



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

Appeal Number: HU/16067/2019

THE IMMIGRATION ACTS

**Heard at Field House
(remote hearing)
On 17 May 2021**

**Decision & Reasons Promulgated
On 10 June 2021**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MD NAZMUL HUDA KHANDAKER
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation

For the Appellant: Ms Isherwood, Senior Home Office Presenting Officer
For the Respondent: Ms Selvakumaran, Counsel, instructed by Lincoln's
Chambers.

This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

DECISION AND REASONS

1. By my decision promulgated on 12 January 2021 (a copy of which is appended to this decision) I set aside the decision of the First-tier Tribunal. I now remake that decision. As in my previous decision, I will refer to the parties as they were designated in the First-tier Tribunal.
2. Ms Selvakumaran had not seen my decision of 12 January 2021 and was unaware that the error of law hearing had taken place. The appellant, however, was aware and had seen the decision. Despite this, I was able to proceed because the parties were in agreement as to the outcome (see below).

Factual Background

3. The appellant is a citizen of Bangladesh born on 31 December 1985.
4. In 2007 he entered the UK as a student with leave until 30 June 2010. He was granted further leave as a student in 2010, 2011 and 2013. His leave granted in 2013 expired on 29 May 2016.
5. On 26 August 2014 the appellant's leave was curtailed on the basis that in April 2012 he obtained an English language certificate known as the Test of English for International Communication ("TOEIC") certificate through deception, by using a proxy test-taker.
6. The First-tier Tribunal found, in a decision promulgated on 18 February 2020, that the appellant did not engage in deception in order to obtain a TOEIC certificate. This finding of the First-tier Tribunal was upheld in my decision promulgated on 12 January 2021. The appellant, therefore, is a person who (a) did not obtain a TOEIC certificate through the use of deception; and (b) has not had leave to remain in the UK since his leave was curtailed (on an erroneous basis) in August 2014.

Private and family life under the Immigration Rules

7. The appellant does not have a partner or children in the UK and there is no route by which he can establish an entitlement to leave to remain in the UK under Appendix FM of the Immigration Rules on the basis of a family life in the UK.
8. Given the length of time the appellant has lived in the UK (over 13 years), I am satisfied that he has established a private life in the UK that engages article 8(1) ECHR. His private life therefore needs to be considered with reference to paragraph 276ADE(1).
9. The only sub-paragraph of paragraph 276ADE(1) that he could conceivably satisfy is sub-paragraph (vi), pursuant to which he would need to establish that there would be very significant obstacles to his integration in Bangladesh.

10. Ms Selvakumaran did not seek to persuade me that the threshold of very significant obstacles was met. She was right to not do so, as the evidence does come close to establishing this.
11. Sales LJ in *Kamara v Secretary of State for the Home Department* [2016] EWCA Civ 813 at [14] succinctly summarised what integration involves. He explained:

"The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."
12. The appellant lived in Bangladesh until he was an adult, speaks Bengali, and has close family in Bangladesh. There is no evidence to suggest that, on return to his country, the appellant will be anything other than an insider who understands how life is carried on and who will be able to establish himself, and develop relationships, both socially and professionally.

Private life outside the Immigration Rules

13. Ms Isherwood drew my attention to the respondent's Educational Testing Service (ETS) casework instructions dated 18 November 2020, which state:

'If an individual who has used an invalid Test of English for International Communications (TOEIC) certificate in support of an application wins an appeal on Article 8 grounds, then the grant of leave will depend upon whether the relevant rules are met. Usually, the individual will be on the path to 5-year settlement if the rules are found to be met and the 10 -year route if the appeal succeeds on the basis of the exceptions in Appendix FM.

If the appeal is dismissed on human rights grounds but a finding is made by the Tribunal that the appellant did not obtain the TOEIC certificate by deception, you will need to give effect to that finding by granting six months leave outside the rules. This is to enable the appellant to make any application they want to make or to leave the UK.'
14. She argued that the appellant's appeal should be allowed on the basis that he ought to be given, in accordance with the ETS casework instructions, six months leave outside the Rules to enable him to make an application for further leave should he wish.
15. Ms Selvakumaran argued that the appellant should be granted 2.5 years leave, placing reliance on a recent consent order in a judicial review case in the Upper Tribunal (JR/1170/2020).

16. I do not have jurisdiction to determine the dispute between the parties as to whether the duration of leave granted to the appellant should be six months or 2.5 years. My role is limited by sections 82(1)(b) and 84(2) of the Nationality Immigration and Asylum Act 2002 to making a finding, one way or the other, on whether the appellant's removal would violate article 8 ECHR. This was explained in *Charles (human rights appeal: scope) Grenada* [2018] UKUT 89 (IAC) at [48]:

"The task, therefore, for the Tribunal, in a human rights appeal is to decide whether such removal or requirement would violate any of the provisions of the ECHR. In many such cases, including the present, the issue is whether the hypothetical removal or requirement to leave would be contrary to Article 8 (private and family life)."
17. Although the parties are in agreement that the appellant's human rights appeal should be allowed, I have summarised below my reasons for deciding the appeal in the appellant's favour.
18. In order to determine whether removal of the appellant from the UK would violate article 8 ECHR, it is necessary to undertake a proportionality assessment balancing the public interest in removal against the appellant's private life.
19. Where, as in this case, a person's private life was established at a time when their immigration status was precarious, ordinarily only little weight will attach to it: section 117B(5) of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act"). It is recognised that, exceptionally, this can be overridden by particularly strong features of the private life in question: *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58 at [48] – [50]. There are, however, no such features in this case. I therefore attach little weight to the appellant's private life.
20. I now turn to the respondent's side of the scales in the proportionality assessment.
21. Part 5A of the 2002 Act identifies several public interests that are potentially relevant where it is argued by an appellant that his removal (or deportation) from the UK would breach Article 8. These are: (a) the public interest in the maintenance of effective immigration controls (117B(1)); (b) the public interest in people who enter or remain in the UK speaking English; (c) the public interest in people entering or remaining in the UK being financially independent; and (d) the public interest in the deportation of foreign criminals (section 117C(1)).
22. The appellant is not a foreign criminal, speaks English and is unlikely to be a financial burden on the state. The only relevant public interest, therefore, is the public interest in the maintenance of effective immigration controls.

23. It is well established that where a person with a private or family life in the UK engaging Article 8(1) is found by a Tribunal to meet the conditions of the Immigration Rules such that under the Rules they would be entitled to a grant of leave to enter or remain in the UK, there may be no public interest in their removal. This was summarised succinctly by Sir Ernest Ryder, Senior President of Tribunals in *TZ (Pakistan) and Another v Secretary of State for the Home Department* [2018] EWCA Civ 1109, who held at [34]:

“Where a person satisfies the rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person’s article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed.”

24. The President of the Upper Tribunal made the same point in *Begum (employment income; Rules/Article 8)* [2021] UKUT 0115, the headnote to which states:

“(2) The significance of P being found by the Tribunal to satisfy a provision of the Immigration Rules, which the Secretary of State considered P did not satisfy, and which caused her to refuse P’s application, applies to entry clearance cases, as it does to cases where P is in the United Kingdom. Provided that ECHR Article 8 is engaged, the Secretary of State will not be able to point to the importance of maintaining immigration controls as a factor weighing in her favour in the proportionality balancing exercise, so far as that factor relates to the particular rule that the Tribunal finds was satisfied: *OA and others (human rights; “new matter”; s. 120) Nigeria* [2019] UKUT 65 (IAC).”

25. It is also well established that, even where the Immigration Rules are not satisfied, there will be cases where the public interest in effective immigration controls is so diminished that it will be outweighed by any private life in the UK that is sufficient to engage Article 8(1): see *Patel (historic injustice; NIAA Part 5A)* [2020] UKUT 00351.

26. The appellant’s leave, which was erroneously curtailed, was granted under the points-based system (PBS), which prioritises consistency over administrative discretion: see *Pathan, R (on the application of) v Secretary of State for the Home Department* [2020] UKSC 41. The public interest, therefore, is in a consistent application of the PBS. In order for the appellant to be treated consistently it is necessary, so far as possible, for him to be put in the position in which he would have been but for the respondent’s mistaken belief that he had engaged in deception. This accords with position adopted by the respondent in the consent orders agreed in *Khan & Ors v Secretary of State for the Home Department* [2018] EWCA Civ 1684 and the view expressed by Underhill LJ in *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009, who stated:

“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 straightforward case, for example, she could and should make a fresh grant of leave to remain equivalent to that which had been invalidated. She could also, and other things being equal should, exercise any relevant future discretion, if “outside the Rules”, on the basis that the appellant had in fact had leave to remain in the relevant period notwithstanding that formally that leave remained invalidated. (I accept that how to exercise such a discretion would not always be easy, since it is not always possible to reconstruct the world as it would have been; but that problem would arise even if the decision were quashed on judicial review.) If it were clear that in those ways the successful appellant could be put in substantially the same position as if the section 10 decision had been quashed, I can see no reason in principle why that should not be taken into account in deciding whether a human rights appeal would constitute an appropriate alternative remedy. To pick up a particular point relied on by Mr Biggs, I do not regard the fact that a person commits a criminal offence by remaining in the UK from (apparently) the moment of service of a section 10 notice as constituting a substantial detriment such that he is absolutely entitled to seek to have the notice quashed, at least in circumstances where there has been no prosecution. (It is also irrelevant that the appellant may have suffered collateral consequences from the section 10 decision on the basis that his or her leave has been invalidated, such as losing their job; past damage of that kind cannot alas be remedied by either kind of proceeding.)

121. So far so good, but the law in this area is very complicated and I am not confident that all its ramifications were fully explored before us. I do not feel in a position to say definitively that the Secretary of State will always be able to exercise her discretion, in the aftermath of a successful human rights appeal, so as to achieve the same substantive result as the formal quashing of the section 10 decision. There may, for example, be legislation (i.e. primary or secondary legislation rather than simply the Rules) which would result in the appellant having to be differently treated depending on whether he or she had leave to remain during a particular period. If there were any real doubt about whether in a given case a successful human rights appeal would be as effective as the formal quashing of the section 10 decision the applicant should have the benefit of that doubt and be permitted to pursue judicial review proceedings.”

27. It follows from this that the public interest in effective immigration controls is served not by the appellant’s removal but rather by the respondent endeavouring to put him into the position he would have been in had the ETS deception allegation and the decision based upon it not been made. The position of the appellant is similar to that of a person who satisfies a provision of the Immigration Rules: provided article 8 is engaged, the public interest in the maintenance of effective immigration controls will not weigh against him unless other circumstances have come to light that mean the

Secretary of State can legitimately invoke a different provision of the Rules. See *Begum* at [36]. There are no such other circumstances in this case.

28. As the appellant has a private life in the UK that engages article 8(1) and the public interest in effective immigration controls is not served by his removal the article 8 proportionality assessment falls firmly in his favour.

Notice of Decision

The decision of the First-tier Tribunal having been set aside, I re-make the decision by allowing the appeal on human rights grounds.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan

18 May 2021