was clearly canvassed simply as a mechanism which might limit the delay of which the Applicant was being informed. Whether this would have been an effective mechanism is not the point. The Applicant was simply being told that the overall delay in finally determining his application might be mitigated if he were to take this course. The second statement upon which the Applicant places great reliance is:

> "*We will not take removal action as a result of the contents of this letter.*"

This short sentence is not felicitously phrased. Nor is it particularly intelligible or coherent. Shortcomings in intelligibility or coherence by their very nature are likely to engender ambiguity and equivocation, the very antithesis of the core characteristic of a substantive legitimate expectation. Considered within its full context and against the framework outlined above, we consider that its import was simply to reinforce the central theme of the letter, namely the delayed final determination of the Applicant's application for further leave to remain. Furthermore, this sentence was, clearly, also designed to provide the Applicant with the reassurance that, during the intervening period, he had no need to be concerned about possible removal action.

(11) While Mr Swain on behalf of the Applicant argued his case with some tenacity, we find it quite impossible to construe the letter in question as engendering the substantive legitimate expectation for which the Applicant contends. To this we add that even if we had been persuaded about the merits of this ground of challenge, we would not have been satisfied that judicial review is the appropriate method of challenge for the Applicant. We would, rather, have given effect to the strong general rule that he should pursue the remedy of statutory appeal available to him, incorporating this ground as part of his case that the impugned decision was not in accordance with the law.

(12) The second, and final, ground of challenge is based on the contention that, having regard to all the available information, there was insufficient evidence to warrant the assessment made by the Secretary of State that the Applicant had secured his English language qualification by deception. In Gazi, this Tribunal held that a challenge to the strength and quality of the evidence underpinning

the Secretary of State's decision in a case of this kind is best suited to the fact finding forum of the First-tier Tribunal and is unsuitable for determination by an application for judicial review. Gazi was cited with approval by the Court of Appeal in Mehmood and Ali. Furthermore, in rejecting each of the Applicant's grounds of challenge, we draw attention to [71] of the Court's judgment:

> "*The fact that the section 10 notices were served on Mr Ali when he was only about half way through his course will undoubtedly lead to great inconvenience and expense. Assuming that he is bona fide pursuing his course, it will also disrupt his educational aspirations. The evidence of personal factors in Mr Mehmood's case is similar. But, although being required to leave the jurisdiction is a real detriment, notwithstanding the continuing availability of a right of appeal …. the mere fact that some inconvenience will result from being required to leave the jurisdiction is not itself 'special' or 'exceptional': it is inherent in the scheme of the statute enacted by Parliament.* ***I can conceive of cases in which serious ill health of the person affected or some other exigency might qualify as an 'exceptional' factor, although I consider that the threshold would be high.***"
>
> [Our emphasis.]

Almost immediately afterwards, in Sood, Beatson LJ, having referred to [71] of Mehmood and Ali, stated at [44]:

> "*I …. suggested …. that serious ill health of the person affected or some other exigency might qualify, although I considered that the threshold would be high. I add to that, on reflection,* ***I consider that the threshold would be very high***."
>
> [Our emphasis.]
>
> Elaboration would be otiose. The FtT is plainly the appropriate forum within which to canvass the Applicant's complaint of insufficiency of evidence.

DECISION

(13) Insofar as this Applicant relies on the contention that an out of country appeal is no longer available in consequence of the recent statutory changes, this argument must be rejected having regard to the related decision of this Tribunal in R (on the application of Roohi and Another) v Secretary of State for the Home Department (2014 Act: saved appeal rights) IJR [2015] UKUT 00685 (IAC).

(14) To conclude:

(a) The application to amend the Applicant's grounds is granted.

(b) The Applicant's case, thus amended, is defeated by the application of the alternative remedy principle and, accordingly, permission to apply for judicial review is refused.

(c) The Applicant will pay the Secretary of State's costs of the AOS, £320.00, subject to any representations in writing to be made within 21 days of the

date hereof.

(d) Permission to appeal to the Court of Appeal is refused.

Signed: _____

The Honourable Mr Justice McCloskey
President of the Upper Tribunal,
Immigration and Asylum Chamber

Dated: **04 December 2015**

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

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 given (Civil Procedure Rules Practice Direction 52D 3.3(2)).

APPENDICES

[1] General stay order of the Upper Tribunal dated 22 May 2015.

[2] Further order of the Upper Tribunal dated 30 July 2015 removing the general stay.

[3] Directions of the Lawyer of the Upper Tribunal dated 28 July 2015.

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

Notice of Directions

The Queen on the application of
Muhammed Usman Binyameen

Applicant

V

Secretary of State for the Home Department

Respondent

Having considered all documents lodged by the parties

Direction of the President, The Honourable Mr Justice McCloskey

[1] This file has been transferred to me as part of my endeavours to identify and collate all of the "TOEIC/ETS" cases in the UT(IAC) system.

[2] I have noted in particular the permission order of UTJ Freeman dated 30 April 2015 and the subsequent exchanges between the parties' representatives. I note the controversy relating to the grounds upon which permission has been granted. This will be easily resolved without the need for a further hearing and I shall do so.

[3] At this juncture, however, the most important consideration is that of progress and timetabling. This, as the Applicant's note of 29 April 2015 recognises, will inevitably be influenced by the judgment of this Chamber in the case of Gazi v SSHD. Please note, in this respect, that judgment in that case will be handed down on 27 May 2015.

[4] The progressing of cases in this field is also influenced by the consideration that the Court of Appeal has listed two appeals in early July. In one of these there will, I anticipate, be an opportunity to pronounce on the correctness of the Gazi decision and my earlier decision on R (Mahmood) v SSHD [2014] UKUT 439 (IAC).

[5] Given the potential for authoritative Court of Appeal guidance in the very near future, I have decided to stay all of these cases for what I trust will be a relatively short period. In cases (such as the present) where permission has been granted, there will be an additional order prohibiting the initiation of any steps designed to remove the Applicant from the United Kingdom until further order.

[6] Finally, there will be liberty to apply. This will (*inter alia*) enable any party to make representations in writing about the terms of this order.

Signed: _____

The Honourable Mr Justice McCloskey

Dated: **22 May 2015**

Sent to the Applicant, Respondent and any interested party / the Applicant's, Respondent's and any interested party's solicitors on (date):
Home Office Ref:

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

Notice of Directions

The Queen on the application of
Muhammed Usman Binyameen

Applicant

V

Secretary of State for the Home Department

Respondent

AND All Other "ETS" / "TOEIC" Cases

Direction of the President, The Honourable Mr Justice McCloskey

[1] In light of the recent Court of Appeal decisions, the stay previously ordered in this case and in all kindred cases viz those with an "ETS"/"TOEIC" element is hereby terminated.

[2] The general prohibition on removal from the United Kingdom is also terminated, with effect from 17 August 2015. This issue will thenceforth be the subject of executive and / or judicial decision on a case – by – case basis

[3] The Upper Tribunal is in the process of transmitting to all judicial review Applicants the attached Notice.

[4] Liberty to apply.

Leonard McCloskey.

Signed: _____

The Honourable Mr Justice McCloskey

Dated: **30 July 2015**

Sent to the Applicant, Respondent and any interested party / the Applicant's, Respondent's and any interested party's solicitors on (date):
Home Office Ref:

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

Notice of Directions

The Queen on the application of Gaurav Sat Paul Jakhu

Applicant

v

Secretary of State for the Home Department

Respondent

Directions of the Lawyer of the Upper Tribunal

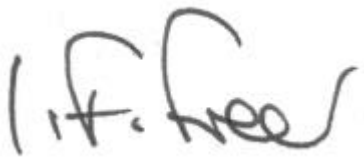
Your case has been reviewed following the decision of the Court of Appeal in *Sheraz Mehmood & Shahbaz Ali v SSHD [2015] EWCA Civ 744* and the following directions are made:-

(1) If the applicant considers that his claim has merit, he is to lodge within 7 days from the date this order is sealed amended grounds (with application fee) presenting his claim in the light of the authorities binding on the Tribunal;

(2) Failure to comply with paragraph (1) will have the effect that this claim will be struck out automatically under Rule 8(1) (a);

(3) Costs reserved.

Please note that the Tribunal will not consider it discourteous if you do not send in any reply to this direction, in order to allow paragraph (2) above to take its course.



Signed: _____

Lawyer of the Upper Tribunal

Dated: **28 July 2015**

Sent to the Applicant, Respondent and any interested party / the Applicant's, Respondent's and any interested party's solicitors on (date):
Home Office Ref: