IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000723

First-tier Tribunal No: HU/60824/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14th of June 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

Md Shabul MIAH
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Waheed of Counsel instructed by Liberty Legal Solicitors.
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 9 April 2024

DECISION AND REASONS

Introduction & Background

1. This is an appeal against a decision of First-tier Tribunal Judge Dieu signed on 29 November 2023 dismissing on human rights grounds an appeal against a decision of the Respondent dated 30 December 2022.

2. The Appellant is a citizen of Bangladesh born on 4 October 1982.

3. The Appellant initially entered the UK on 26 September 2009 with leave until 30 June 2011 as a Tier 4 (General) Student.

4. On 20 May 2011 the Appellant made an application for further leave to remain as a Tier 4 student. The circumstances of that application, and its ultimate resolution, may be gleaned from the Decision of First-tier Tribunal Judge McWilliam promulgated on 17 October 2011 in the Appellant's

successful appeal against refusal (ref IA/25495/2011). The Appellant's application had been refused because his Tier 4 sponsor, London Trinity College, had been removed from the register on 1 August 2011 (when the Appellant's application was still pending), invalidating his confirmation of acceptance for studies ('CAS'). The Appellant had been unaware of the circumstances until he received the decision refusing his application (dated 19 August 2011). The Appellant's appeal was resolved in accordance with the relevant then current jurisprudence – in particular **Patel (revocation of sponsor licence – fairness) India [2011] UKUT 00211 (IAC)**: the appeal was allowed to the extent that the Appellant's application for leave to remain remained outstanding and required to be determined, but that a fresh decision should not be made for a period of 60 days to enable the Appellant to obtain a fresh sponsorship letter and to vary his application accordingly.

5. It is apparent that the Appellant was subsequently granted further leave to remain from 24 July 2013 to 20 May 2015. In relation to this, the Appellant's Skeleton Argument before the First-tier Tribunal refers to the Appellant having obtained a CAS from the Opal College, and also having provided an ETS TOEIC certificate in support of his application (Skeleton Argument at paragraph 5).

6. On 16 January 2014 the Appellant's leave was cancelled because the Respondent considered that he had been working illegally at a restaurant. The Appellant's attempts to challenge this decision were unsuccessful: he did not have an in-country right of appeal and pursued the matter, to no avail, through judicial review. (See Decision of Upper Tribunal Judge Grubb (JR/1358/2014).)

7. Thereafter, an application based on family/private life was made on 16 September 2020, and refused on 12 March 2021. A pre-action protocol letter ('PAP') in respect of this refusal reveals that the application "*relied on the unfairness [the Appellant] suffered due to an ETS TOEIC certificate*" submitted with his earlier application for variation of leave as a student. (The PAP refers to the certificate having been submitted with the application dated 20 May 2011, but given that the TOEIC certificates on file are from November and December 2011 it seems likely that they were submitted with the application made during the 60 day grace period granted after his successful appeal.)

8. The Appellant's attempt to challenge this decision culminated in a decision by Upper Tribunal Judge Macleman on 27 July 2021 (JR/815/2021), refusing the application certifying it as 'totally without merit'. The Order of Judge Macleman makes reference to the Grounds being misleading, and makes robust criticism of "*intemperate and unfounded allegations*" that should not have been advanced by professional representatives. It was determined that the Appellant "*does not show that his current situation is arguably, in any way, attributable to unjust conduct of the respondent. He was given the appropriate opportunity arising from revocation of the*

sponsor's licence in 2011. He has never been the subject of a decision that he cheated in an English language test."

9. The Appellant made a further application for leave to remain on 14 February 2022. Regrettably, much the same language of which Judge Macleman was critical is reproduced in the covering letter of the application.

10. The application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 30 December 2022. It is this decision that is the foundation of these proceedings.

11. The Appellant appealed to the IAC.

12. Before the First-tier Tribunal the Appellant relied upon Article 8 of the ECHR.

13. The First-tier Tribunal made clear findings at paragraph 19 of the 'Decision and Reasons' for rejecting the Appellant's case under paragraph 276ADE(1)(vi). Those findings are not challenged before the Upper Tribunal.

14. The Appellant's case under Article 8 beyond the Rules was rejected for the reasons set out at paragraphs 20-23. This aspect of the case is the subject of challenge in the Grounds of Appeal pursued before me.

15. Permission to appeal was granted for the reasons set out in the decision of First-tier Tribunal Judge Aldridge dated 22 February 2024.

16. Although the Respondent has not filed a Rule 24 response, Mr Melvin provided a Skeleton Argument setting out the Respondent's resistance to the Appellant's challenge.

Consideration of the 'error of law' challenge

17. In a letter dated 7 March 2022 making representations in support of the application of 14 February 2022 the basis of the Appellant's Article 8 claim is stated in these terms: "*Mr Miah now wishes to make human rights claim due to ETS TOEIC certificate*". What follows is essentially a submission premised on the notion that the Appellant had wrongly been refused leave at an earlier stage because of deception in submitting a fraudulently obtained English-language certificate allegedly acquired by cheating in the test.

18. In this context the application was fundamentally flawed. The Appellant has never had his leave curtailed or cancelled, and has never had an application refused, based on an allegation of cheating. Indeed, there is no reference anywhere in the papers to the Respondent making such an allegation at any point. Bizarrely, it is the Appellant who 'outs' himself as a potential cheat – his representatives having sought and obtained evidence

from ETS of the cancellation of his test results because they could not be authenticated.

19. Moreover, it would appear that this was, at least in part, a repeat of the previous Article 8 application that had culminated in the Order of Judge Macleman in which, as quoted above, it was observed that the Appellant "*does not show that his current situation is arguably, in any way, attributable to unjust conduct of the respondent. He was given the appropriate opportunity arising from revocation of the sponsor's licence in 2011. He has never been the subject of a decision that he cheated in an English language test.*"

20. It is very difficult not to draw the inference that at this stage the Appellant's advisers essentially incompetently attempted to 'shoehorn' his case into a template TOEIC / historical injustice application that it did not fit.

21. Nonetheless, I note that within the letter of representations of 7 March 2022 there is a quotation from **Ahsan v SSHD [2017] EWCA Civ 2009** in respect of the adequacy of out-of-country appeals in Article 8 cases. However, the articulation of the relevance of this case is marred by the reference to a "*decision dated 31 March 2016*": no such decision is identifiable in respect of the Appellant; I strongly suspect that this arises through use of a template letter. Be that as it may, the jurisprudence here may be relevant to the decision cancelling leave on 16 January 2014. I return to this below.

22. On appeal to the First-tier Tribunal the Appellant's Article 8 case instead of focussing primarily on a (non-existent) allegation of cheating resulting in either a curtailment of leave or a refusal of further leave, articulated more clearly a claim that historical injustice arose in relation to the circumstances of the cancellation of leave on 16 January 2014 on the ground of working in breach of conditions.

23. In this regard, the Appellant's Skeleton Argument before the First-tier Tribunal noted the fact that the Appellant had sought remedy against the cancellation of his leave in 2014 by way of judicial review, there not being available to him an in-country right of appeal. It was emphasised that judicial review proceedings did not provide a fact-finding forum, and as such there had been no 'trial on the facts'. In this context the Appellant denied that he had been working as alleged by the Respondent: whilst he admitted that he had been helping out at his former place of employment this had not been for a wage – he had helped out his ex-boss who had called him for help whilst he was away for three days on a family visit.

24. The Skeleton Argument also made submissions to the effect that the Appellant had been prejudiced by the 'toxicity' surrounding the TOEIC scandal such that he had not been able to obtain a further CAS and therefore had not been able to apply for further leave to remain. See paragraph 9(i) of the ASA: "*… he is a victim of historical injustices… and*

also due to the ETS/TOEIC scandal which impacted on his ability to progress and obtain further CAS as the toxicity of the ETS saga meant that he was not desirable to sponsors having used an ETS certificate in obtaining leave to remain." This is developed further at paragraph 16 of the ASA.

25. I am afraid that again this appears to be attempting to shoehorn the facts of the Appellant's case into a template submission that does not fit. The Appellant had been successful in using his TOEIC certificate to obtain further leave to remain as a student from 24 July 2013 to 20 May 2015. There is no evidence, and not even an assertion on his behalf, that following the cancellation of his leave in 2014 he ever made any sort of application to an educational institution at all. The reason the Appellant found himself unable to study in the UK, or lawfully pursue any other activity with leave in the UK, was not because he held a TOEIC certificate but because his leave had been curtailed for breach of conditions. There is absolutely no evidence that he was ever rejected, or otherwise prejudiced, on the basis of having a TOEIC certificate. And so we are back again at the comments of Judge Macleman made in July 2021.

26. Summarising the foregoing, insofar as the Appellant relied in the ASA upon the principle of 'historic injustice' in the context of his Article 8 claim before the First-tier Tribunal, the only point of any substance was that in relation to the cancellation of leave in 2014. The case as advanced by reference to possession of a TOEIC certificate was fundamentally misconceived on the facts.

27. To be clear, and notwithstanding that the grant of permission does not exclude argument of Ground 2 – which in substance alleges that the First-tier Tribunal has not engaged with the Appellant's argument "*that he had been "tarred" with the same brush as other ETS victims*" - this is wholly without any merit on the fact of the Appellant's case.

28. For the avoidance of any doubt, I have noted that the ASA asserts a third incidence of historic injustice by reference to the refusal of the Appellant's application for further leave as a student on the basis of his sponsor college having had its licence revoked whilst the application was pending. In the overall scheme of things this adds nothing to the Appellant's case - particularly in circumstances where he was able subsequently to regularise his position through a successful appeal and obtain further leave to remain as a student on a different course. In any event it is not relevant to either the Grounds of Appeal before me or the basis upon which permission to appeal was granted.

29. Yet further for the avoidance of any doubt, I also note that the Appellant advanced a case based on paragraph 276ADE(1)(vi) of the Immigration Rules in respect of 'very significant obstacles to integration', but the rejection of that aspect of his case is not the subject of challenge before me.

30. I turn then to focus on what is, in my judgement, the only matter of any possible weight in the Appellant's case.

31. In respect of the 2014 cancellation of leave the substance of the Appellant's cases is this. He denies that he was working. He complains that the in-country remedy available to him at the time by way of judicial review was inadequate because he was not able to have a trial on the facts. This amounted to 'historical injustice' or was otherwise unfair. In the context of the instant Article 8 appeal it was incumbent upon the First-tier Tribunal to hear evidence and make findings of fact to determine whether his leave had properly been cancelled. If the Tribunal found in his favour on the facts, he should be accorded a remedy that in substance put him back into the position as if the erroneous decision had not been made – which would necessitate allowing his Article 8 appeal. However, the First-tier Tribunal had not afforded him a trial on the facts, and had not made findings for itself, but had merely relied upon the decision of Judge Grubb in refusing the Appellant's judicial review challenge.

32. I have used the phrase 'This amounted to 'historical injustice' or was otherwise unfair' in the preceding paragraph to reflect the fact that Counsel who appeared before the First-tier Tribunal, who did not draft the ASA or the Grounds to the Upper Tribunal, seemingly denied the notion that historical injustice was 'in play'. See paragraph 10: "*On Article 8 whilst he relied upon the appeal skeleton argument [Counsel] accepted that the term 'historic injustice' was too bold a term, it was more that it had been 'unfair'*".

33. It might be said, and indeed it is said by Mr Melvin, that such an apparent concession before the First-tier Tribunal is an obstacle to the Appellant pursuing his challenge before the Upper Tribunal on a submission of 'historic injustice'. That is not an unattractive submission. However, in circumstances where either way I am in substance being asked to determine whether the First-tier Tribunal fell into error of law by not conducting a trial on the facts in respect of the Appellant's breach of conditions, it seems to me that it would not be helpful or appropriate to determine such an issue on the basis of the fine distinction between the ASA and the submissions at the hearing.

34. The cancellation of the Appellant's leave on the basis of breach of condition involved the making of a removal decision under section 10 of the Immigration and Asylum Act 1999. The effect was that the Appellant did not have an in-country right of appeal; hence his election at that time to challenge the decision by way of judicial review rather than leaving the UK to challenge it by way of an out-of-country appeal. The effectiveness of an out-of-country appeal in the context of an Article 8 case, and thereby the lawfulness of any underlying decision, was the subject of extensive litigation culminating in the decision in **Kiarie and Byndloss [2017] UKSC 42**. **Kiarie** was then followed and applied in **Ahsan** (cited in the letter of representations, see above) in the Court of Appeal determining that an out-of-country appeal would not satisfy the procedural

requirements of Article 8 on the facts of those particular appeals involving allegations of TOEIC cheating. This conclusion was expressed as being contingent on the particular features of the cases.

35. Because I am ultimately dismissing this challenge on a different basis as explained below, it is perhaps moot as to whether the issue of the Appellant's breach of condition was one that could not be fairly decided without hearing oral evidence given that in substance he accepts that he was engaged temporarily in running a restaurant on behalf of his ex-boss, but disputes that it amounted to work in a legal sense because he was not being paid: e.g. see Appellant's Skeleton argument before the First-tier Tribunal at paragraph 17. As such, his challenge essentially turned on a legal argument rather than on disputed primary facts: it is, accordingly, not manifest why he would have needed to be present at a hearing to give oral evidence; legal submissions could have been made in his absence and he could rely on statements and documents in so far as it would still have been a requirement to show that he had developed a private life in the UK sufficient to engage Article 8(1). Suffice to say, that notwithstanding the decisions in **Kiarie** and **Ahsan**, it is not readily apparent that the Appellant's circumstances were such that an out-of-country appeal would not have satisfied the procedural requirements of Article 8 in his case. If that is the case – as indeed it seems to be – in the premises it cannot be said that there has been any injustice, or that the First-tier Tribunal Judge in the instant proceedings was required to allow litigation on an issue almost 10 years after the Appellant had had the opportunity of pursuing an out-of-country appeal but had elected not to do so and instead to remain in the UK unlawfully.

36. Be that as it may, the real difficulty with the Appellant's case, and the basis upon which I ultimately decide it against him, is that he quite simply cannot demonstrate the necessary ingredients to establish a case of historical injustice.

37. Helpful guidance is provided in **Ahmed (historical injustice explained) [2023] UKUT 00165 (IAC)**, as per the headnote:

> "*As is clear from the decision in Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351(IAC), the phrase "historical injustice" does not connote some specific separate or freestanding legal doctrine but is rather simply a means of describing where, in some specific circumstances, the events of the past in relation to a particular individual's immigration history may need to be taken into account in weighing the public interest when striking the proportionality balance in an Article 8 case. In relation to the striking of the proportionality balance in cases of this kind we make the following general observations:*
>
> > *a. If an appellant is unable to establish that there has been a wrongful operation by the respondent of her immigration functions there will not have been any historical injustice, as that term is used in Patel, justifying a reduction in the weight given to*

the public interest identified in section 117B(1) of the Nationality, Immigration and Asylum Act 2002. Although the possibility cannot be ruled out, an action (or omission) by the respondent falling short of a public law error is unlikely to constitute a wrongful operation by the respondent of her immigration functions.

b. Where the respondent makes a decision that is in accordance with case law that is subsequently overturned there will not have been a wrongful operation by the respondent of her immigration functions if the decision is consistent with the case law at the time the decision was made.

c. In order to establish that there has been a historical injustice, it is not sufficient to identify a wrongful operation by the respondent of her immigration functions. An appellant must also show that he or she suffered as a result. An appellant will not have suffered as a result of wrongly being denied a right of appeal if he or she is unable to establish that there would have been an arguable prospect of succeeding in the appeal.

d. Where, absent good reason, an appellant could have challenged a public law error earlier or could have taken, but did not take, steps to mitigate the claimed prejudice, this will need to be taken into account when considering whether, and if so to what extent, the weight attached to public interest in the maintenance of effective immigration controls should be reduced. Blaming a legal advisor will not normally assist an appellant. See Mansur (immigration adviser's failings: Article 8) Bangladesh [2018] UKUT 274 (IAC)."

38. The difficulty for the Appellant, with particular reference to subparagraphs (a) and (b), is that at the time of the cancellation decision in 2014 it was entirely in keeping with the understanding of the law to make a decision that only afforded an out-of-country right of appeal. Although the jurisprudence shifted with the decision in **Kiarie** in the context of deportation cases, and such jurisprudence was found to apply in the context of TOEIC cases in **Ahsan**, there is nothing in those subsequent developments that demonstrates a wrongful operation by the Respondent of immigration functions in the Appellant's case in 2014. Even if it might be said - as is contended by the Appellant but denied by the Respondent – that the decision made by the Respondent in 2014 was wrong on the facts, this does not amount to a wrongful operation of the immigration function absent a public law error: Judge Grubb found there to be no public law error.

39. What follows, is that it is wholly immaterial whether or not the Appellant could have established before the First-tier Tribunal that the Respondent's decision was factually incorrect. Success on a 'trial of the facts' would not amount to establishing a wrongful operation of immigration function. Therefore, even if the Appellant were to succeed on a trial on the facts, he would not be able to succeed in showing historical injustice.

40. In my judgement it follows that the Judge was not required to make findings as to the issue of breach of condition, and was entitled to rely upon the decision of Judge Grubb as disposing of the matter for the purposes of the Appellant's instant Article 8 appeal.

41. The Appellant's challenge to the decision of the First-tier Tribunal fails accordingly.

42. Necessarily inherent in the foregoing is that it was not incumbent upon the First-tier Tribunal to make any findings in respect of the Respondent's case that the Appellant had been working in breach of his conditions of leave. It follows that it is unnecessary for me to make any comment or finding. Nonetheless I consider it appropriate to at least make the following observation. The Appellant does not deny that he was 'standing in' for his ex-boss for three days, running his restaurant whilst he took a break. As such he does not deny the facts relied upon by the Respondent, but rather argues that in circumstances where he was not being paid this did not constitute 'work'. That is a very weak case: immigration conditions imposing a prohibition on employment typically include unpaid work; the point of restricting some migrants from working (paid or unpaid) is to protect the domestic employment market; the Appellant was undertaking a task that could have been performed by a paid worker. Accordingly, notwithstanding that I have concluded that there is no legal merit to the Appellant's case, it seems to me that there is also likely no factual merit to his claim not to have been in breach of conditions. Sub-paragraph (c) of the headnote in **Ahmad** may pertain: "*An appellant will not have suffered as a result of wrongly being denied a right of appeal if he or she is unable to establish that there would have been an arguable prospect of succeeding in the appeal.*" These observations, of course, are parenthetic, and are not made with the benefit of full argument: they have not informed my determination of the issue of error of law.

Notice of Decision

43. The decision of the First-tier Tribunal contained no error of law and accordingly stands.

44. The appeal remains dismissed.

I. Lewis
Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

4 June 2024