Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/00186/2020
HU/00188/2020
HU/00192/2020

THE IMMIGRATION ACTS

Heard at : Field House
On : 19 August 2021

Decision & Reasons Promulgated
On: 3 September 2021

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

TUTON [B]
RIMA [S]
[K B]

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Lewis, instructed by Westbrook Law Ltd
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Bangladesh. The first appellant was born on 21 February 1981. He entered the UK on 23 December 2010 with leave to enter as a Tier 4 student, which was extended to 16 June 2013. On 20 September 2012 the appellant's leave was curtailed to expire on 19 November 2012, but he was then granted further leave to 22 February 2014 following an application made on 1 November 2012. The appellant's wife,

the second appellant, arrived in the UK on 7 June 2013 and was given leave to enter as his dependant until 22 February 2014. Their leave was subsequently extended to 21 February 2015.

2. On 20 February 2015 the first appellant applied for leave to remain in the UK with his wife, on family and private life grounds. That application was refused on 7 September 2015 and their human rights claim was certified as clearly unfounded, with allegations made of deception and fraudulently obtaining a TOEIC certificate in relation to the first appellant's application of 1 November 2012. The appellant's son, the third appellant, was born on 4 November 2015. The first appellant applied for judicial review of the certified decision but his application for permission was refused on 24 March 2016.

3. On 22 June 2016 the first appellant claimed asylum on the basis that he was Hindu and was at risk as such from the Islamic community and extremists in Bangladesh. His claim was refused on 15 December 2016 on the basis that it was not credible and that he was at no risk on return to Bangladesh. The appellant's appeal against that decision was dismissed by the First-tier Tribunal on 20 February 2017 again on the basis that his account was not accepted as credible.

4. The first appellant then made further submissions for himself and his wife and child on 21 June 2019 on the basis of their family and private life in the UK under Article 8. In those submissions the appellant contested the allegation of cheating in relation to his TOEIC certificate, as stated in the decision of 7 September 2015, relying upon the change in the caselaw since he had challenged that decision by way of judicial review and in particular upon the case of Ahsan v The Secretary of State for the Home Department (Rev 1) [2017] EWCA Civ 2009. He also referred to the fact that his son was at school and he relied upon a psychological report which referred to his and his wife's depression and to evidence of his heart problems. The respondent treated the submissions as a fresh human rights claim, but refused the claim in a decision dated 9 December 2019.

5. In that decision, the respondent considered that the application fell for refusal on grounds of suitability under paragraph S-LTR.1.6 of Appendix FM of the immigration rules on the basis that the first appellant's presence in the UK was not conducive to the public good owing to his reliance, in his application of 1 November 2012, on a fraudulently obtained TOEIC English language certificate. The respondent considered that the appellant did not, in any event, meet the eligibility requirements in Appendix FM as his wife and son were not British or settled in the UK, that he did not meet the requirements of paragraph 276ADE(1) and that there were no compelling circumstances outside the rules for any of the family members. The respondent considered the appellant's and his wife's medical and mental health problems, but concluded that there was appropriate medication and treatment available in Bangladesh and that neither the Article 3 nor Article 8 threshold was met on that basis.

6. The appellants appealed against that decision and their appeal was heard by First-tier Tribunal Judge Rae-Reeves on 3 November 2020. The first appellant gave oral evidence before the judge. The judge relied on the judgment in Abbas, R (On the Application Of) v Secretary of State for the Home Department [2017] EWHC 78 in regard to the three-stage

process for discharging the burden of proving deception. He found that the first stage was not met and that the respondent had failed to discharge the evidential burden of proof, but in any event he found the appellant to be a credible witness and accepted that he had discharged the evidential burden of raising an innocent explanation in response to the allegation and that the respondent had not established a case for rejecting the appellant's innocent explanation. He therefore concluded that the suitability provisions did not apply.

7. The judge went on to consider the appellants' Article 8 claim. He found that the appellants had established a family life in the UK, that the documentation showed that the first appellant had been offered employment, that he would be capable of gainful employment, that he and his family were not and would not be a burden on the public purse and that they spoke English. The judge also took into account, in his balance sheet analysis, the injustice suffered by the first appellant having been wrongly accused of deception and the toll that that had taken on his physical and mental health and that of his wife. The judge considered that the public interest in immigration control was outweighed by these factors and that the respondent's decision was disproportionate. He accordingly allowed the appeals of all three appellants.

8. The Secretary of State sought, and was granted, permission to appeal Judge Rae-Reeves's decision both in regard to the findings on the ETS deception and the appellants' Article 8 human rights claim.

9. The matter came before me on 29 March 2021 and I heard submissions from both parties on the error of law question. In a decision promulgated on 15 April 2021, I found that Judge Rae-Reeves had materially erred in law in relation to his findings on the Article 8 claim. I set aside the decision on the following basis:

> "16. Although there was no final determination of the issues arising in relation to the APPG report in the case of DK and RK, it seems to me that there is sufficient to conclude from the panel's decision in that case that Judge Rae-Reeves erred in the case before him by departing from the settled caselaw in regard to ETS cases and finding that the respondent had failed to discharge the initial, evidential burden. However, I agree with Mr Lay that that is immaterial in this particular case because the judge went on to consider the second and third stages in the alternative, as though the evidential burden had been met. The judge provided detailed reasons for concluding that the first appellant had discharged the burden of providing an innocent explanation in response to the allegation of deception. The judge made it clear that the appellant's proficiency in the English language was not a determinative issue and that there could be a number of other reasons for applicants to cheat, but he was nevertheless entitled to give some weight to the evidence of the appellant's level of English at the time he took the TOEIC test. I therefore disagree with Ms Cunha that the judge erred in that respect, particularly as he went on to give various other reasons for finding the appellant's account credible, referring to the specific evidence before him which supported the appellant's account. The judge had the benefit of hearing from the appellant and in light of the reasons cogently given, I conclude that he was entitled to make the findings that he did. I therefore uphold his decision on the issue of fraud and deception and the suitability provisions in S-LTR.

17. However, I find merit in Ms Cunha's submissions in relation to the judge's overall Article 8 assessment. The judge's starting point was that family life had been established in the UK, but that was clearly an erroneous finding in the context of Article 8, as none of the appellants were settled here or had any lawful basis of stay. Further, whilst the judge properly conducted a balance sheet approach when considering proportionality under Article 8, I have to agree with Ms Cunha that there were material omissions and errors in his assessment. The judge considered the appellants to be of good character and found that their unlawful residence was outweighed by other factors but failed to consider that the first appellant had previously made a false asylum claim. The judge gave consideration, at [49], to the fact that the appellant's claim had been found not credible, when considering his explanation relating to the deception allegation, but he did not have any regard to the matter in assessing proportionality under Article 8. Further, the judge accorded weight to matters upon which he speculated, namely the appellants' lack of reliance upon public funds and the first appellant's ability to find employment, and accorded weight to their assumed financial independence and their level of English, which were, as Ms Cunha submitted, neutral factors. For all of these reasons I find that the judge did not carry out a full and proper Article 8 assessment and that he erred in law in that respect. That part of his decision has to be set aside and re-made.

18. Having canvassed with the parties the appropriate manner of disposal of the appellants' case should my conclusions be as they are, the suggestion was that I should make directions inviting submissions on whether a further hearing was required. Mr Lay pointed out that the Secretary of State's policy, in cases where a previous deception allegation had been rejected by the Tribunal, was to grant a period of 60 days' leave to the appellant. I do not know whether that would be the case with these appellants, but directions of the kind suggested by Mr Lay would enable the Secretary of State to clarify her position in the light of my findings on the error of law.

19. Accordingly, I set aside the judge's decision on the Article 8 proportionality assessment, but uphold and preserve the findings in relation to deception and suitability under S-LTR. I make the following directions for the re-making of the decision:

DIRECTIONS:

(a) No later than **14 days from the date this decision is sent out**, each party shall file with the Upper Tribunal and serve on the other party written submissions as to the disposal of the appeal, to include submissions as to whether a further oral hearing is required and on the correct balance sheet approach, and to be accompanied by any further documentary evidence relied upon.

(b) The matter will then be brought before myself to decide whether to list the appeal for a resumed, oral hearing or to determine it on the basis of the submissions and evidence before me…"

10. The Secretary of State did not respond to the directions and neither did she respond to the appellant's representative's letter dated 18 April 2021 referring to the Home Office policy contained in the "Educational Testing Service (ETS): casework instructions" version 4.0 of 18 November 2020 which stated, at page 9 of 11:

> "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 to enable the appellant to make any application they want to make or leave the UK."

11. In that letter, it was made clear that further written submissions and attendance at an oral hearing would be unnecessary if the respondent granted the appellants six months' leave in accordance with the policy and indicated that the appeal could be withdrawn if leave were granted. The letter invited the Secretary of State to grant the appellants leave on that basis and to clarify her position.

12. It is unfortunate that the Secretary of State did not respond, either to the appellant's representatives or to the Tribunal's directions, because an oral hearing then became necessary to resolve the matter. It is also unfortunate that at that hearing, listed before myself, Ms Cunha still had no instructions on the respondent's position and was not properly prepared to respond to Mr Lewis' detailed written submissions which had been filed with the Tribunal and served on the respondent on 12 May 2021.

13. In those submissions, it was asserted on behalf of the appellants that the public interest in removal was significantly outweighed by the cumulative impact of various factors, as set out in some detail, and in particular the need to remedy the historical injustice suffered by the appellants as a result of the allegation of deception.

14. I asked Ms Cunha what was the public interest in removal where there was a policy to grant six months' leave to remain in circumstances such as those faced by the appellants. She replied that there was none and she accordingly invited me to allow the appeals on Article 8 grounds.

15. In light of Ms Cunha's concession I see no need to set out any reasoned decision or findings. I indicated to the parties that I would be preparing only a short decision in light of the concession, to which there was no objection. Given that Ms Cunha invited me to allow the appeal in relation to the appellants' Article 8 claim, I do that. I allow the appellants' appeals on Article 8 human rights grounds.

DECISION

16. The original Tribunal was found to have made an error of law and the decision was set aside. I re-make the decision by allowing the appellants' appeals.

Signed *S Kebede*
Upper Tribunal Judge Kebede Dated: 19 August 2021