



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/02928/2019
HU/02934/2019
HU/02932/2019

THE IMMIGRATION ACTS

Heard at Field House
On 14 February 2020

Decision & Reasons Promulgated
On 2 March 2020

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MRS N K (FIRST APPELLANT)
MR S S (SECOND APPELLANT)
MASTER H S (THIRD APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellants. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:

For the Appellants: Ms C Jaquiss, Counsel, instructed by Farani Taylor Solicitors
For the Respondent: Mr M Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants are all citizens of India. The first and second appellants are husband and wife, and they are the parents of the third appellant, who was born in July 2006.
2. The appellants appeal with permission against the decision of First-tier Tribunal Judge Richardson (“the judge”), promulgated on 14 June 2019, in which she dismissed the appellants’ appeals against the respondent’s decision of 29 January 2019, refusing their human rights claim.
3. The first appellant arrived in the United Kingdom in possession of entry clearance as a Tier 4 student on 15 April 2011, accompanied by the second appellant. The third appellant arrived on 5 November 2013, having remained in India with grandparents after his parents’ departure. On 4 February 2015, the first appellant was served with an IS151A Notice, curtailing her leave to remain on the basis that she had allegedly used deception in obtaining a TOEIC English language test certificate, which she had used in application made to the respondent on 9 August 2012. From this point onwards, the appellants have remained in the United Kingdom without leave.
4. Following the judgment of the Court of Appeal in Ahsan and Others [2017] EWCA Civ 2009; [2018] Imm AR 531, the appellants made a combined human rights claim, the refusal of which led to the appeals before the First-tier Tribunal. The respondent’s decision relied in large part on the previous allegation of deception against the first appellant, with reference to the well-known ETS issues. In light of the alleged deception and the circumstances as a whole, the respondent concluded that the appellants could not satisfy any of the Article 8-related Immigration Rules (“the Rules”) or on a wider basis.

The decision of the First-tier Tribunal

5. Having considered the evidence before her, the judge concluded at [52] that the first appellant had not in fact practised deception in obtaining and then relying on the English language test certificate.
6. The judge went on to consider Article 8 in some detail, concluding that:
 - i. there would be no “very significant obstacles” to the first and second appellant’s ability to reintegrate into Indian society;
 - ii. the first and second appellants could not succeed under Article 8 on any other basis;
 - iii. the third appellant was progressing well at school, was well-settled socially, and spoke English and Punjabi;

- iv. the third appellant was not a “qualifying child” for the purposes of paragraph 276ADE(1)(iv) of the Rules or section 117B(6) of the Nationality, Immigration and Asylum Act 2002, as amended (“the 2002 Act”);
- v. whilst the third appellant’s best interests may have rested in him remaining in the United Kingdom, the overall circumstances of the case indicated that it would not be disproportionate for him to leave this country together with his parents.

7. On this basis, the appeals were dismissed.

The grounds of appeal and grant of permission

8. Although two grounds of appeal were set out in the application for permission, in truth they make a single assertion, namely that having found that the first appellant had not been dishonest, the judge then failed to take this highly relevant factor into account when assessing the Article 8 claims. Under ground 2, it is said that the judge failed to have regard to the respondent’s concession made before the Court of Appeal in Khan and Others [2018] EWCA Civ 1684; [2019] Imm AR 54. At para 37 of the judgment, it is recorded that:

“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.”

9. Permission to appeal was granted by Designated Judge of the First-tier Tribunal Shaerf on 6 January 2020.

The respondent’s Rule 24 response

10. In a Rule 24 response dated 30 January 2020, the respondent confirmed that she was not challenging the judge’s conclusion that the first appellant had not been dishonest in respect of the English language test certificate. The following paragraph reads as follows:

“That being the case and taking into account the immigration history set out at [1]-[11] [of the judge’s decision] the Tribunal is invited to allow the appeal to the limited extent that the Respondent will grant the Appellant a period of leave to remain for 60 days as indicated in Khan & Others v SSHD [2018] EWCA Civ 1684 in order to be put back into the position she was in, prior to the curtailment of leave on 4 February 2015.”

The hearing

11. Ms Jaquiss confirmed that she was aware of the respondent’s position, but submitted (both orally and through her skeleton argument) that the “offer” of 60 days’ leave to remain was not an adequate remedy for the erroneous curtailment of the first appellant’s’ leave to remain in 2015. What she described as this “historic injustice” and the “delay” caused by the respondent’s actions required something more, specifically a grant of leave in line with the normal 30 months’ following a successful Article 8 appeal. She asked us to make specific findings relating to the family unit, in particular the third appellant.
12. Mr Kandola submitted that the allegation of deception had not amounted to an abuse of process and was not a “historic injustice”. He submitted that the erroneous allegation of deception had not caused prejudice to the appellants. In light of the Rule 24 response, he did accept that the erroneous allegation constituted a “compelling circumstance” such as to permit the appellants to succeed on Article 8 grounds outside the context of the relevant Rules.

Decision on error of law

13. We conclude that the judge materially erred in law by failing to take account of her finding that the first appellant had not been dishonest when considering the Article 8 claims. This failure related both to the respondent’s concession set out in Khan and

Others (as has been acknowledged by the respondent in the Rule 24 response), but also in respect of the wider Article 8 balancing exercise.

14. We therefore set the judge's decision aside.

Remaking decision

15. It was clearly appropriate for us to go on and remake the decision in these appeals for ourselves. In so doing, we have had regard to the evidence before us, although it is right to say that there is no material dispute as to the essential facts. The immigration history is as set out in paras 3-4, above. The appellants all speak perfectly good English and have been, as far as we are aware, financially independent throughout their residence in this country. They are all healthy individuals. It is likely that the first and second appellants have formed ties here over the course of time.
16. As regards the third appellant, we find that he is currently in Year 9 at school and we have no reason to doubt that he continues to do well there. It is perhaps unsurprising, and we so find, that he has established good social ties in this country since his arrival in 2013. In light of what is said in the first appellant's witness statement contained in the bundle prepared for the First-tier Tribunal hearing, we accept that the third appellant has formed solid friendships and participates in extra-curricular activities. All-told, we would assess his best interests as not only being with his parents, but also remaining in the United Kingdom.
17. There has been no challenge to the judge's conclusion that the first and second appellants would not face "very significant obstacles" to their reintegration into Indian society. Nothing has been brought to our attention which should disturb that conclusion, and we adopt it. The first and second appellants are unable to rely on any other provision of the Article 8-related Rules.
18. The third appellant is not a "qualifying child" for the purposes of section 117B(6) of the 2002 Act and paragraph 276ADE(1)(iv) of the Rules, as he has only resided in the United Kingdom for 6 years and 3 months.
19. We take into account the third appellant's best interests as a primary consideration.
20. We have specific regard to the mandatory considerations set out under section 117B of the 2002 Act. The English language and financial independence factors are of neutral effect in this case. The private lives of the appellants would in the ordinary course of events attract "little weight", as they have been in this country without leave since early 2015. However, a degree of flexibility is built into the "little weight" criterion (see para 36 of Rhuppiah [2018] UKSC 58; [2018] 1 WLR 5536).
21. In the present case, there exists a highly significant feature relevant to the appellants' private lives, accepted by the respondent as constituting a sufficiently "compelling

circumstance” to tip the balance in their favour. That feature is the respondent’s erroneous allegation of deception against the first appellant and the consequent curtailment of her previous leave to remain.

22. There is no reason for us to go behind the respondent’s concession as set out in the Rule 24 response. It is entirely in keeping with the position adopted before the Court of Appeal in Khan and Others. On this basis, we conclude that the respondent’s refusal of the appellants’ human rights claim did not strike a fair balance between their protected rights and the public interest, and that it is accordingly unlawful under section 6 of the Human Rights Act 1998. The appeals therefore fall to be allowed.
23. We add the following observations. First, whilst the Rule 24 response requested that we allow the appeal to the “limited extent” that the respondent would grant the appellants 60 days’ leave to remain, the Upper Tribunal has no power to allow any appeal to a “limited extent”: an appeal is either allowed or dismissed.
24. Second, we do not accept Ms Jaquiss’ categorisation of the respondent’s erroneous allegation of deception against the first appellant as a “historic injustice”. Unlike, for example, the situation facing former Gurkha soldiers, cases such as the present are not concerned with rights to settlement. Nor can it properly be said that the allegation involved an abuse of power or any other illegality.
25. Third, we also take issue with the description of the compelling feature in this case as one of “delay”. In truth, there was no particular delay on the respondent’s part when making the (erroneous) decision in February 2015, nor has there been any tardiness thereafter. Further, the allegation of deception was clearly not indicative of a dysfunctional or arbitrary system operated by the respondent at the material time. Thus, none of the species of delay referred to in EB (Kosovo) [2008] UKHL 41; [2008] 3 WLR 178 and relied on by Ms Jaquiss, apply here.
26. Fourth, whilst we can appreciate the appellants’ desire to be granted as long a period of leave to remain as possible, that decision is not a matter for us. We are not endorsing the respondent’s current view that 60 days is appropriate, nor do we say that a full 30 months should necessarily follow from our decision.

Anonymity

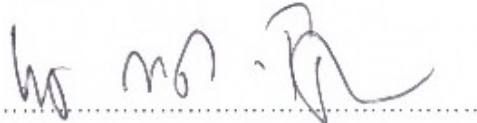
27. Although the First-tier Tribunal did not make an anonymity direction, we have concluded that one is nonetheless appropriate because of the presence of a minor child in these proceedings and the need to protect him from being identified.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We set aside the decision of the First-tier Tribunal.

We remake the decision by allowing the appeals.

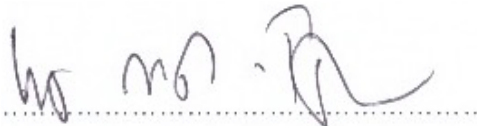


Signed
Upper Tribunal Judge Norton-Taylor

Date: 18 February 2020

TO THE RESPONDENT
FEE AWARD

As we have allowed the appeals and because a fee has been paid or is payable, we have considered making a fee award and have decided to make full fee awards of £140.00 in each appeal, making a total of £420.00.



Signed
Upper Tribunal Judge Norton-Taylor

Date: 18 February 2020