Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/09477/2018
HU/09479/2018
HU/09481/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 February 2019	**On 06 March 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MD [A]
NURANNAHAR [J]
[A J]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr S Karim, Counsel instructed by AWS Solicitors Ltd
For the Respondent: Ms S Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. In September 2011 the first appellant, a citizen of Bangladesh, was granted leave to remain as a student and was granted further extensions in the same capacity until 5 June 2016. (Although his wife and child are also appellants, it is common ground that their appeals depend on his so I

© CROWN COPYRIGHT 2019

shall refer hereafter simply to “the appellant”). His leave was curtailed on 6 October 2015 as it was determined that he had used a false document to obtain his leave to remain. It was stated that for the purposes of his application dated February 2013 he had submitted a certificate from ETS to his sponsor in order for them to provide him with a CAS. The respondent had undertaken a check on his ETS list and found that there was significant evidence his certificate was fraudulently obtained by the use of a proxy test taker for the test taken on 18 September 2012 at London College of Media and Technology. The appellant made Section 120 representations which were refused and certified, but when he challenged these decisions by way of judicial review the respondent agreed to reconsider his case. When on 5 April 2018 the respondent refused his and his dependants’ applications, he appealed. His appeal came before Judge Anstis of the First-tier Tribunal (FtT). By this time, as Judge Anstis records at paragraph 5, the respondent no longer relied on the allegation of deception:

> “5. Although it appears that earlier the Respondent was relying on the Appellant having fraudulently obtained his TOEIC qualification, this allegation does not appear anywhere on the current decision and no longer appears to be relied upon against the Appellant by the Respondent. (Para 32 of the decision letter appears to make indirect reference to it, albeit only in the context of considering whether there are exceptional circumstances requiring a consideration of leave to remain outside the Immigration Rules. There is no reference to it as a reason for refusal in the substance of the decision)”.

The judge went on to find that the appellant did not use deception; stating at paragraphs 46–47:

> “46. By the time of the decision now under appeal the Respondent had abandoned any reliance on the first Appellant having cheated at his TOEIC test. That is not part of the decision currently under appeal.
>
> 47. As Mr Sharma says, the Respondent has not supplied any material in support of its allegation of deception or cheating and so has not gone anywhere towards discharging the initial burden on the Respondent. There is no evidence before me that the first Appellant has cheated in his test, and I find that the first Appellant did not cheat or use deception in his TOEIC test”.

2. The only grounds of appeal being human rights, the judge went on to assess whether the decisions were a breach of Article 8. The principal basis on which the appellant brought his appeal was reliance on the decision in **Khan and Others [**2018] EWCA Civ 1684 which in turn drew on the earlier Court of Appeal decision in **Ahsan [2017]** EWCA Civ 2009.

3. The judge set out his understanding of the **Khan** case as follows:

> “41. The essence of the decision or agreement recorded in Khan is that judicial review applications challenging curtailment on the basis of deception in TOEIC tests should be aside in favour of individuals

being able to make human rights claims for leave which, if refused, would result in the opportunity for an in-country right of appeal to the First-tier Tribunal at which *'the FTT would be able to determine whether or not the Appellant committed a TOEIC fraud'* (para 23, 27 & 28).

42. At para 37 of Khan, the Respondent's position was recorded as follows:

> *'... the SSHD confirms that:*
>
> *(i) For those individuals whose leave was curtailed, and where that leave would still have time to run as at the date of an FTT determination that there was no deception, subject to any further appeal to the UT, the curtailment decision would be withdrawn and the effect ... would be that leave would continue and the individuals would not be disadvantaged in any future application those chose to make;*
>
> *(ii) For those whose leave has been curtailed, and where the leave would in any event have expired without any further application being made, the Respondent will provide a further opportunity for the individuals to obtain leave with the safeguards in paragraph (iii) below.*
>
> *For those whose leave had expired, and who had made an in time application for further leave to remain which was refused on ETS grounds, the effect of an FTT determination that there was no deception would be that the refusal would be withdrawn. The applicant in question would still have an outstanding application for leave to remain and the Respondent will provide them with a reasonable opportunity to make any further changes to their application which would be considered on the basis of them not having employed any deception in the obtaining of their TOEIC certificate, and they would in no way be disadvantaged in any future application they chose to make.*
>
> *(iii) In all cases, the Respondent confirms that in making any future decision he will not hold any previous gap in leave caused by any erroneous decision in relation to ETS against the relevant applicant, and will have to take into account all the circumstances of each case.*
>
> *However, the Respondent does not accept that it would be appropriate for the Court now to bind him as to the approach that he would take towards still further applications in the future, for example by stating that each applicant has already accrued a certain period of lawful leave. The potential factual permutations of the cases that may need to be considered are many and various. In some cases, for example, it will be apparent that, whilst on the facts as presented at the appeal an appellant's human rights claim is successful, he would not have been able to obtain leave at previous dates. Again, this issue will have to be dealt with on a case by case basis.'*

43. It appears that this position, and the agreements reached in Khan and associated cases, where intended to be of broader application than simply those individual cases and were seen by the Respondent and the Court of Appeal in Khan as being the appropriate way of resolving outstanding cases involving allegations of cheating in TOEIC tests.

44. Accordingly, it is that which I have to apply in considering this case".

4. However, for the judge the correct application of **Khan** meant that the appellant could not succeed because:

> "[T]he appellants have effectively had the further opportunity of the further application set out in (ii) of para 37, yet that application has failed in its own right. Albeit by an indirect route, they have come to what seems to be envisaged as the final stage of the process in Khan".

The judge concluded:

"49. On the facts of this case:

(i) the first Appellant did not use deception in his TOEIC test, but,

(ii) the Appellants' underlying human rights claim is not sufficiently strong to succeed irrespective of any question of deception.

50. Mr Sharma's answer to that is that the appeal should nevertheless succeed on human rights grounds on account of the 'historic injustice' that the Appellants have been subject to arising from the unjustified curtailment of the first Appellant's leave.

51. While arguments framed as 'historic injustice' have succeeded in certain cases (notably in respect of Ghurkha dependents) I do not consider that there is any underlying principle that previous unlawful or incorrect behaviour by the Respondent makes a human rights claim bound to succeed or a decision to refuse an application disproportionate. It also seems to me that it must have been in the mind of the parties to the Khan case and the Court of Appeal that there could be cases where deception is not shown but where nevertheless the appeal does not succeed on human rights grounds. A finding that there is no deception does not mean that an appeal is bound to succeed. The ultimate outcome of Khan is that the best an individual can hope for is a consideration of a human rights claim without the allegation of deception hanging over it. That is what the Appellants have had in this case.

Conclusion

52. This is not an outcome that I find particularly satisfactory, but it appears to me inevitable in the limitation of appeal rights to human rights grounds that there will be appellants who have been wrongly dealt with by the Respondent but whose appeals must ultimately be dismissed because the decision does not amount to a breach of their human rights, and this is such a case. The fact that the prior curtailment decision was wrong does not make this

decision a disproportionate interference with the Appellants' human rights, whether considered alone or together with the best interests of the children.

53. The appeals are dismissed".

5. The appellant was successful in being granted permission to challenge the decision of the judge on the basis that the judge had given insufficient consideration to the impact of the curtailment decision. Mr Karim put matters more directly in his submissions before me, maintaining that the judge had misunderstood the effect of **Khan**.

6. I agree. Paragraph 37(ii) of **Khan** stated that for those whose leave was curtailed "a further opportunity for the individuals to obtain leave" would be provided "with the safeguards in paragraph (iii) below". Paragraph (iii) confirmed that in making any future decision the Respondent would "not hold any previous gap in leave caused by an erroneous decision in relation to ETS against the relevant applicant, and will have to take into account all the circumstances of each case". Further, whilst paragraph 37 records the respondent's undertakings, the clear ratio of both **Khan** and **Ahsan** is that a person who has been subject to an erroneous decision in relation to an ETS decision must not be put in a worse position than if the adverse decision – in this case a curtailment decision – had not been made. If that binding authority were followed by the respondent in the appellant's case he would have to be given a period of leave and in that period it would clearly be open to him to make a further application for extension of leave as a student (if not also on some other basis). Contrary to what the judge states at paragraph 48, the appellant has not had the opportunity of such a further application; nor can it be said that "that application has failed in its own right". The judge appears to have falsely reasoned that because the appellant was fighting a human rights appeal his only application could have been a human rights application. That was simply incorrect.

7. The judge's error was plainly material because it led him to attach no significance when conducting the Article 8 proportionality assessment to the legal significance (following **Ahsan** and **Khan**) of the erroneous decision to curtail the appellant's leave. Accordingly, I set aside the decision of the judge.

8. I consider I am in a position to re-make the decision without further ado.

9. The decision I re-make is to allow the appellant's appeal on Article 8 grounds. Applying the five-step approach set out in **Razgar** I consider that the respondent's decision falls foul of principle (3) in that it was not in accordance with the law. The judge rejected the possibility of a breach of principle (3) because he was satisfied that the appellant did not meet the Immigration Rules. But in the context of this case the "law" should have been taken to include binding judicial authority – which was foreseeable and accessible to the parties.

10. In any event, even if I am wrong to find that the respondent's decision is contrary to **Razgar**'s third principle, I am fully satisfied it is contrary to the fifth principle, since the failure of the respondent to implement a binding decision of the Court of Appeal most certainly constitutes a very compelling circumstance going directly to the issue of the public interest consideration. It cannot be in the public interest for the respondent to fail to implement binding judicial authority.

11. Whilst I therefore allow the appeal, it will be clear from the terms in which I have done so, that, pursuant to section 8 of the Human Rights Act 1998, the appropriate remedy is for the respondent to grant a short period of further leave to remain, not less than 60 days, together with confirmation that previous gaps will not be held against him. Such a remedy would be consonant with what was envisaged as appropriate in **Ahsan** and **Khan**.

12. No anonymity direction is made.

Signed Date: 28 February 2019

Dr H H Storey
Judge of the Upper Tribunal