Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/16670/2019
HU/16676/2019 & HU/16680/2019

THE IMMIGRATION ACTS

Heard Remotely at Field House
On 20 January 2021

Decision & Reasons Promulgated
On 04 May 2021

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

IQRA [K]

First Appellant

WASEEM [S]

Second Appellant

[M W]

Third Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr R de Mello, Counsel, instructed by Kingswood Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Pakistan. The first and second appellants are married to each other. They were both born in 1990. The third appellant is their daughter. She was born in October 2017. They appeal a decision of the First-tier Tribunal promulgated on 5 December 2019 dismissing their appeals against a decision of the

respondent on 25 September 2019 refusing them leave to remain in the United Kingdom on human rights grounds.

2. The grounds of appeal are, I find, subtle and I begin by examining carefully the decision of the First-tier Tribunal to see exactly what was decided and the reasons for the decision.

3. This shows that the appellants applied for leave to remain on 1 July 2019 on the basis of their private and family lives. In each case it was the respondent's decision that the appellant could not succeed under Appendix FM because none of the appellants had satisfied the immigration status requirements. The second appellant had lived in the United Kingdom for only nine years and there were no very significant obstacles to his reintegration into Pakistan. The first appellant had lived in the United Kingdom for only two years and similarly faced no very significant obstacle to her integration. The third appellant was born in the United Kingdom but had clearly not lived there for seven years because she was born in October 2017. Further the Secretary of State decided there were no exceptional circumstances to justify a grant of leave outside the Rules.

4. The First-tier Tribunal Judge gave appropriate self-directions in law and then set out his findings beginning at paragraph 37 of the Decision and Reasons.

5. The second appellant arrived in the United Kingdom in January 2010 with entry clearance as a student valid until October 2012. His leave was extended until August 2014. During the currency of that leave, on 29 April 2014, he applied for further leave as a student but that application was refused. He appealed the decision and the appeal was allowed. He was subsequently granted leave to remain outside the Rules for 60 days, expiring on 7 June 2016.

6. It is an unhappy fact in this case that the second appellant's mother died on 12 March 2016 and he visited Pakistan after her death to pay his respects.

7. He returned to the United Kingdom and on 7 June 2016 he purported to make a timely application for further leave to remain outside the Rules. If he had made a valid application then his leave would have been extended by operation of law until the application was determined and, if the application were refused, until his appeal rights were exhausted.

8. It is plain from a letter from the respondent dated 22 January 2018 that the application was *not* supported by the appellant's passport and, by letter dated 23 August 2016, the respondent asked the appellant's representatives for his passport. The passport was not produced in response to the letter and, according to respondent's letter of 22 January 2018, the application of 7 June 2016 was rejected as "invalid" on 13 December 2016 with the result, that the applicant's leave had expired on 7 June 2016 and was not extended by his making a timely application for further leave because, whatever the appellant may have intended, there was no such application.

9. The second appellant does not accept this analysis.

10. According to paragraph 40 of the Decision and Reasons, the second appellant married the first appellant in Pakistan in April 2016. She entered the United

Kingdom on 9 October 2016 with entry clearance as a Tier 4 Student valid until January 2018 and the second appellant varied his application of 7 June 2016 to an application for leave as a dependant partner. However it is clear from the context that the Judge was not *ruling* that the second appellant had varied a valid application but was *recording* what the appellant purported to have done.

11. On 13 December 2017 the second appellant's application for further leave to remain as the partner of a migrant under the points based system was refused. The "Immigration History" set out in the Reasons for Refusal dated 25 September 2019 reads as if the decision on 13 September 2017 answered the application of for leave outside the rules on 7 June 2016 that was varied to an application for leave as a Tier 4 Dependant Partner on 23 December 2016. However, according to the "Reasons for Decision" dated 13 December 2017 the application it decided was made on 10 May 2017. It is apparent from further reading that the application of 10 May 2017 was a variation of an application made on 23 December 2016.

12. Reasons were given for the refusal. First there was a "general reason for refusal". According to the respondent, the second appellant had used deception in a language test and relied on the test result when he made an application in October 2012. He denies any such wrongdoing. Second, the second appellant was said to have overstayed because the application made on 7 June 2016 had been rejected as invalid on 13 December 2016. The second appellant had "resubmitted" the application on 23 December 2016 but by then he had no continuing leave to be extended by reason of the application having been made.

13. The letter dated 13 December 2017 explains (page 12 in the Tribunal's bundle):

> "Your leave to remain expired on 07 June 2016 and you submitted a further application on 7 June 2016. Although this date was prior to the expiry of your previous leave, this application was then rejected as invalid on 13 December 2016. An invalid application does not extend leave under section 3C of the Immigration Act 1971.
>
> As you made your current application on 23 December 2016 and varied on the 10 May 2017 that is not within 28 days of your leave expiring."

14. According to the letter, the attempted application of 7 June 2016 was not made good by the variation accompanied by the passport. Rather an out of time application, dated 23 December 2016, was varied on 10 May 2017.

15. An additional, adverse, finding about funds was not sustained on administrative review but the refusal on both grounds identified above, that is that the second appellant was a TOEIC cheat *and* that he was an overstayer, was upheld on administrative review.

16. The administrative review decision is dated 22 January 2018 and on 26 January 2018 the second appellant applied for further leave to remain as a dependent partner. That was refused on 22 March 2018 and maintained on administrative review on 4 May 2018.

17. It is apparent from the above that the decision made on 13 December 2017 was not an answer to the application that the appellant purported to make on 7 June 2016. That

application was rejected on 13 December 2016. According to the decision letter, the decision dated 13 December 2017 answered an application made on 23 December 2016 and varied on 10 May 2017. (For the avoidance of doubt I have checked these dates. By coincidence decisions were made on 13 December in successive years.)

18. At paragraph 41 of the Decision and Reasons the First-tier Tribunal referred to the application on 7 June 2016 being "rejected as invalid on 13 December 2016" and being "resubmitted" on 23 December 2016.

19. At paragraph 41 and 42 the Judge found that the decision on 13 December 2017 was maintained on both grounds on administrative review on 22 January 2018 and on 26 January 2018 the appellant make a further application which was refused and then subject to an application for judicial review leading to a consent order. Following the initiation of judicial review proceedings the respondent acknowledged that the second appellant had made a human rights application which would not be certified as "clearly unfounded" so there was an opportunity for an in-country appeal. The respondent also agreed that the second appellant would be sent within fourteen days a "Section 120 'one stop' notice" and within 60 days the second appellant sent a fully particularised human rights claim. The particulars were sent in July 2019 and on 25 September 2019 the application in its final form was refused. As set out above, the appeal before me concerned the decision of 25 September 2019.

20. The First-tier Tribunal Judge noted that the refusal of 25 September 2019 made no mention of, and did not rely in any way on, allegations of dishonesty.

21. It is important to appreciate that the application finally decided on 25 September 2019 was made on 26 January 2018, a few days after a decision made on 22 January 2018 on administrative review. The decision made on 22 January and meant that the second appellant had not had leave since 7 June 2016. The application made on 26 January was not a variation of an existing but invalid application that was not made good by variation but which was followed by a valid but late application for further leave.

22. The First-tier Tribunal Judge noted that the "outcome letters" dated 22 March 2018 and 4 May 2018, answering the application on 26 January 2018 for further leave to remain as a dependant partner, had not been provided but he regarded it as undisputed that the application was refused at least in part because the second appellant was regarded as a TOEIC cheat.

23. At paragraph 14 of the Decision and Reasons the Judge noted that it was Mr de Mello's contention that the decision on 22 January 2018 to refuse the application made in 2017 should not have been made. It depended on a finding of dishonesty by the second appellant that was not justified and so by refusing the application made on 26 January 2018 the respondent was relying, indirectly, on her wrong decision to refuse the application on 22 January 2018. Had she not refused that application there would have been no need for an application on 26 January 2018.

24. The first appellant applied in time successfully for her leave to be extended and she was given leave until 12 September 2018. On that day she made an application for further leave outside the Rules. That application was refused on 23 May 2019. On

12 June 2019 she applied for that decision to be reconsidered and the outcome of that led to the appeal in her case.

25. The first appellant has worked in Pakistan as a chemistry teacher for a year where she had been awarded an MSc. Subsequently she was awarded an MSc in the United Kingdom.

26. The second appellant left Pakistan aged 18 and at 19 and has never worked there but was educated in the United Kingdom in early adult life.

27. The third appellant is a dependent child and applied for leave to remain in that capacity. The application was refused but on 1 July 2019 the third appellant submitted further information in support of her human rights claim and it is the refusal of that application that founds her appeal.

28. The judge found that the adult appellants have a close family in Pakistan. The second appellant said he could not return to Pakistan when his mother was ill and this had strained relationships in his family. The judge did not accept this had led to a significant family rift, in particular because the second appellant did return to Pakistan when he could albeit after his mother had then died and the second appellant had been able to provide a death certificate which, the judge found, suggested that the second appellant was able to communicate with his relatives and that therefore family relationships had not broken down completely.

29. The First-tier Tribunal Judge found that the private and family life elements established in the United Kingdom in the case of the first and third appellants were nominal and refusal of leave and removal would not engage Article 8 at all. In the case of the second appellant, given the length of time he had had in the United Kingdom, the judge accepted that removal would interfere with his private and family life but the judge found the decision was in accordance with the law and proportionate.

30. The judge noted at paragraph 50 that it was then the appellants' case the decision was not in accordance with the law. It was the appellants' case that the Secretary of State was trying to benefit from her own wrongdoing.

31. It was said that the respondent had no lawful basis to refuse the second appellant's application and so should have approached the present application on the basis that the earlier applications had been granted.

32. The First-tier Tribunal Judge found "a number of fundamental problems with that submission". He set them out.

33. First, he said, at paragraph 52 of the Decision and Reasons that the second appellant's application in 2016 (decided on 22 January 2018) was refused on two grounds, alleged dishonesty *and* being an overstayer, having initially submitted an invalid application. The judge found nothing before him to suggest that the finding that the second appellant was an overstayer was wrong or not a reason for refusal and so he concluded that the respondent was entitled to refuse the application in 2016 and therefore the subsequent application notwithstanding equivocation about the second appellant's alleged dishonesty.

34. Alternatively, at paragraph 53 of the Decision and Reasons, the Judge found that even if the respondent ought to have given the second appellant leave to remain as a partner the leave would have been limited to the length of the partner's leave, i.e. until 12 September 2018. Although the respondent does not seem to have withdrawn her allegation that the second appellant obtained his language certificate irregularly, the decision on 25 September 2019 was refused without reliance on dishonesty. The decision letter is clear that the second appellant was not considered "unsuitable". According to the Judge, it follows that there was no effort on the part of the Secretary of State to benefit from her wrongdoing even if her approach to finding dishonesty was flawed.

35. Further the judge found that even if he had been wrong in those findings the decision was sound given that the application was for leave outside the Rules. The judge found the finding was in accordance with the law. It was in furtherance of a legitimate aim and proportionate. The adult appellants were able to work. There were no aggravating factors, such as criminality or inability to speak English or inability to work but they were not entitled to remain in the United Kingdom. The third appellant's interests lay in being with her parents and the judge concluded that it was in her best interests to remain with them in her country of nationality.

36. The judge noted that the appellants always had precarious status in the United Kingdom and in the case of the first and third appellants it was short lived. Even if things had worked out better for the second appellant, they could not have worked out better than his being given leave until 12 September 2018 when the first appellant's leave ran out and there was no reason to extend the leave of any of the appellants beyond then.

37. This decision was criticised. I have read the grounds of appeal. It is perhaps helpful to mention here that in the case of the first and third appellants they were given permission later than the second appellant because it appears that they had been overlooked when the grounds were first settled and the application for permission made. Be that as it may, it is clear they all had permission to appeal. As well as the oral submissions, I have considered particularly Mr de Mello's skeleton argument. I confirm that I looked at the document that extends to 23 paragraphs and this was intended to supersede a very similar but different document that extended to only 21 paragraphs.

38. Mr de Mello summarised the relevant background facts. He explained that the second appellant applied for leave to remain outside the Rules on 7 June 2016 and, he said, varied that application on 23 November 2016 for leave to remain as a partner. When he made the application on 7 June 2016 he did not submit his passport. It was his case that he had mislaid this passport and he explained that to the respondent.

39. However in the application submitted on 23 November 2016 he *did* submit his passport. The 7 June 2016 application was refused on 13 December 2017 on the grounds that the second appellant was a TOEIC cheat and because he had overstayed for more than 28 days as he had submitted an invalid application on 7 June 2016. On 16 December 2016 he was told by his solicitors that the application

made on 23 November 2016 was rejected. The subsequent refusal of leave to remain was on the basis that the application of 7 June 2016 was invalid.

40. It was the second appellant's case that the second appellant was not, and should not be treated as, an overstayer. The application made on 7 June 2016 was not supported by the passport as required but the passport was produced *before* the application was decided when the second appellant sought to vary the basis of his claim. Mr de Mello relied particularly on paragraph 5 of the Application for Permission to Appeal to the Upper Tribunal. This states:

> "As to para 52 the ground was neither raised by the Home Office recent refusal [*sic, "Reasons for Refusal?*] nor relied upon by the presenting Officer. In any event the ground is fact sensitive and the FtT failed to explore these facts. As per the facts the applicant made an in-time application on 07 June 2016 and submitted submissions to vary the same application on 23 November 2011*(sic, this must be a mistake)*. The Home office did not process the variation in time and invalidated the 07 June 2016 application on 13 December 2016. However, 3 days later, on 16 December 2016 the Home Office sent an acknowledgment to the applicant stating that the 23 November variation has not been considered. The acknowledgement failed to establish as to why the variation was not granted and why evidential flexibility rule was not exercised for that application. In this case the FtT merely endorsed the Home Office previous refusal."

41. The refusal dated 25 September 2019 which led to the appeal did refer to the second appellant being an overstayer from 7 June 2016 but not to his application for leave being rejected as invalid.

42. According to paragraph 7 of the skeleton argument dated 19 January 2021:

> "No submissions were made by either party to the FtT on the point that the 7 June 2016 application was invalid or the reason why such a decision was or could be wrong."

43. The refusal of 13 December 2017 did allege that the second appellant was a TOEIC cheat. Judicial review proceedings were brought against that decision and the decision was remade giving the second appellant a right of appeal.

44. At paragraph 12 of the skeleton argument it is asserted that:

> "The respondent did not, following the consent order, maintain in the decision dated 25 September 2019 that the appellant cheated in obtaining his ETS or that he breached paragraph 322, HC 395. See the decision letter."

45. I look at that decision letter now.

46. In summary that letter does indeed confirm that the respondent stated on 25 September 2019 stated that the application "does not fall for refusal on grounds of suitability under Section S-LTR of Appendix FM".

47. However the second appellant did not meet the eligibility relationship requirements because his partner was not a British citizen or settled in the United Kingdom or a refugee or a person with humanitarian protection and he did not meet the immigration status eligibility requirements because he had been in the United Kingdom without valid leave for 1205 days, his leave having ended on 7 June 2016.

48. The Secretary of State found no exceptional reasons within or outside the Rules to allow the application.

49. Mr de Mello argued that there were special circumstances here and particularly that the Secretary of State had breached a basic principle of common law. At paragraph 15 of the skeleton argument he said:

> "The Respondent failed to acknowledge that the cheating allegation in relation to TOEIC was a wrong one which affected his immigration status and this was material to the decision on exceptionality. The reference to the Appellant being an overstayer from 7 June 2016 was to be examined from the point of view that the respondent wrongly characterised his application as being invalid given that the respondent had the first appellant's passport at the time of refusing his application".

50. Other points are made.

51. There is a very pertinent passage in the refusal letter dated 13 December 2017. It is exhibited at page 12 of respondent's bundle prepared for the First-tier Tribunal. It states:

> "Your leave to remain expired on 7 June 2016 and you submitted a further application on 7 June 2016. Although this date was prior to the expiry of your previous leave, this application was then rejected as invalid on 13 December 2016. An invalid application does not extend leave under Section 3C of the Immigration Act 1971.
>
> As you made your current application on 23 December 2016 and varied on 10 May 2017 this is not within 28 days of your leave expiring. In addition, your leave was not extended under any of the provisions listed in the Immigration Rules.
>
> In light of this the Secretary of State has deemed that refusal is appropriate under paragraph 319C(j). You do not, therefore, meet the requirements specified in the Immigration Rules in order to be granted leave as a partner of a Points-Based System."

52. The important point is that, according to the Refusal Letter, the second appellant's leave expired on 7 June 2016. He did not make a valid application to extend his leave.

53. However it is plain from the grounds of appeal to the Upper Tribunal that the second appellant maintains that this is wrong and that the defect in the application was cured by his varying the application and supplying the passport before the application of 7 June 2016 had been determined.

54. It is less clear to me that this point was ever made to the First-tier Tribunal Judge. It does not feature in the grounds of appeal to the First-tier Tribunal. It is asserted in Further Submissions at page A13 of the respondent's bundle, paragraph IV that the "Home Office shouldn't have invalidated his application" and the "Immigration History" at paragraph 5 (page B2) of the reasons for the decision of 25 September 2019 says of the application of 7 June 2016 that "You varied this application to one for leave to remain as a Tier 4 Dependant Partner on 23 December 2016".

55. It is however plain that, rightly or wrongly, the application to remain as a Tier 4 Dependant Partner was refused and the decision upheld on administrative review on 22 January 2018. That decision was not appealed but prompted a further application on 26 January 2018. By then any leave that might have been extended by the application made on 7 June 2016 had lapsed and there was no leave existing so no leave was extended by the application of 26 January 2018. It follows that the appellant had no leave when he made the application on 26 January 2018 that, eventually, led to the decision complained of in the present proceedings.

56. Mr de Mello's intriguing argument that, for the purposes of the present appeal, the second appellant should have been treated as a person with leave because that is what he should have been, rather than a person without leave, even though this is what he was, suffers from lack of evidence to support the solicitors' no doubt honest but not necessarily well founded believe that the respondent had changed her mind about the effect of the intended variation of leave and the lack of clear evidence that the complaint was ever made in these proceedings in the First-tier Tribunal. The uncertainty that exists now rather underlines the importance of challenging decisions in good time when the necessary papers are likely to be available. I am not ruling that failures of the kind alleged by Mr de Mello cannot be considered but the evidential basis has to be clear and the only clarity here is that the parties disagree about what happened.

57. This was plainly appreciated by the First-tier Tribunal Judge because he said at paragraph 52 of the Decision and Reasons:

> "First, the [Second] Appellant's application in 2016 was refused not only on the grounds of alleged dishonesty but also because he was an overstayer, having initially submitted an invalid application. I have heard nothing today to suggest that the latter ground was baseless. Therefore it would appear that the Respondent was entitled in any event to refuse the application and, consequently, the subsequent application in 2018."

58. I have decided after much, maybe too much, reflection that the First-tier Tribunal did err because the Judge did not resolve the apparent issue between the parties concerning the status of the 7 June 2016 application, namely, "was it an invalid application that was made good by the late production of the passport or was it an invalid application so that the second appellant had no leave when he later applied for leave as a dependant?" I remain uncertain about how much was made of this before the First-tier Tribunal.

59. If it is established that the second appellant was treated, rightly, as a person without leave there is nothing to criticise at any level.

60. However even the Judge was wrong and even if he should have concluded that the second appellant did have existing leave when he applied for leave as a husband, and, in the circumstances, that he should have had leave a dependant partner the appeal had to be dismissed.

61. It may well be that the appellants all wish to remain in the United Kingdom and it may well be they would contribute significantly to society if they were permitted to remain; certainly the first and second appellants appear to be industrious and

educated people. However, these things are not normally enough to establish a human right to remain in the United Kingdom. They have not shown exceptional circumstances that would permit a decision to be made outside the Rules and they are clearly in reasonable circumstances in Pakistan with supportive families. There is no allowable case on human rights grounds.

62. As Mr Kotas emphasised in his submissions the appellants clearly do not satisfy the requirements of the "ten year" Rule.

63. The judge did carry out an article 8 balancing exercise. It is not challenged in the grounds and it should not have been challenged because it is, at the very least, sufficient.

64. I reject any lurking suggestion that reliance on the (allegedly) false contention that the second appellant had made a late application means that the decision on article 8 grounds was "not in accordance with the law". The requirement that a decision refusing leave is "in accordance with the law" is a requirement that there is a legal basis for the decision rather than the decision being capricious. The assertion that the respondent was wrong to find that the second appellant was an overstayer, even if made out, does not make the decision complained of a decision that is "not in accordance with the law".

65. It is right to note that the first and third appellants really have nothing to add to the mix. The way the case was presented before me was that if the second appellant's appeal was dismissed there was nothing more to be said.

66. There is no material error and I dismiss these appeals.

67. **Notice of Decision**

The appeals are dismissed.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 23 April 2021