Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/21811/2018
HU/21804/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 1 October 2019	**on 15 October 2019**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

RAMANJIT [T]
[H G]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Raza, Counsel, instructed by Charles Simmons Immigration Solicitors

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal against the decision of Judge of the First-tier Tribunal Malcolm (the judge), promulgated on 19 June 2019, dismissing their joint appeals against the respondent's decisions dated 11 October 2018 refusing their Article 8 human rights claims made on 2 March 2018.

Background

2. The 1st appellant is a national of India born on 28 January 1985. The 2nd appellant is the son of the 1st appellant, born in the UK on 7 July 2015. The 1st appellant entered the UK as a Tier 4 (General) Student on 4 April 2011. She made an in-time application for further Leave to Remain (LTR) in the same capacity which was granted, but this leave was curtailed on 25 September 2014 as the 1st appellant was believed to have obtained a TOEIC English language test arranged by Educational Training Services (ETS) using a proxy test taker. Although the 1st appellant requested a reconsideration of this decision this was refused in January 2015, and the refusal was issued again to the 1st appellant in March 2015. The 1st appellant did not seek to challenge the curtailment decision by way of judicial review proceedings.

3. The 2nd appellant was born from the 1st appellant's relationship with Amolak [G], an Indian national with no lawful immigration status in the UK. During an 'enforcement visit' undertaken by immigration officers on 25 January 2018 the 1st appellant is recorded as having said that she was no longer on talking terms with Mr [G]. On 2 March 2018 the appellants made human rights claims. The respondent noted that the 1st appellant was not in a relationship with someone who fulfilled the immigration status requirements of Appendix FM and that she did not meet the requirements of Appendix FM in respect of her relationship with the 2nd appellant. The respondent was not satisfied the 1st appellant provided adequate evidence that there were 'very significant obstacles' to her integration in India and noted that the 2nd appellant had not lived in the UK for at least 7 years. Nor was the respondent satisfied that the Suitability requirements of Appendix FM were met given the belief that the 1st appellant used a proxy test taker in respect of her ETS supervised test. The respondent considered whether there were exceptional circumstances outside the immigration rules warranting a grant of LTR in accordance with Article 8 ECHR principles but concluded there were not. In so doing the respondent considered her duty under s.55 of the Borders, Citizenship and Immigration Act 2009 and the circumstances of the 2nd appellant.

4. The appellants appealed the respondent's decisions pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

The decision of the First-tier Tribunal

5. The judge set out the documentary evidence before her contained in bundles provided by the respondent and by the appellants and summarised the 1st appellant's oral evidence. The judge noted the 1st appellant's explanation for overstaying following the curtailment of her LTR and for the delay in making an application under Article 8 (this was due to her expecting her child) and her description of the ETS test she claimed to have taken. The judge also noted the 1st appellant's claim that she was still in a genuine and subsisting relationship

with Mr [G] and that although they lived apart from August/September 2017 they recommenced living together approximately 6 months prior to the First-tier Tribunal hearing. There was no attendance by Mr [G] at the hearing and he provided no witness statement. The 1st appellant stated that she has regular contact with her parents and two brothers in India and that her partner also had family in India. The 1st appellant explained that since coming to the UK she lived with her aunt who supported her but the 1st appellant did not believe that her aunt would be able to continue supporting her if the appellants returned to India.

6. Having summarised the submissions from both representatives the judge set out her findings. The judge noted the failure by the 1st appellant to seek to regularise her immigration following the respondent's refusal to reconsider her curtailment decision until March 2018. The judge considered the 1st appellant's evidence concerning the circumstances of the ETS test and concluded that she provided an innocent explanation and that she did undertake the test. The judge consequently found that the respondent was not entitled to rely on the Suitability requirements in Appendix FM in rejecting the 1st appellant's human rights claim. The respondent has not challenged this finding.

7. The judge then considered the appellants' Article 8 claims under paragraph 276ADE and outside the immigration rules, it being accepted by the appellants' representative that they could not succeed under Appendix FM. At [79] the judge noted the absence of adequate documentary evidence that Mr [G] was living with the appellants, and noted that, even if he was, he had no lawful immigration status and they had only been living together for a short time. The judge noted that the 1st appellant had educational qualifications obtained in India and the UK, that she spent the formative years of her life in India, that she would be familiar with the culture, language, lifestyle and customs of that country, and that she had family in India who would be able to support her. The judge noted that the bare assertion that the 1st appellant's aunt in the UK would be unable to support the appellants in India was only contained in a statement and was unsupported by any financial evidence. The judge considered the 2nd appellant's age and noted that he would be returned to India with the 1st appellant, ensuring family unity. The judge found that the requirements of paragraph 276ADE were not satisfied.

8. From [81] onwards the judge considered the appeals outside the immigration rules. The judge indicated that she approached the 'free-standing' Article 8 appeal by reference to the principles established in **Razgar** [2004] UKHL 27 and that she took into account the factors in section 117A to 117D of the Nationality, Immigration and Asylum Act 2002. At [84] the judge stated,

> "The first Appellant is exercising family life in the UK with her child and in her evidence also with her partner. The appellant came to the UK as a student and did initially have leave, however, part of her stay has been unlawful and at best her stay in the UK has been precarious."

9. And at [85] the judge stated,

> "Accordingly whilst the first Appellant has been in the UK since 2011, little weight can be given to the private life established by her during her time in the UK."

10. The judge noted that Mr [G] had no leave to remain in the UK, that it was in the best interests of the 2nd appellant to be with his parents, whether that was in India or the UK, and that the 1st appellant's proficiency in English and her financial independence were neutral factors. At [90] the judge explained that, as the 1st appellant could have no expectation of remaining in the UK there were no identifiable exceptional circumstances enabling the appeals to be allowed under Article 8. The appeals were dismissed.

The challenge to the First-tier Tribunal's decision and the 'error of law' hearing

11. The written grounds contend that the judge failed to consider her finding that the 1st appellant did not use a proxy tester in her ETS TOEIC test when undertaking the proportionality evaluation under Article 8. The only reason the 1st appellant's leave was curtailed in 2014 was the mistaken belief that she used a proxy test taker. The 1st appellant should be put back into the position she would have occupied had the curtailment decision not occurred and the judge failed to do this. The judge consequently erred in law in her proportionality assessment.

12. In granting permission Upper Tribunal Judge Reeds stated,

> "The main appellant's history following the curtailment of the visa is unclear from the papers. It is arguable that the FtTJ, having found that the main appellant had not used deception, had failed to give consideration to the impact of the curtailment decision (See Ahsan and others [2017] EWCA Civ 2009 at [120-121] and Khan and others v SSHD [2018] EWCA Civ 1684 at [37(i) (ii)])."

13. In his skeleton argument and his oral submissions Mr Raza submitted that the judge's proportionality assessment failed to take into account the injustice that the 1st appellant faced given that her leave was wrongly curtailed. He relied on paragraph 120 of **Ahsan v SSHD** [2017] EWCA Civ 2009 which reads,

> "The starting-point is that it seems to me clear that if on a human rights appeal an appellant were found not to have cheated, which inevitably means that the section 10 decision had been wrong, the Secretary of State would be obliged to deal with him or her thereafter so far as possible as if that error had not been made, i.e. as if their leave to remain had not been invalidated. In a straightforward case, for example, she could and should make a fresh grant of leave to remain equivalent to that which had been invalidated. She could also, and other things being equal should, exercise any relevant future discretion, if necessary "outside the Rules", on the basis that the appellant had in fact had leave to remain in the relevant period notwithstanding that formally that leave remained invalidated. (I accept that how to exercise such a discretion would not always be easy, since it is

> not always possible to reconstruct the world as it would have been; but that problem would arise even if the decision were quashed on judicial review.) If it were clear that in those ways the successful appellant could be put in substantially the same position as if the section 10 decision had been quashed, I can see no reason in principle why that should not be taken into account in deciding whether a human rights appeal would constitute an appropriate alternative remedy. To pick up a particular point relied on by Mr Biggs, I do not regard the fact that a person commits a criminal offence by remaining in the UK from (apparently) the moment of service of a section 10 notice as constituting a substantial detriment such that he is absolutely entitled to seek to have the notice quashed, at least in circumstances where there has been no prosecution. (It is also irrelevant that the appellant may have suffered collateral consequences from the section 10 decision on the basis that his or her leave has been invalidated, such as losing their job; past damage of that kind cannot alas cannot be remedied by either kind of proceeding.)"

14. According to Mr Raza the respondent's wrongful decision to curtail the 1st appellant's leave constituted an 'exceptional circumstance' and should have been considered by the judge in her proportionality assessment. There was no dispute that Article 8 was engaged and the impact of the curtailment decision on the 1st appellant, coupled with the respondent's approach to situations where there had been an erroneous decision based on proxy test-taking, meant that a refusal of LTR constituted an unjustifiably harsh consequence (by reference to GEN.3.1 of Appendix FM). Given that the respondent's stated position was to put individuals who were wrongly accused of involvement in proxy test taking substantially back into the position they would otherwise have occupied, the judge should have taken this into account when assessing proportionality and allowed the appeal under Article 8.

15. Ms Isherwood pointed out the absence of any challenge to the respondent's curtailment decision and the long delay by the 1st appellant in making her human rights claim. The judge looked at the circumstances of both appellants and the respondent's position in respect of those found not to have been involved in proxy test taking would have made no difference to the proportionality assessment. It was pointed out that there was nothing preventing the 1st appellant from returning to India and making an entry clearance application in light of the ETS findings.

Discussion

16. The judge found that the 1st appellant had not cheated. Her LTR as a student, which had been valid to 9 April 2016, was erroneously curtailed on 25 September 2014. Although the 1st appellant remained in the UK as an overstayer and failed to challenge the curtailment decision, for example by way of judicial review proceedings, had the erroneous curtailment decision not been made she would have continued to reside with lawful leave, albeit in a status that did not lead to settlement until her leave was due to expire in 2016. At [84] the judge

notes that part of the 1st appellant's stay in the UK had been unlawful and that her residence was, at all times, precarious. Whilst these assertions are accurate, the judge has not considered that it was the respondent's erroneous decision that led to curtailment, and that the basis of the curtailment was likely to prevent the applicant from making a successful subsequent application for LTR in most categories. The fact that the 1st appellant's leave was erroneously curtailed must, in my judgement, reduce, at least to some extent, the weight that can be attached to the public interest in the appellants' removal. I am consequently satisfied that the judge failed to 'factor in' the erroneous curtailment in her proportionality assessment, and that the First-tier Tribunal's decision must be set aside.

Remaking the decision

17. No application was made to adduce any further evidence pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and Mr Raza was content for me to proceed to remake the decision on the basis of the evidence before me. I proceed on the basis that the 1st appellant did not cheat in her TOEIC test.

18. It was accepted by Mr Raza that neither appellant could succeed under paragraph 276ADE of the immigration rules. This must be right given the age and length of residence of the 2nd appellant in the UK and the 1st appellant's evidence of her family in India and the First-tier Tribunal judge's at [76] to [80], none of which were challenged. Although the judge appeared to doubt the subsisting nature of the claimed relationship between the appellants and Mr [G], given that he has no lawful immigration status in the UK, even if there was a genuine relationship the 1st appellant could not succeed under Appendix FM in respect of a partnership application and there would appear to be nothing preventing the appellant and Mr [G] from relocating to India as a family unit.

19. In assessing the human rights claims outside the immigration rules I apply the principles established in **Razgar** [2004] UKHL 27 and I take into account the factors in s.117B of the Nationality, Immigration and Asylum Act 2002. I am satisfied that there is family life between the appellants (and possibly between them and Mr [G]), but any decision to remove the appellants would not breach family unity as the appellants (and Mr [G], if he chose) could relocate to India together. Given that the 1st appellant has resided in the UK since April 2011, she would have established private life relationships through the weight of years and her studies and her relationship with her aunt. The 2nd appellant was only born in July 2015 and, as a four year old, is unlikely to have established any significant private life relationships outside his immediate family unit. I am satisfied that the refusals of the 1st appellant's human rights claim interferes with her Article 8 private life right, but that the decision is in pursuit of legitimate public interests and that it is in accordance with the law. I now consider the issue of proportionality.

20. I take into account, as a factor reducing the weight to be attached to the public interest factors, the First-tier Tribunal's finding that the 1st appellant did not cheat in her ETS test and that her LTR as a Tier 4 (General) Student was wrongly curtailed. She has therefore been deprived of an opportunity to lawfully reside in the UK for a longer period, and of an opportunity to make further applications for leave to remain given the basis of the curtailment. The wrongful curtailment decision reduced the weight that can be attached to the public interests in her and her son's removal.

21. The appellants contend that I should allow their human rights claims based on the private lives they have established in the UK, particularly through the 1st appellant's length of residence and her relationships with her aunt and Mr [G], and the 2nd appellant's attendance at school, and in light of the respondent's stated position, in both **Ahsan** and **Khan & Ors v SSHD** [2018] EWCA Civ 1684, in respect of those found not to have cheated in ETS tests.

22. Both **Ahsan** and **Khan** are primarily concerned with the availability and nature of a right of appeal in which the respondent's allegation of proxy test taking could be fairly considered on the merits. **Ahsan** involved direct challenges to decisions to remove taken under s.10 of the Immigration and Asylum Act 1999, as it was prior to the amendments wrought by the Immigration Act 2014. **Khan**, which was concerned with the appeals regime introduced by the Immigration Act 2014, involved direct challenges to curtailment decisions in respect of which there were no rights of appeal. A compromise was reached by the parties in **Khan** in which the appellants would make human rights claims and, if they were successful in a subsequent human rights appeal on the basis that they did not cheat, save in the absence of a new factor, the respondent would rescind her curtailment decisions and afford them a reasonable opportunity to secure further leave to remain [23]. The Court of Appeal set out the Secretary of State's written position at [36] and [37]. [37] reads,

> 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 as 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." (Bold in original)

23. Neither authority dealt with a situation such as the present where there had been no legal challenge to the curtailment decision and where there had been a significant delay between the curtailment decision and the subsequent human rights claim. Nor does either authority dictate how a human rights appeal must be determined even if there was a finding that there had been no dishonesty. It is apparent from both **Ahsan** and **Khan** that, if there is a judicial finding that a person did not cheat the respondent can be expected to provide that person with a further opportunity to obtain leave. It is therefore open to the 1st appellant, armed with the First-tier Tribunal judge's factual findings, to approach the respondent with an application and request, in reliance on **Ahsan** and **Khan**, that she be treated as if her LTR had not been invalidated. The fact of an incorrect invalidation does not however mean that a human rights claim must be allowed. Whilst the past incorrect invalidation is a relevant factor in assessing proportionality, and one that I have fully considered, the proportionality assessment must be undertaken on the basis of the particular facts of each case.

24. When her LTR was curtailed the 1st appellant was residing in the UK as a Tier 4 (General) Student. This is not a category in the immigration rules that leads to settlement. The 1st appellant did not indicate in her evidence that she would have sought further LTR in a category contained in the immigration rules had her leave not been curtailed. She indicated in her statement that she overstayed

because she was expecting her first child. She did not identify any further basis upon which she would, if she was found not to have cheated, have sought to remain in the UK other than by reference to her and her child's private and family life rights. It is speculative to say the least to suggest that, had her leave not been curtailed, she would have sought further LTR, or that, had such an application been made, she would have been granted further LTR.

25. In assessing the proportionality of the decision I additionally take into account the fact that the 1st appellant did not seek to raise any legal challenge to the curtailment decision. I acknowledge her oral evidence at the First-tier Tribunal hearing that she did consult a solicitor in September or October 2014 who did not properly advise her, but she made no reference to this in her statement and there was no supporting evidence. In any event the 1st appellant then attributed the absence of any legal challenge to her pregnancy. The curtailment decision was made over 9 months before the birth of her son, and a copy of the respondent's decision to refuse her reconsideration request was sent to her, at the latest, in March 2015, still 4 months prior to the birth. There was no medical evidence that her pregnancy prevented her from seeking to legally challenge the curtailment decision, and she does not advance any other reason for not challenging that decision. Nor is there any medical evidence that she and her son were unable to return to India after his birth. Instead the appellant remained in the UK illegally for a further 3 ½ years before making her human rights claim.

26. The Article 8 private life established by the appellants in the UK is relatively weak. Although I have accepted that the 1st appellant has established a private life in the UK, and that the respondent's decision interferes with her private life, there is relatively little evidence of the nature and strength of her private life relationships or the quality of her integration. She provides little detail in her statement of the life she has established in the UK and her oral evidence, as recorded by the First-tier Tribunal, did not further advance her private life claim. The best interests of the 2nd appellant are to remain with his parent(s), and given his young age and the absence of cogent evidence that he has established a meaningful private life outside his immediate family unit, the 2nd appellant's best interests could be achieved either in the UK or in India.

27. Applying the factors in s.117B of the 2002 I note the public interest in the maintenance of effective immigration controls, although I attach less weight to this given the erroneous curtailment decision. The 1st appellant's proficiency in English and her ability to be financially independent are neutral factors. Given that her leave was wrongly curtailed I attach more limited weight to her precarious immigration status, although I note the relatively long delay in making her and son's human rights claims.

28. Having considered the aforementioned factors 'in the round', and whilst bearing in mind the consequences of the wrongful curtailment decision, I am not persuaded, on the balance of probabilities standard, that the refusal of the

human rights claims constitutes a disproportionate interference with Article 8 given the relatively weak nature of the appellants' private life claims (and there being no breach of their family life relationships given that the family would be removed together), given the delay in making the human right claims following the curtailment decisions, and given that the unchallenged factual finding by the First-tier Tribunal will no longer prevent the applicant from making a further application and the respondent's position as outlined in **Ahsan** and **Khan**.

Notice of Decision

The First-tier Tribunal decision is vitiated by material errors on points of law and is set aside.

The decision is remade, the human rights claims being dismissed.

D. Blum

Signed
Upper Tribunal Judge Blum

11 October 2019

Date