



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18085/2019

THE IMMIGRATION ACTS

Heard at Field House
On 11 October 2021

Decision & Reasons Promulgated
On 09 November 2021

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

RINKU KAINTH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mavrantonis, of counsel, instructed by Farani Taylor Solicitors

For the Respondent: Mr Melvin, Senior Presenting Officer

DECISION AND REASONS

1. On 17 May 2021, I issued a decision in this appeal in which I found that the First-tier Tribunal (Judge Dean) had erred materially in law in allowing the appellant's appeal. I set aside that decision in full and ordered that the decision on the appeal would be remade in the Upper Tribunal. A copy of that decision is appended to this one, and I do not propose to rehearse the contents of it.
2. The background to the appeal is set out fully in my first decision and I need say only a little about it. What matters for present purposes is that the appellant entered the United Kingdom lawfully and was subsequently suspected of obtaining leave to remain by deception. Like many thousands of other people, the appellant was accused of having used a proxy to take a TOEIC English

language test at an Educational Testing Services centre. The appellant's leave was eventually reinstated but the allegation was made again when she made an application for leave to remain, some time after the expiry of her leave to remain as a student. Ultimately, her application for further leave to remain was refused and she appealed to the First-tier Tribunal (FtT). During the course of the appellant's appeal to the FtT, the respondent withdrew the allegation that the appellant had perpetrated any such fraud. The judge in the FtT was aware of that withdrawal but decided, in any event, that the appellant had not cheated in her test. The judge went on to allow the appeal on human rights grounds for reasons which I found to be legally erroneous.

3. It is accepted before me that the appellant should be granted six months' leave to remain in the event that her appeal is dismissed on human rights grounds. That position has come about as a result of the respondent's published policy entitled Education Testing Service (ETS): casework instructions, dated 19 November 2020. The relevant part of the policy is in the following terms:

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.

4. That the respondent would be granting leave even if the appeal is dismissed was known to the appellant at the time of my first decision. That had been made clear by Mr Whitwell, who represented the Secretary of State at that hearing, and it is recorded in my decision at [15]-[16]. Mr Mavrantonis nevertheless seeks to submit that the appellant's removal would be contrary to section 6 of the Human Rights Act 1998 as being in breach of Article 8 ECHR and it was for that reason that I ordered there to be a further hearing.
5. Mr Mavrantonis' submission on the appeal might be summarised quite shortly. It is as follows. Absent criminality, a finding of fact (or a concession by the respondent) that an appellant did not cheat in a TOEIC English language test requires the Tribunal to allow an appeal on Article 8 ECHR grounds.
6. In his written submissions throughout the life of this appeal in the Upper Tribunal, Mr Mavrantonis has submitted that he had pursued similar arguments in another appeal: Haque v SSHD (HU/02180/2019). That appeal was heard by Upper Tribunal Judge Lane on 4 June 2021 and Mr Mavrantonis understood that UTJ Lane intended to place his decision before the Upper Tribunal's Reporting Committee. When he came to settle his skeleton argument for the purpose of the hearing before me, Mr Mavrantonis recorded that he had still not seen the decision in Haque v SSHD. I made enquiries with UTJ Lane, who was kind enough to provide me with a copy of the decision in that appeal, which was issued to the parties on 4 August 2021.
7. I provided Mr Mavrantonis and Mr Melvin with copies of the decision in Haque v SSHD at the start of the hearing. I gave them a few minutes to read the decision, in which UTJ Lane found against the argument I have summarised

above and dismissed the appeal. At the end of that period, Mr Mavrantonis asked for a little more time, which I duly gave. Upon resuming the appeal a few minutes later, he confirmed that he had had adequate time and I proceeded to hear submissions.

Submissions

8. Mr Melvin began his helpful submissions by confirming that he and Mr Mavrantonis had spoken and, although this was a de novo hearing, they had both taken the view that no oral evidence was necessary. Mr Melvin noted that there was almost total reliance by the appellant on the proposition that her appeal fell to be allowed on human rights grounds because the respondent had withdrawn the allegation of deception. He confirmed that leave would be granted for six months so that she had an opportunity to regularise her position. In order to decide whether the appeal fell to be allowed or dismissed, however, it was necessary to consider the Article 8 ECHR rights enjoyed by the appellant and the effect of any decision to remove her from the United Kingdom. There was no submission made by the appellant that she met the Immigration Rules. There could be no suggestion that the appellant's removal with her husband and child, neither of whom have any status in the UK, would be contrary to s55 of the Borders, Citizenship and Immigration Act 2009. What remained, therefore, was a conventional proportionality assessment in respect of a person who formed her private life in the UK at a time when her status was precarious. The reality was that there was nothing exceptional in the appellant's case, as Judge Lane had also found in Haque v SSHD.
9. Mr Mavrantonis had filed a skeleton argument upon which he relied. The provisional view which had been expressed in the decision of May 2021 was only provisional and the view which Judge Lane had taken was on a case with slightly different facts.
10. Mr Mavrantonis was unable to assist me any further in relation to the appellant's husband's immigration status. He knew that he and the appellant's child had no status but he did not know whether he was an overstayer or an illegal entrant.
11. Mr Mavrantonis highlighted the fact that there was no guidance for First-tier Tribunal Judges on a question which arises regularly in appeals of this nature: in the event that the allegation of fraud is not proved, what is the proper disposal of the appeal? It was inappropriate, he submitted, for an appellant in this position to meet the 'double hurdle' of overcoming the allegation of fraud and then establishing that the decision was in breach of Article 8 ECHR. It was important to recall that ETS cases formed their own subset. Whilst it was accepted that judges should approach such cases using the five-staged R (Razgar) v SSHD [2004] 2 AC 368 approach, the allegation of deception introduced a new dimension. That consideration was not precisely similar to administrative delay, the consequences of which were nowhere near as dire. The appellant had been a student but had been unable to apply for further leave in that capacity and it was necessary for the courts to remedy that injustice.
12. Mr Mavrantonis accepted – as he had in his skeleton – that the Tribunal did not have power to decide what leave should be granted to the appellant. In a case

such as this, however, the critical point was that an allegation of ETS fraud resulted in such difficulty for an appellant that the only permissible course, upon that allegation falling away, was for the appeal to be allowed on Article 8 ECHR grounds. The resolution of that point in the appellant's favour carried determinative weight in the proportionality assessment, he submitted, and it was always sufficient to overcome the public interest considerations in s117B of the Nationality, Immigration and Asylum Act 2002. Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351 (IAC) was relevant but the Upper Tribunal had not in that decision analysed the critical question in this appeal. In Haque v SSHD, Judge Lane had introduced considerations of criminality but there were no such considerations here. In this case, the appellant had become an overstayer because of the false allegation of fraud and the appropriate relief, in circumstances such as these, was for the appeal to be allowed on Article 8 ECHR grounds.

Discussion

13. I have summarised above the proposition which Mr Mavrantonis places at the centre of his argument. It is worth repeating at this stage. He submits that, in the absence of criminality, a finding of fact (or a concession by the respondent) that an appellant did not cheat in a TOEIC English language test requires the Tribunal to allow an appeal on Article 8 ECHR grounds.

14. As originally formulated, the submission was based largely on dicta in Ahsan v SSHD [2017] EWCA Civ 2009; [2018] HRLR 5. In my first decision, however, I expressed the provisional view that Mr Mavrantonis' argument was based on a misreading of Ahsan. I said this:

[32] As presently advised, and this is merely my provisional view, it seems to me that the submission is based on a misreading of Ahsan, and of [116] of that decision in particular. At [116](B) of his judgment in that case, Underhill LJ (with whom Floyd and Irwin LJ agreed), said that an individual who secures on appeal a favourable finding on the question of fraud "will, as a matter of substance, be in no worse position than if the section 10 decision had been quashed in judicial review proceedings". But that does not suggest that an individual in that position is necessarily entitled to succeed on Article 8 ECHR grounds, whatever other circumstances there might be in the case.

15. These were expressly provisional views, however, and Mr Mavrantonis took the opportunity in his skeleton argument and his detailed oral submissions to develop the points he had made in outline at the first hearing. He submitted that there was a 'disposal question' which remained unresolved by the existing authorities. At [19] of his skeleton argument, he sought to derive some assistance for his central proposition from what was said at [120] of Ahsan v SSHD and [37] of Khan v SSHD [2018] EWCA Civ 1684; [2019] Imm AR 54. What Underhill LJ said at [120] of Ahsan was this:

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 necessary “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 cannot be remedied by either kind of proceeding.)

16. Floyd and Irwin LJ agreed with Underhill LJ. In Khan v SSHD, the Court of Appeal was presented, amongst other documents, with a note from the respondent entitled ‘Response to the Appellants’ Position Statement’. At [36]-[37] of his judgment, Singh LJ (with whom McFarlane and Underhill LJ agreed) set out certain passages from that note. It is the passage which was set out underneath [37] upon which Mr Mavrantonis relies. That passage was as follows:

Nonetheless, for the avoidance of doubt, the SSHD confirms that:

- (i) For those individuals whose leave was curtailed, and where that leave would still have time to run as at the date of an FTT determination that there was no deception, subject to any further appeal to the UT, the curtailment decision would be withdrawn and the effect ... would be that leave would continue and the individuals would not be disadvantaged in any future application they chose to make;
- (ii) For those whose leave has been curtailed, and where the leave would in any event have expired without any further application being made, the Respondent will provide a further opportunity for

the individuals to obtain leave with the safeguards in paragraph (iii) below.

For those whose leave had expired, and who had made an in time application for further leave to remain which was refused on ETS grounds, the effect of an FTT determination that there was no deception would be that the refusal would be withdrawn. The applicant in question would still have an outstanding application for leave to remain and the Respondent will provide them with a reasonable opportunity to make any further changes to their application which would be considered on the basis of them not having employed any deception in the obtaining of their TOEIC certificate, and they would in no way be disadvantaged in any future application they chose to make.

(iii) In all cases, the Respondent confirms that in making any future decision he will not hold any previous gap in leave caused by any erroneous decision in relation to ETS against the relevant applicant, and will have to take into account all the circumstances of each case.

However, the Respondent does **not** accept that it would be appropriate for the Court now to bind him as to the approach that he would take towards still further applications in the future, for example by stating that each applicant has already accrued a certain period of lawful leave. The potential factual permutations of the cases that may need to be considered are many and various. In some cases, for example, it will be apparent that, whilst on the facts as presented at the appeal an appellant's human rights claim is successful, he would not have been able to obtain leave at previous dates. Again, this issue will have to be dealt with on a case by case basis.

17. Mr Mavrantonis submits that 'the correct interpretation of [the above passages] is that an FTTJ must allow the appeal under Article 8 ECHR/outside the Rules if her finds that the appellant did not deploy deception in her TOEIC test'. Mr Mavrantonis refined these submissions at the hearing. Responding to something said by UTJ Lane in Haque v SSHD, he accepted that the situation might be different where an appellant's criminality featured in the proportionality balance. At my request, he also explained that his submission was directed to the weight which was to be attached to the public interest in immigration control where a TOEIC allegation was not proved or conceded. There was, he submitted, no public interest in immigration control in those circumstances and the resolution of the TOEIC issue in the appellant's favour was determinative of the appeal.
18. Mr Mavrantonis submits that to conclude otherwise would be to erect what he describes as a 'double hurdle' in the way of people such as the appellant. They would not only have to persuade the Tribunal that they did not cheat in their TOEIC test; they would also be required to show that their removal would be in breach of Article 8 ECHR.
19. Having had the benefit of more fulsome argument than I did at the hearing in April, I come to the firm conclusion that Mr Mavrantonis' submissions are

misconceived. What he seeks is a rule that an erroneous TOEIC conclusion carries such weight in the scales of proportionality that it is determinative in any ordinary immigration case (ie one in which there is no criminality). Nothing in Ahsan v SSHD, or in Khan v SSHD, or in other learning, begins to justify such an approach. An erroneous TOEIC allegation is what the Upper Tribunal (Lane J and UTJ Norton-Taylor) described in Patel as a 'historical injustice', in the sense that the individual in question has previously been the subject of some relevant wrong at the hands of the respondent. The weight which is properly to be attached to such an injustice in the assessment of proportionality is necessarily fact-specific. Depending on the facts, it might carry significant weight in the assessment of proportionality. It might alternatively carry very little weight. It might help to consider two hypothetical situations.

20. The first person is admitted to the United Kingdom to undertake a course of studies to which he is ill-suited. He studies a little and makes only moderate progress in his course. On application for further leave to remain, however, he persuades his sponsoring college that he should have an opportunity to finish the course. His application for further leave to remain is successful, based partly on a TOEIC test. The applicant subsequently stops studying, having lost interest in the course, and starts working unlawfully in the UK. He is then accused of cheating in his TOEIC test. His leave is cancelled because his sponsor has withdrawn their sponsorship and because he cheated in his TOEIC test. He makes a human rights claim. He comes before the FtT with no demonstrable private or family life and no arguable claim under the Immigration Rules.
21. The second person is admitted to the UK to join a spouse present and settled in the UK. On coming to the end of his leave to enter, he makes an application for leave to remain, relying on a TOEIC examination (amongst other documents). Leave is granted and the appellant and his wife have a child. On returning from a holiday, he is challenged about his TOEIC result and his leave is cancelled for that sole reason, shortly before he was due to make an application for ILR, having completed the requisite five years. He makes a human rights application, protesting his innocence and submitting that he would, but for the allegation made against him, have been eligible for ILR.
22. In the first of these hypothetical cases, there is precious little for the appellant to rely upon in the balance sheet of proportionality. His private life, such as it was, was based upon the time he had spent in the UK and the modicum of success he had previously met with in his studies. The historical injustice which he experienced when the respondent made an erroneous TOEIC allegation only served, in reality, to bring about a swifter endpoint for his leave to remain, which was in any event in jeopardy because he had stopped studying. If Article 8 ECHR is even engaged in a case such as this, it cannot be in any real doubt that it would be proportionate to interfere with his private life, notwithstanding the respondent's error.
23. In the second case, however, the appellant is able to point to serious consequences which have come about as a result of the respondent's error. But for the respondent's error, he would have been eligible for ILR. His relationship with his wife and child continues and the historical injustice perpetrated against

him in the form of the erroneous fraud allegation has improperly placed the continuation of that relationship in the UK in jeopardy.

24. The enquiry, in other words, is necessarily fact-sensitive and it would be wholly inappropriate to accede to Mr Mavrantonis' submission that some form of rule should be adopted in these cases. The absence of a rule does mean that judges of the First-tier Tribunal are left without binary guidance in this category of case but that is not objectionable. A judge of the FtT considering a case such as the present will take account of the historical injustice and will consider whether, in the circumstances of that case, the effect of that injustice is such as to outweigh the considerations in favour of the appellant's removal. In some cases, it will be. In others, it will not. It is simply impossible to be as prescriptive as Mr Mavrantonis suggests.
25. The approach which I have outlined above does erect what Mr Mavrantonis described as a 'double hurdle' in a case such as the present, but it is not objectionable for that reason. The (relevant) statutory jurisdiction of the Tribunal is to consider whether the removal of the appellant is in breach of section 6 of the Human Rights Act 1998. In considering that question, Ahsan v SSHD and Khan v SSHD require judges deciding cases such as these to consider whether the appellant cheated in their ETS test. The ultimate question posed by Parliament, however, is not whether they did so; it is whether their removal is contrary to the United Kingdom's obligations under the ECHR. That necessarily involves two 'hurdles', albeit a person who is able to clear the first might find it rather easier to clear the second.
26. It remains for me to consider the case of this individual appellant. She was confronted with the TOEIC allegation for the first time when she returned from holiday in 2014 but her leave was reinstated in August that year, enabling her to continue her studies until the expiry of her leave in April 2015. She did not make an application for further leave to remain as a student at that point. She relied, instead, on the advice of a man she believed to be a solicitor, who obtained a false Spanish passport for her. She then presented that passport at the Job Centre in Maidstone and was arrested for being in possession of a false document. No charges were ultimately pursued. The appellant then made an application for leave to remain as a stateless person. Upon that being refused, she made an application for leave to remain on human rights grounds. The covering letter for that application is helpfully reproduced at pp161-169 of the appellant's bundle. The appellant's solicitors explained, amongst other matters, that the appellant had been disadvantaged as a result of her dealings with a rogue masquerading as an immigration advisor.
27. That, to my mind, is the reality of this case, at least inasmuch as it relates to the appellant's studies. She has not been disadvantaged by the erroneous TOEIC allegation made by the respondent. That allegation was made and then abandoned in 2014 and the appellant was free, at that stage, to seek further leave to remain as a student. She chose not to do so and it was that choice, and not the subsequent re-emergence of the erroneous allegation of TOEIC fraud that brought an end to the appellant's studies. Upon the expiry of her leave to remain in April 2015, she would not have been entitled to further leave to remain as a Tier 4 Student. I very much doubt whether she would even have secured a

sponsoring college without leave to enter or remain. In summary, therefore, the appellant's studies were not brought to an end by the erroneous allegation and it was the choices she made which have had that effect. In respect of the appellant's studies, therefore, the historical injustice to which she was subjected has had no demonstrable consequence and is of no moment in the assessment of proportionality.

28. The same is true of the appellant's relationship with her spouse and child. They have no immigration status in this country. He states in his witness statement that he entered the UK in 2003 and has not returned since. I make no finding on that assertion, which will presumably in due course be the subject of an application to the respondent under paragraph 276ADE. Either way, the appellant's husband has not had leave to remain for many years and their child also has no leave to remain. Neither of them can act as a sponsor for the appellant, therefore, and the child is still so young that it cannot sensibly be argued that her best interests militate in favour of any course other than remaining with her parents, wherever they may be. Had the respondent not made an erroneous decision about the appellant's TOEIC fraud, none of these circumstances would have been any different. She would have had no basis, in other words, to make an application for leave to remain in reliance on her family life even if she was not the subject of the erroneous allegation.
29. In some cases, an appellant will be able to establish that they would have had a good claim for leave to remain (or even ILR) if it had not been for the erroneous TOEIC allegation. In cases of that species, it might be difficult for the respondent to establish that there is any real public interest in the removal of the individual in question. In such a case, it could be cogently argued that the historical injustice negates the public interest in immigration controls which is reflected in s117B(1) of the Nationality, Immigration and Asylum Act 2002. (I note that UTJ Lane made a similar point at [9] of his decision in Haque v SSHD.)
30. This case does not belong to that species. This appellant has no claim for leave to remain, regardless of the erroneous allegation which was made against her. She could not have obtained leave to remain as a student after her previous leave to remain in that capacity came to an end and her relationship is with a man who himself has no leave to remain. The appellant was unlawfully present in the UK after the expiry of her leave to remain and there was a cogent public interest in her removal even before the re-emergence of the TOEIC allegation. There remains a cogent public interest in her removal notwithstanding the respondent's withdrawal of the TOEIC allegation. Her private and family life, such as it is, is incapable of outweighing the public interest in the maintenance of effective immigration controls and her appeal is accordingly dismissed. She will nevertheless be granted six months' leave to remain in order to regularise her position in accordance with the respondent's policy.

Postscript

31. Mr Mavrantonis devoted an appreciable portion of his skeleton argument to a contention that my decision in this appeal should be put before the Upper Tribunal's Reporting Committee. As he recognised in his oral submissions, however, decisions such as that are for the Upper Tribunal rather than the

parties. In any event, since my conclusion is very much that the decision in cases such as this will be highly fact-sensitive, I do not consider that anything I have said in the context of this case would assist other decision makers. As the respondent said in the note provided to the Court of Appeal in Khan v SSHD, the only proper approach is to evaluate the human rights claims of those affected on a case-by-case basis and it would be positively unwise, in my judgment, to attempt to offer any more definitive guidance.

Notice of Decision

The decision of the First-tier Tribunal having been set aside, I remake the decision on the appellant's appeal by dismissing it on all grounds.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 October 2021