



**Upper Tribunal
(Immigration and Asylum Chamber)**
UI-2022-003750

Appeal Number:

HU/04233/2021

THE IMMIGRATION ACTS

Heard at Field House

On 3rd April 2023

**Decision & Reasons
Promulgated
On 25 July 2023**

Before

**THE HON. MR JUSTICE DOVE, PRESIDENT
MR C M G OCKELTON VICE PRESIDENT**

Between

**DEBASHIS SAHA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Zane Malik KC, instructed by City Heights Solicitors
For the Respondent: Mr Melvin, Home Office Presenting Officer

INTRODUCTION

1. This is an appeal brought against the decision of the First-tier Tribunal Immigration and Asylum Chamber (“FtT”) which was promulgated on 7th July 2022, and which related to the respondent’s refusal to grant leave to remain to the appellant on 17th November 2020. Whilst the original application made by the appellant was for indefinite leave to remain on the basis of lawful and continuous residence for 10 years, it appears that the main argument pursued by the appellant before the FtT, and certainly the argument which was pursued before us, was made on the basis that the decision of the respondent was a disproportionate interference with the appellant’s rights under article 8 of the ECHR. Whilst the original grounds of appeal identified three grounds of appeal, these were helpful distilled by Mr Malik KC into the two issues which are addressed in the decision below and which cover the points for which permission was granted.

IMMIGRATION HISTORY

2. The appellant has a lengthy and relatively complex immigration history which is as follows. The appellant arrived in the UK on 26th March 2007 with entry clearance as a student valid from 7th February 2007 until 30th April 2010. On 3rd May 2010 he made an application for further leave to remain as a student which was refused on 27th May 2010. However, following an appeal, he was granted further leave to remain as a student on 12th November 2010 until 27th September 2011. He then made a further application for leave to remain as a student on 27th September 2011 which was refused on 12th December 2011. A further appeal was lodged against that decision which met the fate of being struck out as out of time on 2nd February 2012. This led to a fresh application on 9th March 2012 leading to a grant of further leave to remain as a student on 21st June 2012 until 29th October 2013. A further application for leave to remain as a student was made on 25th October 2013 and he was granted leave until 31st December 2014.
3. On 31st December 2014 the appellant made an application for further leave to remain as a student and that application was refused on 12th June 2015 on the basis that the respondent alleged he had relied on a fraudulently obtained Test of English for International Communication (“TOEIC”) certificate. A subsequent administrative review of that decision upheld it and no right of appeal arose. The appellant commenced judicial review proceedings to challenge this decision, but those proceedings were dismissed on 26th December 2016.
4. Following these proceedings on 7th April 2017 the appellant made a claim based on human rights and in particular article 8 on 7th April 2017. That application was refused with a right of appeal on 5th October 2017. In the determination of the appeal the FtT found that contrary to the respondent’s allegation the appellant had not relied upon a fraudulently

obtained TOEIC certificate, but the FtT took the view that his removal from the UK would not be incompatible with article 8. The appellant appealed against that decision and on 13th December 2018 the Upper Tribunal Immigration and Asylum Chamber (“UTIAC”) concluded that there was no error of law in the FtT dismissal of his appeal. Permission to appeal to the Court of Appeal was refused on 5th February 2020.

5. Following this on 12th March 2020 the appellant made the application which underpins the current appeal, and which was refused on 17th November 2020 as set out above.

THE GROUNDS OF APPEAL

6. On behalf of the appellant Mr Malik identifies two issues in his skeleton argument as the two principal issues in the appeal, and as noted above these embrace all the points on which permission to appeal was granted. The first is whether the FtT’s approach to the question of historical injustice arising out of the allegation that the appellant had relied upon a fraudulent TOEIC certificate was wrong in law, including in particular that the Secretary of State’s published guidance in that respect had not been taken into account leading to an error of law. Secondly, the question is raised as to whether the FtT’s approach to a gap in the appellant’s residence between 4th January 2012 and 21st June 2012 was wrong in law. At the hearing the principal focus of Mr Malik’s submissions was on the first issue. It should further be noted that it was conceded at the hearing, as Mr Malik advised it had been conceded before the FtT, that the appellant was unable to demonstrate an entitlement to leave to remain on the basis of 10 years’ continuous lawful residence.
7. The first issue therefore in this appeal is whether or not the FtT’s approach to the question of historical injustice, and the consequential guidance on this issue provided by the respondent was wrong in law, in particular as it related to the proportionality exercise under article 8.
8. The background to this submission is the decision of the Court of Appeal in the case of *Ahsan & others v Secretary of State for the Home Department* [2017] EWCA Civ 2009. The four appellants concerned in that case had all been accused of cheating in TOEIC tests, an allegation which they denied. The Court of Appeal, having set out the well-known background to the discovery by a television programme of widespread fraud in the taking of TOEIC tests, set out an analysis of the relevant procedures by way of either appeal or judicial review for a person to challenge the Secretary of State’s assertion that they had cheated in their TOEIC test.

9. In the subsequent case of *Khan & others v the Secretary of State for the Home Department* [2018] EWCA Civ 1684, proceedings before the Court of Appeal addressed the issues as to the proper procedures for a challenge to this kind of decision arising as a consequence of legislative changes made by the Immigration Act 2014 since the case of *Ahsan* had been decided. The litigation was compromised. In substance, the respondent accepted that there would be an in-country right of appeal to the FtT in these cases on the basis that the appellant had made a human rights claim. The consent orders concluding the litigation contained the further declaration that if the appellant succeeded in that appeal on the basis that the TOEIC certificate was not fraudulent, then the respondent agreed to afford at least 60 days for the appellant to submit a further application for leave to remain and treat the appellant as having had continuous leave to remain since the date of the decision based on the allegation of TOEIC fraud. It followed from these authorities that a procedural framework was established whereby it was open to a person to challenge by way of an in-country appeal the respondent's conclusion that they had obtained a TOEIC certificate by fraud.
10. This opportunity was taken up by the appellant in the present case, as set out above. In the context of the appeal he satisfied the FtT that he had not been responsible for fraud in obtaining the TOEIC certificate upon which he had earlier relied. It is unnecessary for us to dwell upon the phrase "historical injustice" in connection with TOEIC fraud cases since the point which Mr Malik emphasises on the behalf of the appellant has in substance been addressed in casework instructions which have been issued in respect to them.
11. Mr Malik relies upon the version of the casework instructions published on 18th November 2020, having been unable to locate earlier guidance on this topic. Part of the update in the 18th November 2020 version of the casework instructions included an updated section on implementing appeal findings. It is that section which is the particular focus of Mr Malik's submissions. It addresses in particular the circumstances where following an appeal being dismissed on human rights grounds a finding is nonetheless made that the appellant did not obtain the TOEIC certificate by deception or fraud. The specific terms of the guidance are as follows:

"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."
12. Mr Malik submits that after the appellant's appeal had been dismissed, but the FtT had made a finding that he did not obtain the TOEIC certificate by

deception, the appellant was entitled to the grant of six months leave outside the rules and that this was a factor which had a bearing upon the FtT's assessment of proportionality in the current appeal. In order to evaluate that contention, it is necessary to set out the way in which the FtT addressed these issues.

13. The second issue or ground of appeal, is related to the contention that the gap in the appellant's continuous residence between 4th January 2012 and 21st June 2012 arose due to admitted negligence of his former representative to lodge his appeal in time, and as a result it was dismissed on 2nd February 2012. It is submitted that the failure of his advisor in this case was capable of qualifying the public interest in the maintenance of immigration control pursuant to the decision in *Mansur (immigration advisor's failings: article 8) Bangladesh* [2018] UKUT 274.
14. In the appellant's skeleton argument for the purpose of the hearing before the Upper Tribunal it is submitted that the conclusions of the FtT Judge ignore the fact that the appellant was granted leave to remain on 21 June 2012 in relation to the fresh application made on 9 March 2012 after the appeal was ruled to be out of time. Had an in-time appeal been lodged the appellant's leave would have been automatically extended under section 3C of the Immigration Act 1971 and he would have succeeded on the same grounds that his fresh application was made on 9th March 2012.
15. Having set out the issues raised in the appeal it is appropriate to set out the passages of the FtT Judge's determination which addressed them and which provide the basis for the appeal.

THE DECISION OF THE FtT

16. Having set out the appellant's immigration history and the factual basis upon which his appeal was brought the FtT Judge then set out the evidence which was received at the hearing of the appeal. The appellant gave evidence in relation to his family circumstances both in the UK and also in Bangladesh. He explained that he had a Master's Degree in accounting obtained in Bangladesh, and that in the UK he had completed a Post-Graduate Diploma in International Business from Gloucester University. The Judge then set out the issues that were raised in cross-examination pertaining to his return to Bangladesh.
17. The FtT Judge then addressed the issues in relation to the gap in the appellant's lawful residence in the following terms:

"31. In so far as the gap in the appellant's lawful residence between 4 January 2012 to 21 June 2012 is concerned, the skeleton argument submits that this only arose because of a failing on the part of the appellant's former representative to

lodge his notice of appeal in time. In paragraph 8 of the skeleton argument, counsel, relying on the respondent's long residence guidance, submits that the gap arose from an exceptional circumstance. Relying on the case of **Mansur (immigration advisor's failings: article 8) Bangladesh** [2018] UKUT 274, he submits that the failure to lodge the appeal in time can constitute, and should for the purpose of this appeal, constitute an exceptional circumstance so that the period of overstay is overlooked. However, I agree with the submission in paragraph 6 of the Respondent's Review that the submission is only good if it can be shown that the appeal would otherwise have met with success. The appellant's application was refused, according to the Respondent's Review, because he failed to produce a Certificate of Acceptance for Studies and evidence of maintenance funds. This has not been challenged nor has it been suggested that the appellant's appeal would have been successful if it had been admitted. Accordingly, I find that even if the appeal had been lodged in time, it is unlikely that he would have succeeded and therefore the appellant's leave to remain would have ceased as soon as his appeal rights were exhausted. Thereafter, he would have become an overstayer."

18. Having addressed the question of the gap in the appellant's lawful residence between 4th January 2012 and 21st June 2012, the Judge went on to address the issues arising in respect of the refusal based on the allegation that the TOEIC certificate had been obtained fraudulently. His decision in that connection is reasoned as follows:

"32. In relation to the overstay after 2 July 2015, the skeleton argument submits that this only arose because the appellant's application was refused by the Secretary of State who wrongly alleged that the appellant produced fraudulently obtained a TOEIC certificate. Paragraph 17 points out that it was accepted by the First-tier and Upper Tier Tribunal that this is the case. I note that the respondent also accepts this in the refusal letter. However, she points out that the appellant is unlikely to have succeeded in his appeal, even if TOEIC had not been relied on, because he failed to produce a Certificate of Acceptance for Studies. The implication being that the appellant's appeal would have gone on to be dismissed and consequently, he would have become an overstayer in any event.

33. The skeleton argument submits in paragraph 21 that even if the appeal had been dismissed, but because of the finding in favour of the appellant in relation to TOEIC, the respondent had a policy of granting six months leave to remain to enable the appellant to make a fresh application. I take that into account, however, that would have been a

decision for the respondent. It is not clear to me whether that policy was in place at the time the appellant's appeal was dismissed. If it was and the respondent failed to follow it, the appellant should have sought a remedy elsewhere.

34. The skeleton argument also relies on historical injustice, in that, because the appellant was wrongly refused, he should be put back to a place where he was before the decision:

see **Ahsan v Secretary of State** [2017] EWCA Civ 2009. Once again, that is a remedy which only the respondent can give. The absence of it does not make the appellant's stay, post July 2015 lawful, such that he was able to accrue 10 years continuously lawful residence."

19. The FtT Judge then turned to the question of the appellant's article 8 rights and concluded that having lived in the UK for 14 years he would have established a private life with which the decision to refuse him leave to remain would be an interference. The FtT Judge concluded, uncontroversially, that the key question was whether or not that interference was proportionate in all of the circumstances. The FtT Judge's conclusions were thereafter set out as follows in relation to these issues:

"38. In assessing proportionality, I bear in mind that where an appellant is unable to meet the requirements of the Immigration Rules, his circumstances would have to be exceptional to merit the grant of leave outside the Rules. Exceptional has been defined to mean refusal to grant leave resulting in unjustifiably harsh consequences.

39. Having looked at the totality of the evidence, I do not accept that the decision to refuse leave to remain to the appellant would have unduly harsh consequences either for him, his partner or their two children.

40. I take into account that the private life accrued by the appellant has been accrued whilst he has been unlawfully here for the periods noted above, but most certainly since 2 July 2015, although I have also taken into account that the Secretary of State's wrongful allegation of TOEIC wrongdoing has contributed to that. I take into account that the appellant has two minor children, whilst they may wish to remain here, their best interest lies in being with their natural parents. Undoubtedly, having been away from his home

country for 14 years, his ties with that country would have become tenuous, but he came here when he was an adult, presumably with the intention to return after completing his studies. Therefore, he must have had in mind some plan to enter the job market there in which he would have factored in his exclusion from government jobs on account of his age. The appellant admitted that he may well be able to find jobs in the private sector. The appellant and his wife both have family who should be able to assist their reintegration.

41. I have not been presented with any evidence that should cause me to find that in all the circumstances the removal of the appellant from this country will have unjustifiably harsh consequences, taking into account that immigration control is in the public interest.”

SUBMISSIONS AND CONCLUSIONS

20. In his submissions on behalf of the appellant Mr Malik relies upon the underlying principles in *Ahsan* and *Khan*. If, following a human rights appeal, it were found that the appellant (contrary to the respondent’s earlier contention) had not cheated in their TOEIC test or obtained the certificate fraudulently, then the respondent would be obliged to place that appellant in the same position as they would have been if the fraud allegation had not been made. This could include the grant of leave to remain outside the Rules, not treating the appellant as an overstayer, or disregarding any gap in the appellant’s leave caused by the false allegation. This is the principle which underpins and is reflected in the substance of the casework instructions which have been set out above.
21. Whilst Mr Malik acknowledges that in paragraph 33 of the FtT Judge’s determination reference was made to this policy, and the grant of six months leave to remain to enable the appellant to make a fresh application, Mr Malik’s submission is that the FtT Judge was wrong to conclude that any failure to follow that policy should have been pursued by an attempt to obtain an alternative remedy elsewhere. Furthermore, the FtT Judge was wrong to suggest that it was only the respondent who could give a remedy which would place the appellant back into a situation which would have pertained prior to the decision. It was untenable for the FtT Judge to treat any breach of this policy guidance as a matter which only the respondent could redress, or the appellant could challenge by way of judicial review. Given the policy was issued on 18th November 2020 and was therefore in place at the time when the respondent’s decision was

made on 20th November 2020 the FtT Judge ought to have taken this into account when assessing proportionality.

22. Having considered the appellant's contentions we have formed the view that there are significant difficulties with the appellant's case on this issue. Firstly, it is important to observe that the paragraphs which are in particular focused upon by Mr Malik in his submissions, namely, paragraphs 33 and 34 of the FtT Judge's determination, are located in the section of the judge's reasoning addressing whether the appellant could demonstrate 10 years' continuous lawful residence, and the arguments which were being raised in respect of the period of overstaying after 2nd July 2015. The conclusion which the judge was drawing in those paragraphs was that the existence of the policy, and the arguments in relation to historic injustice based upon the false accusation of fraud, were incapable of making the difference in relation to the question of whether or not the appellant had accrued 10 years continuous lawful residence. Furthermore, as the FtT Judge observed in paragraph 32, adopting the argument presented by the respondent, the appellant's overstaying after 2nd July 2015 was not exclusively because of the allegation of fraud in relation to the TOEIC certificate but also on the basis that he had failed to produce a Certificate of Acceptance for Studies, and therefore his appeal was bound to have been dismissed. These points were all relevant to the question of whether or not 10 years continuous lawful residence could be demonstrated, a contention which as has been noted above the appellant does not pursue in the context of this appeal.

23. The submissions which are advanced in the appeal relate to the article 8 determination reached by the FtT Judge, and the contention that the Judge erred in law in failing to take account of the existence of the policy set out above in assessing proportionality in this case. We note that in paragraph 40 of the determination the FtT Judge did take into account that there had been a wrongful allegation in relation to the TOEIC which had contributed to the period which the appellant had been in the UK accruing a private life protected by article 8. There is no specific reference to the policy, and taking the appellant's case at its height, that may be because the FtT Judge had formed the view that the appellant ought to have sought a remedy by way of judicial review in relation to any failure to follow and apply that policy and that it was for the respondent to provide the remedy in respect of this. Even taking account of this point we remain satisfied that the reasons in paragraph 40 of the FtT Judge's decision are sufficient to indicate that the FtT Judge did take into account all of the issues related to the wrongful allegation of fraud in striking the proportionality balance. The means by which it may have been open to the appellant to find relief is purely peripheral in circumstances in which the FtT Judge has in fact taken into account "that the Secretary of State's wrongful allegation of TOEIC wrongdoing has contributed to" his overstaying.

24. However, even were we wrong about that, and the FtT Judge erred in failing to take account of the policy set out above as a material consideration, we do not consider that this omission would have any decisive bearing on the substance of the decision in this case. When the question of the materiality of the policy was looked into, the essence of the appellant's case was that the policy entitled the appellant to the grant of six months leave outside the rules on 5th February 2020 when the Court of Appeal finally dismissed the appeal within which he had demonstrated that the TOEIC had not been obtained by fraud. The submission was then made that the grant of six months leave would have afforded the opportunity for him to make other kinds of application as a person who had the benefit of leave to remain albeit for a limited period. He could, for instance, have made an application to remain as a student or a family member.
25. The difficulty for the appellant in advancing that submission is, firstly, that there was no evidence before the FtT Judge in respect of any intention to have made any such application and, moreover, any such suggestion of an intended application would have been entirely speculative as to its merits. When considering, therefore, what weight or materiality the policy may have had in the factual circumstances of this case it can be seen that it is of very little moment at all, and certainly not a factor having any significant bearing upon the assessment of proportionality. It is clear that the purpose of the policy is for the additional leave to be granted outside the rules to provide an opportunity for some other application to be made which might justify the grant of further leave. On the evidence that was before the FtT Judge no other basis upon which the appellant might qualify under the rules was advanced beyond the original basis of the application which had been abandoned. Thus, even were it to be conceded that the existence of the policy ought to have been more specifically identified as part of the proportionality assessment it would not have amounted to a consideration of any material weight so as to justify a difference conclusion to the one which the Judge reached. For all of these reasons we have reached the conclusion that this first ground of the appeal must be dismissed.
26. The second ground of appeal, as set out above, is related to the contention that the gap in the appellant's continuous residence between 4th January 2012 and 21st June 2012 arose as a result of the failure of his former representative to lodge his appeal in time, and its subsequent dismissal as out of time on 2nd February 2012. It is submitted that the negligence of his advisor in this case was capable of qualifying the public interest in the maintenance of immigration control pursuant to the decision in *Mansur (immigration advisor's failings: article 8) Bangladesh* [2018] UKUT 274.

27. As set out above, it is submitted that the conclusions of the FtT Judge ignore the fact that the appellant was granted leave to remain on 21 June 2012 in relation to the fresh application made on 9 March 2012. Had an in-time appeal been lodged the appellant's leave would have been automatically extended under section 3C of the Immigration Act 1971 and he would have succeeded on the same grounds that his fresh application was made on 9th March 2012. In our view the difficulty with this argument is that, as pointed out in the respondent's Rule 24 statement, there is no evidence to gainsay the findings of the FtT judge set out in paragraph 31 of the determination that the appeal which was lodged out of time would not have been successful as the result of the appellant's failure to produce a Certificate of Acceptance for Studies and evidence of maintenance funds. In the light of that finding it is necessary to show why reaching that conclusion amounted to an error of law, and the appellant has failed to do so. There is nothing in the material before us to suggest that this finding was not properly open to the FtT Judge. The assertion made by the appellant is insufficient to persuade us that any error of law of the kind suggested was made by the FtT Judge. It follows that the second ground of appeal must be dismissed.
28. It follows that for all of the reasons set out above this appeal must be dismissed.

Notice of Decision

The appeal is dismissed.

Signed Ian Dove

Date 24th July 2023

The Hon. Mr Justice Dove
President of the Upper Tribunal
Immigration and Asylum Chamber