



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: HU/05793/2020

[UI-2021-000780]

THE IMMIGRATION ACTS

**Heard at Field House
On the 4 March 2022**

**Decision & Reasons Promulgated
On the 20 April 2022**

Before

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE WELSH**

Between

**MD ISLAM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel, instructed by Kalam Solicitors

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

- 1.** This is an appeal against the decision of First-tier Tribunal Judge Talbot (“the judge”), promulgated on 9 August 2021. By that decision, the judge dismissed the Appellant’s appeal against the Respondent’s decision, dated 4 May 2020, refusing his human rights claim.
- 2.** The Appellant is a citizen of Bangladesh, born in 1990. He came to the United Kingdom in 2009 as a student, with leave to remain until 28 October 2012. He applied for an extension of that leave. The proposed

sponsor had its licence revoked by the Respondent and the Appellant sought, and was accepted on, a new course of study. On 1 August 2013 he applied for leave to remain. This application was refused on 4 December 2013 on the basis that he had failed to provide evidence of the holding of sufficient funds in order to meet the appropriate threshold under the Immigration Rules (“the Rules”), that being £7200 over a consecutive 28-day period. As there was no right of appeal (although there was an unsuccessful attempt to pursue such a route), the Appellant sought to challenge this refusal by way of judicial review. By a decision dated 23 October 2014, the Upper Tribunal refused permission on the papers, concluding that the Respondent was entitled to conclude that the bank statement provided by the Appellant had not satisfied the Rules. The application for permission was not renewed.

3. Meanwhile, on 23 July 2014, the Respondent made a decision under section 10 of the Immigration and Asylum Act 1999 on the basis that the Appellant was an overstayer and should be removed from the United Kingdom. It was alleged that the Appellant had obtained a TOEIC English language test certificate by deception and that the certificate had been used in the August 2013 application for leave to remain. We shall refer to this as “the ETS issue”.
4. On 4 February 2020, the Appellant made an application for indefinite leave to remain on the basis of long residence, with particular reference to paragraph 276B of the Rules. This application was deemed to constitute a human rights claim, the refusal of which gave rise to a right of appeal. The Appellant duly exercised that right.
5. In essence, the Appellant’s case was put forward on the grounds that: (a) the decision of 4 December 2013 refusing his application for leave to remain had been wrong because it failed to properly understand the documentary evidence provided. This in turn had an impact on the Article 8 claim because there had been a historical injustice; (b) the ETS issue had been erroneously pursued by the Respondent and this constituted a further historical injustice; (c) the first two matters combined with other relevant circumstances demonstrated that removal would be disproportionate.

The decision of the First-tier Tribunal

6. Having set out the procedural background, evidence, and submissions, the judge dealt first with the 2013 refusal of the application for leave to remain. At [17], he noted that the only bank statement produced by the Appellant in his bundle was one apparently showing funds for the period 22 June 2013 to 28 June 2013. The target figure of £7200 was only met on that latter date (the balance then being £9003.62). The Appellant’s oral evidence on the issue was described as “muddled”. His case was that a handwritten date on the bank statement, 1 August 2013 (appearing just

below the formal stamp), in fact demonstrated that the balance of £9003.62 had been held on that date, not only as at 28 June 2013. The judge interpreted handwritten date differently, finding that:

“Assuming that this date was entered by the bank official, I would take it to represent the date on which it was stamped, when the Appellant returned to the bank. This is not sufficient evidence to show that the statement itself was issued on that date and that the available balance remain at that level beyond the closing date on the statement of 28.6.13.”

7. At [18], the judge went on to conclude as follows:

“On the evidence before me, I have no reason to come to a different conclusion from [the Upper Tribunal in the 2014 judicial review proceedings]. I have to conclude therefore that the Appellant had no lawful leave to remain following the refusal of his initial period of leave on 28.10.12. Even if I were to ignore the period between that date and the making of his further application, the Appellant had no lawful leave following the refusal of that further application and any subsequent period of s.3C it follows that the Appellant is unable to show that he fulfils the requirements of paragraph 276B in having shown 10 years continuous lawful residence in the UK.”

8. The judge then moved on to consider the ETS issue. He noted that the allegation of deception had only been made after the previous refusal of leave to remain described above. Notwithstanding this, the judge considered it appropriate (rightly, in our view) to address the Respondent’s case against the Appellant. Having provided a succinct summary of the relevant legal framework relating to the ETS issue, at [22] the judge noted the Respondent’s failure to provide any of what he described as the “key supporting evidence” in support of the allegation of deception. The Respondent’s representative had asserted that this had existed. No such evidence was in fact before the judge at the hearing and he accordingly found that the Respondent had failed to meet the evidential burden which rested upon her. He then concluded that the Respondent’s allegation could not be “upheld”, as he put it, adding that:

“... had the required evidence been submitted by the Respondent, I may have reached a different conclusion on this particular matter. Also given my findings in paragraph 18 above, it is not necessary for me to make a definitive finding as to the Appellant’s behaviour other than that the Respondent has failed to substantiate her allegation on the evidence before me.”

9. We will have something to say about this comment, below.

10. The judge then turned his attention to paragraph 276ADE(1)(vi) of the Rules and concluded that in all the circumstances the Appellant would not have faced very significant obstacles to a re-integration into Bangladeshi society: [23]. At [25] he conducted a proportionality exercise, taking account of the mandatory considerations under section 117B of the

Nationality, immigration, and Asylum Act 2002, as amended and various other matters. His conclusion on the ETS issue did not feature in that exercise. Ultimately, the judge concluded that the Respondent's refusal of the human rights claim did not breach Article 8.

The grounds of appeal and grant of permission

- 11.** The grounds of appeal attacked all three of the central issues addressed by the judge in his decision. It was said that the judge had misread the bank statement and failed to place it in the context of other evidence. As a result, the judge had failed to recognise that the Appellant had been the subject of a historical injustice, as identified in Patel (historic injustice; NIAA Part5A) India [2020] UKUT 351 (IAC). In respect of the ETS issue, the judge had failed to factor this into the proportionality exercise. In particular, the judge had failed to have any regard to policy guidance from the Respondent indicating that individuals who have been accused of deception, but obtain a favourable finding on appeal, would be granted 6 months leave outside the Rules. Finally, it was said that the first two errors undermined the judge's proportionality exercise as a whole.
- 12.** Permission to appeal was granted on all grounds.
- 13.** In a rule 24 response, dated 10 December 2021, the Respondent confirmed that she opposed the appeal. The response highlighted the fact that the 2013 decision was not based on an allegation of deception and therefore the Appellant had been an overstayer since October 2012 and there was no connection to the ETS issue.

The hearing

- 14.** We heard clear and concise submissions from both representatives, for which we are grateful. These are a matter of record and do not need to be reproduced here. We shall address salient points raised on behalf of the parties when setting out our conclusions, below.
- 15.** A procedural issue arose. Mr Whitwell made an application to amend the Respondent's rule 24 response so as to raise an issue of procedural fairness. Relying on a printout from the Respondent's Case Information Database, he submitted that a supplementary bundle of ETS materials (comprising the Lookup Tool, a witness statement from a Senior Presenting Officer, and what has been described as the "generic" evidence relating to the ETS issue) had been sent to the First-tier Tribunal on 29 July 2021, a day after the hearing before the judge, but prior to his decision being promulgated. The effect of this was to show that contrary to the judge's belief, relevant evidence had in fact been provided, albeit after the hearing.

16. Having risen to consider the application, we refused it, with reasons to follow.
17. We reserved our decision on the substantive appeal.

The amendment application: reasons

18. Our reasons for refusing Mr Whitwell's application to amend the rule 24 response are as follows.
19. First, without criticising Mr Whitwell himself, the application was made extremely late in the day and without any sound reason for this. The rule 24 response itself makes no reference to the supplementary bundle and that response was provided five months after the hearing before the judge and three months prior to the hearing before us.
20. Second, even on the evidence from the database, the supplementary bundle was only sent through to the First-tier Tribunal *after* the hearing. That in itself is a significant obstacle in the Respondent's path. She clearly failed to comply with directions issued by that Tribunal. There is no evidence from the Respondent to indicate that any meaningful efforts had been made to ensure that the bundle got through to the judge, or in any other way indicate that there was a procedural issue in play. We note also that the supplementary bundle was seemingly not even provided to the Presenting Officer's Unit itself until the day after the hearing.
21. Third, it appears as though the Respondent did not seek an adjournment of the hearing in order to ensure that any supplementary bundle was before the judge.
22. Fourth, the reason offered by Mr Whitwell for the late production of the supplementary bundle was "administrative error". We fully accept and appreciate Mr Whitwell's candour, but that is that is wholly inadequate.
23. Fifth, the importance of procedural rigour should not be underestimated. It is there to ensure not simply the efficient administration of justice by the Tribunals, but also to maintain fairness to the parties. Just as the Respondent is entitled to have a fair opportunity to address all aspects of an individual's case (including the evidence relied on), so too must that individual know the case against them in good time to prepare and present arguments and evidence to the contrary. In the present case, the Respondent has plainly failed to adhere to the principle of procedural rigour at both levels of the appellate structure; the initial and onward.
24. Thus, the Respondent's rule 24 response stands in its original form and there is no challenge before us in respect of the judge's conclusion on the ETS issue.

Conclusions on error of law

25. We propose to deal with the Appellant's three grounds of challenge in order. Before doing so, we remind ourselves of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years: see, for example, Lowe [2021] EWCA Civ 62, at paragraphs 29-31 and AA (Nigeria) [2020] EWCA Civ 1296; [2020] 4 WLR 145, at paragraph 41. We also remind ourselves that the judge's decision must be read sensibly and holistically and that we are neither requiring every aspect of the evidence to have been addressed, nor that there be reasons for reasons.

Ground 1: the 2013 decision

26. Mr Karim placed significant emphasis on the need for the judge to have looked at the relevant bank statement in conjunction with other evidence before him, namely the application form and the Appellant's witness statement.

27. We accept that the application form and witness statement were indeed before the judge. Having looked at that statement and the application form for ourselves, we accept that the Appellant did assert that he had held the requisite funds in his account for the requisite period of time. We note the judge's view that the Appellant's oral evidence was "muddled" and on the face of it, this was a sustainable conclusion. Even putting that to one side, the simple assertions made in the witness statement and in the application form were never going to have been sufficient to demonstrate on the balance of probabilities that the mandatory financial requirements had been satisfied. This is so whether those materials were taken in isolation or read in conjunction with the bank statement. The provision of bank statements was mandatory and it was in our judgment plainly the case that the bank statement which had been provided constituted the appropriate focus of the judge's attention.

28. We turn to the bank statement. The Appellant's argument is that the handwritten date, being 1 August 2013, represented the date of the statement and demonstrated that the stated current balance of £9003.62 stood as at that date. Plainly, the judge took a different view at [17], regarding it as the date on which a bank official confirmed that the statement was authentic. Put in short terms, our conclusion is simply that the judge was entitled to adopt that position. Mr Karim realistically acknowledged that different interpretations of the statement existed and we agree with Mr Whitwell's point that it was no error of law for the judge to have chosen one which did not suit the Appellant. Further, there was no further evidence from the bank to confirm what the current balance was on 1 August 2013 and the typed current balance shown at the top of the statement was entirely consistent with the typed balance contained in the box and running alongside the date of 28 June 2013. It was in no way irrational for the judge to interpret the handwritten date in the way that he

did. For what it is worth, had we been considering this evidence at first instance, our view would have been precisely the same.

29. Mr Karim submitted that it would have been close to absurd for the Appellant to have provided a bank statement which had not assisted his application for leave to remain. That is a respectable argument, but it could equally have been the case that the Appellant simply provided all that he had available to him, whether it was sufficient to meet the Rules or not. In any event, Mr Karim's submission does not add anything of substance to the identification of any error of law.
30. The 2014 judicial review proceedings do bear some relevance, albeit to a limited degree. The Upper Tribunal saw the same evidence and, whilst it was of course exercising a review jurisdiction only, it did not even deem the Appellant's case to be arguable. It is clear to us that the judge in the present proceedings did not regard the Upper Tribunal's decision as in any way binding, or indeed even as representing a starting point.
31. In light of the above, the judge was entitled to conclude as he did and there was no failure to have had regard to any historical injustice. Ground 1 fails.

Ground 2: the ETS issue

32. Before addressing Mr Karim's core submission on this issue, we make two observations. First, although the judge couched his finding on the ETS issue at [22] in somewhat ambivalent terms, we regard the upshot of his assessment as constituting a conclusion that the Appellant did *not* cheat in respect of his TOEIC test. The bottom line is that it was for the Respondent to prove her case against the Appellant and she demonstrably failed to do this. Appeals before the First-tier Tribunal are not dress rehearsals and, absent exceptional circumstances, it would in our view be inappropriate for the Respondent to seek to resurrect any allegation in the future.
33. The second observation is that the ETS issue, as raised by the Respondent in 2014, had no causal link to the 2013 refusal of the Appellant's application for leave to remain. The section 10 decision made in 2014 was not in response to another application made by the Appellant, nor did it curtail any extant leave to remain. In this way, the present case does not represent the paradigm historical injustice scenario. It has not been suggested, nor could it properly be so, that but for the erroneous allegation of deception, the Appellant would have been granted leave to remain in 2014.
34. Mr Karim's focus was directed to the Respondent's guidance on cases in which individuals have been wrongly accused of deception in respect of the ETS issue, together with statements from the higher courts, including Ahsan and Others [2017] EWCA Civ 2009; [2018] Imm AR 531. In respect

of the former, the guidance (Educational Testing Service: casework instructions, version 4.0, 18 November 2020) states at page 9:

“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.”

35. Paragraph 120 of Ahsan reads:

“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 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.)”

36. Mr Karim submitted that the effect of the guidance was that the Appellant would obtain a grant of leave to remain following the outcome of his appeal before the judge. This inevitable consequence should have been a factor - a decisive factor - in the judge’s proportionality exercise. This is because a grant of leave following the conclusion of the appellate proceedings was at least indicative of the Respondent’s recognition that removal would be disproportionate.

37. We reject that analysis. Whilst it is true that the judge did not make reference to his ETS conclusion or the guidance at [25] of his decision, this omission does not in our judgment constitute an error of law which could have had a material bearing on the outcome.

- 38.** The wording of the guidance is clear: leave to remain will be granted to an individual who has obtained a favourable finding on the ETS issue if their appeal has been *dismissed*. That outcome is a prior condition to any grant. It cannot be the case that the terms of the guidance have the effect that any judge hearing an appeal who finds in favour of an individual on the ETS issue is then bound to allow that appeal solely because a grant of leave will be made by the Respondent after proceedings have concluded. The illogicality of the Appellant's case is obvious: how can the possibility of a grant of leave if an appeal is dismissed lead to that appeal having to be allowed?
- 39.** In addition, the judge had to take the Appellant's case as it stood at the date of hearing (strictly speaking, the First-tier Tribunal remained seized on appeal until promulgation, but that makes no difference in the present case). It remained the case that the Appellant was liable to removal in consequence of the refusal of his human rights claim and the prospect of removal remained live at the point at which the appeal had to be decided. The ground of appeal under section 84(1)(c) of the 2002 Act was still in play and the judge was entitled, indeed bound, to consider the case on that basis.
- 40.** The judgment in Ahsan does not assist the Appellant. First, his case is not one in which any extant leave was invalidated by reason of an erroneous allegation of deception. The Appellant had been without leave to remain since 2012 and this was because of the 2013 decision, which was not predicated on the ETS issue. Second, and related to the first point, there was no question of the Appellant being put back into a position more favourable than if the erroneous allegation had never been made. At that point in time, the Appellant was an overstayer and it cannot be said that he would have, or that it was even likely that he would have, been granted leave to remain on some other basis.
- 41.** Ground 2 fails.

Ground 3: Article 8 within and without the Rules

- 42.** In our view, the judge was fully entitled to conclude that paragraph 276ADE(1)(vi) of the Rules had not been satisfied. At[25], the judge took relevant matters into account when conducting his proportionality exercise. Beyond that, the fact that grounds 1 and 2 have failed mean that the judge did not leave out of account any considerations which could have had a material bearing on the outcome of that exercise.
- 43.** Ground 3 fails.

Anonymity

- 44.** The First-tier Tribunal did not make an anonymity direction. There is no reason for us to make one at this stage in proceedings and we do not do so.

Notice of Decision

45. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and that decision shall stand.

46. The appeal to the Upper Tribunal is dismissed.

Signed: H Norton-Taylor Date: 8 March 2022
Upper Tribunal Judge Norton-Taylor