IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000186
First-tier Tribunal No:
HU/52860/2020
LH/00832/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 21 May 2023

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

Mohammad Shakhawat Hossain Chowdhury
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Biggs, Counsel instructed by Turpin & Miller LLP (Oxford)
For the Respondent: Mr Basra, Senior Home Office Presenting Officer

Heard at Field House on 24 April 2023

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh who entered the UK in January 2010 as a student with leave until August 2013. In August 2013 he applied (in time) for further leave as a student and was granted leave until 9 December 2016. On 28 November 2014 he was notified of a decision to remove him due to his having cheated on a TOEIC test. I will refer to this as "the 2014 decision".

2. On 31 October 2018 the appellant applied for leave outside the Rules and on 18 March 2019 the application was refused. The appellant appealed against this decision and his appeal was allowed by Judge of the First-tier Tribunal Davey, who found that the respondent had not established that the appellant cheated on the TOEIC test. On 30 September 2019, in order to give effect to Judge Davey's decision, the respondent granted the appellant leave outside the Rules for 30 months.

3. On 21 November 2021 the appellant applied for indefinite leave to remain. That application was refused on 21 April 2022. The appellant then appealed to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Robinson ("the judge"). In a decision dated 5 January 2023 the judge dismissed the appeal.

Decision of the First-tier Tribunal

4. The main issue in dispute before the First-tier Tribunal was whether the appellant should be treated as if he had accrued ten years of continuous lawful residence and therefore was entitled to ILR pursuant to para. 276B of the Immigration Rules. The appellant's case in summary was that:

   (a) following his successful appeal before Judge Davey, the respondent was required to put the appellant into the position he would have been in had a false allegation of cheating not been made; and

   (b) the way to put him into that position was to treat him as having leave between November 2014 (when the 2014 decision was made) and 30 September 2019 (when the respondent granted the appellant 30 months' leave following Judge Davey's decision).

5. The respondent accepted that the appellant should, so far as possible, be put into the position he would have been in but for the cheating allegation, but argued that this was achieved by treating the leave granted in 2013 as if it had run its course (as would have been the case absent the cheating allegation) such that the appellant's leave ended on 9 December 2016. There was, therefore, according to the respondent, a gap in lawful leave between December 2016 and the application on 31 October 2018, the consequence of which was that the appellant could not establish ten years of continuous lawful residence.

6. The judge agreed with the respondent and dismissed the appeal on the basis that (1) there was a gap in the appellant's leave between 9 December 2016 and 31 October 2018 which meant that he did not fall within the scope of paragraph 276B (leave to remain on the ground of long residence); and (2) the appellant's removal would not be disproportionate under article 8 ECHR because, inter alia, the historical injustice suffered by the appellant had already been addressed by the respondent.

Grounds of Appeal

7. The appellant relies on paragraph 120 of *Ahsan v SSHD* [2017] EWCA Civ 2019 where Underhill LJ stated:

> 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.)

8. Ground 1 states that, in accordance with *Ahsan*, the respondent must treat the appellant as if he had leave "in the relevant period". The grounds submit that the judge failed to appreciate that the "relevant period" in this case is the period between the 2014 decision and the grant of leave in 2019 following Judge Davey's decision. It is argued that the appellant was deprived of lawful status during this period as a consequence of the unlawful 2014 decision and that merely treating the appellant as having leave until 9 December 2016 does not remedy the injustice he suffered. It is submitted that treating the appellant as if he had leave until the grant of 30 months leave in 2019 is fair, coherent, and appropriate in all the circumstances.

9. Ground 2 submits that the judge failed to appreciate that the appellant was unable to regularise his immigration status until the TOEIC allegation was resolved. This ground also refers to the judicial review proceedings that were brought by the appellant to challenge the 2014 decision. These proceedings were resolved by a consent order in July 2020. The judge found that the appellant's acceptance of the 2020 consent order indicated that he agreed to the grant of 30 months leave in 2019 as a remedy to address the unlawful 2014 decision. The grounds submit that this is misconceived because the consent order merely recognised that the appellant's challenge to the factual basis of the 2014 decision had become academic in the light of Judge Davey's decision.

Submissions

10. Mr Biggs accepted that ground 2 may be immaterial if the appellant did not succeed on ground 1 and focused his submissions on ground 1.

11. Mr Biggs submitted that *Ahsan* makes clear that there is an overarching principle that the Secretary of State must put individuals like the appellant into the position in which they would have been but for the wrongful cheating allegation. He contended that the only effective way this can be done is by treating the appellant as if he has enjoyed the benefit of a continuous period of lawful residence in the UK during the period 2014 to 2019. Mr Biggs submitted that anything short of that would leave the appellant in a significantly worse position than he would have been in the absence of the cheating allegation.

12. Mr Biggs also argued that the appellant was effectively precluded from making an in time application to extend his leave beyond 9 December 2016 because, at that time, as a consequence of the 2014 decision, he did not in fact have any leave that could be extended. He submitted that reinstating leave until 9

December 2016 is therefore insufficient and anything short of treating the appellant as if he had leave until September 2019 would not remedy the historical injustice he has experienced due to the 2014 decision.

13. Mr Basra submitted that Mr Biggs' argument relies on speculation as to what might have occurred in 2016 when the appellant's leave granted in 2013 would have come to an end and the judge was correct to find that treating the 2014 decision as if it had never been made, combined with granting a period of leave in 2019, was the most appropriate way to put the appellant into the position he would have been in but for the 2014 decision.

Analysis

14. It was not in dispute before the First-tier Tribunal (or before me) that the respondent was required to put the appellant, so far as possible, into the position in which he would have been had the 2014 decision not been made.

15. The leave granted to the appellant in 2013 and ending in December 2016 was as a student. There was no evidence before the First-tier Tribunal that the appellant was engaged in a course of study or other activities that would have made it likely that in December 2016 he would have applied for - and would have been granted - further leave. As a student, he was not on a pathway to settlement in the UK and he would not have had any reason to believe that, absent a significant change in his circumstances, he would have been able to accrue ten years of lawful continuous residence such that paragraph 276B would apply or that he would have another basis to remain in the UK permanently. I therefore agree with Mr Basra that it is speculative to suggest that the appellant would have been granted leave extending beyond December 2016.

16. On the other hand, but for the 2014 decision, the appellant would, as argued by Mr Biggs, have had the opportunity to make an in-time application that might have been successful. To say that such an application would not have succeeded is as much speculation as to saw that it would not. It cannot therefore be said that merely treating the 2014 decision as invalid fully remedies the injustice of the 2014 decision.

17. Accordingly, treating the appellant as if he had leave until December 2016 does not go far enough because it does not reflect the fact that the appellant lost the opportunity to make an in -time application in December 2016; but treating the appellant as if he had leave until September 2019 goes too far because it is speculative, and lacks any evidential basis, to assume that the appellant would have been granted leave beyond December 2016.

18. Underhill LJ stated in paragraph 120 of *Ahsan* that "it is not always possible to reconstruct the world as it would have been". In my view, this is such a case. It seems to me that the most appropriate way to treat the appellant, so far as possible, as if the 2014 decision had not been made, would be to, in addition to treating him as if he had leave until December 2016, grant him a relatively long period of leave thereby giving him sufficient opportunity to organise his affairs in the UK and apply to extend his leave if he has a basis to do so. The respondent did this by granting him 30 months leave following the decision of Judge Davey, which on any view is a sufficiently long period of time for the appellant to identify any other bases upon which he might be entitled to leave to remain in the UK. Accordingly, the judge was entitled to dismiss the appeal on the basis that (1) there was a substantial gap in the appellant's leave so that he did not qualify for

ILR under paragraph 276B; and (2) the combination of treating the 2014 decision as if it had not been made and granting the appellant 30 months leave was an appropriate way to put the appellant, so far as possible, in the position he would have been in but for the 2014 decision.

Notice of Decision

19. The decision of the First-tier Tribunal did not involve the making of an error of law and stands.

D. Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9.5.2023