IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001465
On appeal from: HU/51101/2021
IA/04641/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 06 April 2023

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

UTKIR SAFAROV
(NO ANONYMITY ORDER)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Zane Malik KC of Counsel, instructed by iConsult Immigration (OISC Registered)
For the Respondent: Ms Susana Cunha, a Senior Home Office Presenting Officer

Heard at Field House on 12 January 2023

DECISION AND REASONS

1. The appellant is a citizen of Uzbekistan who challenges the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 24 March 2021 to refuse him indefinite leave to remain on human rights grounds, based on his private and family life in the UK.

2. **Mode of hearing.** The hearing today took place face to face.

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Background

3. The appellant arrived in the UK on 22 May 2005 with a Tier 4 student migrant visa. He had leave on that basis until December 2010, when he applied for, and was granted, Tier 1 Highly Skilled Post-Study Migrant, expiring 28 January 2013.

4. On 11 December 2012, before the expiry of his Tier 1 Highly Skilled visa, the appellant applied for further leave as a Tier 1 (Entrepreneur) migrant, which was refused on 8 July 2013, with an in-country right of appeal which he exercised. The appellant was appeal rights exhausted on that application on 17 January 2014 and has not had valid leave since then.

5. On 6 February 2014, less than 28 days after the expiry of his 3C leave, the appellant sought leave to remain on long residence grounds. The application was accompanied by a valid CAS but while the application was pending, the sponsoring college lost its Tier 4 licence.

6. The appellant produced a savings book from the National Bank of Uzbekistan. The respondent in her refusal letter asserted that 'this was checked with the issuing body who confirmed that they had not issued the document and that it was a forgery'. She cannot now produce the document verification report or any other record supporting this statement in the refusal letter.

7. On 27 February 2015, the respondent refused the application on suitability grounds with reference to paragraph 322(1A) of the Immigration Rules HC 395 (as amended).

The Lucas decision [29 January 2021]

8. The appellant exercised his in-country right of appeal and on 29 January 2021, First-tier Judge Lucas (the Lucas decision) considered that the basis of the respondent's refusal, which relied on dishonesty by the appellant, was unsound. The respondent had not included the evidence of dishonesty in the First-tier Tribunal hearing bundle and was unable to produce it. The appellant continued to assert that the National Bank of Uzbekistan documents were genuine.

9. Ms Adekunle, who appeared for the respondent, accepted at the hearing that the evidence on which the respondent had relied in finding dishonesty was not available. The First-tier Judge found that the respondent had not discharged the burden upon her of proving dishonesty by the appellant.

10. The appeal was allowed to the extent that the Tribunal directed the respondent to reconsider her decision on Article 8 ECHR and long residence as at the date of the application made by the appellant in 2016.

Refusal letter

11. On 24 March 2021, 5 years later, the respondent made a fresh decision. After setting out the appellant's immigration history, and noting that the Lucas decision established that at the date of application, the appellant did not have 10 years' lawful residence, the respondent concluded that the appellant could not meet the requirements of paragraph 276ADE of the Rules. Although there was no longer any suitability issue asserted, he could not meet any of the eligibility requirements of paragraph 276ADE(1).

12. The respondent then considered whether there were any exceptional circumstances for which leave to remain should be granted outside the Rules. She noted that the appellant had asthma, but did not consider that the severity of his ailment or the Uzbek healthcare system were such as to bring him within the Article 3 ECHR threshold: see *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17.

13. Uzbekistan had a functioning healthcare system and the appellant had not shown substantial grounds for believing that he would face a real risk of being exposed to a serious, rapid, and irreversible decline in his health resulting in intense suffering or a significant reduction in life expectancy if returned there.

14. The application was refused again. The appellant appealed to the First-tier Tribunal.

The Aldridge decision

15. On 10 November 2021, First-tier Judge Aldridge dismissed the appeal. He recorded that the appellant had conceded that he could not bring himself within paragraph 276ADE or any other provision of the Immigration Rules. The ambit of the appeal was limited to Article 8 ECHR outside the Rules.

16. The appellant gave oral evidence. The appellant reminded the Tribunal that he came to the UK when he was 19, and had lived here for 16 years. His younger brother and family were here, and he also had friends in the UK who provided witness statements for the hearing, some of whom he met while working at Primark, and others through the small Uzbek community in the UK. His IT skills were in great demand. He supported members of the community and raised funds for good causes. His support given to one person, who was in a hospice and died there, was such that many of the letters of support mentioned his help given to that family and the ongoing friendship between them.

17. The appellant explained that in 2014, following the earlier adverse decision, he had sent his wife and eldest daughter back to Uzbekistan, where they stayed with his mother for four years. The appellant's wife returned to the UK in 2018 on a student visa to pursue a Master's degree, after which she intends to stay and make her career here. The couple have two daughters, who have been able to come to the UK as

dependents of his wife, and in April 2020 they had a third daughter here, a British citizen child.

18. The appellant said he had stayed in the UK to clear his name but had not expected it to take so long. Since 2014, he had been supported financially by his younger brother here, and by friends. His brother had rented a property for the appellant to live in. One of the appellant's two brothers, a sister, his own and his wife's parents were still living in Uzbekistan, as well as some uncles, aunts, nieces and nephews. His daughters were awaiting the outcome of entry clearance applications to rejoin their parents in the UK.

19. The First-tier Judge dismissed the appeal, finding that there was no exceptionality and no reason for leave to remain to be granted on Article 8 ECHR grounds outside the Rules.

20. The appellant appealed to the Upper Tribunal.

Grounds of appeal

21. The appellant advanced two grounds of appeal:

    (1) That the First-tier Tribunal's approach to the historical injustice was legally flawed and inadequately reasoned. The appellant was an overstayer from January 2015 but had made the present application within 28 days of his 3C leave expiring.

    The appellant contended that he should be put back in the position in which he would have been, had the respondent not made the error which she did: see *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009; *Khan v Secretary of State for the Home Department* [2018] EWCA Civ 1684; and *Patel (historic injustice; NIAA Part 5A)* [2020] UKUT 351 (IAC). Had the respondent not considered him to be dishonest, he argued that she should and would have exercised discretion in his favour and given him additional time to find another sponsoring college.

    (2) The appellant also challenged the First-tier Tribunal's findings concerning the effect of delay from January 2014 until First-tier Judge Lucas' finding of no dishonesty in 2021. The First-tier Judge's approach in the present decision was legally flawed and inadequately reasoned: see *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41 and *Ahsan.*

Permission to appeal

22. First-tier Judge Chowdhury granted permission to appeal in the following terms:

> "(2) The appellant has lived in the UK continuously since May 2005, making a number of successive applications to extend his stay in the

> UK. (The grounds make a typographical error as to the initial date.) The grounds assert with regard to his application made as a Tier 4 student in February 2014 that the Respondent made an unfounded allegation that the Appellant had submitted false bank statements. Had there been no error the Appellant's application would have been granted. Relying on *Ahsan v SSHD* [2017] EWCA Civ 2009, it is argued the Respondent would be obliged to deal with him thereafter so far as possible as if that error had not been made. This, the grounds argue, should have been given weight in the Judge's Article 8 proportionality exercise. Arguably the analysis does not exhibit this and the consequent lesser importance given to the maintenance of immigration control.
>
> (3) In addition arguably the Judge had not appreciated the fact the Appellant could not exercise his right to appeal from abroad and had not had proper regard to the delay caused by seeking to exonerate himself."

Rule 24 Reply

23. There was no Rule 24 Reply by the respondent.

24. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

25. For the appellant, Mr Malik accepted that the appellant's valid leave from 22 May 2005-17 January 2014 did not give him 10 years' lawful residence in the UK. He confirmed his concession below that his application for indefinite leave to remain on long residence grounds could not succeed within the Rules, and that he had not shown that there would be very significant obstacles to his reintegration in Uzbekistan if he were returned there.

26. The core of the appellant's case was that had the Secretary of State not made the deception allegation in 2013, which she now could not support, she would by now have granted him indefinite leave to remain. Everything that followed flowed from that error as to suitability.

27. The appellant had been obliged to remain in the UK to clear his name, since his appeal would have been brought to an end by operation of law had he returned to Uzbekistan. He had the right to clear his name: see *Ahsan* which required an effective remedy to be given. The appellant could not now apply to remain in, or to re-enter the UK as his student wife's dependent. He was a long-term overstayer and his application would be refused on that basis.

28. As to delay, Mr Malik accepted that the First-tier Judge had regard to *EB (Kosovo)*, but argued that the guidance in *EB* had been misapplied.

29. For the respondent, Ms Cunha accepted that the judge ought not to have given weight to the appellant's failure to leave the UK at the expiry of his

valid leave in 2014, but the effect of sections 117B(4) and (5) of the Nationality, Immigration and Asylum Act 2002 (as amended) was that little weight could be given to the private life asserted.

30. On the facts of this appeal, the appellant would not have been given leave to remain, even without the respondent's error in relation to the deception allegation. The decision on Article 8 ECHR outside the Rules was correct.

The legal framework

31. The *Ahsan* cases all concerned whether an in-country right of appeal existed to challenge, whether by judicial review or appeal, decisions taken by the Secretary of State based on individuals having cheated in TOEIC tests. Three of the cases related to the service of administrative removal notices pursuant to section 10 of the Immigration and Asylum Act 1999, while that of Mr Ahsan challenged a refusal of leave to remain on human rights grounds, based in part on his alleged TOEIC test cheating, where permission to apply for judicial review of a clearly unfounded certificate had been refused by the Upper Tribunal.

32. At [20] in *Ahsan,* Lord Justice Underhill (with whom Lord Justices Floyd and Irwin agreed) considered the effect of a finding of deception, with reference to paragraph 320 of the Immigration Rules:

> "20. It was common ground before us that a finding of "deception" such as was made by the Secretary of State against the Appellants in these cases would prejudice their chances of obtaining leave to enter in the future, if and when they eventually left the UK, but there was initially some disagreement about the nature and extent of the prejudice. ... Even in circumstances which do not attract a mandatory ban, leave to enter or remain will "normally" not be granted where there has been such deception and there are aggravating circumstances. And, quite apart from the particular provisions of paragraph 320, the fact that an applicant has used deception will also be relevant in the assessment of the suitability criteria prescribed in Appendix FM.
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> 21. More generally, it is self-evident that an official finding – albeit not made by a court or tribunal – that a person has cheated in the way alleged in these cases may become known to others, in which case it is likely to be a source of shame and to injure their reputation."

33. In *SM and Qadir (ETS evidence -burden of proof)* [2016] UKUT 229 (IAC), the Upper Tribunal found that there was a primary evidential burden on the Secretary of State when asserting deception, but that the ETS evidence relied upon was capable of discharging it. That is not relevant here: the respondent accepts that she cannot now discharge the legal burden upon her in relation to dishonesty.

34. In *Khan,* there was an agreed approach which I understand to refer only to the ETS cases. The judgment was principally concerned with costs, the outcome of the appeal itself having been agreed between the parties and

recorded in a Note which the court quoted in its judgment at [37]. The Note makes it clear that the factual matrices of each appellant would be considered on a case by case basis.

35. In *Patel*'s case, the Upper Tribunal made a distinction between an 'historic injustice' such as that affecting British Overseas citizens or the family members of Gurkha ex-servicemen, and an 'historical injustice' arising out of the Secretary of State's operation or non-operation of her immigration functions. In relation to historical injustice, the Upper Tribunal gave the following guidance:

> ***"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 (e.g. 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 (e.g. 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 (e.g. 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.*
>
> ***C. Part 5A of the Nationality, Immigration and Asylum Act 2002 and the weight to be given to the maintenance of effective immigration controls***
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> *(4) In all cases where, for whatever reason, the public interest in the maintenance of effective immigration controls falls to be given less than its ordinary weight, the usual course should be for the judge so to find in terms, when addressing section 117B(1) of the 2002 Act. The same result may be achieved, at least in some situations, by qualifying the consideration in section 117B(4) that little weight should be given to a private life formed when the person concerned is in the United Kingdom unlawfully. Judicial fact-finders should, however, avoid any recourse to double-counting, whereby not only is the weight to be given to effective immigration controls diminished but also, for the same reason, a private life is given more weight than would otherwise be possible by the undiluted application of section 117B(4).*
>
> *(5) The weight to be given to the public interest in the maintenance of effective immigration controls is unlikely to be reduced because of disappointments or inadequacies encountered by individuals from teaching institutions or employers."*

36. It is 'historical injustice' which is relied upon in this appeal, in relation to Article 8 ECHR outside the Rules. Mr Malik relies both on the second example, delay in the *EB (Kosovo)* sense, and on the third (the *Ahsan*

example), where the respondent formed a view about the appellant's activities or behaviour which turned out to be mistaken.

Analysis

37. The appellant has conceded that on the factual matrix in his appeal, indefinite leave to remain would not have been granted within the Rules. The question for the Tribunal, therefore, is whether the respondent's exercise of her discretion outside the Rules was lawful or whether, having regard to the historical injustice of considering the appellant to have used deception, if he were put back in the position in which he would have been, leave outside the Rules should have been granted.

38. The basis of the 28 March 2015 refusal was primarily that the appellant had used deception, which the respondent now cannot prove. I disregard the deception element of the application.

39. I am required to consider only Article 8 ECHR outside the Rules. The application was applying for Tier 4 leave, which is not a settlement route. If the respondent were to seek to put the appellant back in the position he would have been in 2015, she would give the appellant an opportunity now to find another College at which to pursue his Tier 4 studies. The leave granted being precarious, his private life position would not have improved.

40. The appellant has lived in the UK since 2005. Section 117B(4) and 117B(5) normally require me to give little weight to private life developed while the appellant was here precariously (until 28 March 2015) or without leave, thereafter.

41. The delay caused by the respondent's unsupported finding of dishonesty has encompassed the return of the appellant's wife to the UK in 2018, and the birth of two of his three daughters, all three of whom are now living here. If the respondent had not made the error which she did, the appellant would have been living with his family throughout, either in Uzbekistan or in the UK, depending on the outcome of his Tier 4 application.

42. The Aldridge decision did not take separate account of the appellant's family life with his wife and his daughters, all of whom are living here in the UK now. That was not the case when the First-tier Judge considered the appeal, but his wife was already here and I can see no consideration of the family life between husband and wife in the decision. He also has family life with his three daughters.

43. If the appellant is now removed, he is likely not to be allowed to return to the UK for up to 10 years, by which time his eldest daughter would be 19 years old and the youngest would be 13 years old. The family has already lived apart for 4 years before the appellant's wife was able to return, and two of his daughters had to wait even longer for entry clearance to join their mother as her dependants.

44. The appellant's wife intends to make her life in the UK. His youngest daughter is a British citizen and cannot be required to leave the UK. It may be that the older two are also registered as British citizens: that evidence is not before me. A further separation of 10 years, even with visits to Uzbekistan by his wife and daughters, would permanently and substantially damage the appellant's family life.

45. In these circumstances, the weight to be given to the importance of immigration control is reduced, by reason of the respondent's error in 2014. I am satisfied that the historical injustice, combined with the appellant's family life, amounts to exceptional circumstances for which leave to remain ought to be given outside the Rules.

46. The appeal is allowed.

Notice of Decision

47. For the foregoing reasons, my decision is as follows:

    The making of the previous decision involved the making of an error of law. I set aside the decision. The decision in this appeal is allowed.

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 15 February 2023