IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002550

First-tier Tribunal No: HU/57275/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 November 2024

Before

UPPER TRIBUNAL JUDGE LINDSLEY
UPPER TRIBUNAL JUDGE RIMINGTON

Between

ISAAC YOUNIS
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Duffy, instructed by Farani Taylor Solicitors
For the Respondent: Mr M Parvar, Senior Home Office Presenting Officer

Heard at Field House on 1 October 2024

DECISION AND REASONS

1. The appellant challenges the decision of First-tier Tribunal Judge Scullion (the judge) who on 24th March 2024 dismissed the appellant's appeal against the refusal of his human rights claim by the Secretary of State on 26th May 2023. The appellant's underlying application was made on 5th May 2021.

2. The appellant is a citizen of Pakistan born on 23rd April 1992. He came to the UK on 20th March 2011 as a Tier 4 student migrant with leave to remain until 30th December 2013. This leave was extended until 13th October 2016, but on 25th September 2014 the respondent curtailed his leave to remain on the basis, it was asserted, that he had relied in his previous application upon a Test of English for International Communication (TOEIC) certificate that had been obtained by deception. On 22nd February 2016 the appellant applied for leave to

remain under the Immigration Rules (family and private life). This application was refused on 31st July 2016 with an out of country appeal right. We have not had sight of that refusal decision.

3. The appellant then overstayed and made a second application under the Immigration Rules on the basis of his family and private life on 23rd December 2016 which was refused with a right of appeal in October 2017. His appeal against this refusal was allowed in 2018 by Judge of the First-tier Tribunal Povey, on the basis that it was found the appellant had not used deception by cheating in his TOEIC test and further that it would be unduly harsh to expect the appellant and his then partner (Ms John who was a Christian) to have their family life in Pakistan. The appellant was then granted leave to remain as a partner until 10th April 2021.

4. The applicant applied again for further permission to remain under Immigration Rules on the basis of his family and private life on 5th May 2021. A decree nisi was granted to the appellant on 18th March 2021 and on 11th May 2021 he was divorced from Ms John. The application was refused on 26th May 2023 and the appellant's subsequent appeal dismissed by the FtT in March 2024 and which generated this appeal.

5. Permission to appeal was granted by Upper Tribunal Judge Jackson on 27th June 2024 on the basis that it was arguable that the judge had erred in law particularly as there was no consideration of the impact of the decision of the First-tier Tribunal in 2018 that the appellant did not use deception in his TOEIC test in 2013, and so it was arguably wrong to find it was highly speculative to assume that the appellant would have met the ten years continuous residence Rules in March 2021.

<u>Grounds for permission to appeal.</u>

6. The grounds set out that the appellant's case was put before the FtT on the basis that on 20th March 2021 the appellant had completed a period of '10 years' residence in the UK and that but for the 'historical injustice' that residence would have been continuous and lawful. Thus it would be disproportionate to require the appellant to leave the UK, given that the Secretary of State had denied the appellant the opportunity to obtain Indefinite Leave to Remain. It had been previously found by Judge Povey that the appellant had not cheated and there were insurmountable obstacles to the appellant and his then wife relocating to Pakistan. Further the judge had found that the appellant would have made an in-time application in October 2016 had his previous leave not been wrongly curtailed.

7. *Ground (i)*

At §20 the judge found it would be highly speculative to assume that the appellant would have been able to meet the requirements of the rules as it was not possible to be sure when his leave would have been granted had he made a successful application in October 2016. As

noted before the FtT, however, AP (India) v SSHD [2015] warns against an unduly rigorous approach.

8. *Ground (ii)*

Even if the judge was not being unduly rigorous, he was wrong in relation to the facts. The judge accepted at §20 that the appellant would have made an application in October 2016 rather than December 2016 and it was not unreasonable to assume that the Secretary of State would have taken a similar amount of time (10 months) to make a decision and so the decision would have been made in August 2017 not October 2017. The grounds set out that

'a. If that decision had been a refusal there would be no material difference in the timeline and the A would have had his leave expiring in March 2021 rather than May 2021 and he would then make an in-time application to be on 3c Leave which he could then vary to an ILR application once he reached 20 March 2021.

b. If that decision was positive, he would have been granted LTR until Feb 2020, had the A made a further application there is no reason to assume that the SSHD's decision would have been made any sooner. However, even if the decision were to be made by the SSHD within 6 months (which would be exceptional in our experience) and refused, the A would have likely appealed and s.3C of the 1971 Immigration Act '

It was thus not speculative that the appellant would have been able to extend his leave until 20th March 2021 and was more likely than not that the appellant would have secured 10 years continuous lawful residence on 20th March 2021.

9. *Ground (iii)*

The grounds cited §43 of the decision and submitted that historical injustice is not a 'one use 'get out of jail free' card and that if the effect of the historical injustice continued to have an effect on the appellant's immigration status it will continue to be relevant going forward. in 2018 when Judge Povey considered the case the appellant had not reached 10 years residence and this issue was not relevant.

Submissions

10. Both parties provided a skeleton argument.

11. Mr Duffy relied on his written grounds of appeal. The judge had relied overly on what he termed speculation and did not approach the facts in the correct way and failed to give weight to the evident facts. Reasonable assumptions should be made. At each stage of the appellant's immigration history and on the balance of probabilities there was no reason for the appellant not to make an application. It should be assumed that people acted rationally and the judge had not

given consideration to the facts of the case nor due weight to relevant matters. Mr Duffy accepted that the appellant did not meet the requirements of the Immigration Rules and acknowledged that the application had not been varied to one of 10 years long residence and the appeal was not based on paragraph 276B. He submitted that once the appellant had achieved the acceptance of 10 years continuous lawful residence, he could then submit an application for Indefinite Leave to Remain.

12. Mr Parvar submitted that it was impermissible for the judge to place himself in the shoes of the decision maker. It was noted that the appellant previously had leave to October 2016, had married in August 2016 and was entitled to succeed on the basis of his relationship but there was no confirmation that had the application been made earlier the appellant would for example, still be married. His decree nisi was made on 18th March 2021 and before the key date the judge described so that would indicate the relationship had broken down earlier.

13. Further it could not be assumed that the historical injustice was determinative which is how the grounds were put. The relevant point was whether the factors were fairly assessed. The judge had clearly factored in the historical injustice into an assessment on proportionality. Mr Parvar also cited Marepally v Secretary of State [2022] EWCA Civ 855 which at §9 indicated that it was only grants of underlying leave not Section 3C leave which counted towards continuous lawful residence. Additionally there were other requirements

Conclusions

14. We had the benefit of the skeleton arguments submitted by both representatives. In relation to the submission made by Mr Parvar that Marepally applied and any Section 3C leave did not contribute to 10 year's continuous lawful residence, we resist that interpretation. Marepally held that the *purpose* of Section 3C leave was to protect the immigration status of those with existing leave who have applied for a variation and are awaiting a decision not to contribute to continuous leave but identified that §41 of Akinola [2021] EWCA Civ 1308, whilst also acknowledging the purpose of Section 3C, added that in terms of the accumulation of 10 years continuous lawful residence, 'it is plainly an important aspect of it'. Thus the authorities do not resist that Section 3C leave can contribute to 10 years continuous lawful residence. Indeed, the Secretary of State's own Long Residence Guidance V20.0 issued on 11th April 24 confirms that '*Leave which is extended by virtue of section 3C of the Immigration Act 1971, counts as lawful presence for the purposes of long residence.*' We accept that Section 3C leave is not a grant of leave and only extends *existing* leave whilst an application/appeal remains unresolved, nonetheless it can contribute to long residence.

15. The grounds of appeal were couched as misdirections of law.

16. The judge made findings from §11 onwards citing the previous decision of Judge Povey. Indeed at §19 the judge recorded the following findings from Judge Povey as follows

> ‘“The Appellant’s immigration status is less straightforward. But for the erroneous curtailment of his leave in September 2014, he could have continued to have lawful leave until October 2016. Thereafter, it is speculation as to what the outcome of further applications for leave to remain would have been. Assuming they were made in time, the Appellant’s immigration status would not be in issue. The Respondent’s current policy is to not hold any gaps in leave caused by an erroneous ETS decision against an applicant and such decisions will be withdrawn (per Khan at [8] (sic)). One consequence of that course of action is that when the Appellant began his relationship with Ms John, he would not have been in the UK unlawfully.”

17. The finding as to speculation as to the outcome of further applications following October 2016 was initially made by Judge Povey and those findings were not challenged. The judge proceeds at §20 to find that had the appellant’s leave not been curtailed he would have applied for leave to remain by October 2016. The judge proceeds

> ‘However thereafter, it is highly speculative to know what would have happened and what the likely timeline would have been. Even if leave to remain had been granted to the appellant in relation to an application he may have made by October 2016, it is likely the appellant would have had to make at least one further application after that. The further down the timeline on travels from the erroneous curtailment of his leave in September 2014 the more speculative everything becomes. The fact is that after Judge Povey’s decision, that appellant was granted leave to remain until 10th April 2021. It is complete speculation as to when the appellant’s leave to remain might have ended had he applied in or around October 2016 (and subsequently). It may have been on or after the key date of 20 March 2021 but I find that it equally could have been before that date and indeed even before the date of 10th April 2021 which is the actual date the appellant’s leave ended’.

18. The skeleton argument put before the judge in the FtT submitted that the matter was to be considered on the basis of exceptional circumstances and although indicating that he had now been here for 10 years, the remaining requirements of paragraph 276B were not addressed.

19. When considering the approach to be taken to historic injustice, Khan [2018] EWCA Civ 1684 at §37 records the confirmation of the Secretary of State that

> ‘(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. …
>
> (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.'

20. What is clear from Khan is that the Secretary of State resisted any binding approach towards further applications in the future for example in relation to each appellant accruing a certain period of leave.

21. At §120 of Ahsan, and cited by the judge, Underhill LJ said this

> 'The starting-point is that it seems to me clear that if on a human rights appeal an appellant were found not to have cheated, which inevitably means that the section 10 decision had been wrong, the Secretary of State would be obliged to deal with him or her thereafter so far as possible as if that error had not been made, i.e. as if their leave to remain had not been invalidated. In a straightforward case, for example, she could and should make a fresh grant of leave to remain equivalent to that which had been invalidated. She could also, and other things being equal should, exercise any relevant future discretion, if necessary "outside the Rules", on the basis that the appellant had in fact had leave to remain in the relevant period notwithstanding that formally that leave remained invalidated. (I accept that how to exercise such a discretion would not always be easy, since it is not always possible to reconstruct the world as it would have been;…'

22. Nothing in Ahsan 2017 EWCA Civ 2009 nor Khan states that an erroneous TOIEC conclusion carries such weight in the scales of proportionality that it is determinative in any ordinary immigration case. The weight which is properly attached to any injustice in the assessment of proportionality is necessarily fact specific.

23. The judge in this instance was aware of the erroneous curtailment and noted that Judge Povey dealt with the consequence in the decision in a way which was to the benefit of the appellant and referred to the relevant authorities.

24. It is not the judge who is the primary decision maker and it was open to the judge to find that to theorise as to the outcome of an application or sequence of applications and an immigration history would be speculative particularly as the judge was relying on the previous findings of Judge Povey (who also found speculation in the continuation or success of applications) which were unchallenged and, as noted, the appellant during the currency of his leave became divorced. Indeed the decree nisi was in place before the expiry of 10 years and that was on a later application than October 2016. The remedy for the appellants in Ahsan and Khan, inter alia, was said to grant another period of leave

which in effect the appellant had received. Further the appellant was to be treated as if he had leave to remain in the relevant period [of leave] notwithstanding it had been formally invalidated. That had also occurred. As pointed out by Judge Povey the advantage to the appellant at that time was that when he began his relationship, he would not have been in the UK unlawfully. Also noted was that neither the first 2016 application nor the reasons for refusal were provided.

25. The judge in this instance cited Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351(IAC) which held that where the public interest in the maintenance of effective immigration control falls to be given less than its ordinary weight, the usual course should be for the judge so to find in terms when addressing section 117B(1) of the 2002 Act. In accordance with Patel and when making his assessment in relation to proportionality, the judge did not at any point take an issue as to the appellant being in the UK unlawfully.

26. Simply the judge found at §22 that the appellant did not satisfy the Immigration Rules. The appellant was no longer in a relationship and 'did not qualify for leave to remain under the 10 year private life route'. Indeed the underlying application was made on the basis of paragraph 276ADE and not under paragraph 276B of the Immigration rules.

27. In effect Mr Duffy invited us to find that the judge's approach to the facts and temporal issue was materially in error but we resist that application. This in effect is a challenge to the weight the judge afforded to the evidence and the immigration history of the appellant. Volpi v Volpi [2022] EWCA Civ 464 confirms at 2(i) that 'An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong'. That the appellant disagrees with the findings of the judge that successive applications would be too speculative does not make the findings a material error of law.

28. The judge at §26, having made his findings including his observations on the erroneous curtailment of leave and its consequences, in the same paragraph specifically confirmed he would adopt a balance sheet approach and did import the 'historical injustice' consideration into his assessment. The judge noted that the Immigration Rules were not met. The judge, however, acknowledged that the appellant's immigration status was precarious but at no time stated it was unlawful and identified that the appellant had lived in the UK since 2011. The judge acknowledged the erroneous curtailment again at [43].

29. The judge found 'on the other side of the balance sheet, the appellant has built up some private life in the UK since he has lived here since 2011. There was an erroneous curtailment of the appellant leave in September 2016 but Judge Povey rectified any unfairness to the appellant in his decision in 2018 and on that basis the respondent granted the appellant a further period of leave'.

30. The appeal was on the basis of human rights and the test as identified in the determination was that of the balance sheet approach in Hesham Ali v Secretary of State [2016] UKSC 60. At §25 the judge identified the test as being whether there were unjustifiably harsh consequences on his return. Indeed, that was the test the judge was invited to apply by the appellant's skeleton argument before the FtT and no challenge was made to the finding that there were none save for the claimed historical injustice.

31. Mr Duffy submitted that the judge should have made a finding that the appellant had 10 years lawful residence, however, was not the basis of the application (and the appellant did not produce evidence to demonstrate that he could fulfil the remaining requirements). The judge for sound reasoning, not least with reference to the underlying reasoning of Judge Povey, resisted the 'assumptions' that he was invited to make on various and subsequent applications to clock up 10 years residence. It was open to the judge to make the findings he did. In effect the challenge is to the weight attached to the evidence and we find that the weight given and approach taken was a matter for the judge.

32. In terms of historic injustice we repeat the appellant was divorced by the time the 10 years had been clocked up and that was in relation to a later application than the one which was said might have been made. The judge addressed Ahsan, Khan and Patel.

33. In terms of addressing the grounds specifically (i) we find it was open to the judge to make the findings he did. AP (India) was in relation to historic injustice owing to the British Overseas Citizen policy and it was stated at §37 that the courts should 'not in this context be unduly rigorous in the application of the causation test'. This was not a historic injustice case and for the reasons given above together with our observations on the application of AP (India) we find no merit in this ground. There was nothing unduly rigorous in the judge's approach contrary to AP (India).

34. Ground (ii) is centred on the basis that 'it is not unreasonable to assume' as to the Secretary of State's timings as to decisions and the basis of those applications and decisions. The judge was asked to conclude that the appellant, as it was described in the skeleton argument to the FtT, would have 'secured *successive* leave to remain, had the "historical injustice" not occurred. On this basis to suggest that the weight given in the judge's own assessment was flawed on a theoretical basis does not have traction when the argument itself is based on the hypothetical. It is predicated that the assumptions are reasonable but these do not take into account the divorce of the appellant.

35. As identified above notwithstanding the judge's reference to Judge Povey having 'rectified any unfairness', the judge did not, following the guidance of Patel, take Section 117B factors against the appellant.

36. On ground (iii) the existence of historical injustice could not without more have resulted in the appeal being allowed on Article 8 grounds and this is not the correct approach.

37. The judge referred to Judge Povey as having rectified the error and we note that the Educational Testing Service (ETS): casework instructions (accessible version) updated on 19 November 2020 confirms that:

> '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'

38. Thus the judge was not incorrect in finding that the issue had been corrected in terms of leave granted previously following the grant of leave by the Secretary of State and additionally he did not factor into his findings that the appellant was in the UK unlawfully.

39. As stated in Ahmed [2023] UKUT 165 (IAC) §46

> 'Even where an appellant is able to establish both that there has been a wrongful operation of immigration functions and that he has suffered as result, it does not necessarily follow that there should be a significant (or any) reduction in the weight given to the public interest in effective immigration controls.'

40. Nor was there any indication that there was, as in OA and Others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 65 (IAC), consent given that this 'new matter' could be considered. OA and Others (human rights; 'new matter'; s.120) Nigeria [held at [33] that

> 'Accordingly, where the judge concludes that the temporal requirement of paragraph 276B is satisfied and [our underlining] that there is nothing in the evidence before the judge to indicate that an application under paragraph 276B, made by the appellant within a reasonable time after the hearing, would be likely to be rejected by the respondent, the judge should allow the human rights appeal; provided, of course, he or she is satisfied that the respondent cannot rely upon any discrete public interest factor which would still make removal proportionate.'

41. The judge did not accept the temporal requirement of 10 years was met on adequate reasoning and this as noted was not a matter put to the Secretary of State.

42. The judge's approach to the claim, the self directions made and the assessment of the facts and weight given did not involve a material error. The judge used the very test advanced in the covering letter dated 13th May 2021 from the solicitors. Simply no unjustifiably harsh consequences were presented and, as the judge found, any historical

injustice in this instance and these circumstances could not assist in reaching that threshold. What in effect was being sought was a finding that the appellant had reached 10 years lawful residence so the appellant could proceed to make a further application but for the reasons we have given the approach to the facts and historical injustice was not materially flawed and the judge was entitled to dismiss the claim on human rights grounds. We find no material error in the judge's decision.

Decision:

The First-tier Tribunal decision contains no material error of law and shall stand. The appellant's appeal remains dismissed.

Helen Rimington

Judge of the Upper Tribunal Rimington
Immigration and Asylum Chamber

4th November 2024