**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Numbers: HU/05992/2019
HU/05996/2019

**THE IMMIGRATION ACTS**

| **Determined on the papers at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 16 January 2020** | **On 28 January 2020** |

**Before**

**UPPER TRIBUNAL JUDGE O'CONNOR**

**Between**

**(1) SHOEB MOHAMED IQBAL DUKANWALA**
**(2) SHAHINA DUKANWALA**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**DECISION AND REASONS**

1. The appellants are husband and wife, both citizens of India, born in 1983 and 1986 respectively. The first appellant (the husband) entered the UK on 23 November 2010 as a student. The second appellant joined him as a dependant in February of 2011. The appellants' leave was variously extended until April 2016.

2. On 26 November 2015 the first appellant's leave was curtailed. He subsequently submitted a Human Rights Claim which was refused and certified but the SSHD subsequently reconsidered this decision pursuant to an Order of the Court of Appeal. The application was once again refused on 12 March 2019 - a decision which also relates to the second appellant. The appellants' appealed this decision to the First-tier Tribunal.

3. Of significance to the instant appeal is the terms of the Court of Appeal's order, signed on 09 November 2018, which disposed of judicial review proceedings challenging the decision of 26 November 2015 which reads:

> "HAVING REGARD to the requirements of Section VI of Practice Direction 52A to Part 52 of the Civil Procedure Rules;
>
> AND UPON the parties confirming that none of the parties to these proceedings is a child or a protected party;
>
> AND UPON the parties hereto confirming that this application to appeal is not from a decision of the Court of Protection;
>
> AND UPON the Respondent agreeing to withdraw the Secretary of State for the Home Department's decision dated 26 November 2015 to curtail leave to remain;
>
> AND UPON the Respondent agreeing to withdraw the Secretary of State for the Home Department's decision dated 24 February 2016 to refuse leave to remain;
>
> AND UPON the Appellant undertaking to submitting any full particulars relating to his application for leave to remain and that removal would breach his human rights for consideration with 28 days of the date of the sealed Order;
>
> AND UPON the Respondent agreeing to make a fresh decision within 3 months of the date the Respondent receives any further evidence for consideration, or if no submissions are received, within 4 months from the date this Order is sealed, absent any special circumstances, which, if refused, will attract an in-country right of appeal to the First Tier Tribunal, subject to the exercise of certification powers under section 94 of the Nationality, Immigration and Asylum Act 2002;
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> AND UPON the Respondent agreeing to not remove the Appellant from the country until such decision is made;
>
> AND UPON the Respondent agreeing that if the Appellant succeeds in any appeal, on the basis that he did not commit a TOEIC fraud then, in the absence of some new factor justifying a difference course, the Respondent will:
>
> (i) Take into account all the circumstances of the case, and in particular in deciding his case will act reasonably to ensure that, so far as is practicable, the Appellant is not disadvantaged by an earlier wrong finding of deception.
>
> (ii) Treat the Claimant as being an in time applicant since the 26 November 2015 (and any earlier period as may be established) as if he had 3C leave, subject to there being no other periods where the Appellant was an overstayers.
>
> (iii) Grant the Appellant a reasonable opportunity, being not less than 60 days, to submit an application for further leave.
>
> (iv) Waive any fee or charge (including health surcharge) that might be payable for making such an application.
>
> AND UPON the parties requesting that this application to appeal be withdrawn;
>
> BY CONSENT, IT IS ORDERED THAT:
>
> 1. The application for permission to appeal be withdrawn.

2. There be no order as to costs."

4. The appeals against the Secretary of State's decision of 12 March 2019 came before First Tier Tribunal Judge Myers on 24 June 2019 and were dismissed in a decision promulgated on 27 June 2019. The material paragraphs that decision read as follows:

> "[15]The First Appellant submits in his grounds of appeal that under the terms of the consent order the Respondent should have withdrawn the previous decision regarding his alleged deception has not understood the terms of the consent order. He states that the consent order means that the parties would "revert to the situation as it stood on 25/11/2015, no finding of deception having been made." Furthermore, there should have been a review of his alleged TOEIC deception, with consideration of his evidence of train tickets and Facebook posts but instead the Respondent has made a decision on the human rights application. He further submits that the decision is in breach of the Appellants' Article 8 rights.
>
> [16] First, in relation to the consent order I find that Appellants have misunderstood its terms. The order records that the parties agreed as follows; the Respondent agreed to withdraw the decision of 26/11/2015 to curtail leave to remain and the decision of 24/02/2016 to refuse leave to remain, the Appellant undertook to submit within 28 days full particulars relating to his application for leave to remain and that removal would breach his human rights, and on him doing so the Respondent agreed to make a fresh decision which if refused would attract an in country right of appeal. It further records that the Respondent agreed that if the Appellant succeeds in any appeal on the basis that he did not commit a TOEIC fraud then the Respondent would ensure that the Appellant had not been disadvantaged by the earlier wrong finding of deception, treated him as being an in time applicant and give him a reasonable opportunity to submit an application for further leave.
>
> [17] It is the Respondent's case that the First Appellant does not meet the suitability requirements of the Immigration Rules because he is alleged to have used deception in a language test in February 2012. This and many other allegations came about after suspicions were raised about ETS test results following intelligence and investigations undertaken by a BBC Panorama programme in February 2014 which discovered instances of proxy sitters and exam invigilators dictating answers and multiple choice question papers being given out having already been completed.
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> …
>
> [20] The documents before me do not include any evidence from the Respondent in relation to the alleged forged language certificates. Furthermore, it is apparent from the application for judicial review that no evidence had been disclosed to the Appellant. I cannot therefore find that the Respondent has satisfied the burden of proof to show that on the face of it there is evidence of deception. It follows that the Appellant has succeeded in showing that he did not commit a TOEIC fraud and therefore does not fall foul of the suitability requirements in the Immigration Rules.
>
> …

> [26] … the Appellants do not satisfy the requirements of the Immigration Rules.
>
> [27] I must now consider the evidence to see if there is anything which had not been already adequately considered in the context of the Immigration Rules … which could lead to a successful article 8 claim.
>
> …
>
> [34] For all of the above reasons, I therefore find that interference by the Respondent for the maintenance of effective immigration control is proportionate in this case. I do not find that the Appellants' appeal succeeds outside the Immigration Rules."

5. In her Rule 24 response to the grant of permission to appeal against the FtT's decision, the Secretary of State said as follows:

> "(1) The respondent to this appeal is the Secretary of State for the Home Department. Documents relating to this appeal should be sent to the Secretary of State for the Home Department, at the above address.
>
> (2) The respondent does not oppose the appellant's application for permission to appeal. It is accepted that the FTT did not follow the instructions set out in the Consent Order after having found that no deception was committed by the appellant. It is accepted that the appeal should have been allowed on this basis to then allow the SSHD to give the appellant 60 days to make a fresh application on the basis that he is put back in the position he was in on 26 November 2015 and has had s.3C leave since then and therefore was not an overstayer. The Upper Tribunal is invited to proceed on this basis."

6. In my view, the Secretary of State was entirely correct to accept that this is an appeal which ought to have been allowed on Article 8 grounds by the FtT, given its findings that the Appellant did not commit deception and the terms of the Court of Appeal's Order. The terms of this Order are such that it is clear that the Secretary of State accepted (and she continues to accept) that the public interest demands that the appellants be allowed to remain in the UK in order to make a further application to formalise and regularise their stay, as they would have been able to do had the deception allegation not been made against them. This is a feature of the Appellants' case which the FtT failed to grasp.

7. In such circumstances, I adopt the approach suggested by the Secretary of State and set aside the decision of FtT. I remake the decision on the available evidence, concluding that the appeal should be allowed on Article 8 grounds for the reasons disclosed by the Secretary of State in her Rule 24 response.

## Decision

The decision of the First Tier Tribunal is set aside.

Upon remaking the decision of appeal and for the reasons given above, the appeal is allowed on Article 8 grounds.

Signed Date 17 January 2020

Mark O’Connor
Upper Tribunal Judge O’Connor