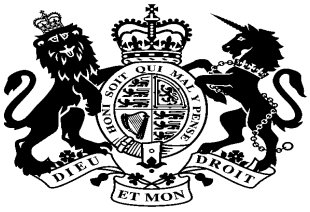

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
UI-2023-002171
HU/56054/2022

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reason Issued**
On: 26th July 2023	**On: 14th August 2023**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Tania Akter
(no anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellant: **Mr Z. Malik KC, Counsel instructed by Chancery Solicitors**
For the Respondent : Officer **Ms A. Ahmed, Senior Home Office Presenting**

DECISION AND REASONS

1. The Appellant is a national of Bangladesh born on the 14th February 1989. She appeals with permission against the decision of the First-tier Tribunal (Judge Mace) to dismiss her appeal on human rights grounds.

2. The Appellant first entered the United Kingdom as a student on the 21st February 2010. She remained here until the 6th December 2011 when she returned to Bangladesh. On the 19th March 2012 she re-entered the country on a new student visa, which for the purpose of this decision can be taken to have expired on the 20th May 2014; on the 19th May 2014 she made an 'in-time' application for further leave to remain as a student, which was refused on the 19th December 2014. The Appellant became an overstayer on that date.

3. In the years that followed the Appellant made no fewer than seven different applications to try and regularise her position in the UK. She applied for leave 'outside of the rules' (18.5.15), relied on Article 8 ECHR (21.1.16), claimed asylum (10.10.17), asserted a Zambrano right of residence under the Immigration (European Economic Area) Regulations 2016 (10.1.19 and again on the 7.11.19) and asserted that her return to Bangladesh would be a violation of the UK's obligations under Article 3 (23.4.19). None of these applications were successful. The application giving rise to the present appeal was made on the 3rd August 2021. Therein the Appellant argued that having spent 13 years in the UK it would be a disproportionate interference with her private life to expect her to leave now.

4. The Respondent refused the application on the 25th October 2022. The Respondent rejected the Appellant's claim generally on Article 8 grounds, concluding that she did not meet the conditions set out in paragraph 276ADE(1) of the Rules, and that she had not shown the decision to otherwise be disproportionate. Importantly for the purpose of this appeal, she also refused the application on suitability grounds:

> "The applicant do not meet the suitability requirements S-LRTP 1.1 to 1.7 and 2.1 to 2.4.
>
> S-LTR 1.6 states:
> 'The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR 1.3 to 1.5), character, associations, or other reasons, make it undesirable to allow them to remain in the UK'.
>
> You took an English Test with an proxy test taker on the 16 April 2013 at South Quay College scoring 180 for speaking and 180 for writing. Have used deception to gain English Language Certificate, therefore fails to meet the requirements under S-LTR 1.6" (*sic*)

5. On appeal before First-tier Tribunal Judge Mace the Appellant strongly took issue with this ground for refusal. She pointed out that the historical allegation of ETS fraud made against her by the Respondent had been rejected on its facts by the First-tier Tribunal in a decision dated 21st June 2018. That matter having been resolved in her favour, in an undisturbed decision of the Tribunal, it could not properly be revived now. Judge Mace accepted that argument. His deliberations about the effect of that conclusion read as follows:

16. On the basis of that finding, the submission was that, following case law and the process agreed by the respondent that such appellants would be allowed an opportunity to apply for further leave, the appeal should be allowed.

17. I have considered the immigration history carefully. The appellant's leave was curtailed with effect from 20 May 2014. It is important to note that the appellant's leave was curtailed not as a result of the ETS allegation of deception, but because the college she was attending notified the Home Office that she had ceased studying with them.

18. I was referred to the case of Ahsan and Others v SSHD [2017] EWCA Civ 2009 and Khan and Ors v SSHD [2018] EWCA Civ 1684. It was held that an out-of-country appeal would not satisfy the appellant's rights. Khan went on to approve the compromise position put forward for all decisions in relation to ETS made after April 2015. The appellant would submit full particulars of why it would be incompatible with Article 8 for him or her to be required to leave the UK within 28 days; the respondent would either rescind the ETS decision, refuse the Human Rights claim or certify it. In any human rights appeal the Tribunal would be able to determine whether or not the appellant committed fraud; and, if the appellant succeeds in the appeal on the basis no fraud was committed, then in the absence of some new factor justifying a different course, the appellant would be afforded a reasonable opportunity of securing further leave to remain.

19. In the appeal decision in June 2018, it was noted that leave was curtailed in 2014 due to poor attendance and outstanding fees. The issue of the ETS deception decision was fully considered. The Tribunal was referred to the Judicial Review decision which considered the deception claim and found that the suitability issue had been appropriately determined by the respondent. The respondent sought to rely on this finding to argue that the issue should not be revisited. The appellant's representative argued otherwise, submitting that the appellant had not previously had a substantive hearing on the issue. The Judge found that, as a result of further caselaw, Judicial Review was an entirely unsatisfactory litigation vehicle for the determination of such issues. The Judge therefore agreed to consider the evidence further relating to the ETS issue. He stated in the decision that the evidence was provided and "I have considered it in full".

20. The appellant was able to make a further application for leave to remain as a student, which was refused in December 2014. She was granted a right of appeal which she did not exercise. However, she did make further repeated applications on varying grounds. The appellant has also exercised the opportunity to request Judicial Review of the certification of her human rights clam made in 2016. The Upper Tribunal held that the respondent was unarguably entitled in law to certify the claim as clearly unfounded.

21. I find that the appellant has exercised repeated opportunities to secure further leave to remain through the applications she has made since the finding that she did not commit fraud was made in her favour in the appeal of June 2018. That was some five years ago and the appellant has remained in the UK since then. In January 2019 she applied for a residence card. An application under Article 3 was refused in October

> 2019. A further application for a residence card was refused in December 2019. She made the application subject of this appeal in August 2021.
>
> 22. The appellant has had, and has taken, repeated opportunities to apply for further leave. It is correct that the appellant did not challenge the ETS deception finding until her asylum claim was determined on appeal. But the fact remains that a finding was made in her favour at that point. The submission that the appellant did not have any legal right to challenge the decision is not correct. She was able to challenge the finding during the course of her asylum appeal and that was an appeal right she was able to exercise in country.
>
> 23. I am satisfied that the appellant has had a reasonable opportunity to secure further leave to remain. I am not persuaded by the submission on behalf of the appellant that, based on the previous finding that she did not commit ETS fraud, that a favourable outcome in this appeal must follow. All matters relating to the appellant's family life and her private life have been considered. Any risk to her on return to Bangladesh has been considered. Any right she may have under EU law have been considered. Further submissions and further applications have been considered, as have requests for Judicial Review and permission to appeal.

6. Judge Mace thereby dismissed the appeal.

Grounds of Appeal: Discussion and Findings

7. For the Appellant Mr Malik KC submits that the history rehearsed by Judge Mace was all irrelevant. It did not matter why the Appellant's leave was originally curtailed, or what is said in Ahsan or Khan about fairness; nor does it matter that the Appellant has made intervening applications, and had the opportunity to make others. That is because there is an existing Home Office policy which, on its face, benefits the Appellant. That policy should have been given effect by the Tribunal when it considered proportionality and the only reason that it was not was because the Respondent failed to bring it to the Tribunal's attention. This was an error of the type identified in UB (Sri Lanka) v Secretary of State for the Home Department [2017] EWCA Civ 85. It was the responsibility of the Respondent to bring relevant policies to the attention of the court, and non-disclosure, whether deliberate or accidental, will give rise to procedural unfairness.

8. The policy in question is entitled *Educational Testing Service (ETS): Casework Instructions* (version 4.0). At page 8 the policy reads:

> "If the appeal is dismissed on human rights grounds but a finding is made by the Tribunal that the appellant did not obtain the TOEIC certificate by deception, you will need to give effect to that finding by granting six months outside the rules. This is to enable the appellant to make any application they want to make or to leave the UK"

9. Mr Malik submits that there is nothing in that statement of policy which would exclude the Appellant. We should not read words into that paragraph

which are not there. Its application is not confined to situations where leave was curtailed because of an allegation of ETS fraud, or to cases where the applicant can show that she has suffered prejudice as the result of such an allegation. The words of the policy are straightforward, and they should have been brought to the Tribunal's attention. Although the Tribunal does refer, at its 16, to caselaw and 'process', it is common ground between the parties that this particular policy was not shown to the Judge.

10. Ms Ahmad made several arguments in reply; I consider each in turn.

11. First, she pointed out that the document *Educational Testing Service (ETS): Casework Instructions* did not exist when the First-tier Tribunal had made its finding in favour of the Appellant in June 2018. Had the policy been available then, Ms Ahmad agreed that the Appellant would have a strong argument to say that she should have been granted six months' leave to remain at that time. As it is the policy is dated the 18th November 2020.

12. I am not persuaded that this argument can be made out. Ms Ahmad was not able to identify in the passage relied upon (set out at my 8 above), or in the policy as a whole, anything indicating that there is a temporal restriction on its application. Nowhere does it say that it only applies to claims being determined after publication. I would further note that this is version 4.0, and Ms Ahmad had been unable to provide the Tribunal will any earlier versions that might have assisted with her point.

13. Second, Ms Ahmad adopts the reasoning of Judge Mace that there was no disadvantage to the Appellant caused by the allegation of fraud. This is not a case where an unjustified allegation directly led to leave being wrongly curtailed. In such cases the justification for granting a period of leave is clear. Here the allegation had nothing to do with the Appellant's Tier 4 visa being curtailed (that was for non-attendance) and she has had multiple opportunities to regularise her position since.

14. Mr Malik was prepared to accept, for the sake of argument, that Ms Ahmad was correct to say that the Appellant had suffered no disadvantage. I have not been provided with her complete history of refusals and appeals so I am unable to say whether the allegation of fraud played a determinative role in any of her previous applications being turned down. What is however clear is that on the face of the policy, no such qualification is necessary. The policy itself simply requires that two pre-conditions are met: that a human rights appeal is (otherwise) dismissed, and that the allegation of ETS fraud is rejected. It is not for this Tribunal to try and work out why the Secretary of State terms her policy in the way that she does. It is true that its publication followed a series of cases in which the Courts found unfairness in various processes around this scandal, but were it intended to only capture a certain class of 'ETS case' it would no doubt have said so. Its wide range suggests that it has been framed in the way that it has for pragmatic reasons.

15. Third, Ms Ahmad contended that the dicta in UB (Sri Lanka) had no application in a case like this because the Court was there concerned with a protection claim.

16. I am unable to accept that the principle of procedural fairness set out by the Court in UB turned on the claimant before it being an asylum seeker, or that its application should be limited in that way. As Mr Malik points out, the Court in UB draws support for its conclusions from Mandalia v Secretary of State for the Home Department [2015] UKSC 59, itself a Points Based System case.

17. Ms Ahmad further submitted that the obligation upon the Respondent to disclose her own policies had been somewhat diluted by the Upper Tribunal's decision in Lata (FtT: principal controversial issues) [2023] UKUT 00163 (IAC) which emphasises that the duty to provide the Tribunal with all relevant materials falls upon "the parties". Ms Ahmad rightly notes that although the Appellant objected to the refusal on suitability grounds, she had not herself brought this policy to the attention of the Tribunal, and in those circumstances had also failed in her duty of disclosure.

18. I do not think, with respect, that Lata is of any assistance in these circumstances. Firstly, Mr Malik is right to point out that "the parties" still includes the Respondent. The whole point of the decision in UB is that if one party can be expected to know what policies might be in place or might be relevant that is the party who has written and implemented those policies.

19. Finally I note that Ms Ahmad did initially ask me to consider, but in the end did not pursue, the argument that what the Appellant should now do is ask the Home Office for a '60 day letter': Khan & Ors v Secretary of State for the Home Department [2018] EWCA Civ 1684. In view of her retreat in submissions I do not propose to address that argument here.

20. I return to the argument put on behalf of the Appellant. That is that notwithstanding the Tribunal's negative findings about her Article 8 claim overall, there was a published policy which on its face stated that where a human rights claim failed, but the Secretary of State had failed to make out her case in respect of the ETS fraud, the claimant should be granted six months' leave to remain. I have not found anything in the document as a whole to suggest that this should not be applied to the Appellant. It was plainly a policy that was relevant to her case, which was directly refused by the Respondent on grounds of suitability. The Tribunal found no reason to depart from the findings of the Tribunal in 2018 that the Appellant had not been shown to have committed fraud. The policy should have been shown to the Tribunal, and the appeal allowed on the limited basis that it would be disproportionate to refuse leave in circumstances where a published policy said otherwise: SC (Article 8 – in accordance with the law) Zimbabwe [2012] UKUT 00056 (IAC).

Decision

21. The decision of the First-tier Tribunal is set aside for error of law.

22. The decision in the appeal is remade as follows: the appeal is allowed on Article 8 grounds.

23. There is no order for anonymity.

Upper Tribunal Judge Bruce

4th August 2023