IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003971

First-tier Tribunal No:
HU/50014/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 5th of December 2023

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

HANGMA TAWA LIMBU
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Ahmed of Counsel, instructed on a direct access basis
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Heard at Field House on 23 October 2023

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no technical difficulties for the hearing itself and the papers were all available electronically.

2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Cotton dated 8 August 2023 in which the Appellant's appeal against the decision to refuse his human rights claim dated 29 December 2022 was dismissed.

3. The Appellant is a national of Nepal, born on 11 April 1999, who first entered the United Kingdom on 14 May 2011 with entry clearance as a Tier 4 (General) Student valid to 30 October 2013. Her leave to remain was curtailed on 21 April 2012 to expire on 20 June 2012 as her college's licene had been revoked. A fresh application for leave to remain as a student was made on 18 June 2012 with

leave to remain granted to 27 November 2014. On 7 February 2013, the Appellant's leave to remain was again curtailed to expire on 8 April 2013 as her college's licence was revoked. A fresh application was again made on 12 April 2013, with leave to remain as a student granted to 19 March 2016.

4. The Appellant's leave to remain was curtailed on 27 January 2015 to expire on 31 March 2015 on the basis that the Appellant had been expelled from her course because she had fraudulently obtained an ETS/TOIEC English language test certificate.

5. On 24 March 2015, the Appellant sought leave to remain on human rights grounds, which was refused and certified as clearly unfounded on 27 May 2015. The Appellant made further representations on human rights grounds on 12 October 2015, which were refused and not accepted as a fresh claim under paragraph 353 of the Immigration Rules. The Appellant was detained and served with a removal notice on 26 April 2017, further to which she made further submissions the same day and released from detention the following day. The Respondent refused to treat those further representations as a fresh claim on 9 May 2017.

6. On 30 January 2018, the Appellant applied for leave to remain as the dependent child of a Ghurka, which was refused on 16 July 2019. The Appellant's appeal was dismissed by the First-tier Tribunal on 26 November 2019 and the Appellant was appeal rights exhausted on 7 September 2020.

7. The most recent application was made on 24 May 2021 for leave to remain on family and private life grouds, it is the refusal of that application which is the subject of this appeal.

8. The Respondent refused the application, first on the basis that the Appellant did not meet the requirements of paragraph 276B of the Immigration Rules as she did not have ten years' continuous lawful residence. The Appellant's last period of leave to remain having ended on 27 May 2015 and following which she remained in the United Kingdom unlawfully. The Respondent considered the Appellant's claim that there was a historic injustice in the curtailment of her leave to remain on 27 January 2015 such that she should be treated as a person with leave to remain throughout her time in the United Kingdom. This was rejected on the basis that even putting the Appellant back in the position without the curtailment, her leave to remain would have expired on 19 March 2016 and her further applications since that date have been refused for reasons not connected to her ETS test, specifically the decisions on 24 March 2015, 12 October 201 and 26 April 2017. It was noted that the Appellant's previous appeal found that she did not use deception in her ETS certificate but the appeal was nevertheless dismissed on other grounds. Overall the Appellant was not treated as having had lawful residence since 31 March 2015 when her previous leave to remain was curtailed.

9. The Respondent refused the Appellant's claim under Appendix FM of the Immigration Rules on the basis that she did not have any of the qualifying family relationships. In respect of private life, the application was refused under paragraph 276ADE of the Immigration Rules as there would be no very significant obstacles to her reintegration in Nepal. There were no exceptional circumstances to warrant a grant of leave to remain outside of the Immigration Rules.

10. Judge Cotton dismissed the appeal in a decision dated 8 August 2023 on all grounds. The Judge considered the application of the principles in *Devaseelan* and also the decision in Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009, finding that:

> *"26. The appellant's case is that **Ahsan** guides this tribunal to put the appellant in no worse position than had she not been wrongly accused of fraud. Having considered the judgment in that case, and in particular the parts that I have been referred to in submissions, I find that this is not what the Court of Appeal decided. The Court was considering when the Upper Tribunal might refuse to hear a Judicial Review of a case and the case instead be considered in the FtT as a Human Rights claim. Although the appellant submitted that she should be put in no worse position than had the fraud not been alleged against her, I do not consider myself required to seek to achieve any remedy other than a finding on whether the Imigration Rules are met, or the removal of the appellant would improperly interfere with her Human Rights."*

11. On that basis, the First-tier Tribunal found that the Appellant had not had ten years' continuous lawful residence in the United Kingdom and there was no such concept of 'quasi-lawful' leave following an improper curtailment of her previous leave to remain and in any event, she had not yet accrued 10 years' lawful residence. The Judge did not consider that he could speculate what would have happened if the earlier period of leave had expired as originally granted, which would require a finding that further leave to remain would have been sought, the basis for any such application and whether it would have been granted.

12. In relation to the Appellant's right to respect for private and family life, in essence the First-tier Tribunal found that the situation was not materially different to that at the time of the previous appeal which was dismissed in 2019; that the Appellant did not meet the requirements of paragraph 276ADE of the Immigration Rules and her removal would not be a disproportionate interference with her Article 8 rights.

The appeal

13. The Appellant appeals on four grounds as follows. First, that the First-tier Tribunal erred in law in failing to apply the Respondent's published policy following the decision in Ahsan to the facts of this case and that but for the false allegation of deception, the Appellant's leave would have continued and she would have made further successful application(s). Secondly, that the First-tier Tribunal erred in law in considering a need to speculate on future applications given that a number were made and all refused on suitability grounds. Thirdly, that the First-tier Tribunal erred in its assessment of proportionality for the purposes of Article 8 by failing to consider the Appellant's time in the United Kingdom and delay in the process. Finally, the First-tier Tribunal erred in law as to its application of the principles in *Devaseelan* with respect to the earlier Tribunal decision as there was a failure to take into account the Respondent's policy and decision in Ahsan.

14. In a rule 24 response, the Respondent opposed the appeal noting that there was no evidence that the Appellant had made in-time applications for leave to remain and nor was she subsequently granted any period of leave. Even if her overstaying was disregarded, she did not have any lawful leave to remain for continuous residence purposes.

15. At the oral hearing, Mr Ahmed made submissions in support of the grounds of appeal. In particular, he submitted that the First-tier Tribunal had failed to engage at all with the Respondent's policy relied upon to deal with the historic injustice in this case (the Educational Testing Service (ETS): casework instructions), version 4 published on 18 November 2020 – the "ETS instructions"), albeit no specific paragraphs were identified as relevant nor relied upon before the First-tier Tribunal. Mr Ahmed submittd that the Appellant had been deprived of the opportunity to make further applications after her leave to remain had been curtailed as all had been refused on suitability grounds, although those decisions were not available in the bundle for this appeal. If her leave to remain had not been curtailed, she may have been able to make further applications for leave to remain as a student rather than being restricted to human rights applications and would have had the benefit of leave to remain, affecting the weight to be attached to her private life under section 117B of the Nationality, Immigration and Asylum Act 2002.

16. In any event, it was submitted that the false allegation of deception in the past affected the public interest when considering proportionality and therefore the lack of consideration as part of this exercise led ot a flawed assessment.

17. On behalf of the Respondent, Ms Everett relied on the rule 24 response and submitted that there were no material errors of law in the First-tier Tribunal decision, who were right to find that this was a weak Article 8 claim and that there would be no disproportionate interference.

18. Ms Everett considered whether the Appellant had in any way been disadvantaged by the Respondent's apparent failure to apply the ETS instructions or that some how this affected the public interest but submitted that she had not because three further applications were made and refused for reasons not connected to the ETS certificate. It would be pure speculation as to whether without the curtailment the Appellant could or would have made any different application for leave to remain or led to any successful application. Whilst it is noted that the Appellant has not at any time been granted leave to remain under the ETS instructions at any point, it was submitted that this does not matter as it would not have been of any benefit given the substantive consideration given to her claims. In these circumstances, there was no error of law in the First-tier Tribunal's assessment of Article 8.

19. In reply Mr Ahmed submitted that the whole point of the ETS instructions was to grant a period of leave which would have been of benefit to the Appellant.

Findings and reasons

20. The grounds of appeal are in essence all on the same theme as to whether the First-tier Tribunal correctly took into account the previous finding that the Appellant did not cheat in her English language test such that her leave to remain should not have been curtailed for this reason on 27 January 2015, which included its approach to the application of Ahsan and ultimately its consideration of these issues when considering the proportionality balancing exercise for the purposes of Article 8 of the European Convention on Human Rights. It is in this case helpful to set out first how the Appellant's case was presented to the First-tier Tribunal when considering the decision.

21. In the first skeleton argument before the First-tier Tribunal, it was submitted on behalf of the Appellant that the refusal of her long residency application was

unreasonable and unfair as the core reason for why her leave was curtailed (to 31 March 2015) was due to the mistake of the Home Office in finding that she had obtained her TOIEC certificate by fraud. That decision had been overturned but she had already had her leave curtailed, her 10 years' residency had been broken. The Appellant relied on a partial quote from paragraph 116 of Ahsan as authority for the proposition that the Appellant should be in no worse position had the deception decision not been made against the Appellant and the section 10 decision deprived the Appellant from being able to continue her studies. Overall to place the Appellant in the position that she would have been, her residency up to May 2021 should have been considered to be lawful and continuous.

22. Further submissions were set out both in relation to private and family life under the rules and in accordance with Article 8 of the European Convention on Human Rights. In relation to the public interest for the proportionality balancing exercise, it was submitted that there was no public interest in her removal (without any specific reasons being given) and her removal would be disproportionate taking into account her ties, age and duration of time in the United Kingdom.

23. In a supplementary skeleton argument, the Appellant places further reliance on the case of Ahsan in that the curtailment decision was unlawful because it did not afford the Appellant an in-country right of appeal on the allegation of deception; such that within the prism of Article 8, she benefited from quasi lawful leave, despite the curtailment. Specific reference was made to paragraph 86 in Ahsan, which concerned the issue of whether Article 8 is engaged for a student part way through a course and then a slightly fuller, but still incomplete, quote from paragraph 116 is set out.

24. The Appellant went on to reiterate that the curtailment decision deprived the Appellant from being able to continue her studies and was unfair. Specifically, it was stated that the Respondent had failed to correctly address the ETS Casework Instructions published on 18 November 2020 (albeit not produced before the First-tier Tribunal). The purpose of those instructions was to ensure that historic injustice was corrected and the consequence of allowing the appeal under Article 8 would afford the Appellant leave to engage in further studies. In relation to the public interest for the proportionality balancing exercise, it was submitted that there was no public interest in removing the Appellant because she has been present, in the main, lawfully; the curtailment decision should not have been made without a right of appeal; the Appellant has not been a burden on the state; she has been treated grossly unfairly by the Respondent; the decision in Ahsan has not been taken into account and the Appellant's position in Nepal is precarious.

25. The First-tier Tribunal considers these points in paragraph 23 and 26 of the decision (set out above) and rejects the Appellant's proposition on the basis of Ahsan.

26. In full, paragraph 116 of Ahsan states as follows:

"116. Of course, as already established, the direct route to the FTT by way of an old-style appeal against the section 10 decision itself would not provide an effective remedy in these cases, because it is out-of-country. The question before us is whether a different route to the FTT (in-country), via a human rights appeal, constitutes an appropriate available remedy. In my judgment, it may do, if but only if all of the following conditions are satisfied:

(A) It must be clear that on such an appeal the FTT will determine whether the appellant used deception as alleged in the section 10 notice.

(B) It must be clear that if the finding of deception is overturned the appellant will, as a matter of substance, be in no worse position than if the section 10 decision had been quashed in judicial review proceedings.

(C) The position at the date of the permission decision must be either that a human rights claim has been refused (but not certified), so that the applicant is in a position to mount an immediate human rights appeal, or that the applicant has failed to accept an offer from the Secretary of State to decide a human rights claim promptly so that a human rights appeal would become available.

If those conditions are satisfied, the UT would in my view normally be entitled to refuse permission to apply for judicial review – though it is impossible to predict the idiosyncrasies of particular cases, and I should not be regarded as laying down a hard-and-fast rule. I should say something more about each of the conditions."

27. The context of the decision as a whole was in essence as to whether an application for Judicial Review was the appropriate remedy against a finding of deception and specifically a section 10 decision to remove a person from the United Kingdom (in the case of three of the Appellants). It is unclear from the papers in the present appeal as to whether the Appellant has been served with a section 10 decision and if so when, in particular whether this was in the pre-2014 regime as was considered in Ahsan. The specific detail in paragraph 116 was in the context of the view that all things being equal, the First-tier Tribunal would be the most appropriate forum for considering an ellegation of deception rather than in an application for Judicial Review and the specific question was whether a statutory appeal would be an appropriate alternative remedy to an application for Judicial Review. The three factors set out are the conditions to be satisfied to make a statutory appeal to the First-tier Tribunal an appropriate alternative remedy such that permission to apply for Judicial Review could be refused. They are not, as submitted on behalf of the Appellant, any wider proposition for placing an person back in the position that they were in but for an incorrect deception decision. The reference in condition (B) to the application being in no worse position is purely a reference to whether there would be differential consequences to them of being successful in a statutory appeal being allowed on human rights grounds compared to a successful application for Judicial Review quashing a section 10 decision. It is a procedural, not substantive historic injustice point.

28. There is some further comment in Ahsan at paragraph 120 in the context of condition (B) as to what the Respondent would be obliged to do if an individual were found not to have cheated in their English language test, as follows:

"*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 mae, 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 ot reconstruct the world as it would dhave been; but that problem would arise even if the decision were quashed on judicial review.) …"

29. There was however no specific reliance on this particular part of the decision on behalf of the Appellant either before the First-tier Tribunal or in the Upper Tribunal and for the reasons to which I come below, still would not have assisted the Appellant in this appeal in any event. In all of these circumstances, the First-tier Tribunal entirely lawfully considered and applied Ahsan, it not being authority for the proposition relied on by the Appellant that it required her to be put in the positon she would have been but for the curtailment of her leave on deception grounds.

30. The Appellant places separate reliance on the ETS instructions in support of this point on the basis that they were in place to deal with the historic injustice of deception decisions which were wrongly made. At the outset, the ETS instructions stated that they are to provide *"guidance on how to manage cases affected by the Educational Testing Service (ETS) English language issues …".* Their stated purpose was to give effect to a Written Ministerial Statement made on 23 July 2019, to (a) balance 'a belief that deception was committed some years ago against other factors that would notmally lead to leave being granted, particularly where children are involved; and (b) to update operational guidance to ensure no further action is taken where there is no evidence an ETS certificate was used in an immigration application. There is nothing on the face of the instructions to support the Appellant's submissions on their purpose and it is telling that Mr Ahmed was unable to identify any specific paragraph to support the Appellant's case. The ETS instructions were not even made available to the First-tier Tribunal in the papers before it, nor to the Upper Tribunal and were instead only referred to in fairly vague terms.

31. I have in any event considered the ETS casework instructions. The only possible relevant section is the second to last one which deals with implementing appeal findings, which, so far as relevant to the present appeal states:

"If the appeal is dismissed on human rights grounds but a finding is made by the Tribunal that the appellant did not obtain the TOIEC 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 leave the UK."

32. This section is however perhaps more directly relevant to the Respondent's action, or in this case, inaction following the previous Tribunal decision in 2019. It is at least arguable that following that previous decision, the Respondent should have granted the Appellant a period of six months leave to remain outside of the Immigration Rules to allow her to make a further application or leave the United Kingdom. There is no suggestion that this happened, nor that the Appellant at the time raised the issue with the Respondent or made any challenge to her failure to follow this part of the ETS casework instructions. There was then no specific reliance on this section before the First-tier Tribunal in the present appeal

and no submissions before me as to any specific impact of this on the First-tier Tribunal's decision beyond the simple statement in the grounds of appeal that the Respondent had failed to follow it in the context of the latest decision subject to the appeal and a simple assertion of historic injustice.

33. The reliance on Ahsan is in essence a red herring in this appeal as it is misplaced, the issues raised are more akin to a more general claim of historic (or more accurately historical) injustice as in Ahmed (historical injustice explained) [2023] UKUT 00165 which sets out how, in specific circumstances, the events of the past in relation to a particular person's immigration history history may need to be taken into account in weighing the public interest for the proportionality balancing exercise for the purposes of Article 8. This could potentially include the curtailment decision and the failure to grant leave in accordance with the ETS Casework Instructions. Although Ahmed is not directly cited or relied upon by the First-tier Tribunal, the approach is in substance precisely the one taken by the First-tier Tribunal in the present appeal to consider first whether the Immigration Rules were met and then whether the removal of the Appellant would be a disproportionate interference with her right to respect for private and family life. In particular, it is relevant to establish that a person has suffered as a result of an incorrect decision and to consider whether they could have challenged an earlier decision or taken steps to mitigate the claimed prejudice.

34. In paragraph 28 of the First-tier Tribunal decision, the Judge noted that to conclude that the Appellant had ten years' continuous lawful residence in the United Kingdom, he would not only have to treat the allegation of fraud as it if didn't happen (such that the Appellant's leave to remain would have expired on 19 March 2016 as per the original grant) but also make findings that she would have applied for further leave to remain, the basis of any such leave and that the Respondent would have granted further period(s) of leave to remain up to May 2021 to total ten years' continuous residence. There was nothing unlawful in the Judge considering the totality of that to be too speculative.

35. Although there was at that point in the decision no reference to the applications that the Appellant did make since 24 March 2015; the refusal of those on 27 May 2015, 3 September 2016 and 9 May 2017 were not on the grounds of deception but were substantive refusals of human rights claims (not dependent on any extant leave to remain at the date of application). There is no evidential basis for Mr Ahmed's assertion, contrary to the Respondent's reasons for refusal letter, that these were all refused on grounds of deception and no copy of any of the decisions was before the First-tier Tribunal, nor relied upon in the Upper Tribunal. In these circumstances, it would not even be speculation that the Appellant could have continued to be granted successive periods of leave to remain, on the facts, she was not, for reasons other than deception. In these circumstances, even at its highest, if the Appellant were to be placed back in the position that she was when her leave was wrongly curtailed, her leave to remain would have expired on 19 March 2016 and she would still currently be an overstayer and would not have accrued ten years' continuous lawful residence. It is also notable that there is was no evidence before the First-tier Tribunal of any challenge to the curtailment decision, or the following three refusals, which would have been open to the Appellant even if only by way of Judicial Review.

36. The only possible historical injustice that could be identified is that the Respondent failed to grant six months' leave to remain following the previous Tribunal decision in 2019. However, I do not consider that that would have made

any material difference to the assessment of the current application made considerably after that appeal which again was not refused on the basis that the Appellant did not have any extant leave to remain and a short additional period of lawful leave would not have materially affected the weight to be attached to the Appellant's private or family life under section 117B of the Nationality, Immigration and Asylum Act 2002. In any event, this could not be an error of law by the First-tier Tribunal given that it was not specifically relied upon before the First-tier Tribunal nor does it specifically feature in the grounds of appeal. I deal with the point here as a matter of fairness and completeness given it was canvassed at the oral hearing when I raised it.

37. The remaining issue from the grounds of appeal is therefore whether the First-tier Tribunal erred in law in its assessment of proportionality for the purposes of Article 8, encompassing whether the principles in *Devaseelan* were wrongly applied. First, on the latter point, the previous Tribunal could not possibly have erred in failing to take into account the ETS Caswork Instructions as the hearing and decision predated their publication by over a year. Secondly, there was no failure of the First-tier Tribunal to take into account any matters raised in Ahsan, its task was to consider on the facts whether the Appellant had used deception in her English language test, which it did and found in the Appellant's favour. There is no basis for the submission that this decision was not therefore the appropriate starting point in accordance with the principles in *Devaseelan* or that it was somehow undermined by a lack of specific consideration of casework instructions not yet in place or a decision as to the availability of an alternative remedy in an application for Judicial Review. Relevant to this appeal, the First-tier Tribunal made detailed findings as to the Appellant's private and family life, including adverse credibility findings and found that her removal would not breach Article 8.

38. In paragraph 30 onwards, the First-tier Tribunal in the present appeal considers whether the Appellant can meet the requirements of paragraph 276ADE of the Immigration Rules and then Article 8 more broadly. The evidence was not materially different to that before the previous Tribunal (save for the claim of no family support now which was treated with the greatest circumspection) and there was no reason to depart from the earlier findings. The First-tier Tibunal did not err in this approach.

39. In any event, the First-tier Tribunal undertook a proproportionality balancing exercise in paragraph 38 of the decision and took into account the factors in section 117B of the Nationality, Immigration and Asylum Act 2002. The Judge identifies the need to maintain effective immigration control as a matter in the public interest and none of the past matters detract from that. It can not be rationally said that there is no public interest in this case, even taking in to account the erroneous deception decision in 2015 given that the Appellant still does not meet any of the requirements for a grant of leave to remain under the Immigration Rules (and has not in multiple previous applications). Even if the Appellant had had leave to remain until 19 March 2016 rather than 31 March 2015 and even if she also had a period of six months' leave to remain following the previous Tribunal decision in 2019; that would not materially affect the fact that her immigration status has been precarious throughout her stay in the United Kingdom such that little weight would be given to her private life. The other factors are neutral. The Appellant's Article 8 claim was on any objective view a weak one which would inevitably have been dismissed.

40. For all of these reasons, there is no error of law in the First-tier Tribunal's decision.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

2nd December 2023