IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001914

First-tier Tribunal Nos: HU/54319/2022
IA/06476/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 5th June 2024

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

The Secretary of State for the Home Department

Appellant

and

Md Shohal Rana
(no anonymity order made)

Respondent

Representation:
For the Appellant: Ms H Gilmore, Senior Home Office Presenting Officer
For the Respondent: Mr M West, Counsel, instructed by Liberty Legal Solicitors LLP

Heard at Field House on 5 July 2023

DECISION AND REASONS

1. I see no need for and do not make an anonymity order in this case.

2. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against the decision of the Secretary of State on 1 July 2022 refusing him leave to remain on the basis of his private life.

3. The facts of the case are quite complex but, for the purposes of introduction, it was his case that he had been in the United Kingdom for almost nine years and was entitled to remain. The substantial reasons given by the First-tier Tribunal for granting permission to appeal are set out below:

> "There is arguably an error of law in that the Judge may have speculated the [Claimant] would have been granted further periods of leave thereby eventually accruing 10 years, had his leave not been curtailed in September 2014 (2 years after his arrival). Leave was curtailed on a basis that was no longer pursued by the Respondent. It is evident that the Judge was persuaded by a "historic injustice" argument and applying a "but for"

> notion. The [Secretary of State] was not represented. The [Claimant] although resident in the UK has not, on any view, had 10 years' continuous lawful residence in the UK and cannot satisfy the provisions of 276B - a mistake made at paragraph 17."

4. Permission was granted on all grounds.

5. Against the background of this introduction, I consider the First-tier Tribunal's Decision and Reasons. On that occasion the claimant was represented by Mr Shahadoth Karim of Counsel who has prepared a substantial Rule 24 notice in this case. As has been indicated, the judge did not have the benefit of a representative from the Secretary of State. The First-tier Tribunal's Decision and Reasons shows that the claimant is a national of Bangladesh who was born in 1987. He came to the United Kingdom in March 2012 as a student and his leave was extended until 30 January 2017. However, his leave was curtailed on 10 January 2014. He sought to challenge that decision by way of judicial review but his challenge was unsuccessful. It was said by the First-tier Tribunal Judge that:

> "The difficulty was that in order to pursue matters he would have to leave the United Kingdom and appeal from Bangladesh. He has remained here ever since."

6. The judge then noted that on 5 February 2021 the claimant applied for leave to remain on the basis of his family life. By then he had been in the United Kingdom for almost nine years. The application was refused on 1 July 2022 and that refusal is the decision complained of.

7. According to the judge's summary of the refusal the application was refused with reference to paragraph 276ADE(1) of HC 395. It was felt that the claimant could integrate into Bangladesh where he had lived for most of his life and had close family ties. The Secretary of State did not see anything "unduly harsh" about the outcome. The Secretary of State noted that the claimant had medication for depression but found that appropriate treatment was available.

8. The judge summarised the claimant's history. It was his case that he had completed a full-time English language course from February 2012 to July 2013 at a college and was then admitted to university in London to study business management. There was a five week preliminary English course that he completed successfully in September 2013 and had been issued with a new student visa valid from 16 August 2013 to 30 January 2017. However he then learnt after he completed his first year that the university licence had been suspended and he and others were being investigated in respect of their performance in an English language test. He was able to continue with his studies and completed his second year of university education in June 2015. The university then indicated he could proceed to his final year but in July 2015 he received an email and text message advising him that his visa had been curtailed with effect from 22 October 2014.

9. The judge noted that Mr Karim summarised the central point in the claim that the claimant had entered the United Kingdom lawfully in March 2012. His leave was extended until January 2017 but the leave was curtailed. Mr Karim explained that the leave was curtailed because the claimant was identified as a person who had cheated in an English language test and was suspected of having conducted the test by proxy. However, the Secretary of State had not relied on that in the refusal letter relating to the latest application. Mr Karim argued that the Secretary of State appeared to accept that the leave should not have been curtailed and, if it had not been curtailed, he would have continued his studies. The judge was referred to paragraph 276B of HC 395, which the judge found,

suggested that but for the termination of his leave, which the Secretary of State no longer appeared to rely on, the claimant would have continued to reside in the United Kingdom. Although he was an overstayer the judge was referred to a decision (which he does not identify) saying that where a person was found not to have been involved in deception, that person should not be treated as an overstayer. Mr Karim argued as the second point that the claimant met the terms of paragraph 276ADE(1)(vi) on health grounds.

10. The judge said at paragraph 13:

> "I find merit in the submission of Mr Karim that the [claimant] is a victim of a historic injustice. He was granted leave until 2017. He was in the final year of his studies. Undoubtedly, to come to the United Kingdom and to study was a major decision for the [claimant] and his family. There would have been considerable cost involved and he would have made future plans on the basis of his studies. These lands [plans] came to nothing when the [Secretary of State] terminated his leave. The termination was on the basis of deception in the English language testing. This was a serious allegation to have made and undoubtedly caused the [claimant] significant stress. Now, many years later the [claimant] does not seek to substantiate this allegation. Meantime, the [claimant] has suffered by his studies ending prematurely and the uncertainty of his future."

11. The judge was clearly impressed by that argument. He clearly had expressly applied a "but for notion" and concluded that the claimant would have remained lawfully in the United Kingdom and would by the time the judge heard the case have completed more than ten years' lawful residence. The judge found that the requirements of paragraph 276B were met and there was "no public interest" presumably in his removal.

12. In the alternative, the judge found that the circumstances justified the appeal being allowed on Article 8 grounds.

13. The judge conducted an Article 8 balancing exercise with regard to part 5A of the Nationality, Immigration and Asylum Act 2002. The judge noted that the claimant's presence in the United Kingdom had been precarious although he did enter lawfully and had overstayed for the reasons given. The judge had found that sufficient reason to allow the appeal and expressly did not consider paragraph 276ADE(1)(vi) concerning the claimant's medical condition.

14. The grounds from the Secretary of State were summarised as a "misdirection in law/failure to make findings/failure to provide adequate reasons". The grounds summarise the case as the decision being allowed because the judge found that the claimant met paragraph 276B and allowed on Article 8 grounds and part of the reasoning was that the "ETS issue" (this would be understood by people familiar with this kind of case to be a reference to the dubious language test) not being raised by the Secretary of State. The grounds assert that it is "uncontentious history" that the claimant had no leave. It was initially valid until 30 January 2017. The judicial review challenge failed and permission to appeal to the Court of Appeal was refused on 2 June 2017.

15. The claimant applied for asylum on 10 September 2018, which it was noted was almost twenty months after the initial leave had ended, but that claim was subsequently withdrawn. The grounds assert that the First-tier Judge:

> "… appears to conclude that the [claimant], had he not had his leave to remain curtailed, would have completed ten years' lawful residence and thus satisfied the requirements of paragraph 276B. It is submitted that this

> is clearly an error since the [claimant] had not completed a period of ten years' lawful residence on the facts. Second, the FTTJ made such a finding without reference to any evidence that supports the view that leave to remain would have been granted from 30/01/17 onwards and third, fails to take into account the significant gap running up to the asylum claim in 10/09/18."

16. The grounds then describe the assessment of Article 8 outside the Rules as "brief and inadequate" especially as the claimant was an overstayer. The judge had not conducted an assessment of paragraph 276ADE which was the matter in issue and according to the grounds a finding was needed on that.

17. Paragraph 276ADE is no longer in force but when it was in force it was the primary paragraph for determining if an applicant should be given leave to remain on private life grounds.

18. The grant of permission to appeal caused Mr Karim to prepare a substantial Rule 24 notice, which I now consider.

19. Importantly he contends at paragraph 7, that on 10 September 2014 a "section 10 decision on ETS grounds" was served on the claimant who at that time had valid leave to remain until 30 January 2017. Just over a month later on 20 October 2014 the Section 10 decision was withdrawn and then served again. According to the Rule 24 notice: "The result was that due to the ETS allegation and the section 10 decision, the [claimant's] lawful residence was wrongly and unlawfully brought to an end."

20. Mr Karim's notice then explains that the claimant sought judicial review. It was his contention that he should be able to challenge the decision but the case law at the time determined that it was an adequate remedy to pursue relief from outside the United Kingdom. Mr Karim noted that the judicial review claim and the application to appeal to the Court of Appeal was unsuccessful. He then said there was "no substantive consideration at the deception point". The judge noted the Rule 24 notice and said that the judge found at paragraph 15 "To effectively challenge an allegation of personation most likely the [claimant] would need to give oral evidence about his account. He did try and remedy this by seeking a judicial review but at that stage the authorities were not favourable."

21. The Rule 24 notice then notes how in February 2021 the claimant applied on human rights grounds relying on the judgment in **Ahsan v The Secretary of State for the Home Department (Rev 1) [2017] EWCA Civ 2009** and his application specifically provided a response to the ETS allegation and invited the Secretary of State to deal with the explanation. Mr Karim contended that this was in accordance with the advice given in **Khan & others v Secretary of State for the Home Department [2018] EWCA Civ 1684**.

22. Mr Karim then noted that the Secretary of State no longer pursued the ETS deception allegation. He contends that as a result the First-tier Tribunal Judge did not err in finding in favour of the claimant on this issue and allowing the appeal. He pointed out that the Secretary of State's review expressly accepted that no suitability on ETS grounds arise. The Rule 24 notice contends that the respondent is misconceived relying on the JR claim and appeal to the Court of Appeal being dismissed. He said it was clear that they were brought on the basis that the suitable remedy was out of country. I under the claimant's point to be that the failure of the proceedings did not in any way endorse the validity of the finding that the claimant was a cheat and I agree that it did not.

23. The Rule 24 notice argues that "case law makes clear that the FTT's approach is the correct approach".

24. It then refers to the decision in **Ahsan v The Secretary of State for the Home Department (Rev 1)** and according to Mr Karim this confirmed that an "exonerated person" such as the claimant should be treated as someone who had not overstayed from the point of the Section 10 decision. He backs this up with a quotation from a judgment of Underhill LJ at paragraph 120 which I set out below:

> "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 review14.) 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 …."

25. The Rule 24 notice then refers to the decision in **Khan & others v Secretary of State for the Home Department [2018] EWCA Civ 1684** confirming that the Secretary of State had agreed that a person who was not guilty of ETS deception would be treated as someone who had not overstayed. Again, there is a long quotation from the judgment, in this case in **Khan**, but I think it appropriate to set out and I do. The Court of Appeal said at paragraph 37:

> "37. Further, at para. 8 of the note, it was stated:
>
> Nonetheless, for the avoidance of doubt, the SSHD confirms that:
>
> (i) For those individuals whose leave was curtailed, and where that leave would still have time to run 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 they 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."

26. In an effort to drive home his point, Mr Karim referred to the headnote in the Tribunal's decision in **Patel (historic injustice; NIAA Part 5A) India [2020] UKUT 351 (IAC)** under the heading:

"**B. Historical injustice**

(3) Cases that may be described as involving 'historical injustice' are where the individual has suffered as a result of the wrongful operation (or non-operation) by the Secretary of State of her immigration functions. Examples are where the Secretary of State has failed to give an individual the benefit of a relevant immigration policy (eg **AA (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 12**); where delay in reaching decisions is the result of a dysfunctional system (eg **EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41**); or where the Secretary of State forms a view about an individual's activities or behaviour, which leads to an adverse immigration decision; but where her view turns out to be mistaken (eg **Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009**). Each of these failings may have an effect on an individual's Article 8 ECHR case; but the ways in which this may happen differ from the true 'historic injustice' category."

27. The Notice contends that the First-tier Tribunal Judge referred to the principles in **Ahsan** and applied them to the case and asserts that the decision of the First-tier Tribunal was entirely lawful. In particular it asserts that the judge did not err by applying the "but for test" because it was plain that but for the decision to cancel his leave he would have had leave to remain until 2017 and would not have suffered the prejudice that he did and according to the notice, the assurances given by the SSHD in ***Khan*** set out above, are clear and apply squarely to this appeal.

28. The notice asserts there was no error in treating the Claimant as someone who had not overstayed because of the historical injustice being the erroneous decision and finding in his favour under 276B of the Rules.

29. Finally, Mr Karim relied on the Secretary of State for the Home Department guidance notice, Educational Testing Service (ETS): casework instructions Version 4.0, November 2020, page 9: Which states:

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

30. The notice contends that under the guidance, the Secretary of State was bound to give the claimant at least six months' leave to remain which makes the appeal "completely erroneous and academic".

31. He contends that it is important and significant that the Secretary of State in the review did not contend that the claimant fell foul of the suitability requirements or that he should not succeed on the ETS issue. Further, the review did not contend that the claimant's approach in his skeleton argument relating to **Ahsan**, **Khan** and **Patel** was incorrect.

32. Whether or not it is right the Rule 24 Notice is clearly a very considered document and it is regrettable that it had not come to Ms Gilmore's attention before the hearing. I do not blame her for that but it did not.

33. Ms Gilmore reminded me that the application was made with reference to paragraph 276B of HC 395. This concerns someone who had made an application for indefinite leave to remain on the grounds of long residence and he was required to have had at least ten years' continuous lawful residence in the United Kingdom. In addition, regard had to be had for his character and connections in the United Kingdom and a whole host of other factors that important but I see no need to spell them out here. One of them however is that he must not be in the United Kingdom in breach of the Immigration Rules. She submitted that it was simply wrong and they should be set aside and reconsidered.

34. I asked Mr West how it was decided that the claimant would have had ten years' lawful residence. He said I must view that in the light of what was before the First-tier Tribunal. He emphasised that the judicial review did not in any way endorse the finding that the claimant was a cheat. He advised that no issue was taken on suitability. The claimant had been a victim of an historic injustice. There was guidance indicating how it should be addressed. Mr Karim had pointed out that out to the First-tier Tribunal Judge who had accepted the argument. Nothing wrong with the decision. It was rightly allowed under Article 8.

35. In her reply Ms Gilmore again insisted he had not had ten years' lawful residence. Mr West said that even if that were right, it was still open to the judge and it could have been allowed on the basis of the period of time that he had had in all the circumstances of the case.

36. Against that background, I consider the Reasons for Refusal given in the letter of 1 July 2022. This says that the applicant applied for permission to stay in the United Kingdom on private life grounds and at that time had eight years, eleven months' residence in the United Kingdom.

37. The immigration history was considered. This showed the applicant entered the United Kingdom on 4 March 2012 with leave until 8 July 2013. That leave was extended until 30 January 2017 and then curtailed to end on 1 September and then 22 October 2014 and the claimant was made a judicial review application, which was unsuccessful. The current application was made on the 5 February 2021. The letter then, possibly significantly, was emphatic that the application did not fall for refusal on grounds on suitability but he had not achieved twenty years' residence, which is what is required by 276ADE or he had to show very

significant obstacles to his integration which he had not done. There is much in the letter about how the claimant could go back and although he had a medical history that was needing medication there was nothing to suggest he could not be returned. The letter then concluded in a rather summary (but adequate) way, saying that the appellant had not established an Article 8 right outside the Rules.

38. Certain things seem tolerably clear. The claimant came to the United Kingdom with permission in March 2012. His leave was extended until January 2017 but then curtailed to end in October 2014. It is now clear that the decision to curtail leave was based on an unsustainable assertion that the claimant was a TOEIC cheat. That should not have happened and if it had happened it should have been remedied. On the face of it the claimant had leave until 30 January 2017 or should have been treated as if he had because the decision to curtail before then was wrong on its facts.

39. It does not follow seamlessly from this that that because the claimant had leave or should have been treated as having leave until 30 January 2017, that the judge was entitled to treat him as if he had ten years' lawful leave when he heard the case in 2023. However, that is not really what has happened here. Mr Karim's Rule 24 notice shows that the claimant contended that he should have been given a short period of leave when it was discovered that he was not a TOEIC cheat and his leave had been cancelled wrongly. Maybe if that had happened these proceedings would not have been brought and the application that led to them never made.

40. It is very clear from the "Grounds of Appeal" to the First-tier Tribunal, which might be described more as a general essay about the case rather than a particularly good example of identifying the appropriate statutory grounds, that the complaint was that the Secretary of State had not engaged with the TOEIC issue. The grounds say in terms "The refusal decision has explained most of the history but in respect of the TOEIC issue, the respondent mistakenly or purposefully avoided disclosing the TOEIC issue which made the refusal decision most arbitrary".

41. I do not suggest that the tone of the ground is particularly helpful or justified but the fact is that the correspondence before the application made plain that this case was about the Secretary of State's failure to give the claimant some recognition of the injustice he suffered as a result of being identified wrongly as a TOEIC cheat. This was not argued before me in detail and these remarks are not intended as a criticism of the Secretary of State because he did not have an opportunity in the hearing to comment. The point I am making is that this is an appeal that has come about because, in my judgment, the Secretary of State and the claimant were at cross-purposes. The application was processed on a tramline when what was needed was a bit of lateral thought. It is particularly relevant that the Secretary of State chose not to send anybody to the hearing before the First-tier Tribunal even though the nature of the complaint was identified rather robustly in the grounds and indeed in the skeleton argument provided by Mr Karim, I assume well before the hearing because it was dated 28 October 2022.

42. I see no basis whatsoever for criticising the judge's finding that the claimant was a victim of historic injustice and that but for that he would have been entitled to remain in the United Kingdom at least until January 2017.

43. When dealing with the appeal on human rights grounds and conducting an Article 8 balancing exercise the judge had to consider the public interest and

concluded that the claimant had been entitled to some leave which diminished public interest in removing him or refusing further leave.

44. I have looked again at the Secretary of State's "review". The Secretary of State appreciated that the claimant did not fall foul of the "suitability" requirements. However, the Secretary of State was concerned only with the fact that the claimant had not achieved ten years' lawful residence and was therefore not within the scope of the Rules.

45. I have looked again at paragraph 17 of the Decision and Reasons where the judge said:

> "I accept the argument advanced on behalf of the [claimant] that he has suffered a historic injustice when his leave was terminated and with hindsight and in country right of appeal could not be pursued. Applying a 'but for 'notion it is my conclusion that he otherwise would have remained lawfully in this country. He has now completed more than 10 years. On this basis I find he satisfies the provisions of 276B and there are no public interest."

46. I find that a very difficult passage. It is a very clear finding that but for the historic injustice the claimant would have completed more than ten years but I can see no justification for that. I see nothing in the witness statement from the claimant to point to such a conclusion. Neither can I see that however unjustly the claimant was treated, it can be said that he does satisfy the provisions of paragraph 276B when he plainly does not. He has not had (even if he should have had) leave to remain and to that extent the judge erred.

47. However, the judge in the next paragraph (paragraph 18) allowed the appeal "on a freestanding Article 8 basis". The judge was clearly entitled to do that. What the judge found is that the claimant had been in the United Kingdom for, by then, more than ten years; he had entered with permission and his leave should have been extended because he was the victim of an historic injustice. It is almost impossible to say what would have happened if the claimant had been given further leave but it is very hard to criticise a decision giving weight to a private life established when the claimant was lawfully in the United Kingdom for at least part of that time and should have been lawfully in the United Kingdom for rather more than that time. It is also hard to criticise the judge for finding that the period of ten years in that status is relevant because if he had had leave at that time he would have satisfied the Rules. Whilst the claimant might be criticised for extending his stay by a misconceived and not pursued asylum claim, he is not somebody who has ever hidden himself away from the authorities and the Secretary of State has not taken advantage of the opportunity of knowing his whereabouts to give him some leave to recognise the historic injustice done. Given the illumination of the public interest in 276B the judge was, I find, entitled to give the period of residence significant weight. It may be that this was not how every judge would have resolved the point but it is not perverse or obscure. It is clear what the judge has done and it is not clearly wrong.

48. When all is said and done, this is a person who entered the United Kingdom lawfully and whose leave was curtailed, we now know, on no good basis. He has tried to remain in the United Kingdom since then and on the particular facts of the case the judge has decided he had established a human right to be there. I find the judge was entitled to do that and so although the Secretary of State succeeds in part, the appeal still has to be dismissed.

49. It remains the case that Article 8 arguments on his health have not been resolved.

Notice of Decision

50. The appeal is dismissed.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

5 June 2024