Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/18342/2019 (V)
HU/18344/2019 (V)
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THE IMMIGRATION ACTS

Heard at Field House via Skype for Business On Tuesday 27 April 2021	**Decision & Reasons Promulgated On Friday 14 May 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MAHANAZ ISLAM (1)
ARDIN RAHMAN (2)
[A R] (3)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr G Ó Ceallaigh, of Counsel, instructed by Lawmatic Solicitors
For the Respondent:	Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. By a decision dated 20 January 2021, Upper Tribunal Judge Lindsley found an error of law in the decision of First-tier Tribunal Judge Suffield-Thompson itself promulgated on 2 January 2020. Judge Suffield-Thompson dismissed the Appellants' appeals on human rights grounds against the Respondent's decision dated 25 October 2019 rejecting their human rights claims. Having found an error of law, Judge Lindsley set aside the First-tier Tribunal's decision and gave directions for a resumed hearing. Judge Lindsley's error of law decision is appended to this decision for ease of reference.

2. The Appellants are all nationals of Bangladesh. The First Appellant is the wife of the Second Appellant and mother of the Third Appellant. The family's immigration history is adequately set out at [1] and [2] of the error of law decision and I do not repeat what is there said.

3. By her error of law decision, Judge Lindsley preserved various findings made by Judge Suffield-Thompson which are set out at [15] of her decision as follows:

> "The appeal is dismissed by the First-tier Tribunal on the basis that the appellants' removal is proportionate because: the appellants had taken insufficient steps to clear the first appellant's name so it was not believed that they had remained in the UK for this purpose; they had not returned to Bangladesh and re-entered with entry clearance as they could have done if the first appellant truly wished to complete her studies in the UK so it was not believed that she really intended to do this; it was not credible that the appellants were supported by family and friends as there was no documentary evidence of this; it was in the best interests of the third appellant to be brought up in Bangladesh where the first and second appellants would be in professional jobs with wider family support; if the appellants returned to Bangladesh they will have family, good work opportunities and would not face hardship; and there was no evidence that they were integrated in the UK or working here."

4. The reason Judge Lindsley found an error of law in the First-tier Tribunal's decision arose from events occurring in 2014. It is said by the Appellants that, at that point in time, the Respondent alleged that the First Appellant had cheated when taking a TOEIC (Test of English for International Communication) test as she had used a proxy test-taker. It is said that, as a result of the Respondent making that allegation, the First Appellant was unable to pursue her studies as the allegation is said to have been made to the college which subsequently withdrew its sponsorship. This case therefore has some links with the so-called ETS (Educational Testing Services) litigation. The Respondent denied making such an allegation. It is now common ground that no such allegation was made to the First Appellant herself and, unlike in other ETS cases, the Respondent did not directly curtail the First Appellant's leave based on the allegation of cheating.

5. Judge Lindsley found, in short summary, that "there was no consideration by the First-tier Tribunal of the contention of injustice by the respondent by having

made a false allegation of cheating to LSBF [London School of Business and Finance - the college] which led inexorably to [the First Appellant] losing her sponsorship, her leave to remain and ability to study in the UK, and the contention that there was a duty ….to put the appellant in the same position she would have been if the false allegation had not been made to the first appellant's college." ([13] of the error of law decision).

6. Judge Lindsley directed that the resumed hearing should take place by remote means. Neither party objected to that course. She directed that it would take place based on submissions only and that "[t]he parties will both use their best endeavours to obtain copies of the correspondence sent by the respondent to the LSBF in 2014 which led LSBF to write in their e-mail of 23rd December 2014 that the Home Office had stated that the first appellant had used a proxy test taker to take her English test." She also directed that any further documentary evidence should be filed and served ten days prior to the resumed hearing.

7. An additional bundle was filed by the Appellants on 22 April 2021. Although that is not ten days prior to the hearing, I admitted that evidence without objection by Ms Cunha. No further evidence was filed by the Respondent. I refer to documents in the Appellants' additional bundle below as [ABS/xx]. I also have the Appellants' bundle before the First-tier Tribunal (referred to below as [AB/xx]), a core bundle of documents including the Respondent's bundle (referred to below as [RB/xx]) and the Appellants' skeleton argument and chronology before the First-tier Tribunal.

8. Although there were some minor sound problems with Ms Cunha's connection, those did not affect my ability to follow her submissions. Other than those minor difficulties, there were no technical difficulties affecting the conduct of the hearing.

THE ISSUES

9. Judge Lindsley having preserved findings made by the First-tier Tribunal, and as Mr Ó Ceallaigh confirmed, there are only two issues which I have to decide. The first is, as a matter of fact, what occurred in 2014. The second is what impact those events have on the Appellants' immigration position and human rights claim. Mr Ó Ceallaigh confirmed that the Appellants' case is restricted to the impact of the allegation on the public interest in the maintenance of immigration control. He fairly accepted that, but for that point, the Appellants would not succeed in their appeal. That is the case in light of the factual findings preserved by Judge Lindsley as set out above.

DISCUSSION AND FINDINGS

10. I begin by dealing with Mr Ó Ceallaigh's submission regarding the Respondent's change of position. He pointed out that Mr Lindsay said at the previous hearing that no ETS allegation had been made against the First Appellant whereas Ms

Cunha now accepted, following the LSBF disclosure, that it was alleged that the First Appellant had a "questionable" result in a TOEIC test. I was not entirely clear whether Mr Ó Ceallaigh went so far as to allege that the Respondent had misled the Tribunal or acted in bad faith in this regard. If he did, I reject the submission.

11. As I will come to below, the allegation made appeared in a list provided to LSBF of students whose TOEIC results were said to be "questionable" or "invalid" by the Home Office, following information from ETS. It was not an allegation made directly to the First Appellant (as is common ground). It is also common ground that the curtailment of the First Appellant's leave flowed directly from the withdrawal of the college sponsorship albeit indirectly that arose following the provision of the list of TOEIC results which list contained the allegation relied upon by the college. As such, it is unlikely that the allegation will have appeared on the First Appellant's Home Office file or notes in relation to her. It is understandable therefore that the Respondent has asserted and continues to assert that she has never directly relied on such an allegation.

12. As I come to below, the allegation appears to have been made in the context of a review of the position of a number of students registered with LSBF. I accept therefore that Mr Lindsay, at the previous hearing, may well have been entirely unaware of what occurred. I will however need to say something regarding a document which was before Judge Lindsley concerning the compromise of a judicial review involving the First Appellant which might suggest that an allegation of some sort was made against her. I accept however that there was no intention by the Respondent deliberately to mislead the Tribunal in this regard.

13. In order to consider what occurred in 2014, it is necessary to have regard to the Appellants' additional bundle in some detail.

14. The First Appellant has submitted an additional witness statement dated 22 April 2021 ([ABS/4-5]). That witness statement contains substantially more information about what occurred in 2014/2015. Her first statement as before the First-tier Tribunal, in this regard said only that her sponsorship had been withdrawn in December 2014 because the Home Office had informed LSBF that she had used a proxy test taker when taking her English language test and had acted unreasonably and unfairly by curtailing her leave (see §3 of the statement at [AB/4]). She said that she did not use a TOEIC certificate in any application and that the "[c]ollege authority maintain that as they have been informed by the Home Office, therefore, I should short [sic] out this issue with the Home Office" ([§4]). She did not mention the steps taken by LSBF prior to the withdrawal of sponsorship nor by the Respondent when curtailing her leave.

15. The First Appellant's additional witness statement contains the following relevant information:

(a) The First Appellant enrolled with LSBF to complete a CIMA (Chartered Institute of Management Accountants) degree in January 2014. The course was due to last until 24 November 2016. There is a letter dated 8 December 2014 from LSBF ([ABS/15]) confirming that the First Appellant attended 89 classes out of a possible 96 and had an attendance rate of 93%. That letter post-dates the intervention of the college in relation to the First Appellant's sponsorship (see below).

(b) The First Appellant did not ever take an English language test with TOEIC. The allegation that she cheated in such a test could not therefore be factually accurate. She took a test via City and Guilds. She does however accept that she registered for a TOEIC test.

(c) The result of the test which the First Appellant is said by the college to have sat with TOEIC is "questionable" not "invalid" (see what is said below).

(d) The First Appellant was asked by her college to take a "PTE test" (Pearson Test in English). She sat that test but because it was unfamiliar to her, she says, she failed it. Although Mr Ó Ceallaigh suggested at one point in his submissions that the PTE test was "harder" than the City and Guilds test, he fairly accepted that there was no evidence to support that submission but he asserted that the test was "different" and that the First Appellant was also under pressure when taking that test due to the circumstances at that time (see below). The First Appellant says that she was unprepared and that she was "mentally upset and broke down".

(e) The First Appellant failed the test and her appeal against the withdrawal of her sponsorship was also dismissed. She says that she tried to enrol with other colleges but could not do so because of the ETS allegation. She says that such contact was made by telephone. There is scant documentary evidence in this regard.

16. I turn then to the evidence which emanates from LSBF. Although it is not entirely clear from the additional bundle why LSBF was told about the First Appellant's asserted "questionable" result, some evidence appears in this regard at [RB/A25] in a letter dated 26 March 2015 from the Home Office to the First Appellant's previous solicitors. That reads as follows so far as relevant:

> "ETS have provided the Home Office with the details of 56,000 ETS certificates that they have withdrawn. We shared information with LSBF of the details of this action as it related to their student body and asked them to investigate that their students were abiding with the immigration rules.
>
> The sponsor guidance imposes various duties on sponsors in order to ensure that immigration control is maintained. If a college concludes that any students that it sponsors have obtained their leave or sponsorship by deception, it has a duty to take appropriate action, in line with the sponsor guidance and its internal policies

> governing the sponsorship of international students. In your client's case it appears that, following investigation LSBF concluded that the appropriate course of action was withdrawal of sponsorship. Again, UKVI were not involved in that decision making process (except to the extent outlined above), and accordingly this decision is not one on which we are in a position to comment further.
>
> If your client have concerns about the manner in which LSBF's investigation was conducted, or disagree with the conclusions reached or actions taken, this is a matter to be taken up with LSBF."

17. As appears from the LSBF documents, the college was sent a list not only of those students whose ETS results were either questionable or invalid but also students who were working beyond the hours that they were entitled to work ([ABS/20]). As such, the motive behind the provision of the lists appears to have been to inform LSBF of students who were failing to comply, on the evidence the Home Office had, with the terms of their sponsorship and leave in order that LSBF could fulfil its own duties under the sponsor licence requirements. As such, I accept Ms Cunha's submission that the Home Office was bound to provide the evidence to LSBF.

18. According to LSBF, they were requested to withdraw the students on the list "accordingly" ([ABS/20]). That is somewhat at odds with what is said by the Home Office. There is no disclosure of any correspondence between the college and the Home Office, but I am prepared to accept that the Home Office is likely to have told the college to withdraw sponsorship to any student found to be in breach of the immigration rules ("the Rules") and the conditions of their leave.

19. As I canvassed with Mr Ó Ceallaigh in the course of his submissions, there may be a debate however as to what the college was asked to do or should have done in relation to the First Appellant as her TOEIC result is said to have been only "questionable" and not "invalid". Mr Ó Ceallaigh confirmed my understanding that there was at some point a different process for those whose results were only "questionable". Mr Ó Ceallaigh pointed out that on current Home Office instructions, the First Appellant would not have had her leave curtailed based on the ETS allegation in any event as she had not relied on it in an application. Be that as it may, I have no evidence as to the process at the relevant time. I am prepared to assume for present purposes that the college was instructed to take the same action against students in the "questionable" category as in the "invalid" category.

20. There is some anomaly in the evidence from LSBF as to what the college was otherwise told about the TOEIC result. It is very clearly stated in an email dated 2 March 2021 ([ABS/6]) that LSBF was not given the exam result. This point is dealt with in more detail in a letter dated 11 February 2021 ([ABS/21]) as follows:

> "This student was identified to us as having a proxy test taker for their proof of English. Although the lists were provided, no evidence was shared with LSBF to

> substantiate claims whether any wrongdoing had taken place. Students were categorised further into two categories; their test was "Invalid" or it was "Questionable", your client fell under the Questionable category".
>
> [my emphasis]

21. However, as I will come to below, when dealing with its own process, in some of the correspondence, LSBF has asserted that the First Appellant's PTE scores were inconsistent with her TOEIC result. That cannot be the position if LSBF had no information about those scores. Mr Ó Ceallaigh accepted when asked about this that what was meant was that the First Appellant's PTE scores did not reach the level of B2 which was the level shown in her City and Guilds certificate and would be the requisite level for a TOEIC qualification.

22. That submission is supported by what is said in the letter at [ABS/21] as follows:

> "We expected the results from the PTE test to be similar to the level of the TOEIC as they are both English tests and your client had already achieved a B2 in her City and Guilds qualification".

That sentence makes clear that the college was well aware that the First Appellant had relied on a City and Guilds qualification when applying for her course and that what the college was looking for was a PTE result consistent with a B2 qualification.

23. Notwithstanding LSBF's understanding that the college had been asked to withdraw sponsorship from the students on the lists, the letter at [ABS/21] goes on to explain events after the sending of the lists as follows:

> "LSBF made the decision not to directly withdraw all students, regardless of their category and instead a process was implemented where we would interview all students identified. The outcomes would be; a free PTE test, expel the student, confirm that they have already been expelled or offer them a second interview."

24. As Ms Cunha submitted and I accept, this suggests a two-stage process – an interview followed by a range of outcomes not all of which involve expulsion. In the First Appellant's case, the letter at [ABS/21] goes on to explain that the First Appellant attended the interview on 3 October 2014. After the interview, a decision was made to offer her a free PTE test to prove that she had "actually performed the English test herself, not by the use of a proxy".

25. The results of the PTE test taken on 5 November 2014 appear at [ABS/30]. Those show the following scores:

Listening: 37

Reading: 39

Speaking: 32

Writing: 40

Grammar: 10

Oral fluency: 35

Pronunciation: 25

Spelling: 20

Vocabulary: 10

Written Discourse: 10

The overall score was 36. That does not reach the requisite score.

26. Ms Cunha drew my attention to an e-mail sent apparently by the First Appellant (although from the Second Appellant's address) dated 6 November 2014 ([ABS/29]). This was in connection, it appears, with a request from the Tier 4 compliance team at LSBF asking for the PTE scores to be uploaded onto the system. The email reads as follows:

> "hey you suggest me to get the PTE exam i done the exam as well please remind you i did not get toice b2. I extend my visa by city & guild. i did not even get b2 and it was my first time visa extension. i have no idea why you gays call me for PTE exam.. i attach my city & guild certificate".

27. I of course appreciate that English is not the First Appellant's first language. I also accept that communications by e-mail are sometimes written in a hurry and not checked. However, the grammatical, punctuation and spelling errors in a communication from a student to her college where one might expect a degree of professionalism tend to support the scores in the PTE test.

28. Following that email, on 12 November 2014, the college wrote to the First Appellant as follows ([ABS/27]):

> "We explained in our previous communication that it is very important that you attend the exam as scheduled. We also stated that we will be relying on the results of the exam, together with our assessment of the representations you made during the interview in order to make out decision whether or not to continue your Tier 4 sponsorship.
>
> Five working days has now passed since you sat the examination. You are now requested to take two additional steps.
>
> 1. You are now required to assign your test results to 'London School of Business and Finance'. This can be done by following the steps outlined below this email.
>
> 2. Additionally you are also required to submit your PTE transcript to us via the email address: HTSLicenceinterview@lsbf.org.uk.

You must complete both steps before 17/11/2014. Accordingly, if you fail to assign your results to us, or submit the transcript to us, we will proceed to make a decision on your continued sponsorship based on information available to us. Both steps will be verified following these steps.

It is important you understand that at present, based on the information provided by UKVI and on the balance of probabilities, we are minded to withdraw your sponsorship and expel you from your course of study. However, we will evaluate your PTE exam performance and the representations you made during your interview holistically before we make our final decision. It is in your best interest, therefore, to assign your scores to 'London School of Business and Finance' and email in your PTE transcript."

29. The reference to the college being "minded to withdraw" the First Appellant's sponsorship based on the information provided by the Respondent is potentially supportive of the Appellants' case that the college considered itself bound to withdraw sponsorship and had already made up its mind. Equally, however, the reference to considering the PTE test results and representations made in interview are potentially supportive of the Respondent's case that the college was following its own process and reaching its own decision.

30. The competing submissions in this regard have to be considered in the context of all the evidence from LSBF. The evidence which is relevant to this point is as follows:

Email dated 25 November 2014 from LSBF to the First Appellant [ABS/28]

"We have written to you on 30/08/2014 telling you that your student record has been identified by UKVI, who informed us that you have obtained a TOEIC certificate which was Questionable by Educational Testing Services ("ETS"). As you are aware, our agreement to sponsor you as an International Student in the UK was evidenced by our acceptance to issue you with a Confirmation of Acceptance for Studies ("CAS"). Our CAS document was issued conditionally (and remains conditional) based upon our assessment of your academic profile and abilities as evidenced by the documents that you submitted to us at the time of application. If any of the documents submitted prove to be inaccurate or misleading, or in cases where you have failed to disclose material information about your academic background and qualifications, we reserve our right to withdraw our sponsorship without notice and to notify UKVI of the same.

You were invited to attend the interview as a condition of your continued sponsorship. We explained that your continued sponsorship would be assessed based on the results of the interview and the results of an additional Secure English Language Test ("SELT") – the Pearson Test of English ("PTE") – which we invited you to sit at our cost.

Following your PTE you were asked to assign your PTE test scores to London School of Business and Finance and send in your PTE certificate to HTSLicenceinterview@lsbf.org.uk by 17/11/2014. Because of a failure to follow

these clear steps we have subsequently decided to **withdraw sponsorship and expel you from your course of study.**

We have reached this decision on the balance of probabilities, based on information available to us from UKVI, your representations during the interview, and the results of your PTE exam.

Accordingly, we are not satisfied we should prefer your evidence that your TOEIC exam certificate should be considered valid to the information supplied by UKVI and ETS, the organisation who administrates the TOEIC exam. We conclude, therefore, that information and documents you have provided to us at the time of application were misleading."

[emphasis in the original]

Decision of LSBF following appeal against above decision [ABS/31]

"**Appeal Notes**

Student claims to have not sat TOEIC

Student only scored 36

Further Comments/ Decision

Your PTE exam results are inconsistent with the level of English proficiency that we would expect based on your previous TOEIC exam results and the natural improvement that we would expect from a student attending a course in the UK for the duration that you have been attending. Therefore, the original decision is upheld."

Letter dated 9 December 2014 communicating appeal outcome [ABS/32]

"… Having considered your appeal, we are satisfied that the decision to withdraw sponsorship was correct, for the following reasons:

Your PTE exam results are inconsistent with the level of English proficiency that we would expect based on your previous TOEIC exam results and the natural improvement that we would expect from a student attending a course in the UK for the duration that you have been attending. Therefore, the original decision is upheld.

Accordingly, we confirm our decision to withdraw your Tier 4 sponsorship. UKVI are informed of our decision, which means your leave to remain in the UK as a Tier 4 student has been curtailed…."

31. The above sequence of events is summarised in the letter dated 11 February 2021 from LSBF at [ABS/20-21] to which I have already referred in the following terms:

"Your client attended the interview on 3rd October 2014 at 12am. Following that interview, a decision was made to offer her a free PTE test. This test would essentially prove that the student had actually performed the English test herself, not by the use of a proxy."

[LSBF then makes the point about the levels of the respective tests which I have cited at [22] above]

Your client took the PTE test on 5th November 2014 which LSBF paid for. The student was then requested to assign their PTE scores to LSBF, the standard procedure so LSBF could verify the test at the time as stipulated in the attached email dated 12 November 2014. The email included steps as to how the PTE scores could be assigned.

However, the student did not assign their scores to LSBF within the stipulated period and the decision was taken to withdraw sponsorship and expel your client from their course of study which was communicated to your client on 25 November 2014…It was explained that this decision was based on information available to us from UKVI, your client's representations during the interview, and the results of your client's PTE exam.

Despite the above decision and your client's own inaction, your client was given a further opportunity to appeal the same. The student's appeal application was successful, and she attended the appeal hearing on 5th December 2014 at 5:20pm. Your client also brought with her the PTE test results as evidence to the appeal. The PTE test score showed that your client had achieved a score of 36 which was below the requirements…In accordance with B2 Study Visa requirements, your client should have achieved a score of 59 for the PTE test. Accordingly, LSBF made the decision to expel the student and withdraw sponsorship. A letter was sent to your client on 9th December 2014 informing her of the decision and that the original decision was to be upheld..

Although the Home Office had directed us to remove the student, LSBF went over and above to grant Mrs Islam several opportunities to rebut the claims of the Home Office. We did not take the approach of many other providers and just withdraw everyone. We implemented a strict and fair process to screen all alleged students despite our obligation to strictly act upon the Home Office's advice…

Considering the above, please note that any claim initiated by your client will be defended robustly…"

32. Finally, LSBF's position is reiterated in an email dated 2 March 2021 ([ABS/6]). Having again confirmed that LSBF was not provided with the TOEIC score as I have already noted, the email continues as follows:

"... Secondly, the proficiency of your client's English ability is not the determining factor in this matter. The fact remains that LSBF were informed by the Home Office that your client had a 'questionable' TOEIC English assessment and regardless of your client's English ability, as sponsors LSBF were duty bound to act upon this information.

> The PTE is a recognised English assessment and accepted by the UKVI. It is reasonable to assume the PTE scores achieved by your client would have been at a B2 level, which was the level required to study the course. Your client's PTE scores fell below the requisite standard. As demonstrated in our letter dated 11 February 2012, LSBF did not take the route of other providers and blindly withdraw students. Instead, an independent investigation was conducted following which your client's sponsorship was withdrawn…."

33. In relation to the action taken by the Respondent, the letter confirming the curtailment of the First Appellant's leave is dated 7 April 2015. It appears at [AB/29] and reads as follows (so far as relevant):

> "You were granted leave to remain as a Tier 4 General Student until 24 March 2017 in order to undertake a course of study at London School of Business and Finance.
>
> However, the Home Office was informed by the London School of Business and Finance on 23 December 2014 that you ceased studying with them.
>
> Home Office records have been checked and there is no evidence that you have made an application to change your sponsor or made a fresh application for entry clearance, leave to enter or leave to remain in the United Kingdom in any capacity.
>
> Therefore, as you have been excluded or withdrawn from your course of studies, as notified by your Tier 4 sponsor, your leave is curtailed under paragraph 323A(a)(ii)(2) of the Immigration Rules until 09 June 2015."

34. The First Appellant was therefore given a period of sixty days to find another sponsor. As I have already noted, she says that she was unable to find another sponsor due to the ETS allegation but has provided scant documentary evidence confirming her enquiries (which she says were made by phone only). There is however evidence in the initial appeal bundle at [AB/14-16] that the Appellant tried to obtain sponsorship via Boost Education Service when given the sixty days' leave. She says however that she would have been required to sign a TOEIC declaration which appears at [AB/17]. I do not understand her case in that regard since she says that she never sat a TOEIC case (even though she had registered for it). It is not clear to me why she would have been unable to sign the declaration.

35. Be that as it may, immediately prior to the expiry of the sixty days, the First Appellant made an application with the Second Appellant as her dependent based on their Article 8 rights. The human rights claim was refused by the Respondent and certified as clearly unfounded. The Appellants did not seek to challenge by way of judicial review either the curtailment decision or the certification decision.

36. The Appellants did however bring a judicial review challenge in August 2019. It appears from the Appellants' chronology that, having made a series of unsuccessful applications, on 16 April 2019, the Appellants made further

representations. Those appear at [RB/A1-19]. They were refused on 15 May 2019. The refusal letter appears at [RB/B1]. The further representations included a denial by the First Appellant of the allegation that she had cheated in her English language test and are put forward on the basis that, as an individual impacted by the ETS litigation, having made a human rights claim in the representations, and following the Court of Appeal's judgment in Khan and others v Secretary of State for the Home Department [2018] EWCA Civ 1684, the First Appellant should be given a right of appeal. Although the Respondent rejected those representations, she agreed to reconsider following a judicial review challenge.

37. Unfortunately, the judicial review application is not in any of the bundles. However, presumably because this was presented as an ETS case, the judicial review was compromised by a consent order sealed by the Tribunal on 9 September 2015 ([AB/26-27]). That consent order contains the following recital:

> "AND UPON the Respondent agreeing that if the Appellant succeeds in any appeal, on the basis that she did not commit a TOEIC fraud then, in the absence of some new factor justifying a different course, the Respondent will rescind her decision of 7 April 2015 to curtail her Tier 4 leave and:
>
> (i) Treat the Applicant as being an in time applicant since 7 April 2015 (and any earlier period as may be established) as if she had 3C leave, subject to there being no other periods where the Applicant was an overstayer.
>
> (ii) Grant the Applicant a reasonable opportunity, being not less than 60 days, to submit an application for further leave;
>
> (iii) Waive any fee or charge (including health surcharge) that might be payable for making such an application."

38. It is the reconsideration of the 15 May 2019 refusal which led to the Respondent's decision dated 25 October 2019 which is here under appeal. The decision letter appears in the Respondent's bundle. As the Respondent points out at [34] of that letter "the Home Office has never refused any previous application or claim on the basis of suitability and has never regarded you as being a person who has attempted to obtain leave by deception" (in other words there was and never has been any direct allegation of deception). The letter goes on to rehearse in summary the course of events with which I have already dealt. The letter also points out that the First Appellant had already been accorded a period of sixty days to find another sponsor after LSBF's withdrawal of sponsorship.

39. As appears from the foregoing, it appears that the Respondent mistakenly agreed to a consent order which does not reflect the factual basis of this case. I do not consider that the consent order has an impact in this case for three reasons. First, although there is no finding of deception in this appeal (and nor is the Tribunal asked to consider that issue), there is no finding to the contrary. In other words, that is not an issue in this appeal save insofar as it impacts on actions taken in the past. I did not understand Mr Ó Ceallaigh to suggest that, because the First-tier

Tribunal Judge had not made a finding of deception, the Appellants were entitled to succeed in their appeal.

40. Second, as I have already pointed out, the Respondent had already given a sixty days' period following the withdrawal of sponsorship to find another sponsor. The Respondent had therefore already provided at least part of the remedy contained in the recital.

41. Third, the recital makes clear that the agreement as to what would occur depended on there being no "new factor". Whilst it might be said that the mistaken assumption that this was a standard ETS case in which the Tribunal would be asked to determine whether the First Appellant had in fact exercised deception is not new, the consent order envisages that course being followed in this appeal. That is not what happened because, as I have already pointed out, the allegation was not relied upon by the Respondent in the decision under appeal.

42. That then is the relevant factual background to the Appellants' case. Mr Ó Ceallaigh submitted that this factual background made a difference to the Appellants' case by way of diminution of the public interest for the following reasons:

    (1) The LSBF process was flawed. The first point made is that PTE was a different test. He submitted that LSBF assumed that if the First Appellant did not meet the standard required by that test, then she would be treated as having behaved fraudulently. The First Appellant's evidence is that she was under pressure and unprepared and that is why she performed badly. Thereafter, the Respondent had merely relied on LSBF's assessment and therefore the allegation of fraud as fact.

    (2) LSBF failed to have regard to the City and Guilds certificate when assessing the case. The conclusions were based on the TOEIC result.

    (3) Although LSBF had given the First Appellant a "minded to" indication, it is clear from the correspondence that LSBF considered itself bound to withdraw sponsorship from the First Appellant. The college was therefore under pressure to remove her.

43. In short, therefore, the Appellant's case is that the intervening procedure carried out by LSBF was unfair and does not absolve the Respondent from its responsibility in relation to the withdrawal of the First Appellant's sponsorship which led directly to the curtailment of her leave. Had it not been for the Respondent including the First Appellant's name in the list to LSBF, she would have continued to study successfully, would have been entitled to remain in the UK and would by now have qualified for settlement.

44. Mr Ó Ceallaigh drew my attention in particular to what is said at [64] of the decision in R (oaa Mohibullah) v Secretary of State for the Home Department (TOEIC – ETS – judicial review principles) [2016] UKUT 00561 (IAC) ("Mohibullah") as follows:

> "From Mr Armstrong's quiver next emerged the submission that the Tribunal should apply the prism of conspicuous unfairness to the decision making route selected by the Secretary of State. The factual ingredients in this discrete argument are that this is the only known case to date in which this curtailment of leave provision in Rule 323A has been deployed by the Secretary of State (which is not contested); the conditions under which resort to this decision making power became possible were orchestrated by **the dubious conduct of the Secretary of State's agents in exercising improper pressure on the college to withdraw the Applicant from his course**; and the Applicant has been treated differently than other suspected TOEIC fraudsters, without adequate explanation or good reason. The other key ingredient in this equation is, of course, that each of the other two possible decision making routes generated a statutory right of appeal."
>
> [emphasis based on submission]

45. The decision in Mohibullah is said to be of significance because, as in this case, the decision to curtail leave was premised on the college's withdrawal of sponsorship (see [5] of the decision). There are however a number of reasons why I do not consider that the decision is of assistance. First, unlike in this case, the college in Mohibullah had simply withdrawn sponsorship without apparently giving the applicant in that case any opportunity to deal with the allegation ([11]). Second, the applicant in Mohibullah was not given an opportunity to find an alternative sponsor (in other words a sixty day' period) as was the First Appellant.

46. Third, the submission regarding the "improper pressure" has to be read in the context of the facts and evidence set out at [12] to [31] of the decision. The requirement to withdraw sponsorship from the students in that case was in the context of a decision to suspend the college's licence if the college did not take action. Although I indicated in the course of the hearing that the communication from the Home Office to LSBF in this case might also have been taken in that context, I had not been shown the letter from the Home Office to the Appellants' previous solicitors regarding the communication to LSBF which appears in the Respondent's bundle as referred to at [16] above and which is not consistent with that assumption.

47. Fourth, the Tribunal's consideration of the course of action followed by the Respondent in that case also has to be considered in what the Tribunal described as "the crucial importance of context". Mohibullah was a judicial review challenge. Had the Respondent made the decision in another way, the applicant in that case would have been given a right of appeal ([70]). It was the deprivation of the right of appeal coupled with the pressure put upon the college

in relation to its licence which the Tribunal concluded gave rise to the "conspicuous unfairness" in that case ([73]). Here, the First Appellant has been given a right of appeal. She has had the opportunity to put her side of the story both in the context of the process followed by LSBF and in the appeal.

48. Finally, the submission to which Mr Ó Ceallaigh alluded is of course just that. It was a submission made by the applicant's barrister. It appears in a section headed "Conspicuous Unfairness" at [64] onwards. What is there said has to be considered in the light of later case-law to which I now turn.

49. I begin with the case of Patel (historic injustice; NIAA Part 5A) [2020] UKUT 00351 (IAC) ("Patel") to which Ms Cunha referred but did not take me.

50. The guidance in Patel reads as follows:

> "**A. Historic injustice**
>
> (1) For the future, the expression "historic injustice", as used in the immigration context, should be reserved for cases such as those concerning certain British Overseas citizens or families of Gurkha ex-servicemen, which involve a belated recognition by the United Kingdom government that a particular class of persons was wrongly treated, in immigration terms, in the past; and that this injustice should be recognised in dealing with applications made now (eg Patel and Others v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17; AP (India) v Secretary of State for the Home Department [2015] EWCA Civ 89).
>
> (2) The fact that the injustice exists will be uncontroversial. It will be generally recognised. It will apply to a particular class of persons. Unlike cases of what might be described as "historical injustice", the operation of historic injustice will not depend on the particular interaction between the individual member of the class and the Secretary of State. The effects of historic injustice on the immigration position of the individual are likely to be profound, even determinative of success, provided that there is nothing materially adverse in their immigration history.
>
> **B. Historical injustice**
>
> (3) Cases that may be described as involving "historical injustice" are where the individual has suffered as a result of the wrongful operation (or non-operation) by the Secretary of State of her immigration functions. Examples are where the Secretary of State has failed to give an individual the benefit of a relevant immigration policy (eg AA (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 12); where delay in reaching decisions is the result of a dysfunctional system (eg EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41); or where the Secretary of State forms a view about an individual's activities or behaviour, which leads to an adverse immigration decision; but where her view turns out to be mistaken (eg Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009). Each of these failings may have an effect on an individual's Article 8 ECHR case; but the ways in which this may happen differ from the true "historic injustice" category.

C. Part 5A of the Nationality, Immigration and Asylum Act 2002 and the weight to be given to the maintenance of effective immigration controls

(4) In all cases where, for whatever reason, the public interest in the maintenance of effective immigration controls falls to be given less than its ordinary weight, the usual course should be for the judge so to find in terms, when addressing section 117B(1) of the 2002 Act. The same result may be achieved, at least in some situations, by qualifying the consideration in section 117B(4) that little weight should be given to a private life formed when the person concerned is in the United Kingdom unlawfully. Judicial fact-finders should, however, avoid any recourse to double-counting, whereby not only is the weight to be given to effective immigration controls diminished but also, for the same reason, a private life is given more weight than would otherwise be possible by the undiluted application of section 117B(4).

(5) The weight to be given to the public interest in the maintenance of effective immigration controls is unlikely to be reduced because of disappointments or inadequacies encountered by individuals from teaching institutions or employers."

51. As is evident from the foregoing, the First Appellant's case falls, if at all, under the heading of historical injustice. The examples given by the Tribunal in Patel of historical injustice involve cases where ETS allegations had been made directly in an immigration decision which was under challenge (by reference to the case of Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009 cited at [46] of the decision in Patel). The category into which that case is said to fall is where the Respondent has made a decision which turns out to be mistaken. In other words, if, in this case, the Respondent had alleged that the First Appellant had cheated in her ETS test, but she was found not to have done so, that might well be a case of historical injustice. That is the sort of case which would lead to the outcomes set out in the consent order to which I have referred at [37] above. In this case, however, as I have pointed out, there is no mistaken decision made by the Respondent. Although the First Appellant says that she did not take the ETS test, it is confirmed by LSBF that her name appeared on a list of those with "questionable" test results. Although I accept that I do not have direct evidence that the Respondent was informed of that test result by ETS, the evidence from LSBF is that the First Appellant's name was on the list provided and the First Appellant does not deny that she booked such a test even if she says that she did not take it.

52. The way in which the argument was developed before me by Mr Ó Ceallaigh is that, but for the Respondent's actions, LSBF would not have withdrawn sponsorship. In other words, LSBF's actions did not break the chain of causation. It is asserted that, but for the Respondent's actions, the First Appellant would have successfully continued with her studies and would have completed a term of ten years' lawful residence in the UK (based as I understand it on the Second Appellant's length of residence). I reject that submission for the following reasons.

53. First, as I have already pointed out, all that the Respondent did was to inform the college of the information given to her by ETS. Even if it is the case that the Respondent told the college to withdraw sponsorship to individuals on those lists, the Respondent was entitled, indeed probably duty bound, to bring to the college's attention instances of students who were said in some way to be breaching the Rules. As I have pointed out, LSBF was given details not only of those with an ETS allegation against them, but also those said to have been working in breach of conditions. I do not of course suggest that the First Appellant fell within that second category, but this shows that the ETS allegation made by the provision of the information was part of a more general exercise to alert the college to those who may be in breach of the Rules.

54. Second, insofar as the Appellants rely on the "dubious process" adopted by the Respondent in achieving a curtailment of leave indirectly in reliance on what was said in Mohibullah, I have explained why that was a very different case. Observations made by the Tribunal in that factually distinct case also have to be read in the light of developments in the case law regarding "conspicuous unfairness". Although I did not receive legal argument on this issue, it is appropriate to have regard to what was said by the Supreme Court in R (oao Gallaher Group Ltd and others) v Competition and Markets Authority [2018] UKSC 25 at [34] to [41] of the judgment in that case. The conclusion at [41] of the judgment is that "procedural unfairness is well-established and well-understood. Substantive unfairness on the other hand – or 'whether there has been unfairness on the part of the authority having regard to all the circumstances' – is not a distinct legal criterion. Nor is it made so by the addition of terms such as 'conspicuous' or 'abuse of power'". I have already explained why I do not consider the actions taken by the Respondent to be unfair in any event. I repeat the point that the First Appellant was allowed a period of time to find another sponsor following the withdrawal of sponsorship by LSBF.

55. Third, and returning to this case, looked at through the lens of fairness in terms of what occurred after the lists were given to LSBF, I do not consider that the actions of the college can be said to be unfair. Even if it is the case that LSBF was told to withdraw sponsorship from those students on the list, it did not do so without some form of due process. Even it considered itself bound to remove those who were found likely to have breached the Rules, which would in any event be consistent with its duties as a sponsor, the evidence does not suggest that it closed its mind to the possibility that a student would be able to show, notwithstanding the information from the Respondent that sponsorship should not cease.

56. In this case, the First Appellant was given an interview, the opportunity to take another test to demonstrate her English language capabilities, and an appeal against the decision to withdraw sponsorship when that decision was made following her inaction in sharing the test results. If one looks at those opportunities against what would have happened if the Respondent had taken a

decision to curtail leave based directly on the ETS allegation, there is no unfairness at all. In the common type of ETS case, the most that an appellant can achieve is the possibility of having his or her case tested by the Tribunal. I do not suggest that an opportunity for judicial determination is not an adequate remedy but in such cases an appellant's language skills can only be considered by a Judge based on the evidence. Here, the Appellant was given the, arguably better, opportunity to prove her English language skills via a test from another provider which is qualified to assess those skills for itself. She has also had the opportunity in this appeal to explain what occurred at that time. She has said that she was mentally unprepared for the test. However, if that were the case, she could have put forward evidence to her college explaining why she had not passed the test. There is nothing to suggest that she did so even on appeal. The evidence suggests that the First Appellant had at least one month to prepare for the PTE test.

57. As I have already noted, the First Appellant was also given sixty days by the Respondent following withdrawal of LSBF's sponsorship to find another sponsor. She says that she was unable to find a sponsor due to the ETS allegation. I have already dealt at [34] above with the only documentary evidence of attempts to find another sponsor. Even assuming it to be the case that other colleges rejected her due to the ETS allegation, she did not take any action against either LSBF or the Respondent at that time which she could have done if she considered that she had been treated unfairly.

58. Finally, it does not follow that, had it not been for the actions of the Respondent and LSBF, the First Appellant would necessarily have continued her studies successfully and completed a period permitting her and her family to remain indefinitely. I accept that there is evidence that she had a high attendance record on her course. I appreciate that she had completed an Extended Diploma in Management with College of Advanced Studies prior to enrolment with LSBF. The documents at [AB/9-11] shows that she passed that course. There are no documents showing that she had taken any examinations with LSBF. That is probably unsurprising since she enrolled on that course only in January 2014 and the action to withdraw her sponsorship began in October 2014. However, even in relation to that course and if she had been able to complete it successfully, her leave would have expired in March 2017 (the course came to an end in November 2016). That period would not have taken the First Appellant to a period of ten years for settlement (she entered the UK in September 2012). Even relying on the Second Appellant's length of residence, the couple would not have completed ten years' residence (he came to the UK as a student in November 2009 and remains in the UK only as the First Appellant's dependent). A finding that the family would have been able to remain indefinitely had it not been for the actions of the Respondent and LSBF is speculative in the extreme.

59. For those reasons, applying the guidance in Patel, I do not consider it appropriate to either reduce the weight to be given to the maintenance of effective

immigration control or to increase the weight to be given to the Appellants' private life. The treatment of the First Appellant by the Respondent in 2014 and 2015 does not amount to a historical injustice. It has not been shown that the Respondent acted improperly or made any mistake. LSBF acted on information provided to it by the Respondent. The college was bound to act on the information it was given. The Respondent acted on information provided to it by ETS. There is no evidence that the information was not provided by ETS. The First Appellant was given the opportunity to show why her sponsorship should not be withdrawn. Ultimately, it was withdrawn because the First Appellant could not satisfy LSBF via another independent test demonstrating her proficiency in English that the information given by ETS must be wrong. The First Appellant had the opportunity to demonstrate that the information from ETS could not be relied upon.

60. Mr Ó Ceallaigh having accepted that, if the weight to be given to the public interest did not fall to be reduced, the Appellants could not succeed, I do not, strictly, need to say any more. For the sake of completeness and so that the Appellants understand why they have lost, I set out the relevant reasons.

61. The Third Appellant is a child currently aged two years. At that age his best interests are to remain with his parents wherever they are. There is no evidence of any medical conditions or other reason why his best interests are to remain in the UK (see also findings of Judge Suffield-Thompson as preserved – [3] above). The Third Appellant has not been in the UK for seven years. He does not fall within paragraph 276ADE (1) of the Rules.

62. The First and Second Appellants have had no leave to remain since 30 September 2015 when their human rights claim was certified following an in-time application made during the sixty days given by the curtailment letter in April 2015. At that point in time, the Second Appellant had been in the UK for just under six years. The First Appellant had been in the UK for just over three years. Both were originally here as students and therefore their residence was always precarious. Neither the First nor the Second Appellants therefore have a sufficient period of residence to meet paragraph 276B of the Rules. There is no evidence of any very significant obstacles to integration in Bangladesh. The finding as preserved by Judge Lindsley is that, on return to Bangladesh, the Appellants will have family support, the opportunity to work and will not suffer hardship (see [3] above).

63. The Appellants are therefore unable to satisfy the requirements of the Rules.

64. When assessing the Appellants' claim outside the Rules, I am bound to have regard to the factors in Section 117A-D Nationality, Immigration and Asylum Act 2002 ("Section 117") so far as relevant. Section 117B (5) requires little weight to be given to private life established when a person is in the UK when their immigration status is precarious. Equally, Section 117B (4) requires little weight

to be given to private life established when a person is in the UK unlawfully. The status of the Appellants throughout has been either precarious or unlawful. The Third Appellant has not been in the UK for seven years. Section 117B (6) has no application in this case.

65. I note the findings preserved from the decision of Suffield-Thompson as set out at [3] above. Those include that there is no evidence of integration in the UK or, as I have noted above, of obstacles to integration in the Appellants' home country. For those reasons, I can give only little weight to the Appellants' private lives and the impact on their private lives caused by removal.

66. Since I have not found there to be any good reason to reduce the weight to be given to the public interest in this case based on what occurred in the past, I give full weight to that public interest. In this case, Section 117B (1) provides that maintenance of effective immigration control is in the public interest. That involves the removal of persons who have no right to be in the UK and who are unable to meet the requirements of the Rules.

67. Weighing the factors for and against the Appellants, I am satisfied that the decision to remove the Appellants is proportionate. Removal does not breach the Appellants' right to respect for their family and private lives. There is no breach of their Article 8 rights. Their appeals therefore fail.

Decision:

The Appellants' appeals are dismissed on human rights grounds.

Signed: *L K Smith* Date: 4 May 2021
Upper Tribunal Judge Smith

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/18342/2019 (V)
HU/18344/2019 (V)
HU/18345/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House
via Skype for Business
On 19th January 2021

Determination Promulgated

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

MAHANAZ ISLAM (1)
ARDIN RAHMAN (2)
[A R] (3)
(ANONYMITY ORDER NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G O'Ceallaigh, of Counsel, instructed by Lawmatic Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants are citizens of Bangladesh. The first appellant is the wife of the second appellant and mother of the third appellant. The second appellant came to the UK as a Tier 4 student in October 2009 and the first appellant entered the UK as a Tier 4 student in September 2012. From December 2013 the second appellant had leave to remain as the first appellant's dependent. On 7th April 2014 the first appellant's leave to remain as a Tier 4 student migrant was curtailed to expire on 9th June 2015 because the London School of Business and Finance, her college, notified the respondent that they had withdrawn their sponsorship.

2. On 8th June 2015 the first and second appellants made a human rights application, which was refused and certified as clearly unfounded on 30th September 2015. On 11th November 2015 they made an application as the extended family members of an EEA national which was refused without a right of appeal on 10th May 2016. On 4th October 2016 they applied again to remain on Article 8 ECHR grounds. These submissions were rejected as a fresh claim under paragraph 353 of the Immigration Rules on 13th July 2018. On 4th October 2018 an application was made by the first and second appellants to remain outside of the Immigration Rules. On 28th October 2018 the third appellant was born in the UK. On 28th February 2019 the application outside of the Immigration Rules was refused as a fresh claim under paragraph 353 of the Immigration Rules.

3. On 16th April 2019 the appellants made further submissions which were rejected as a fresh human rights claim on 15th May 2019, these were added to with further submissions dated 12th August 2019, and following judicial review proceedings these were reconsidered in the decision of 25th October 2019, which refused the application on human rights grounds but accepted that the representations amounted to a fresh claim which should be accorded a right of appeal. The appellants then lodged an appeal against this decision, which was dismissed on human rights grounds in a decision of First-tier Tribunal Judge Suffield-Thompson, promulgated on 2nd January 2020.

4. Permission to appeal against the decision of the First-tier Tribunal was granted by Upper Tribunal Judge Bruce, on 8th June 2020 on the basis that it was arguable that the First-tier Tribunal had erred in not weighing in the appellants favour the fact that the respondent had withdrawn her allegation of deception and the negative consequences of that allegation for the appellants.

5. This matter comes before me to determine whether the First-tier Tribunal had erred in law in its decision, and if so whether that decision should be set aside. The hearing was held remotely, by Skype for Business, in light of the need to reduce the transmission of the Covid-19 virus and in light of this

being found to be acceptable by both parties and being a means by which the appeal could be fairly and justly determined. There were no significant issues of connectivity or audibility during the hearing. At the start of the hearing Mr Lindsay explained that due to lockdown he did not have the full file, and particularly he did not have the appellant's bundle from the First-tier Tribunal. Mr O'Ceallaigh kindly emailed him this bundle.

Submissions – Error of Law

6. In the grounds of appeal drafted by Mr O' Ceallaigh, and in his oral submissions in support, it was argued for the appellants, in summary, as follows.

7. It is argued that the respondent wrongly accused the first appellant of having cheated in an English exam which led to her not being able to complete her studies for her CIMA qualification at London School of Business and Finance (LSBF) as her sponsorship was withdrawn. The evidence that the respondent accused her of cheating is to be found in an email at E16 of the respondent's bundle from LSBF to the applicant dated 23rd December 2014 and also is reflected in the judicial review consent order of 9th September 2019, fond at E17 of the respondent's bundle, which refers to the appellant potentially succeeding in her forthcoming appeal on the basis that she did not commit a TOEIC fraud. The appellants consistent position since 2015 has been that the respondent had accused her of cheating and that this had led to the withdrawal of her sponsorship and her curtailment of leave to remain as a student, and not that this allegation emanated first from the college, LSBF. The first appellant had not even taken a TOEIC test, although she had booked one, and had instead relied upon a City & Guilds English certificate, and any copy and paste material contradicting this position in the representations from Universal Solicitors of 16th April 2019 was just that as initially the correct position is set out in the letter. The first appellant could not register with a new college to study at because of this allegation, and it followed that she and the second appellant became overstayers in the UK. It is common ground that the respondent has made no allegation of deception directly to the first appellant.

8. It is argued that in similar factual circumstances in R (Mohibullah) v SSHD (TOEIC – ETS – judicial review principles) [2016] UKUT 561 (IAC) it was found to be dubious conduct by the Secretary of State to have placed improper pressure on the college to withdraw that applicant from the course, and curtailing the appellant's leave was found to be so unfair and unreasonable so as to be an abuse of power. In Mohibullah the Secretary of State had continue to pursue the accusation of fraud, in this case she does not which strengthens the first appellant's position to have been unjustly treated. A false accusation by the respondent led to the first appellant being ejected from her course and her leave to remain was therefore unlawfully curtailed.

In R (Ahsan & Others) v SSHD [2017] EWCA Civ 2009 the Court of Appeal considered that where a person was lawfully present that the question of proportionality was solely to be determined by reference to the question as to whether the curtailment was justified. It is suggested that if on a human rights appeal an appellant was found not to have cheated that then the respondent should deal with that appellant as if their leave to remain had not been invalidated, and perhaps an appropriate way of doing this would be to make a fresh grant equivalent to that which had been invalidated.

9. It is therefore argued that the First-tier Tribunal errs in law in the following ways: in not considering that the appellants only became overstayers due to the respondent's unlawful action; in failing to acknowledge that the only question to be determined was that which had already been decided in the appellants favour by the respondent, i.e. that the first appellant did not cheat; that this factor was not considered; and that wrongly it was considered in the public interest to remove the appellants and was held against them that they became overstayers.

10. Mr Lindsay, in his oral submissions for the respondent, defended the decision of the First-tier Tribunal. Mr Lindsay also pointed out that the letter of representation from Universal Solicitors dated 16th April 2019 was contradictory as to whether the first appellant maintained she had never even taken a TOIEC test. He argued that the First-tier Tribunal had not erred in law as they had found at paragraph 38 of the decision that the "the Home Office has never asserted that she was a cheat" and so that this was found not to be a case factually covered by Mohibullah or Ahsan where there was clear and accepted evidence that the respondent had alleged the appellant had cheated, followed up by a s.10 1999 Act decision to remove. The factual and immigration position was therefore fundamentally different in this case law. It is argued that it is clear from the refusal decision of 25th October 2019 at paragraphs 35 and 38 that all the respondent had done was to share a large amount of information from ETS about English language tests that had been withdrawn due to fraud. If the first appellant's college had erroneously withdrawn her sponsorship following receipt of this information then that was a private law matter between her and the college, and had nothing to do with the respondent, and so did not provide a basis for the appellant to succeed in remaining in the UK following an Article 8 ECHR proportionality assessment. Further the grounds of appeal did not cover a challenge to the finding a paragraph 38 of the decision of the First-tier Tribunal, and so this challenge could not succeed. In addition the other unchallenged findings in the decision of the First-tier Tribunal, such as that which found that the best interests of the third appellant were to return to Bangladesh where he had extended family, were not appealed and so this appeal could not in any case succeed.

11. At the end of the hearing I notified the parties that I found that the First-tier Tribunal had erred in law and so the decision was to be set aside, but that the remaking would be dealt with at an adjourned hearing. I did not give my full reasons, but informed the parties that I would send these reasons in writing. Initially Mr O'Ceallaigh argued that the matter should be remitted to the First-tier Tribunal, but I said that I found that this was not necessary as the issues were limited and there was no need for extensive remaking. The other unchallenged findings made by the First-tier Tribunal in the proportionality assessment should be preserved. The parties both agreed to use their best endeavours to find, serve and file the emails sent to the first appellant's college, LSBF, in 2014: the respondent agreed to check for them in her own physical files (as Mr Lindsay said they were not on the computer system) and the appellant's solicitors would try to obtain them by contacting LSBF. Both parties should also check thoroughly in the judicial review bundles. It was agreed that the matter would be remade by submissions only and that to allow for attempts to source these emails, in the context of the Covid-19 lockdown, the matter should be relisted at the first available date after 2 months.

Conclusions – Error of Law

12. The First-tier Tribunal accepts, at paragraph 21 of the decision, the immigration history of the appellants as set out by the respondent and that there is no allegation, at this point in time, that the first appellant obtained a TOEIC certificate by deception. It is accepted at paragraph 28 of the decision that Article 8(1) ECHR is engaged as to remove the appellants would interfere with their private lives due to their length of residence in the UK. It is recounted at paragraph 34, within the section of the decision that makes the proportionality assessment, that because, in 2014, the respondent advised her college that she had used a proxy test taker to take her TOIEC exams she lost her sponsorship from her college, and it followed that her leave to remain as a student under Tier 4 was curtailed. It is recorded that there was no subsequent allegation of cheating made to her by the Home Office. Mr Lindsay argued that at paragraph 38 the First-tier Tribunal concluded that the respondent had made no allegation of cheating. I do not find that this was the case. I find that what is found in this paragraph, when it is read as a whole, is that the First-tier Tribunal did not believe that the appellants had remained in the UK to clear their names of the cheating allegation and the part of the paragraph cited by Mr Lindsay is in fact the evidence, accepted by all, that there had never been any direct allegation of cheating towards to the first appellant by the respondent. I do not find that the First-tier Tribunal considered the evidence from the reasons for refusal letter, the email from LSBF college and the consent order and then concluded that no allegation of cheating against the appellant by the respondent had been shown on the balance of probabilities.

13. I find therefore that there was no consideration by the First-tier Tribunal of the contention of injustice by the respondent by having made a false allegation of cheating to LSBF which led inexorably to her losing her sponsorship, her leave to remain and ability to study in the UK, and the contention that there was a duty, following Mohibullah and Ahsan to put the appellant in the same position she would have been if the false allegation had not been made to the first appellant's college. These were live issues in the appeal before the First-tier Tribunal and it was an error of law not to consider and determine them.

14. Patel (historic injustice; NIAA Part 5A) [2020] UKUT 00351(IAC) provides further guidance on issues of historical injustice, such as those outlined in R (Ahsan & Others) v SSHD ,where an individual has suffered as a result of the wrongful operation by the Secretary of State of her immigration functions. In such cases it may be that less weight it due to be accorded to the public interests in immigration control or that properly more weight should be given to the appellants private life ties, which would normally only be given little weight under s.117B(4) of the Nationality, Immigration and Asylum Act 2002, but it should not be the case that for the same reason more weight is given to the private life ties of the appellants and less weight to immigration control. This pertinent reported case of the Upper Tribunal must be considered by the parties when making their submissions on remaking.

15. The appeal is dismissed by the First-tier Tribunal on the basis that the appellants' removal is proportionate because: the appellants had taken insufficient steps to clear the first appellant's name so it was not believed that they had remain in the UK for this purpose; they had not returned to Bangladesh and re-entered with entry clearance as they could have done if the first appellant truly wished to completed her studies in the UK so it was not believed that she really intended to do this; it was not credible that the appellants were supported by family and friends as there was no documentary evidence of this; it was in the best interests of the third appellant to be brought up in Bangladesh where the first and second appellants would be in professional jobs with wider family support; if the appellants returned to Bangladesh they will have family, good work opportunities and would not face hardship; and there was no evidence that they were integrated in the UK or working here.

16. I find that it cannot be said that despite the negative findings in the proportionality balance, which I preserve as they are not challenged in the grounds of appeal, that this appeal would be bound ultimately to fail as it is arguable that a new Tribunal might find that the respondent had communicated to the LSBF that the first appellant had cheated in her English test; and because it is arguable that the authorities of Mohibullah and Ahsan mean that a finding that the first appellant had not cheated, in the context of a finding of a historical injustice by the respondent in making an unfounded

allegation of cheating to her college, could weigh sufficiently in her favour to lead to her removal being a disproportionate interference with her private life.

Decision:

(1) The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

(2) I set aside the decision of the First-tier Tribunal dismissing the appeal but preserve the findings outlined above at paragraph 15.

(3) I adjourn the remaking to a further hearing via Skype for business before the Upper Tribunal.

Directions

- The remaking hearing will consist of submissions only in a remote Skype for Business hearing to be listed at the first available date after 19th March 2021.
- The parties will both use their best endeavours to obtain copies of the correspondence sent by the respondent to the LSBF in 2014 which led LSBF to write in their email of 23rd December 2014 that the Home Office had stated that the first appellant had used a proxy test taker to take her English test.
- Any further documentary evidence relied upon should be filed and served ten days prior to the remaking hearing.
- The time estimate is 2 hours.

Signed: *Fiona Lindsley*

Date: 20th January 2021