IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006576
UI-2022-006577
First-tier Tribunal No:
HU/57753/2021
HU/57751/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 1 October 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

ARCHITA TEJASKUMAR BHAVSAR
TEJASKUMAR SUBHASHCHANDRA BHAVSAR

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Duffy, of Farani Taylor Solicitors
For the Respondent: Mr Parvar, Senior Presenting Officer

Heard at Field House on 18 September 2023

DECISION AND REASONS

1. The appellants appeal, with the permission of First-tier Tribunal Judge Sills, against the decision of First-tier Tribunal Judge Gandhi ("the judge"), who dismissed their appeals against the respondent's refusal of their human rights claims.

Background

2. The appellants are Indian nationals who were born on 9 April 1978 and 7 June 1979 respectively. The second appellant is the first appellant's husband.

3. The appellants' immigration history is particularly important in this case. They entered the United Kingdom on 27 March 2010. The first appellant held entry

clearance as a Tier 4 (General) Student which was valid from 4 March 2010 to 30 September 2012. The second appellant entered at the same time, holding entry clearance for the same duration as her dependant. They were granted further to remain in the same capacities on 24 January 2013. That leave was valid until 30 October 2014.

4. The appellants made further applications in the same capacity on 28 October 2014. Those applications were refused in a letter dated 11 June 2015. The respondent concluded that the first appellant had used deception in a previous application. She concluded specifically that the first appellant had relied on a TOEIC certificate which had been fraudulently obtained by the use of a proxy test taker. The appellant was entitled to seek Administrative Review of that decision but did not.

5. Five years passed, during which the appellants remained in the UK as overstayers. On 7 January 2021, they made an application for leave to remain on human rights grounds. Their online application was accompanied by representations from their current solicitors. Those representations included a statement that the first appellant denied the allegation of fraud 'in its entirety' and a request that the respondent should 'reconsider the above and make a fresh decision in accordance with the current case law for TOEIC related issues.' The letter stated that the Home Office had failed to provide any proof of the allegations and that those allegations were inherently unlikely, given that the first appellant had passed a master's degree in the UK and had secured good scores on two IELTS tests. There was extensive citation of authority and a contention that it would be contrary to Article 8 ECHR to remove the appellants.

6. The respondent refused the applications on 17 and 18 November 2021. I need only make reference to the refusal letter which was sent to the first appellant. The respondent concluded that she was unable to meet the requirements of Appendix FM or paragraph 276ADE(1)(vi) of the Immigration Rules. During that consideration, the respondent stated that the first appellant's application did not 'fall for refusal on grounds of suitability in Section S-LTR of Appendix FM.' In considering the claim outside the Immigration Rules with reference to Article 8 ECHR, the respondent also said this:

> In your application covering letter date19/01/2020 via your legal representative, and in support of your application, you advised no exceptional circumstances that we should consider and take into account forming our decision on your application. We have noted and carefully considered the arguments presented by your legal representative in relation to your previous T4 - General Student LTR application which you have submitted on 28/10/2014, and was decided on 11/06/2015. The application outcome was, Refused leave with Administrative Review (AR). Our records show, the Administrative Review (AR) was not exercised. Your Representative argued the refusal was without the Right of Appeal (ROA) and was due to TOEIC related issues therefore since then, you became an Overstayer. We do not accept the previous decision without the Right of Appeal is a valid or reasonable justification to accept as exceptional circumstances to disregard your period of overstaying. Administrative Review was offered as an immigration regulatory measure which it had not been exercised.

> Furthermore, we must point out, our decision on this current application did not rely or has been delivered with re-consideration to the matters related to the TOEIC. Our current decision was made solely on the basis of your application circumstances and all the current information and evidence you have provided which we did carefully consider and found as failed the private life rules.

The Appeal to the First-tier Tribunal

7. The appellants appealed. They duly filed and served an Appeal Skeleton Argument ("ASA") which was settled by Bilal Malik of counsel. That document contained an argument that there had been a 'historical injustice' perpetrated against the first appellant. The injustice was said to be that the respondent had refused leave to the first appellant in 2014 and had 'in effect surprisingly retracted' the TOEIC allegation on which that refusal had been based. The ASA then submitted that the appellants would probably have secured successive leave to remain were it not for the historical injustice but that, applying AP (India) v SSHD [2015] EWCA Civ 89; [2015] INLR 431, the FtT should not be 'unduly rigorous' in the application of the causation test.

8. The respondent reviewed the decision under challenge with the benefit of the ASA. She maintained the decision. In relation to the historical injustice argument, she said this:

> At appeal the A highlights "historic injustice" and relevant case law (ASA, page 4 para 8). However, the R notes the A's have failed to argue why this is relevant to their case. As Identified in the RFRL, the decision was made solely on the basis of their application circumstances and all the current information and evidence you have provided. This review is also made on the Private life application and the evidence provided at this application and appeal. The R does not accept "Historic Injustice" is applicable in A1's current case.

9. The appeal came before the judge on 30 June 2022. The appellants were represented by Mr Malik of counsel. The respondent was unrepresented. The judge heard oral evidence from the first appellant and submissions from Mr Malik before reserving her decision.

10. The judge's reserved decision contains extensive reference to the authorities relied upon by Mr Malik. I do not propose to set out much of that analysis. What matters for present purposes are the two conclusions she reached at [28] and [31]. In the first of those paragraphs, the judge found that the respondent had 'implicitly retracted' the allegation of deception. In the second, the judge concluded as follows:

> Although Mr Malik submits that the delay in the appellants making the application under appeal is not relevant, in fact delay was found in AP to be a relevant factor. In the first appellant's case, had she made the application sooner and argued historical injustice, she would not have had to show she would have been granted successive periods of leave. In my view it is too speculative to say the first appellant would have obtained any further leave because any number of things could have happened in the interim to prevent her getting successive leave. In this case, unlike AP, there is simply no evidence before me, direct or

> indirect, from which I can infer that any further periods of leave would have been granted.

11. The judge's analysis continued and at [34] she accepted that the first appellant would, were it not for the historical injustice, have received one further period of leave. She did not accept that she would have received successive periods of leave, however. At [35], she weighed all relevant factors including the historical injustice and concluded that the balance of proportionality came down in favour of the respondent.

The Appeal to the Upper Tribunal

12. The appellants appealed to the Upper Tribunal contending, in summary, that the judge had adopted an unduly rigorous approach to the consequences of the respondent's error and that her proportionality balance was vitiated as a result.

13. Judge Sills granted permission to appeal. It is necessary to set out the second and third paragraphs of his order in full:

> [2] This is a somewhat unusual case. The finding that the Respondent had impliedly retracted a previous finding of deception on the basis that they did not rely on that finding in the present proceedings, and that the Appellants are victims of historical injustice as a result, strikes me as highly questionable.
>
> [4] Nonetheless, having made that finding, it is arguably irrelevant whether the Appellants would have one further period of leave or successive periods, but for the historical injustice. Further, the Judge arguably failed to give proper consideration to the finding of historical injustice in considering the public interest, the Appellants' failure to satisfy the Immigration Rules, and their private life. Hence the proportionality assessment is arguably flawed.

14. At the outset of the hearing before me, I indicated that I was minded to hear argument on the point raised at [2] of Judge Sills' order. I noted that there was no response to the grounds of appeal under rule 24 and that the Secretary of State had not, as a result, given the appellants notice of her intention to take the point raised at [2] of Judge Sills' order in the manner contemplated in the amended Rules and by Underhill LJ at [31] of SSHD v Devani [2020] EWCA Civ 612; [2020] 1 WLR 2613. Mr Parvar confirmed that he wished to take the point and I indicated to Mr Duffy that he was entitled, if so advised, to take the objection that the point should be put in writing by the Secretary of State.

15. Mr Duffy indicated that he did not wish to take that objection and that he was prepared to deal with the point. Having taken into account the absence of any objection from Mr Duffy, the terms of Judge Sills' order and the over-riding objective, I considered it just to waive the requirement (in rule24(1B)) for a written response calling into question the judge's finding that there had been a historical injustice. Both parties proceeded to make submissions on that point and on the merits of the appellants' appeal.

Submissions

16. For the appellants, Mr Duffy submitted that the judge had not erred in law in finding that there had been a historical injustice. The facts spoke for themselves. The TOEIC allegation was available to the respondent in the decision under challenge but it had not been taken. If it was pursued, it was available as a ground of refusal under paragraph S-LTR 4.2 but the respondent had stated in terms that there was no issue as to suitability. In those circumstances, the judge had quite properly accepted that the allegation had been implicitly withdrawn. The respondent should have been taken to have decided that there was no proper basis upon which she could have refused on grounds of suitability.

17. As to the merits of the appellants' appeal, Mr Duffy submitted that it was clear that the appellants had suffered a disbenefit as a result of the respondent's erroneous TOEIC allegation. The judge had accepted that the first appellant would probably have secured further leave but for the error and the consideration of whether she would have secured 'successive' periods of leave was simply too forensic. Although the judge had referred to AP (India) v SSHD, she had in substance failed to adopt the approach required by that decision. Applying that decision correctly, the outcome was clear and the appeal fell to be allowed without more.

18. For the respondent, Mr Parvar noted that there had been no express withdrawal of the TOEIC allegation and submitted that the point might not have been raised in the respondent's decision for any number of reasons. Refusal under paragraph S-LTR 4.2 is discretionary and it might have been that the respondent concluded in the exercise of her discretion that she would not hold the point against the appellants. The Secretary of State was not required to explain that in the decision under challenge. The judge had not considered this – she had merely assumed that the allegation had been abandoned because it was not expressly relied upon.

19. As to the merits of the appellants' grounds, Mr Parvar submitted that they were based on a misunderstanding of the judge's decision. She had not required the appellants to show that they would have been granted successive periods of leave had it not been for the refusal in 2015. The judge had instead taken account of the likelihood of the appellants being granted leave on that single occasion. It was important to recall that the application had been for leave as a student (and student dependant) and the expectation would be that the appellants would return to India at the conclusion of the course. The appellants had not met the Rules and had failed to take any steps earlier, preferring to overstay. The judge's analysis was a holistic one which corresponded with the approach required by Ahmed (historical injustice explained) [2023] UKUT 165 (IAC).

20. Mr Duffy submitted in reply that the appellants had not been able to obtain redress against the erroneous allegation. The only judicial remedy available at the time was judicial review and that would probably have been refused, given that the decision in Ahsan & Ors v SSHD [2017] EWCA Civ 2009; [2018] Imm AR 531 had not been issued until 2018. They had been prompted to remain in the UK by their sense of injustice. The respondent had been invited to provide evidence in support of the allegation and she had failed to do so. There had evidently been a historical injustice which had disadvantaged the appellants. They were not seeking ILR but merely a decision which put them back in the position they would have been but for the error.

21. I reserved my decision at the conclusion of the submissions.

Analysis

22. I consider the judge to have erred in concluding that the respondent had 'implicitly withdrawn' the allegation of TEIC fraud. The error into which she fell was that she gave inadequate reasons for that conclusion. I acknowledge that the respondent was not represented before her, and that she was not provided with any significant assistance by the terms of the respondent's review, but the process of reasoning which led her to the conclusion at [28] was inadequate.

23. The judge was required, in my judgment, to consider the process by which the respondent might have brought the allegation of deception in 2012 to bear in her consideration of the application which the appellants made in 2021. The advocates agreed before me that the only candidate provision was S-LTR 4.2. As Mr Parvar noted in his concise submissions, that paragraph permits but does not require the Secretary of State to refuse leave to remain where, amongst other things, false representations have been deployed in support of a previous application for leave to remain.

24. The discretionary nature of that provision was necessarily relevant to the judge's assessment of the historical injustice submission. The respondent might have reviewed the case and decided that there was no proper foundation for the allegation of fraud, such that the condition precedent for refusal under S-LTR 4.2 was simply absent. She might, however, have reviewed the case and decided that there was convincing evidence of fraud but that she did not wish, in the exercise of her discretion, to deploy that ground of refusal. The judge failed to recognise these different possibilities and concluded that the point had been implicitly withdrawn because it had not been mentioned. In my judgement, however, the one did not follow inexorably from the other. That conclusion must therefore be set aside.

25. I turn to the appellant's grounds of appeal. I do not consider the complaints in the grounds to be made out. The error into which the judge is said to have fallen is that she engaged in an unduly rigorous analysis of the consequences of the historical injustice, contrary to what was said by Elias LJ in AP (India). But the judge was clearly cognisant of all that was said in that decision. Her decision illustrates that she was fully aware of the salient authorities and the principles she should apply. She cited R (Razgar) v SSHD [2004] UKHL 27; [2004] 2 AC 368, at [17], as providing the structure for her analysis. She cited Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351 (IAC); [2021] Imm AR 355, at [22], as informing the approach she adopted to the question of 'historical injustice'. She made reference to Ahsan & Ors v SSHD [2017] EWCA Civ 2009; [2018] Imm AR 531, at [23], as providing support for the 'restorative' approach which Mr Malik relied upon. Then, at [25], the judge cited what was said by Elias LJ at [37] of AP (India) v SSHD:

> Mr Malik submitted that in the present appeal a further issue arises, namely whether the first appellant would have secured successive leave to remain, had the "historical injustice" not occurred. On this issue Mr Malik submits that some assistance can be found in the comments of Elias LJ in AP (India) v SSHD [2015] EWCA Civ 89 where, on the slightly different issue of the degree of rigour with which courts should assess whether there was a causal connection between a

> "historic injustice" and prejudice to the immigration applicant, his lordship stated at [37] that: the courts should not in this context be unduly rigorous in the application of the causation test, given that its significance is to redress this historic injustice. I think there would be manifest unfairness to conclude that the absence of express evidence on the causation point should defeat the claim.

26. Anything which was said elsewhere in the judge's decision is to be seen in this context. She manifestly understood the law which she was to apply because she had received meticulous submissions upon it and had clearly taken time to study the relevant decisions and to extract the salient principles from them.

27. As Mr Parvar submitted, the judge did not require the first appellant to show that she would have been granted continuous periods of leave but for the respondent's error. Her approach was more nuanced than that. She noted that there had been a significant gap between the historical injustice and the appellants' application for leave to remain. She considered this to distinguish the case from AP (India) and she considered the significance of that difference. She accepted that the appellant would have been granted further leave as a student had it not been for the TOEIC allegation but she simply did not know what would have happened thereafter. As the judge noted, there was no comparable period in AP (India) and nothing said by Elias LJ in his judgment in that case prohibited the judge from considering the significance of the gap between the injustice and the next attempt to regularise status, some five years or more later.

28. The judge decided the appeal in 2022 and did not have the benefit of the Upper Tribunal's decision in Ahmed (historical injustice explained) [2023] UKUT 165 (IAC), which was issued in July 2023. But the approach which she adopted was in accordance with the guidance given by Dove P and UTJ Sheridan in that case. She noted that this was a case of a private life 'which could reasonably/proportionately be enjoyed outside of the UK.' The judge did not treat the historical injustice as determinative but as one aspect of the balancing exercise she was required to undertake. She took into account the fact that the appellants could not meet the Immigration Rules as matters stand. All of these were legitimate considerations which were weighed in the balance by the judge.

29. The appellants' submission is, in essence, that the judge's acceptance of the historical injustice should, without more, have resulted in their appeal being allowed on Article 8 ECHR grounds. But the authorities did not establish that to be the correct approach in 2022 and Ahmed has confirmed that to be so. The appellants had only a tenuous private life claim and they had overstayed for many years without taking steps to regularise their position. The judge was entitled to find that their removal was proportionate despite her finding that there had been a historical injustice.

30. Drawing the two threads of my analysis together, I find as follows. The judge erred in law in finding that there was a historical injustice in this case. Her decision in that respect was inadequately reasoned and that finding cannot stand. That error does not justify the setting aside of the decision, however, because the judge's subsequent proportionality assessment was correct in law.

Notice of Decision

The appellants' appeal to the Upper Tribunal is dismissed.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 September 2023