IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-000046
UI-2024-000047
UI-2024-000048
First-tier Tribunal Nos: HU/01061/2023
HU/01062/2023
HU/01063/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 12th of March 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MRS SOYSA WARUSHAHANNADIGE ARUNAKANTHI ANOMA
MR DAMBURE VITHANCHCHI KUMARASIRI
MISS SANUSHI THAMASHA DAMBURE VITHANCHCHI
(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr P Lewis, Counsel; instructed by Direct Access
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

Heard at Field House on 22nd February 2024

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Haria, promulgated on 13th November 2023 dismissing the Appellant's human rights appeal.

2. The Appellants applied for permission to appeal on three grounds and were granted permission to appeal by First-tier Tribunal Judge Boyes in the following terms:

> "1. The application is in time.
>
> 2. The grounds assert that the Judge erred in numerous respects. Grounds 1 and 2 effectively argue the same issue and ground 3 raises

an issue of fairness in that the documents the appellants wished to rely upon were not properly before the court through no fault of the appellants.

3. Grounds 1 and 2 are arguable. The Judge was obliged in this instance to consider relevant matters in the 8(2) balancing exercise and it is arguable that the failure to notionally put the appellants back into the same position they were arises out of a misunderstanding on the part of the Judge and as such an error. For the reasons which are well explained and justified in the grounds in respect of 1 and 2, permission is granted.

4. With respect to ground 3, permission is granted. The Judge can clarify which documents where explicitly before her in due course but it is arguable that the totality of the information the appellants wished to rely on may not have been before the Judge. That is arguably an error.

5. Permission is granted".

3. Before me, Mr Clarke confirmed that the appeal was contested and that there was no Rule 24 response from the Respondent.

Findings

4. At the conclusion of the hearing I reserved my decision which I now give. I find that the decision demonstrates material errors of law, such that it should be set aside in its entirety.

5. In respect of Grounds 1 and 2 which I take in reverse order, the grounds argue that the judge has failed to take into account a relevant consideration and misdirected herself in law in respect of the historical injustice that the Appellant has suffered arising from the incorrect allegation of having cheated in her ETS TOEIC English test in respect of which the Appellant was found to be innocent by First-tier Tribunal Judge O'Garro in her decision promulgated on 23rd August 2016. At the outset it would help to specifically set out certain passages from Judge O'Garro's decision:

Background

4. On 5 April 2011 the first appellant was granted leave to enter the United Kingdom as a student until 20 August 2012.

5. On 25 April 2011 and 26 March 2011 the first, second and third appellants were respectively granted leave to enter the United Kingdom as Tier 4 General dependants of the first appellant.

6. On 31 October 2012 the first appellant was granted further leave to remain as a Tier 4 General student until 20 February 2014. The second and third appellants leave to remain was granted in line with the first appellant's leave.

7. On 17 February 2014 the appellants made in time applications for further leave. Their applications were refused as the first appellant was considered a person who had previously obtained leave to remain in the United Kingdom by deception. This was due to information provided to the respondent by Educational Testing Service (ETS) that there was an anomaly with the first appellant's speaking tests score taken on 17 July 2012. It indicated the presence of a proxy test taker. The respondent concluded that the appellants' applications made on 31 October 2012 were obtained by deception.

8. The appellants appealed that decision. The first appellant denied deception. She said that she is very proficient in English. She said that prior to coming to study in the United Kingdom she had worked in Sri Lanka as an hotelier at an International hotel which required her to carry out her duties in English and she has been doing her studies in the United Kingdom at degree level and above which required her to be proficient in English language. She said that the respondent has not provided the evidence to support the allegation of deception.

...

Consideration and Findings

17. In reaching my decision, I apply the civil standard of proof, that of a balance of probabilities. I take fully into consideration all the documents contained in the file and submissions received.

18. The respondent refused the appellants' applications for leave to remain as a Tier 4 (General) student and tier 4 (General) student dependants, because she believed that the first appellant had used deception in a previous application.

19. Although the respondent has raised the issue of deception by the first appellant and has used this as a reason for refusing the appellants' leave to remain in the United Kingdom, I find that save for making the allegation, the respondent has provided no evidence to the required standard to support her allegation.

20. I reminded myself of what the Tribunal said in the case of **RP (proof of forgery) 2006 UKIAT 86**. In that case a Tribunal Panel said that where there was an allegation of forgery, the onus is on the ECO to prove the allegation and he must adduce strong evidence in order to discharge that burden.

21. I also have paid regard to the relevant case of R on the application of **Gazi v SSHD (ETS-Judicial Review) 20150 UKUT** and what the Tribunal said therein about the use of generic evidence to prove deception in ETS cases.

22. I noted in that case, the Tribunal said that the ETS testing often yielded false positive results. I take into account the fact that the burden of proof is on the respondent to provide specific and individual evidence

in relation to the first appellant to support the allegation that she used deception by relying on the ETS documents she submitted with her previous application.

23. I have also paid regard to the more recent case of **SM and Qadir v Secretary of State for the Home Department (ETS-Evidence-burden of Proof) 2016 UKUT 00229**, and the further criticism made in that case of the respondent's reliance on generic evidence.

24. I take account of the fact that the first appellant entered the United Kingdom as a student in 2011 and would have had to produce evidence of satisfactory competence in English Language to undertake her studies. I also take took into account that up until the refusal of her visa, the first appellant had been studying at degree level doing a Masters in Business Administration which she said she completed in December 2014. She now has offers from several reputable Universities to complete a PHD in Hospitality Management. The first appellant said that these are level 8 courses and she will be studying in English and that these Universities would only offer her a place to do a PHD, if they were satisfied that her level of English was of a good standard.

25. I am aware that the case of **AA (Nigeria) 2010 EWCA** decided that references to 'false' representations and documents in paragraph 322(1A) required an element of dishonesty. The court said that an element of deception is required, that is, the appellant or someone acting on his/her behalf must have an intention to deceive in order for the paragraphs to be invoked.

26. I find that the respondent has not provided the evidence she is required to provide to discharge the burden of prove to the standard required in order to satisfy me that the first appellant had used deception in a previous application. I find that the respondent has made not out the case against the appellant and Paragraph 322(1A) is not invoked.

27. As I find that the respondent has not proven to the required standard that the first appellant had used deception when she made her previous application for leave, then it seems to me that it must follow that the respondent's decision which is based on this allegation of deception, is not in accordance with the law.

28. Based on my findings, fairness now requires the respondent to grant a period of discretionary leave of no less than 60 days, to enable the first appellant to submit a fresh Confirmation of Acceptance for Study (CAS) to enable her to complete her studies.

6. As can be seen from the above excerpts, the Appellant held valid leave to remain as a Tier 4 (General) Student along with her dependants on her PBS status, and applied in time for leave to remain as a student on 17th February 2014 prior to expiry of her student leave on 20th February 2014. These applications were refused owing to the allegation of the Appellant having used a proxy test

taker in her tests taken on 17th July 2012. It is also noteworthy that having found that the overall burden of proof was not discharged by the Respondent and that the Appellant had not committed deception or fraud, Judge O'Garro found at paragraph 27 of her decision that the decision is not in accordance with the law, that being a permissible outcome for an appeal arising from an application preceding 6th April 2015. Of particular importance is the final 28th paragraph of Judge O'Garro's decision in that it sets out that based on the judge's findings fairness requires the Respondent to grant a period of "discretionary leave of no less than 60 days, to enable the first appellant to submit a fresh Confirmation of Acceptance for Study (CAS), to enable her to complete her studies".

7. It is also important to note the point in time at which this decision was promulgated. As is clear from the above passages excerpted from the judge's decision it was promulgated after the decision in SM and Qadir v Secretary of State for the Home Department (ETS-Evidence-burden of Proof) 2016 UKUT 00229 from 2016 but prior to the Court of Appeal's decisions in Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009, which was handed down on 5th December 2017; and in Khan & Ors v Secretary of State for the Home Department [2018] EWCA Civ 1684 that was handed down on 17th July 2018.

8. From the Appellant's Bundle, I can see that a great deal of correspondence and litigation ensued following the outcome of Judge O'Garro's decision, arising primarily from the Respondent's failure to put her findings into effect for the Appellant's benefit so that she could complete her studies. For example, I note that a judicial review was lodged, in order to compel the Secretary of State to comply with the direction of Judge O'Garro. This ultimately led to the production of a letter from the Home Office dated 21st March 2018 which sought to do so, and which reads as follows in relevant part (including typos, as found in the original letter):

> "Your clients applications have been granted 60 days Leave outside the Rules with the exception to switch back in tot Tier 4. Please ensure that the enclosed letters are passed to your client(s) immediately".

9. In response to this letter the appellants' former representatives sent their own letter dated 13th April 2018 which stated inter alia as follows:

> "Our client's Tier 4 Sponsor has notified her that the course start date is 11th July 2017 and unless the leave is valid until at least 13th June 2018, the CAS cannot be issued".

10. Thus, pausing to contextualise the above events in chronological order, on 23rd August 2016 Judge O'Garro issued her decision and reasons including the stipulation that discretionary leave of no less than 60 days be given to the Appellant to enable her to complete her studies, followed ultimately by a letter dated 21st March 2018 giving 60 days' leave outside the Rules to switch back into Tier 4, followed by a letter dated 13th April 2018 which conveyed that owing to the start date of the course the leave granted was not going to assist the Appellant.

11. I note that the letter giving 60 days' leave outside the Rules of 21st March 2018 came after the Court of Appeal handed down its judgment in Ahsan on 5th

December 2017. I also take note that at [120] of that judgment, Lord Justice Underhill stated that, in his view, the starting point was that in a human rights appeal, if an appellant was found not to have cheated, 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". Lord Justice Underhill further noted that the Secretary of State could:

> "Other things being equal, ...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)".

12. In my view, what is clear from this decision and [120] of Ahsan is that Lord Justice Underhill provided the Court's binding view that a successful Appellant could be put into substantially the same position they had been, and that there is no reason in principle why that should not be taken into account in deciding whether a human rights appeal could provide for such a remedy.

13. It is important to recall that the Ahsan judgment was not before Judge O'Garro as her decision preceded the Court of Appeal's judgment, and equally Judge O'Garro did not have the benefit of the Court of Appeal's judgment in Khan wherein at [37], Lord Justice Singh framed the terms of consent and reasons given by the Secretary of State for settling three linked appeals to include the following terms:

> "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".

14. Therefore, turning back to the Grounds of Appeal which pose the following question framed by Mr Lewis on the Appellants' behalf, namely whether the grant of 60 days' leave by a letter dated 21st March 2018 had been "sufficient to put the Appellants back into as good a position as if the allegation had not been made", it is clear that this is consistent with the Ahsan judgment that binds lower courts and tribunals, and the giving of 60 days' leave was clearly insufficient because the Appellant was, as confirmed by the contemporaneous letter from her solicitors dated 13th April 2018, unable to obtain a CAS owing to the short window of time given by the 60 days' leave outside the Rules. This clearly fell far short of putting the Appellant into a position that she would have been had the allegation never been made.

15. There was a great deal of debate before me as to whether or not the start date of the course, being 11th July 2017 and the fact that the course needed to begin within 28 days of the course start date, in other words by approximately mid-June 2018, is the reason why the Appellant could not meet paragraph 245ZX(l) of the Immigration Rules in force at the time (which stipulated that the studies should commence within 28 days of the expiry of the previous leave to remain as a student), or whether the wording used by Judge O'Garro in stipulating that discretionary leave be granted for "no less than 60 days", meant that these were the reasons why the Appellant could not continue with her studies uninterrupted. However, with respect to both parties, this seems to me to entirely miss the point. Judge O'Garro's reasoning for stating in the final paragraph of her decision that the Respondent must grant a period of discretionary leave was in order "to enable (the Appellant) to complete her studies". At that time it was customary for the Respondent to give 60 days' leave where there had been an interruption to a student's studies pursuant to, for example, a revocation of a sponsor licence as discussed in the decision of Patel (revocation of sponsor licence – fairness) [2011] UKUT 211 (IAC). However, given the later judgments in Ahsan and Khan, Judge O'Garro would not have known the Secretary of State's position in respect of the relief and remedy she proposed to apply for instances where students were disadvantaged by an incorrect allegation of using a proxy test taker and having committed deception. However, in giving effect to Judge O'Garro's stipulation that the Respondent given "no less than" 60 days leave, the Respondent was clearly not prevented from giving a longer grant of leave, particularly where the outcome of Judge O'Garro's decision was that this should happen in order "to enable (the Appellant) to complete her studies".

16. Consequently, when the First-tier Tribunal answered the question raised in Ahsan in November 2023, it is to nothing that there was a previous judicial review claim wherein the Appellant sought to challenge the unfairness in being given 60 days in reliance upon the Upper Tribunal's judgment in *MM (unfairness; E & R) Sudan* [2014] UKUT 105 (IAC), which was the manner in which the issue was framed before the Court of Appeal and formed part of the reasons for The Honourable Sir Ross Cranston refusing permission to appeal on 5th February 2019. This was different to reliance instead being placed on the judgments of Ahsan and Khan and the Secretary of State's stated position in those judgments contrasted with the limited and unhelpful grant of *only* 60 days leave despite the letter issuing that leave postdating the position in Ahsan which binds the Respondent and wherein it was clear what relief should potentially emanate from a Tribunal appeal where a student has been exonerated of the allegation of cheating. I find that Lord Justice Underhill made it plain that the Secretary of State would be obliged to deal with an exonerated student as if the erroneous allegation had not been made and that the Respondent was aware of this at the time the letter was issued.

17. By comparison with the previous ETS casework instructions published 8th March 2020 (version 2.0), the giving of 60 days' leave outside the Rules was reserved, at that time, for implementing appeal findings where an appeal had been *dismissed* on human rights grounds albeit that a Tribunal had also found that an Appellant did not obtain a TOEIC certificate by deception. By comparison with the current ETS casework instructions published 18th November 2020 (version 4.0), the same section of the guidance, concerning implementing appeal findings,

states that even if an appeal is dismissed on human rights grounds with the findings made that the Appellant did not obtain a TOEIC certificate by deception, the Respondent will "give effect to that finding by granting six months' leave outside the Rules". However, in situations where an Appellant wins an Article 8 appeal as well as having a finding of not having used deception to obtain a TOEIC certificate – which is closest to the situation that the Appellants experienced having succeeded before Judge O'Garro, the guidance states that "usually, the individual will be on a path to a five year settlement if the Rules are found to be met and the ten year route if the appeal succeeds on the basis of the exceptions in Appendix FM".

18. It is plain that the grant of leave depends upon whether the relevant Rules are met but even in the worst case scenario, at the very minimum, even if they are not, six months' leave to remain outside the Rules will be given as opposed to 60 days. As an aside, it is unclear why the Secretary of State has changed her position from that of 60 days where an appeal failed in version 2 of the guidance to six months in version 4 of the guidance, however, it is immaterial for the purposes of this appeal.

19. What becomes increasingly clear is that, as at the date of the appeal hearing before the First-tier Tribunal, the giving of 60 days was by contrast, plainly inferior to the relief that the extant ETS casework instructions demonstrated applicants would invariably be given – even if their appeal was dismissed on human rights grounds, which was not the case here given that the decision was found to be not in accordance with the law by Judge O'Garro.

20. For the sake of completeness, I also note that the question of historical injustice had not been resolved by the decision refusing permission to appeal by Sir Ross Cranston from a judicial review as the grounds before him were wholly different to those put before the First-tier Tribunal.

21. Therefore, in answering the question, raised in Grounds 1 and 2 as to whether the historical injustice caused by the ETS allegation had been adequately remedied by the Respondent and the First-tier Tribunal's findings that it had owing to the grant of 60 days, I find that the First-tier Tribunal has inadvertently omitted consideration of this complex chronology of ETS jurisprudence and the Secretary of State's gradually more pronounced (and published) position as to how he will act where there is a finding that deception was not used to obtain a TOEIC certificate, as was the case here. Had the First-tier Tribunal been made aware of this jurisprudence and the Respondent's published position on the appropriate relief where a student is found to have not cheated to obtain their ETS TOEIC Certificate, it is plain that it would not have found that the Respondent's eventual compliance with the stipulation made by Judge O'Garro was sufficient to remedy the historical injustice such that this shortfall in leave being given to the Appellants truly provided restitution as was deemed to be the appropriate outcome since Ahsan, and certainly as the terms of Judge O'Garro's decision were that "no less" than 60 days should be given at a time where it was not known what relief was appropriate for genuine ETS examinees, and also given that the purpose that Judge O'Garro sought to achieve, "to enable (the Appellant) to complete her studies" was not, in fact, achieved by the mere grant of 60 days as the previous representative's letter confirms.

22. In light of the above, these findings were therefore not open to the First-tier Tribunal to reach. In any event it is clear that the position taken by the Secretary of State in issuing a 60 day letter does not meet the proposed terms that he gave to the Court of Appeal in Khan whereby it was accepted that in situations such as the present, the following would apply:

> "The refusal would be withdrawn ... the applicant ... 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 ... and they would in no way be disadvantaged in any future application they chose to make".

23. Albeit, this position in Khan was handed down months after the letter was issued, in hindsight and certainly at the date of the hearing before the First-tier Tribunal in November 2023, one can see that the 60 day letter was plainly deficient in providing restitution to the Appellant.

24. In conclusion, against the clear indication given by the Respondent to the Court of Appeal, it is plain that 60 days was insufficient given that it was not adequate for the purposes of obtaining a CAS from the University of Gloucestershire and given that it would not have placed the Appellant in the position that she would have had an outstanding application and a "reasonable opportunity" to make any further changes to her application and particularly as it cannot be said that she was "in no way ... disadvantaged" in her future application that she wished to make to study with the University of Gloucestershire.

25. Consequently I find that Grounds 1 and 2 demonstrate material errors of law in the First-tier Tribunal Judge's decision and I hereby set aside the decision in its entirety.

26. I do not go on to consider Ground 3 given that I have already set aside the decision bearing in mind that the assessment of historical injustice is flawed which would impact the weight to be given to the public interest and which would then affect the Article 8 proportionality assessment that the Tribunal will have performed, pursuant to the Upper Tribunal judgment in Patel (historic injustice; NIAA Part 5A) India [2020] UKUT 351 (IAC).

27. I therefore find that the First-tier Tribunal has materially erred for the reasons given above.

Notice of Decision

28. The Appellant's appeal is allowed.

29. The appeal is to be remitted to the First-tier Tribunal to be heard by any judge other than First-tier Tribunal Judge Haria.

Deputy Judge of the Upper Tribunal

Immigration and Asylum Chamber

6 March 2024