Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10582/2019
HU/10583/2019
HU/10584/2019
HU/10585/2019

THE IMMIGRATION ACTS

Heard at Birmingham
On 11th August 2020

Decision & Reasons Promulgated
On 19th August 2020

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MRS MISBAH [T] (1)
MR RAJA [I] (2)
MR [A R] (3)
MISS [A Q R] (4)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Rowena Moffat, instructed by Farani Taylor Solicitors
For the Respondent: Mrs H Aboni, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants are all nationals of Pakistan. The first appellant is the wife of the second appellant. The third and fourth appellants are their children, both of whom were born in the UK. Their appeal to the First-tier Tribunal ("FtT") against the respondent's decision of 4th June 2019 to refuse their application for leave to remain in the UK on human rights grounds, was dismissed by FtT Judge Keane for reasons set out in a decision promulgated on 12th March 2020.

2. Permission to appeal to the Upper Tribunal was granted by FtT Judge Osborne on 29th April 2020. The matter comes before me to determine whether the decision of FtT Judge Keane is vitiated by a material error of law, and if so, to remake the decision. The hearing before me on 11th August 2020 took the form of a remote hearing using skype for business. Neither party objected, and I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

Background

3. The first appellant arrived in the UK on 3 June 2011, with entry clearance as a Tier 4 (Student) valid until 15 March 2014. She was accompanied by the second appellant who had been granted entry clearance as a dependent partner in line with that granted to the first appellant. On 13 November 2013, the first appellant was informed that her leave had been curtailed so that it expired on 12 January 2014.

4. The third appellant was born in the UK on 27 December 2013. On 15 January 2014, the first appellant completed a speaking test at Premier Language Training Centre and obtained a TOEIC certificate from Educational Testing Service ("ETS").

5. On 17 February 2014 the first appellant submitted an application for leave to remain as a student. In support of that application she relied upon the TOEIC test certificate from ETS. That application was refused by the respondent on 25 June 2014 without a right of appeal and she was served with a notice to a person liable to removal from the UK. I pause to record that neither Miss Moffat nor Mrs Aboni were able to confirm to me whether the respondent's decision of 25 June 2014 was before Judge Keane. Judge Keane cannot be criticised for failing to refer to a relevant document that was not in fact provided to him. Mrs Aboni was able to access a copy of that decision and she emailed a copy of the decision to the Tribunal and Miss Moffat during the course of the hearing before me. The decision states:

> "… For the purposes of your application, you submitted a TOEIC certificate from Educational Testing Service ("ETS") to the Home Office. ETS has a record of your speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained. Your scores from the test taken on 15 January 2014 at Premier Language Training Centre have now been cancelled by ETS.
>
> On the basis of the information provided to her by ETS, the SSHD is satisfied that there is substantial evidence to conclude that your certificate was fraudulently obtained. As deception has been used in relation to your application, it is refused under paragraph 322(1A) of the Immigration Rules.
>
> Your application is further refused on the basis that you do not meet the requirements for leave to remain as a Tier 4 (General) Student listed under paragraph 245ZX of the Immigration Rules. Since you fall for refusal under the general grounds for refusal, you do not meet requirement (a) of paragraph 245ZX. Furthermore, requirement (c) of paragraph 245ZX stipulates that you must have a minimum of 30 points under paragraphs 113 to 120 of Appendix A, which list the required attributes for Tier 4 students. You have claimed 30 points for your Confirmation of Acceptance for Studies ("CAS"). However, paragraph 118 of Appendix A requires certain criteria to be met for an award of points for a

> CAS. You do not meet these criteria because the English language test that you provided in accordance with paragraph 118(b)(ii)(4) [degree level study, non-HEI] has been cancelled. Accordingly, no points have been awarded for your CAS and you do not meet requirement (c) of paragraph 245ZX.
>
> Furthermore, requirement (c) of paragraph 245ZX stipulates that you must have a minimum of 30 points under paragraphs 113 to 120 of Appendix A, which list the required attributes for Tier 4 students. You have claimed 30 points for your Confirmation of Acceptance for Studies ("CAS"). However, the decision of your Tier 4 sponsor that you are either competent in English language at a minimum of level B2 of the Common European Framework of Reference (CEFR) for languages or that you are a person who meets an alternative requirement is rendered ineffective by the deception you used to obtain your TOEIC certificate. Accordingly, no points have been awarded for your CAS and you do not meet requirement (c) of paragraph 245ZX.
>
> In making the decision to refuse your application, consideration has been given to the following: On 3 May 2011 you were granted leave to enter the United Kingdom as a Tier 4 student until 15 March 2014 …"

6. The first appellant submitted a further human rights application based on her private and family life in the UK, on 8 July 2014. That application was again refused by the respondent for reasons set out in a decision dated 20 February 2015. The human rights application made by the appellant was certified as clearly unfounded under s94 of the Nationality Immigration and Asylum Act 2002. That decision was not challenged. I have not been provided with a copy of that decision, and again, neither Miss Moffat nor Mrs Aboni were able to confirm to me whether the respondent's decision of 20 February 2015 was before Judge Keane.

7. Nevertheless, the first second and third appellants remained in the UK and on 5 December 2015 the fourth appellant was born. On 7 January 2019 the third appellant applied to register as a British citizen as a minor who is otherwise stateless. His application was refused by the respondent on 4 March 2019.

8. On 9 October 2019 the respondent received representations made on behalf of the appellants seeking leave to remain in the UK on the basis of their family and private life. The respondent refused the application for reasons set out in a

decision dated 4 June 2019 and it was that decision that was the subject of the appeal before FtT Judge Keane.

The appeal before me

9. The appellant advances two grounds of appeal, which, as Miss Moffatt submits are interlinked. First, Judge Keane found the first appellant raised an innocent explanation against the allegation of deception, which satisfied the minimum level of plausibility and the respondent had failed to discharge the burden of proof which had then reverted to the respondent. Having so found, Judge Keane failed to consider the consequences that flow from those findings, and in particular, what had been said by the Court of Appeal in Ahsan v SSHD [2017] EWCA Civ 2009, and in Khan v SSHD [2018] EWCA Civ 1684. The respondent's compromise in those cases, was that where a finding was made by the FtT in an ETS case that there had been no deception, the appellant would be put back in the position he/she was in prior to the decision being made, and would be able to make a fresh application. The appellants claim that following the guidance given in those decisions, Judge Keane ought to have allowed the appeal so as to enable the appellants to be put back in the position they would have been in, but for the allegation of deception. Second, the appellants claim Judge Keane erred in his assessment of the public interest considerations set out in s117B Nationality, Immigration and Asylum Act 2002. Judge Keane found there is family life between the four appellants but failed to implicitly or explicitly address s117B(2)(a), and (b), and s117(3) and s117(4)(b). Furthermore the assessment of the public interest, required Judge Keane to have regard to the consequences of the historical refusals of leave to remain because of the allegation of deception, which in the end, Judge Keane had found, was not made out by the respondent.

10. Before me, Miss Moffatt refers to the judgement of the Court of Appeal in Ahsan -v- SSHD in which Underhill LJ said, at [120]:

> "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 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; but that problem would arise even if the decision were quashed on judicial review.) If it were clear that in those ways the successful appellant could be put in substantially the same position as if the section 10 decision had been quashed, I can see no reason in principle why that should not be taken into account in deciding whether a human rights appeal would constitute an appropriate alternative remedy. To pick up a particular point relied on by Mr Biggs, I do not regard the fact that a person commits a criminal offence by remaining in the UK from (apparently) the moment of service of a section 10 notice as constituting a substantial detriment such that he is absolutely entitled to seek to have the notice quashed, at least in circumstances where there has been no prosecution. (It is also irrelevant that the appellant may have suffered collateral consequences from the section 10 decision on the basis that his or her leave has been invalidated, such as losing their job; past damage of that kind cannot alas cannot be remedied by either kind of proceeding.)

11. Miss Moffat submits that having rejected the claim made by the respondent that the first appellant had used deception, it was necessary for the judge to ask himself what wrong was caused to the appellants by the unfounded allegation, and that should have included a consideration of how the decisions made by the respondent had affected her studies in the UK, and the other consequences that had flowed from the unfounded allegation. Having made findings, those findings should have formed part of the overall assessment of whether the decision to refuse leave to remain is disproportionate to the legitimate aim. It was relevant to the assessment of proportionality that if the appellants had remained in the UK unlawfully because of an erroneous allegation of deception, that should not be held against the appellants. She submits that winding the clock back, if the only reason for refusing the application for leave to remain made on 17th February 2014, as it appears to be, was the allegation of deception, that was material to the assessment of the Article 8 claim and proportionality.

12. In reply, Mrs Aboni submits Judge Keane directed himself appropriately and gave adequate reasons for dismissing the human rights appeal. She submits that if the first appellant is put back in the position she would have been in, her leave to remain had been curtailed on 13 November 2013 so that it expired on 12 January 2014. The first appellant had no leave to remain when she made her application on 17 February 2014. The decision to curtail her leave to remain was made because the college that she was attending had lost its sponsor licence. She was provided with a period of 60 days within which she could make an in-time application for further leave to remain. The decision to curtail her leave to remain was not challenged and the first appellant did not make a further application until 17 February 2014. She accepts the allegation of deception was first made by the respondent in the decision dated 25 June 2014. Mrs Aboni submits that even if the clock is wound back, the appellant had no valid leave at the time she made her application. She submits Judge Keane adequately considered the Article 8 claim and it was open to the judge to dismiss the appeal for the reasons set out in his decision.

Discussion

13. Judge Keane refers to the relevant immigration history at paragraph [1] of his decision. The claim made by the appellants is summarised at paragraph [3] of the decision. He heard oral evidence from the first and second appellants. His findings and conclusions are set out at paragraphs [8] to [14] of the decision. He noted, at [9], that the appellant's immigration history was not in dispute and in so far as the human rights claim is concerned, he said:

> "… The appellants' circumstances were unremarkable in that they reflected the life and times of two parents with two young children and the manifold facets of family and private life … although there was no medical evidence there was not a reason to doubt that Mr [I] had been admitted to hospital suffering severe chest pains. … Similarly, there was not a reason to doubt that Miss [AQR] suffers from eczema."

14. Judge Keane considered the evidence relied upon by the parties regarding the allegation made by the respondent that the human rights application fell for refusal on grounds of suitability because the first appellant had fraudulently obtained a TOEIC certificate, and willingly participated in what was an organised and serious attempt to defraud the respondent and others. It was conceded on behalf of the first appellant that the respondent's evidence had discharged the evidential burden of establishing a prima facie case that the TOEIC certificate had been procured by dishonesty. Judge Keane went on to consider the explanation provided by the first appellant and at paragraph [10] he concluded as follows:

> "… There was a measure of conviction in Mrs [T]'s evidence (on which Mr Raza drew) when making submissions that given her background and academic pedigree she would have no reason to embark upon fraudulent conduct. I find Mrs [T] raised an innocent explanation which satisfied the minimum level of plausibility. The respondent did not adduce further evidence so as to establish to the balance of probabilities that her prima facie innocent explanation fell to be rejected. There was no further evidence on which the respondent relied. The respondent accordingly failed to discharge the burden of proof which had reverted to him."

15. Judge Keane therefore found that the respondent had not established that the application fell for refusal on grounds of suitability. However, he was not satisfied that the requirements of paragraph 276ADE(1) of the immigration rules are met by the appellants. He noted that neither of the children has lived continuously in the UK for at least seven years and he was not satisfied that it would be unreasonable to expect the children to leave the United Kingdom. Equally he was not satisfied that the first and second appellants have established that there would be very significant obstacles to their integration into Pakistan for the reasons given in paragraph [11] of the decision.

16. Having found that the requirements of the immigration rules are not met, Judge Keane went on to consider whether there are any other exceptional or compelling circumstances that justify the grant of leave to the appellant outside the application of the immigration rules. He found that the best interests of the

two children lie in their remaining with their parents. At paragraphs [13] and [14], Judge Keane concluded as follows:

> "13. The appellants failed to establish that there were compelling and exceptional circumstances which justify the grant of leave outside the immigration rules. As mentioned earlier in this decision, the circumstances were not to be distinguished from other families who have experienced a period of residence abroad before returning to their country and moreover, a country which by dint of their lengthy previous periods of residence would be highly familiar to them. The appellants' (in reality Mrs [T] and Mr [I]) expectations objectively considered were in any case that they would in time return to Pakistan upon the conclusion of Mrs [T]'s academic studies undertaken in the United Kingdom. Their leave was precarious and their private life established in the United Kingdom was correspondingly deserving of less weight than if their right to reside had been permanent. I have already mentioned in this decision that each could play their part in re-establishing themselves in their country of origin and each could apply (once more) those commendable personal attributes of resourcefulness and persistence which enabled them to establish themselves in the United Kingdom. Public interest considerations by reference to Section 117B of Nationality, Immigration and Asylum Act 2002 applied. The maintenance of effective immigration controls is in the public interest. Again, little weight should be accorded to a private life established by the appellants at a time when their immigration status was precarious. It was not suggested by on behalf of the appellants that any medical treatment or prescriptions which Mr [I] (dependent upon a cogent diagnosis of his state of health) or Miss [AQR] might require would not be available in Pakistan.
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> 14. If it be necessary for me to carry out a **Razgar** style" assessment (**R (Razgar) v Secretary of State for the Home Department [2004] INLR 349 HL**) and finding that the consequence of removal would have consequences for the appellants which would potentially engage the operation of Article 8, I nevertheless find for the same reasons as have led me to find that there were not compelling or exceptional circumstances which justify the grant of leave outside the immigration rules that their right to respect for private life would not be subject to a disproportionate interference…."

17. It is clear that in reaching his decision Judge Keane did not consider the impact of his finding that the first appellant had not used deception, and the consequences that flow from that finding, when addressing the Article 8 claim made by the appellants and in his assessment of proportionality. As Underhill LJ said in Ahsan, where on a human rights appeal an appellant is found not to have cheated, 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.

18. I must therefore consider whether the error was material to the outcome of the appeal. It is correct to say that the first appellant's leave to remain was curtailed so that it expired on 12th January 2014. Importantly, the decision to curtail the first appellant's leave to remain was not in any way based upon the conduct of the first appellant and neither was any allegation of deception levelled against at that stage. Mrs Aboni submits the curtailment was as a result of the sponsor licence having been revoked and in accordance with the respondent's practice, the appellant was given a short period of time to secure an alternative sponsor so that she could make arrangements to continue her education. The first appellant made her further application for leave to remain as a student on 17 February 2014 after her leave to remain had expired.

19. The only reasons given by the respondent in the decision of 25 June 2014 for refusing that application is that the first appellant submitted a TOEIC certificate from ETS in support of the application that had been cancelled by ETS. The application was refused because the first appellant did not meet the requirement set out at paragraph 245ZX(a) of the immigration rules. That is, the applicant must not fall for refusal under the general grounds for refusal and must not be an illegal immigrant. Furthermore, the first appellant was not awarded the relevant points under paragraphs 113 to 120 of Appendix A, because she relied upon an English language test that had been cancelled, and the respondent claimed was ineffective, because of the deception used to obtain the TOEIC certificate.

20. The respondent's decision is silent as to whether the requirement set out in paragraph 245ZX(m) was met by the appellant. That is, the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded. The respondent had not conceded that the requirement was met. On a proper application of the rules, that requirement could not be met by the first appellant. It is uncontroversial that the leave to remain that had previously been granted to the

first appellant, ended on 12 January 2014. She did not submit her further application for leave to remain as a Tier 4 (General) Student under paragraph 245ZX of the immigration rules until 17th February 2014. That was more than 28 days after her previous leave to remain had come to an end.

21. The first appellant has been exonerated by Judge Keane from the allegation of deception that was previously made against her, such that the respondent will be unable to rely upon that allegation in any future applications that are made by the first appellant. However, in my judgment it remains the position that on any view of the facts and a proper application of the immigration rules, winding the clock back and dealing with the first appellant so far as possible as if the allegation of deception had not been made in the respondent's decision of 25 June 2014, the first appellant could not satisfy the requirements set out in paragraph 245ZA for leave to remain in the UK as a Tier 4 (General) Student Migrant under the points based system.

22. The Judge's failure to consider the decision of the Court of Appeal in Ahsan was not material to the outcome of the appeal. It was in all the circumstances, in my judgement, open to Judge Keane to conclude that there are no compelling or exceptional circumstances that justify the grant of leave outside the immigration rules and that the right to respect for private life would not be subject to a disproportionate interference.

23. Even winding the clock back, the appellants have remained in the UK unlawfully since 12 January 2014. The findings by Judge Keane regarding the best interests of the children and that there are no very significant obstacles to the first and second appellants reintegration into Pakistan are not challenged. The appellants are therefore unable to satisfy the requirements of the immigration rules. All that the appellants were left with insofar as their Article 8 claim is concerned, is what was described by Judge Keane as being circumstances that "*... were unremarkable in that they reflected the life and times of two parents with two young children and the manifold facets of family and private*

life.". Judge Keane carefully addressed the Article 8 claim having regard to the relevant public interest set out in s117B of the 2002 Act. I accept that as a general principle, Miss Moffatt is right when she submits that in any assessment of proportionality, the fact that an individual has overstayed in the UK because of an unfounded allegation of deception made by the respondent, may be relevant and ought not be held against the applicant in the assessment of proportionality, but that does not assist the appellants here. For example, it is easy to understand that where an individual has had leave to remain curtailed on the grounds that they used deception, that the Tribunal subsequently finds on appeal not to have been established, the presence of the applicant in the UK without leave may be relevant to the assessment of proportionality. However, the appellants here had already overstayed following the curtailment of leave to remain to 12 January 2014 and the application for further leave to remain was not made until 17 February 2014. The immigration rules already make provision for the respondent to disregard a short period of overstaying to enable an applicant to get their immigration affairs in order, but here, the first appellant did not make her application either in-time, or so that the short period of overstaying would be disregarded.

24. It follows that in my judgement, there was no material error in the decision of Judge Keane capable of affecting the outcome of the appeal and the appeal is dismissed.

DECISION

25. The appeal is dismissed and the decision of First-tier Tribunal Judge Keane shall stand.

V. Mandalia Date 13th August 2020

Upper Tribunal Judge Mandalia