



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001307

First-tier Tribunal Nos: HU/53780/2023
LH/06823/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 18th of June 2024

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

Md Mydur Rahman Khan
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr M Biggs, Counsel, instructed by Ascentim Legal Solicitors
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 28 May 2024

DECISION AND REASONS

Background

1. The appellant appeals against the decision of a Judge of the First-tier Tribunal, Judge Symes, dated 26th February 2024, in which the Judge dismissed the appellant's appeal against the respondent's refusal of leave to remain, on human rights grounds. We pause to observe that this is not an application for judicial review. We say this because at the conclusion of his judgment, the Judge refers to his conclusion (§27) that the respondent's decision to grant the appellant leave of only six months was a proportionate response to his situation and so the appellant's appeal failed. A challenge to the length of a grant of residence, as opposed to a refusal of a human rights claim, would not generate a statutory right of appeal. However, as the Judge makes clear in §1 of his judgment, he was considering a refusal on 2nd March 2023 of the appellant's human rights claim.

2. The sole basis on which the appellant's subsequent application for permission to appeal has been granted relates to a factual error contained in passages of the judgment, where the Judge had recorded that the immigration history supplied by the respondent set out that the appellant arrived in the UK on 15th September 2013, with leave to remain as a student.

The agreed mistake of fact

3. The parties agreed that the Judge's references at §§2 and 16 to the appellant's arrival in 2013 were incorrect, as he had entered the UK on 15th September 2009, (albeit he was absent from the UK from 11th July 2013 to 14th August 2013).

The remainder of the Judge's reasons

4. The Judge also recorded at §2 that the appellant was unable to find an alternative sponsoring college in 2014, when his leave was curtailed, because at this time, the respondent alleged that he had committed an English language test ('TOEIC') fraud. We conclude that this must be a record of the appellant's case, rather than the Judge making a finding or noting an agreed immigration history, as the respondent made clear in its review, before the hearing in front of the Judge, that it did not make any allegation of fraud until the appellant's later asylum claim in 2018, which the respondent refused on 7th August 2019.
5. The Judge also referred at §2 to an earlier Tribunal decision, that of Judge Cox, promulgated on 4th November 2019, in which she dismissed his protection and human rights claims. She made significant adverse credibility findings against the appellant in relation to the protection claim and also found that the immigration decision refusing leave to remain was not disproportionate in relation to his right to respect for his private and family life. However, Judge Cox found that the respondent had not proven its allegation that the appellant had used deception when taking his TOEIC test.
6. Following Judge Cox's decision, on 18th September 2020, the appellant had applied for leave to remain on private and family life grounds. The respondent granted him limited leave for a six month period from 4th March until 4th September 2022. During that time, he left the UK to return to his country of origin, Bangladesh; got married; and then returned to the UK. During the period of his marriage and brief visit to Bangladesh, his wife became pregnant and has since given birth to their child, in Bangladesh. That was the context of his further application for leave to remain on long residence grounds on 4th September 2022, namely that he wished his wife to join him in the UK.
7. At §3, the Judge recorded that the appellant's application for leave to remain on long residence grounds was rejected because, even though he had not used deception, he had no lawful leave to remain in the period from 27th May 2014, when his sponsoring college had reported that he had stopped studying and his leave was curtailed as a result; until his later asylum application, as a result of which he was granted temporary admission, 8th September 2018. The respondent had not accepted that the appellant's lack of immigration status was caused by the TOEIC allegation, because the respondent had not made that allegation until the appellant's 2018 asylum claim. The respondent also did not accept that the appellant would face very significant obstacles to integration in Bangladesh, given that he had spent his formative years there (he was born in March 1985 and entered the UK in 2009, aged 24).

8. The Judge's decision and the earlier decision of Judge Cox do not record the outcome of the appellant's studies between 2009 (with a visa which was initially valid until 30th April 2013) and the curtailment of his renewed student visa in 2014.
9. Having set out the appellant's immigration history and the respondent's decision, the Judge recorded the issues on appeal, at §10, as follows:
 - “(a) Has the Appellant established private life in the UK with which the Respondent's actions have materially interfered?
 - (b) If so, were the Respondent's actions in accordance with the law?
 - (c) If they were in accordance with the law, were they proportionate?”
10. At §11, the Judge considered the authority of Ahsan v SSHD [2017] EWCA Civ 2009, as authority for the proposition that if, on a human rights appeal, an appellant had been found not to have cheated, which inevitably meant that a 'Section 10' decision (that is, an administrative removal decision under section 10 of the Immigration and Asylum Act 1999) on the basis that they used deception, had been wrong, then the respondent would be obliged to deal with him so far as possible, as if that error had not been made. This could be achieved through granting leave equivalent to that invalidated by enforcement proceedings or exercising discretion to grant leave outside the Rules, which should be exercised flexibly to respond to the circumstances of any case. We pause to observe that it is not suggested that the respondent issued a "Section 10" decision in respect of the appellant. The Judge went on to state:
 - “12. The Appellant's case on this appeal is essentially that the grant of six months' leave to remain in March 2022 (understood to be pursuant to the Respondent's policy to seek to restore persons wrongly accused of English language fraud to their former position) was insufficient to remedy the unfairness that he suffered due to the wrongful allegation made against him. Whilst he might not have been informed of any such allegation expressly before he made his asylum claim, the Respondent would either have been disclosing those suspicions to any potential Sponsor thus undermining his attempts to secure a new place of study, or the general climate was such, due to the pall of suspicion which hung over anyone who had taken a TOEIC language test, that any potential sponsoring college would be discouraged from offering a study place to this cohort for fear of losing their own Sponsor licence. His treatment amounted to a historical injustice, in the light of Judge Cox's rejection of English language fraud, and the consequence was that the requirement for him to leave the UK was either not in accordance with the law (because it failed to make good the injustice as required by Ahsan) or disproportionate to his private life established here (as the public interest in enforcing immigration control was substantially diminished by the historical injustice which significantly contributed towards the Appellant's inability to regularise his immigration status sooner).”
11. The Judge cited the relevant passage of Ahmed (historical injustice explained) [2023] UKUT 00165 (IAC) which discussed the concept of 'historical injustice'. A party needed to show the respondent's wrongful operation of an immigration

function, and also that he or she suffered as a result. If, absent a good reason, an appellant could have challenged an error earlier, this would need to be taken into account in assessing the weight of the public interest in the maintenance of effective immigration control.

12. At §14, the Judge accepted the general proposition made by Mr Biggs, who appeared below, that there “may well be cases” where the respondent’s allegation of a TOEIC fraud, subsequently shown to have been unfounded on appeal, had frustrated the acquisition of a decade of lawful residence in the UK, which amounted to an historical injustice and that it might be disproportionate to fail to recognise that a grant of settlement (ie. permanent residence) was appropriate. The Judge recognised that the type of grant of leave to remain was a matter for the respondent, but a judge’s reasons for upholding a human rights appeal could indicate a “range of legitimate responses”.
13. The Judge went on to make relevant findings of fact, beginning at §15. He noted that there was no reason to depart from Judge Cox’s unchallenged finding that the respondent had not proven the allegation of TOEIC fraud. The appellant had provided evidence, via diary entries, that he had sought to enrol at four different colleges in 2014, but was unable to do so. At §16, the Judge repeated the mistake of fact that the appellant had entered the UK in September 2013.
14. It is necessary for us to repeat the Judge’s findings at §17 to 27, to explain whether the mistake of fact was material:

“17. This is not a case where the Appellant's problems originally arose from an English language fraud allegation: there was some other factor involved in his loss of a Sponsor. Ms Keates did not dispute the fact that this was for reasons beyond his control, and given she did not challenge his evidence that he received a 60-day letter from the Respondent, that can only be because he was not seen as complicit in whatever issues arose regarding the loss of that Sponsor. However this does make the causative link between the Respondent’s allegation and the Appellant's subsequent overstaying less strong.

18. The question arises as to the reasons that the various colleges refused to admit the Appellant to study there: he had previously satisfied one college to give him a place, indicating that his qualifications were adequate for at least his original course of study. I do not believe that the Respondent informed any of those colleges of the suspicions held against him, simply because as I understand things, the Home Office would not be involved in the consideration process at that stage (only being contacted by a putative Sponsor upon an immigration application being made); and the sixty day letter is intended to facilitate, not obstruct, the making of applications.

19. I do however accept that from the beginning of the English language fraud crisis, which was under way by early 2014, the environment for students bearing TOEIC certificates (and unable to take an alternative English language test because they lacked immigration status or were unable to book an alternative test within their remaining leave) would be difficult; the term “toxic” has been used in some quarters to summarise the likely perception of them by sponsors at the time. Sponsor institutions are rigorously policed by UKVI on the basis that

they are effectively administering immigration control measures and that UKVI will apply a light trigger to taking enforcement action; the extensive case law (eg London St. Andrews College [2014] EWHC 4328 (Admin)) on Sponsor licence revocations shows as much. So reticence in taking on someone in the Appellant's position in 2014 would be wholly understandable.

20. I therefore accept on balance of probabilities the Appellant's possession of a TOEIC certificate as the only means by which he could establish his English language proficiency was the reason that a series of colleges refused to offer him a place. Accordingly the immigration environment within which the Appellant found himself did put him in a more difficult position than he would otherwise have been in.
21. The next question is whether the Secretary of State's grant of six months leave to remain complies with the obligation identified in Ahsan: ie to deal with him thereafter so far as possible as if that error had not been made, as if his leave to remain had not been invalidated.
22. That question falls to be determined in the context of the Appellant's right to private life. I accept that he has established private life via his lengthy residence in the UK. he has provided scant details of his life here, and he has married a woman resident in Bangladesh, but I nevertheless accept that his long period of residence here is likely to result in a network of relationships and friendships being established. The refusal of his application for further leave to remain, given that foundation of private life, amounts to an interference with it. So that leaves the questions of accordance with the law and proportionality.
23. Beyond the facts that I have accepted, the Appellant's evidence is rather vague, including as to the reason for his original loss of Sponsor. I cannot detect anything relating to his ambitions for further study in the UK or as to what course of further studies his initial studies here might have equipped him, nor as to what career trajectory he might have planned. This is important because his case rests on the assumption that but for the Respondent's allegation against him, he would have pursued a total of ten years lawful residence here, which presupposes that he would have successfully found sponsors for his studies and then as a worker. One can only study in the UK for a finite period significantly short of ten years, subject to pursuing postgraduate studies, which is not suggested to have been a realistic aspiration here. It has consistently been possible to switch out of the mainstream student route into a skilled work route. Whilst he is now working, I presume that is not sponsored work, as no reference to a sponsor appears in his witness statements. So there is no evidence from which I can draw the conclusion on balance of probabilities that the Appellant would in fact have successfully secured further grants of leave to remain in the UK amounting to a lawful decade of residence here had his course of studies not been interrupted.
24. There is a further difficulty with his case. The Appellant made no application to the Respondent from 2014 until his asylum claim in 2018. It must have been obvious that he could only have regularised his immigration status in the UK by some kind of immigration

application. Of course one fully appreciates the likely refusal of such an application, but it would have been an avenue to take matters forward, this being the self-evidently correct option taken by a great many individuals in the Appellant's position. By postponing the application which would be the necessary launchpad for any challenge to the Respondent's thinking, he was, I fear, largely the author of his own misfortune. I do not see any justification for the Respondent being obliged as a matter of legal fairness to effectively elevate a long period of overstay into de facto lawful residence, given the Appellant's failure to act sooner.

25. For these reasons I do not accept, on balance of probabilities, that the Appellant has been derailed from obtaining indefinite leave to remain via ten years of lawful residence by the climate of suspicion around TOEIC certificates which the Respondent's policies have created. The grant of six months leave to remain was a perfectly reasonable response to the facts of his case. In reality, of course, he has benefited from a much longer period of residence within which to put his affairs in order, via the operation of statutory leave under s3C of the Immigration Act 1971, which has provided him with some further sixteen months of lawful residence.
26. The only concern I have had in considering this appeal is that the grant of six months leave to remain outside the Rules would not appear to entitle one to switch into most modern immigration routes (see eg SW1.5 of the Skilled Worker route: "An applicant who is applying for permission to stay must be in the UK on the date of application and must not have, or have last been granted, permission ... (f) outside the Immigration Rules)." However, the Appellant identified no such intention which that proviso might have jeopardised, and anyway, one must presume that the Respondent's practice would be to waive that restriction on switching: otherwise the award of six months leave to remain with a view to providing a platform for regularising one's stay on a longer term basis would be meaningless.
27. I conclude that the Respondent's decision to grant the Appellant leave of only six months was a proportionate response to his situation. So the appeal fails."

The Grounds of Appeal

15. The appellant appealed on two grounds, only one of which has been permitted to proceed. Ground (1) was that there was a material mistake of fact. The appellant relied on the authorities of E and R v SSHD [2014] EWCA Civ 49 and MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC) for the propositions that a mistake must have been established in the sense of being uncontentionous and objectively verifiable, which it was; and that the mistake must have played a material, but not necessarily decisive part in the Judge's reasoning.
16. The appellant argued that the error was material because it was relevant to Judge's assessment of the appellant's argument that he had suffered a detriment as a result of the respondent's policies, which could only be proportionately corrected by a grant of more than six months' leave. The materiality of the error was apparent at §23, in which the Judge proceeded on the basis that the

appellant needed to establish that he would have successfully secured further grants of leave to remain amounting to a lawful decade. In the appellant's case, by 2014, he has been lawfully resident for over four years. From 2018, he was granted temporary admission, extended under Section 3C of the Immigration Act 1971. By reference to §§23 and 24, the Judge's analysis might have been different, had he appreciated that the appellant had already accrued a significant period of lawful residence by 2014, and at time when he was unable to obtain further leave as a consequence of the 'toxic' environment identified by the Judge at §19 to §20.

17. Judge Austin of the First-tier Tribunal granted permission on ground (1) only in a decision of 27th January 2024. Ground(2), in respect of which permission was refused, was to the Judge's reasoning at §24, in particular his analysis of the absence of any application by the appellant between 2014 to 2018. That reasoning therefore remains undisturbed. Before us, Mr Biggs indicated that there was no challenge to Judge Grant's refusal of permission on ground (2).
18. We pause to observe that the respondent did not serve a Rule 24 Response.

The parties' submissions before us

19. Mr Biggs reiterated his skeleton argument below before the Judge and specifically the basis on which the appellant had pursued his human rights appeal. It was implicit in the Judge's reasons at §19 to §20 that the Judge had found there to have been historical injustice because of a wrongful operation of an immigration function. The immigration environment in which the appellant had found himself in 2014, namely a general cloud of suspicion for all students having taken TOEICs and without leave, put him in a more difficult position. That was why the Judge had proceeded at §21 to consider whether the respondent's grant of six months' leave complied with the obligation identified in Ahsan. If it had not been so implicit at §19 and §20, then there would have been no need to have considered the Ahsan duty if, in terms, there had been no wrongful operation. The Judge had also accepted the appellant's evidence, against which there can be no challenge, that he had attempted to find a new sponsor, but was unable to do so, having approached several of them. As a consequence of the so-called "toxic" environment, had the respondent not acted in such a heavy-handed way in 2014 generally, on balance, it is possible that the applicant would have been able to continue his studies lawfully in the UK. The acknowledged error of fact about when the appellant entered the UK did not need to be decisive. Instead, it merely needed to have played a material part in the Judge's reasoning.

The Appellant's submissions

20. Ms Ahmed argued that the admitted factual mistake was not material. The immigration history had been clear (see page [248] of the Tribunal Bundle) and to succeed on a claim for indefinite leave to remain based on the 10-year route, this ignored the fact that even at the date of the Judge's decision, the appellant had not been continuously lawfully resident for ten years, taking the period from 15th September 2009 to 17th May 2014; and aggregating it with the subsequent period of leave from 4th March 2022, until the Judge's hearing on 18th January 2024 (the appellant had been appeal rights exhausted on 30th January 2020 and applied for further leave to remain on 18th September 2020). The Judge had been clear that it was not appropriate to elevate long periods of overstaying into 'de

facto' lawful residence, given the appellant's failure to act sooner (see §24) in respect of which there is no ground of appeal before the Upper Tribunal. Ms Ahmed then raised a number of points, to which Mr Biggs objected as there had been no Rule 24 Response. In objecting, he referred to the case of the SSHD v Devani [2020] EWCA Civ 612, §31, as authority for the proposition that a Rule 24 Response was mandatory if the respondent wanted to rely on grounds on which they were unsuccessful, below (the so-called "additional grounds provision"). If the respondent sought to challenge the 'implicit findings' by the Judge that the respondent had wrongfully operated one of its immigration functions, it needed to have raised this in a Rule 24 Response.

21. We do no more than summarise the gist of Ms Ahmed's additional submissions. We have not reached any view of those submissions in reaching our decision, and repeat them merely for completeness. These submissions are that when read fairly, the Judge did not, at §§19 or 20, implicitly find that the respondent had wrongfully operated an immigration function. For such a contentious proposition, there needed to be clear findings, not implications, and there were not. The fact that sponsoring colleges may or may not have shied away from accepting TOEIC students without leave did not amount to an operation by the respondent of a function, nor was the respondent responsible for their actions. The Judge's consideration of Ahsan at §21 was merely for completeness. As a consequence, it followed from Ahmed that there was no 'historical injustice' and the mistake of fact was immaterial for that additional reason.
22. Ms Ahmed added that this Tribunal was not considering a judicial review application. If the appellant wanted to challenge the policy of granting six months' limited leave in the event that a TOEIC appeal was successful, that could only be by way of judicial review.
23. Finally, Ms Ahmed reiterated that to have succeeded in proving historical injustice, the appellant would need to have shown not only a wrongful operation of an immigration function, but that he had suffered as a result, which was not the case here. The Judge had made that very clear, at §24.

Discussion and Conclusions

24. We start with the acknowledged mistake of fact by the Judge, namely that the appellant entered the UK in 2009 and not 2013. We accept Mr Biggs's submission that for the mistake to have been material, it need not be decisive, provided that it played a material part in the reasoning. A second stage, if the mistake of fact was material so as to amount to an error of law, is that for an error of law to be immaterial, any rational tribunal must have come to the same conclusion (see §43 of ASO (Iraq) v SSHD [2023] EWCA Civ 1282). It is unnecessary for us to consider that second stage, as we have concluded that the Judge's mistake of fact did not play a material part in his decision. We come on to explain why.
25. To reiterate, this was not an application for judicial review of the respondent's decision to grant a limited period of leave, but a human rights appeal against the decision to refuse further leave to remain. That decision, which the Judge considered in detail, was on the basis of long residence, and whether a period of unlawful residence (2014 to 2018) should not have been disregarded, but have been treated as de facto lawful residence.

26. The Judge accepted Mr Biggs' general proposition that there might be instances of where it was appropriate, because of historical injustice, to do so (§14). However, regardless of when the appellant's lawful residence in the UK began, the Judge did not accept that there was such an historical injustice which justified treating the appellant's unlawful overstaying as lawful residence. Even taking the appellant's case at its highest, that there was a wrongful operation of an immigration function and the appellant had initially suffered in 2014 (and in taking the case at its highest, we should not be understood to endorse the submission that the Judge did "implicitly" make such a finding), the Judge went on to give a number of reasons.
27. First, this was not a case where the appellant's problems originally arose from his being accused of a TOEIC fraud. He was not served with a "Section 10 " decision (referred to above and in Ahsan), which made the causative link between the respondent's allegation of TOEIC fraud, said to have taken place on or before 2014, but not alleged until 2018; and the period of overstaying between 2014 and 2018, "less strong" (§17).
28. Second: whilst it is true that the Judge referred at §22 to the context of the appellant's right to respect for his private life established via his lengthy residence (the exact period of which was vulnerable to the mistake of fact), however, at §23, the Judge noted that the appellant's case rested on the assumption that he would have pursued 10 years lawful residence, but there was no evidence that the appellant would have been able secure further grants of leave to remain (for example via a post-studies switch into a work visa route), amounting to a lawful decade of residence. Nothing in that analysis rested on the mistaken finding that the appellant had been in the UK lawfully from 2009, rather than 2013, by the time his leave was curtailed in 2014.
29. Third, the same is true of the Judge's analysis at §24, in finding that the appellant made no application for leave to remain between 2014 to 2018; that he was an "author of his own misfortune;" and there was no justification for elevating a lengthy period of overstaying during which he made no application, into a period of lawful residence. Nothing in that analysis is affected by when the appellant's period of lawful leave began.
30. The Judge tied up these reasons at §25, when he concluded that the appellant had not been "derailed" in obtaining indefinite leave to remain, because of the TOEIC allegations against the appellant. That too was unaffected by the Judge's mistake of fact.
31. In summary, the Judge's mistake of fact was not material, so as to amount to a error of law. We reiterate that nothing we have said should be taken to endorse (or for that matter reject) the contention that the Judge made an implied finding that the Respondent wrongly operated an immigration function in 2014, because of some kind of "toxic" environment for those seeking to take TOEIC tests. It is unnecessary for us to comment on that.

Notice of Decision

32. **The Judge's decision did not contain an error of law such that it should be set aside. The Judge's decision therefore stands and the appellant's appeal is dismissed.**

J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9th June 2024