Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08937/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 January 2020	**On 9 April 2020**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

TAHERA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M M Hossain, Counsel, instructed on a direct access basis
For the Respondent: Ms S Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Beg (the judge) who, in a decision promulgated on 18 July 2019, dismissed the appellant's human rights appeal against the respondent's decision of 2 May 2019 refusing her human rights claim.

© CROWN COPYRIGHT 2020

Background

2. The appellant is a Bangladeshi national born on 1 October 1978. She entered the United Kingdom on 13 January 2010 as a Tier 4 (General) Student with leave valid until 31 May 2012.

3. The appellant made an in-time application for further leave to remain in the same category, but this was refused with a right of appeal on 1 November 2012. It appears that the appellant exercised her right of appeal, but her appeal was dismissed. I have not been provided with the decision dismissing the appellant's appeal. According to the appellant's grounds her appeal rights became exhausted on 19 June 2013 when the Upper Tribunal refused her application for permission to appeal. On this day her leave to remain, which had been extended by virtue of section 3C of the Immigration Act 1971, ceased.

4. On 6 August 2013 the appellant applied for further leave to remain as a Tier 4 (General) Student. This application was made when the appellant had no leave to remain in the UK. The application was refused on 12 December 2013 under paragraph 322 (1A) of the Immigration Rules on the basis that an NCC Bank Ltd statement and a further bank letter (a solvency certificate) submitted by the appellant were not genuine. According to the Reasons for Refusal Letter the documents had been checked with "the issuing body" who confirmed that they did not issue the statement or letter submitted by the appellant in support of her application and that the documents were forged. This decision did not attract a right of appeal because the appellant had no leave to remain in the UK when her application was made.

5. On 9 May 2014 the appellant requested a reconsideration of the decision refusing her application made on 6 August 2013. I have not been provided with a copy of this request. The respondent treated this request as a human rights claim, presumably on the basis that it raised Article 8 ECHR considerations. On 25 November 2014 the respondent refused the human rights claim. This decision was based on the appellant's inability to meet the Suitability requirements of the Immigration Rules as a result of her alleged use of a proxy test taker in respect of a TOEIC English language test undertaken under the auspices of Educational Testing Service (ETS) on 18 April 2012 at Westlink College. The respondent was not satisfied the appellant met the requirements of S-LTR.2.2(a) ("Whether or not to the applicant's knowledge – (a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application"). Nor was the respondent satisfied that the appellant met any of the requirements of Appendix FM. Nor was the respondent satisfied that the appellant met the requirements of paragraph 276ADE(1)(iv) (there being no 'very significant obstacles'

to her integration in Bangladesh). The decision did not expressly refer to the previously raised concerns with the NCC Bank documents.

6. Although the decision dated 12 December 2013 was based on paragraph 322 (1A) of the Immigration Rules, as the respondent treated the reconsideration request made on 9 May 2014 as a human rights claim, paragraph 322 (1A) was not available to her by virtue of paragraph A320 of the Immigration Rules. This paragraph established that paragraph 322 did not apply to an application for leave to remain as a family member under Appendix FM, and that Part 9 (except for paragraph 322 (1)) did not apply to an application for leave to remain on the grounds of private life under paragraph 276ADE.

7. The appellant appealed the decision of 25 November 2014 and, in a decision promulgated on 16 June 2015, Judge of the First-tier Tribunal C A Parker allowed the appeal under the immigration rules but dismissed the appeal on human rights grounds. Judge Parker was not satisfied that the respondent had discharged the burden of proving that a proxy test taker had been used. Although the respondent relied on generic evidence to support her decision, no evidence specific to the appellant in respect of the TOEIC test had been provided for the appeal.

8. I pause at this point to note that Judge Parker should not have allowed the appeal under the Immigration Rules because there was no longer a right of appeal against a refusal of a decision taken under the Immigration Rules on the basis that the decision was not in accordance with the Immigration Rules. Following the amendments to the Nationality, Immigration and Asylum Act 2002 wrought by the Immigration Act 2014 the appellant only had a right of appeal against a refusal of a human rights claim. The appellant could not, in any event, have exercised a right of appeal relying on the grounds that the decision was not in accordance with the immigration rules even under the earlier iteration of the 2002 Act as her leave to remain, extended pursuant to section 3C of the Immigration Act 1971, expired on 19 June 2013.

9. Following Judge Parker’s decision, the respondent made a further decision on 2 May 2019. The new decision is a direct response to the application made on 6 August 2013. There was no reference to human rights in the decision. The decision referred to an NCC Bank Ltd statement dated 30 July 2013 in the appellant’s name and a letter from the same bank. The respondent was satisfied that the letter and the statement were false because NCC Bank Ltd confirmed that the account did not exist. The application was therefore refused under paragraph 322 (1A) of the Immigration Rules. The decision indicated that the appellant had a right of appeal. The basis of the right of appeal was not identified. I have not been provided with any documents identifying the legal basis for the right of appeal.

10. It is not clear to me why the respondent believed that the appellant had a right of appeal. the appellant's leave, extended by virtue of section 3C of the Immigration Act 1971, expired on 19 June 2013. She did not have leave to remain when she made her Tier 4 (General) Student application on 6 August 2013. Under the Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014/2771, the appellant (Article 9) the appellant would have a right of appeal if her application was made before 20 October 2014 (which it was) and the decision was made on or after 6 April 2015 (which it was, as the decision was reconsidered following the decision of Judge Parker) but only "where the result of that decision is that the applicant has no leave to enter or remain." As the appellant had no leave when her application was made, the respondent's decision had no effect on her immigration status. It was not because of the decision that the appellant had no leave to remain. Although the respondent issued the appellant with a 'Notice to a Person Liable to Removal' (IS.151A) on 25 November 2014 pursuant to s.10 of the immigration and Asylum Act 1999 on the basis that the appellant used deception in seeking leave to remain (by reference to her TOEIC certificate only), the grounds of appeal only focused on the decision refusing the appellant leave to remain. There is nothing to indicate that the respondent made a further decision pursuant to s.10 of the Immigration and Asylum Act 1999 that could be the subject of an appeal under the appeal provisions prior to the changes brought in by the Immigration Act 2014.

11. The appellant nevertheless appealed under s.82 of the Nationality, Immigration and Asylum Act 2002. Her appeal was heard on 2 July 2019. No issue appears to have been raised with regard to the First-tier Tribunal's jurisdiction to hear the appeal. The grounds of appeal to the First-tier Tribunal contended that the issue relating to the NCC Bank statement and letter had been resolved in the respondent's reconsideration decision dated 25 November 2014 and that the respondent could have relied on this allegation of deception within that decision. The respondent's decision was said to be unfair and in breach of the common law duty of fairness. The decision was additionally said to jeopardise the appellant's Article 8 rights and those of her family (her husband and her child born in the UK - the appellant had two children by the time of the appeal hearing in July 2019, aged 6 and 3). The decision was said to constitute a disproportionate interference with Article 8 in light of the appellant's length of residence and in light of the best interests of her children.

The decision of the First-tier Tribunal

12. The judge had before her a bundle of documents filed by the appellant that included the decision of Judge Parker dated 16 June 2015, the respondent's decision dated 25 November 2014, the IS.151A decision dated 25 November 2014, the respondent's decision dated 12 December 2013, and a letter purportedly issued by the NCC

Bank dated 15 January 2014. The judge additionally had a witness statement from the appellant. The respondent's bundle included a 'Temporary Migration verification referral form' referring to communication between the UKVI Verification Team and the NCC Bank between 24 May 2018 and 13 June 2018 in which a bank representative confirmed by return email that the bank records indicated that the appellant's account did not exist. At the outset of the hearing the respondent served a Document Verification Report (DVR) dated 9 September 2013 detailing communication between the Visa Assistant working at the British High Commission in Dhaka and the NCC Bank. Having refused an application made by the appellant's representative to adjourn, the judge heard oral evidence from the appellant.

13. In the section of her decision headed 'Determination and Reasons' the judge noted the submissions made by the appellant's counsel that the respondent could not rely on the NCC Bank documents issue because it had not been raised in the November 2014 decision. At [13] the judge stated,

> "I find that the respondent is perfectly entitled to raise the issue of deception involving the NCC Bank even at a later stage, that is in the refusal letter dated 2 May 2019. I find that the appeal before the First-tier Tribunal on 16 June 2015 was in relation to a different issue of deception that is the ETS test. The appeal was not allowed on the basis of the NCC Bank issue because that was not an issue before the Tribunal at that time. I do not find that there has been an inherent unfairness to the appellant in the respondent raising the issue of deception regarding the NCC Bank statement and letter."

14. The judge went on to consider all of the evidence relating to the NCC Bank statement and letter, including the letter purportedly from the bank dated 15 January 2014, and the appellant's written and oral evidence, and concluded that the respondent had discharged the burden of proving that the NCC Bank statement and letter were forgeries. In reaching this decision the judge directed herself in accordance with the principles established in **AA (Nigeria)** [2010] EWCA Civ 773.

15. The judge went on to consider the grounds relating to Article 8 ECHR. The judge indicated that she had taken into account section 117B of the Nationality, Immigration and Asylum Act 2002 and s.55 of the Borders, Citizenship and Immigration Act 2009. The appellant's representative indicated that the appellant was not relying on family life but only upon her private life. The judge accepted that the appellant had a private life having regard to her studies in the UK and the fact that she lived with her husband and her two children. The judge noted that none of the family members had leave to remain in the UK. There was very little evidence before the judge relating to the appellant's children. The judge found that the best interests of the

children, who were aged 6 and 3, were to live with their parents who were their primary carers. The children were young enough to adapt to life in Bangladesh with the support of their parents. They would be able to receive education in Bangladesh and the family had a network of support. The appellant had previously worked in Bangladesh as a teacher and would be able to use her skills and qualifications to obtain employment. The appellant failed to identify her specific health issues and there was no suggestion that she would be unable to obtain appropriate treatment in Bangladesh. The judge concluded that the decision would not result in unjustifiably harsh consequences and would not therefore constitute a disproportionate breach of Article 8. The judge dismissed both 'the immigration appeal' and 'the human rights appeal'.

The challenge to the judge's decision

16. The grounds contend that the judge failed to consider the issue of res judicata, and in particular the cause of action estoppel or issue estoppel. As the issue of the appellant's bank statement had been raised in the decision dated 12 December 2013, and was not subsequently relied on by the respondent, despite her having ample opportunity to do so, the respondent was estopped from now relying on the same issue. The appellant legitimately expected the issue relating to the bank statement and bank letter to have been resolved and the judge should not have permitted the respondent to reopen the issue. The judge failed to make relevant findings given that the appellant said her bank account had closed in 2015. The judge placed too much weight on the respondent's new verification report as the respondent's enquiries were with a different branch of the bank.

17. The grounds further contend that the judge failed to consider the best interests of the appellant's oldest child given that the child would now have to adjust to new schools and a new community where another language was spoken and would lose face-to-face contact with school friends and extended family in the UK. The grounds contend that the judge failed to adequately consider the 5 stages identified in **Razgar** [2004] UKHL 27 and failed to consider the principles established in **Beoku-Betts** [2008] UKHL 37.

18. In granting permission Upper Tribunal Judge O'Callaghan stated,

> "I remind myself that 'arguable' is a low hurdle to cross. An issue arises in this matter as to the weight that the First-tier Tribunal could appropriately give to a document or documents that have previously be considered by the respondent to be false during earlier statutory appeal proceedings but were not relied upon by the respondent at the earlier appeal hearing. It is arguable that the res judicata principle applies in such circumstances.
>
> The Tribunal would be aided by the parties addressing, but not limiting their argument to: **AS and AA (effect of previously linked determinations) Somalia** [2006] UKAIT 00052;

> **Chomanga (binding effect of an appealed decisions) Zimbabwe** [2011] UKUT 312 (IAC); **Mubu & Ors (immigration appeals – res judicata) Zimbabwe** [2012] UKUT 398 (IAC) and **Koori v SSHD** [2016] EWCA Civ 552."

19. In his submissions at the 'error of law' hearing Mr Hossain accepted that Judge Parker's decision was "unusual" and he indicated that he could not understand how Judge Parker was able to allow the appeal under the immigration rules given that it was an appeal against the refusal of the human rights claim. Mr Hossain reiterated that the respondent's decision from November 2014 and Judge Parker's decision in 2015 made no reference to the alleged use of false bank statements. The respondent had sufficient opportunity to raise the issue during the previous appeal and the 2018 DVR was not supported by any email evidence. Mr Hossain accepted that there had been no previous judicial finding respect of the bank statement issue and that there was now further evidence available in the form of the 2018 DVR. Mr Hossain relied on **Chomanga** in support of his submission that the respondent was not entitled to rely on the NCC Bank statement issue when no reliance had been placed on that issue in the November 2014 decision or the 2015 appeal.

Discussion

20. The decision that is the subject of the appellant's appeal to the IAC is a refusal to grant the appellant leave to remain as a Tier 4 (General) Student dated 2 May 2019. The appellant's application for leave to remain was made on 6 August 2013. For the reasons set out above, and in particular paragraph 4 of this decision, the appellant had no leave to remain when she made her application on 6 August 2013. This is accepted by her in her grounds. As the appellant had no leave to remain, the decision refusing her application did not result in her ceasing to have leave to remain. Nor does it appear that a further decision was made to remove the appellant as a person unlawfully in the UK (there is nothing to suggest that the IS.151A decision made on 25 November 2014, which was based on the ETS allegation, remained extant or was maintained following Judge Parker's decision).

21. The respondent's decision that gave rise this appeal does not refer to human rights, does not consider the appellant's Article 8 rights or those of her family, and does not purport to be a refusal of a human rights claim. This would be consistent with the dismissal by Judge Parker of the appellant's human rights claim. It is therefore very difficult to understand why the respondent stated in her decision that the appellant had a right of appeal. I appreciate that the question of whether the appellant had a right of appeal was not raised before the First-tier Tribunal. The respondent cannot however bestow a right of appeal where there is none. In these circumstances I am not satisfied that the First-tier Tribunal had jurisdiction to entertain an appeal against the decision dated 2 May 2019.

22. However, even if I am wrong and the appellant does enjoy a right of appeal in respect of her application made on 6 August 2013 and eventually refused on 2 May 2019, I am not persuaded that the judge erred in respect of the res judicata principle. Unlike **Chomenga**, where the Upper Tribunal held that unappealed findings of fact in a judge's decision were binding on the parties, there were no previous judicial findings in relation to the bank account issue. In **Chomanga** the Secretary of State was relying on identical factual assertions in the second appeal as had been determined in the first appeal. As the issue relating to the NCC Bank statement and letter was not raised in the respondent's decision of 25 November 2014, there were no binding factual findings made by Judge Parker that applied in the appeal before Judge Beg. The findings of fact made in the earlier decision were simply not relevant in the later decision.

23. There was, in any event, fresh evidence produced after the respondent's decision dated 25 November 2014 and Judge Parker's decision of 2015, namely, the further DVR report. This new evidence was based on further correspondence between the British High Commission and the NCC Bank. I accept that the new evidence is deficient in some respects. The email from the Bank referred to in the DVR was not provided, and it is not clear whether the answer from the Bank – that the account 'does not exist' - took account of the appellant's claim that she closed the bank account in 2015. The new DVR was nevertheless sufficient evidence, when considered alongside the 2013 DVR, which did contain correspondence from the NCC Bank, upon which the respondent could rely to support her refusal to grant leave to remain.

24. I am reinforced in my conclusion that the respondent was not estopped from raising the NCC Bank document issue by reference to the Upper Tribunal decision in **Mubu**. Having considered the authorities relating to res judicata the Upper Tribunal held, in clear terms, that "… the principles of res judicata are not applicable in immigration appeals" (see also [40]). As there had been no judicial consideration of the NCC Bank document issue, Judge Beg was entitled to adjudicate upon it. Further, there can be no cause of action estoppel because there has been no judicial pronunciation in respect of the NCC Bank issue (see **Mubu**, at [34]).

25. Nor is it arguable that there was procedural unfairness in the respondent relying on the NCC Bank document issue. The appellant was aware since the decision in December 2013 that the respondent considered the bank statement to be a false document. The reconsidered decision (which was a refusal of a human rights claim) dated 25 November 2014 made no reference one way or the other to the NCC Bank document issue. There was certainly no concession by the respondent that the bank statement and letter were genuine, and no reasonable indication that the issue had been 'closed down' or determined as suggested in the grounds. As Judge Beg pointed out in

her decision the appellant had ample opportunity to obtain further evidence from the NCC Bank, in addition to the letter allegedly issued by the bank dated 15 January 2014, to support her position that the bank documents in issue was genuine, and to obtain evidence that she had closed her account in 2015 and transferred the funds to the UK. I note the absence of any ground challenging the First-tier Tribunal judge's refusal to grant an adjournment. I am not persuaded there has been any procedural unfairness in the judge's decision to determine the NCC Bank document issue.

26. Nor is it arguable that the judge failed to take into account relevant considerations when assessing the evidence relating to the NCC Bank documents. The judge fully considered the letter purportedly issued by the bank dated 15 January 2014 at [20] and engaged with the appellant's claim that she closed her bank account in 2015 at [19]. The judge attached significant weight to the full DVR that had been undertaken in 2013, including the email from the vice-president and manager of the appellant's branch (e.g. [21]). From [14] to [21] the judge gave cogent and legally sustainable reasons for concluding that the respondent had discharged the burden of proving that the NCC Bank documents were forgeries.

27. I can deal briefly with the remaining grounds relating to Article 8. The judge accurately stated that there was relatively little evidence provided by the appellant relating to her eldest child, and the judge demonstrably considered the best interests of both of the appellant's children ([25] and [26]), based on the evidence before her and taking account of all relevant considerations, including the ages of the children, their length of residence, and the support that could be provided to the children from both their parents and their extended family in Bangladesh. The judge properly applied the approach identified in **Razgar** [2004] UKHL 27 and took account of the factors identified in s.117B of the 2002 Act.

Notice of Decision

The making of the First-tier Tribunal's decision did not involve the making of errors on points of law.

The appeal is dismissed.

D.Blum

31 March 2020

Signed Date

Upper Tribunal Judge Blum