Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2021-000669
HU/50536/2020; [IA/01596/2020]

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre
on: 26th September 2022

Decision & Reasons Promulgated
on: 6th November 2022

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Mijanur Rahman Mukta
(no anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr O'Ceallaigh, Counsel instructed by Lawmatics Solicitors
For the Respondent: Mr Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Bangladesh born on the 5th February 1990. He appeals with permission against the decision of the First-tier Tribunal (Judge G. Jones) to dismiss his human rights appeal.

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Background and Matters in Issue

2. The Appellant has lived in the United Kingdom since October 2010 when he was granted leave to enter as a Tier 4 (General) Student Migrant. His leave was subsequently varied in that it was extended, curtailed, granted again, and curtailed again. For the purposes of this appeal only one event in that chronology is relevant: on the 5th October 2014 the Appellant's leave was cancelled on the grounds that he had submitted an English language exam certificate (TOEIC) which had been obtained by fraud. The Secretary of State believed that a proxy took that test on the Appellant's behalf. The Appellant did not leave the UK, and has been an overstayer ever since.

3. In the 8 years since his leave was curtailed the Appellant has developed a private life in the UK. He has, he says, formed a family life with his partner Ms Shammi Akhter Chowdhury. It was for those reasons that on the 16th August 2018 he applied for leave to remain on human rights grounds, relying on his rights under Article 8 ECHR.

4. The Respondent refused to grant leave on the 30th September 2020. The Respondent did not accept what the Appellant asserted about his family life in the UK but moreover found that the public interest weighed heavily in favour of refusal, given the Appellant's complicity in the TOEIC fraud. As the rules put it, he failed on 'suitability' grounds.

5. On appeal Judge G. Jones heard the Appellant's evidence about when he took his English language test, and weighing that evidence alongside the Respondent's evidence, found as fact that the allegation of fraud had not been proven to the requisite standard. Central to that finding was the fact that the Appellant's explanation about how he had personally taken his test was not challenged by the Respondent at the hearing. Judge Jones went on to consider the Appellant's human rights claim. He rejected his claim to be in a subsisting relationship with Ms Chowdhury, and taking all of the considerations listed in s117B Nationality, Immigration and Asylum Act 2002 into account – including the public interest in favour of the maintenance of immigration control – the appeal is dismissed.

6. The grounds of appeal against that decision are five pages long but in essence make two points:

    i) The Tribunal failed to consider the consequences of its own finding that the Appellant did not cheat. This was relevant in respect of both fairness and proportionality;

    ii) In rejecting the assertion that the Appellant is in a subsisting relationship with Ms Chowdhury the Tribunal failed to take material evidence into account.

Discussion and Findings

7. There can be no dispute that in its ‘findings’ the First-tier Tribunal makes no reference to its own conclusion that the allegation of TOIEC fraud is not made out. Indeed by her ‘Rule 24’ response the Secretary of State concedes just that, and invites me to set the decision of Judge Jones aside, an invitation I accept. The finding that the Appellant did not in fact cheat in his English exam was obviously a material matter, and it is a material matter that is overlooked.

8. What is the consequence of that? The grounds first point to the judgment of the Court of Appeal in Ahsan v SSHD [2017] EWCA Civ 2009 and in particular the following from the speech of Lord Justice Underhill:

> “115. I start from the position that, other things being equal (though that is an important qualification in this case), it is better for the issue whether a person has cheated in their TOEIC test to be determined in an appeal to the FTT rather than by way of judicial review proceedings in the UT….
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> 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….”

9. Here the Court accept the proposition put by counsel for the applicant Mr Knapfler QC that in such cases the proportionality balancing exercise in effect begins and ends with a binary decision: did the claimant cheat or not? [At §76]:

> 76. If, therefore, article 8 would indeed be engaged by HK’s removal, it was necessary to consider the remaining *Razgar* questions – whether her removal would be in accordance with the law (question (3)) and, if so, whether it was (for short) justified (questions (4)-(5)). In practice the answer to those questions depended straightforwardly on whether she had cheated in her TOEIC test. If she had not, it was not suggested that there was any legitimate basis for removing her. Mr Knafler emphasised that we were not in this kind of case concerned with the familiar balancing exercise of weighing the state’s interest in maintaining an orderly system of immigration control against the

interests of the individuals in question: HK was entitled by the Rules to be here unless she had cheated.

10. Nowhere does the First-tier Tribunal consider this *ratio* in Ahsan, nor consider its relevance for the purposes of the Appellant's Article 8 appeal on 'private life' grounds. At the date that his leave was wrongly curtailed on the 5th October 2014 the Appellant would have had another 23 months to run on his then extant Tier 4 (General) Student Migrant visa. The binary question about cheating being answered in his favour, he is entitled to be placed back in the position he would have been in had the error not been made. The appeal fell to be allowed on these grounds alone.

11. If follows that I need not deal with the remaining ground in any great detail, save to say that I am satisfied that it is made out. The Appellant and his wife by Islamic law Ms Chowdhury both gave oral evidence attesting to their relationship (since 2014) and cohabitation (since 2017). I am told by Mr O'Ceallaigh, without contradiction by Mr Tan, that the only 'discrepancy' arising from that evidence was the contrast between Ms Chowdhury's claim in evidence given in August 2018 that she and her husband had been living together "since last year" and her oral evidence that in fact they started living together at the beginning of 2018. No consideration is given to whether that might be an innocent mistake of the sort made by most people trying to recall dates. The rest of the oral evidence consistently indicated that they were in a subsisting relationship, yet none of that evidence features in the Judge's analysis. Similarly the Judge picks from the Appellant's GP records the apparently damning evidence that he told his doctor in September 2000 that he "does not live" with his partner but does not go on to consider the other references to his girlfriend 'of 7 years' in those GP notes or the record, by the same doctor, that he is now married. The decision states that there is "a distinct lack of documentary evidence" but does not address what documentary evidence there actually was. Accordingly I would also set the decision of the First-tier Tribunal aside insofar as it relates to the Appellant's family life, but given my findings above there is no need for the decision in that regard to be remade.

Decision and Directions

12. The decision of the First-tier Tribunal is set aside.

13. The appeal is allowed on human rights grounds.

14. There is no order for anonymity.

Upper Tribunal Judge Bruce
26th September 2022