



**In the Upper Tribunal  
(Immigration and Asylum Chamber)  
Judicial Review**

JR/5954/2019

In the matter of an application for Judicial Review

The Queen on the application of

**HUSSAIN**

Applicant

versus

The Secretary of State for the Home Department

Respondent

**NOTIFICATION of the Judge's decision**

Having considered all documents lodged and having heard Mr Michael Biggs of Counsel, instructed by Lexwin Solicitors, for the applicant and Mr Colin Thomann of counsel, instructed by GLD, for the respondent at a hearing on 13 April 2021

On the application for order as to costs and following consideration of the documents lodged by the parties

**Order by Upper Tribunal Judge Gleeson:**

**BY CONSENT:** This application is dismissed on withdrawal by the applicant, on the terms set out in this Order, the question of costs being reserved to the Upper Tribunal Judge.

**COSTS:** I make no order for inter partes costs

**APPEAL:** I refuse permission to appeal to the Court of Appeal.

**Reasons**

- (1) The applicant has permission to challenge the respondent's decision on 29 August 2019 to grant him 30 months' leave to remain under Appendix FM on the 10-year family life route rather than the 5-year route, because at the date of hearing the respondent considered the applicant to be an overstayer.
- (2) It is common ground that if placed on the 5-year route the applicant would also have been granted 30 months' leave to remain, and that there is no difference in the conditions of his leave, except the length of time the applicant will have to wait for settlement.

- (3) The applicant is married to a person settled in the United Kingdom and a British citizen child is affected by this application for leave to remain. The respondent's decision stated that she was granting leave because

“...there are exceptional circumstances in your case which would render refusal a breach of Article 8. This is because you have a British child, and it is not considered that it would be reasonable to expect your child to leave the United Kingdom.”

- (4) The applicant presently still has leave: his initial period of 30 months will expire on 1 March 2022. I find that his Article 8 ECHR rights have not yet been affected since he is not required to leave the United Kingdom until then.
- (5) On 1 April 2021, the applicant produced a bundle of over 200 documents which the respondent had not previously been asked to consider (the new material). It is not appropriate for the Upper Tribunal to be the primary decision maker on the new material, particularly as it was all evidence which could and should have been filed, at the latest, following the grant of permission in March 2020, rather than less than two weeks before the substantive hearing.
- (6) The respondent relied, until the day of the hearing, on a decision she claimed to have made and served in October 2014, disposing of the applicant's Tier 4 application which by then had been varied to a private and family life application based on his marriage and the child. She cannot, it seems, produce either evidence of service of that decision (said to have been served with the section 10 decision in December 2014), nor can she find any copy of the alleged October 2014 decision, even an unserved one. Mr Thomann did not rely on the existence of the October 2014 decision at the hearing today.

### Relief sought

- (7) The applicant's challenge to the respondent's grant of leave on the 10-year route initially included a request that the Upper Tribunal quash the respondent's decision to grant him 30 months' leave on the 10-year route. That has not been pursued, as Mr Biggs confirmed, because to quash the August 2019 decision would also quash the leave granted, which is not in the applicant's interest.
- (8) In his amended grounds for review filed following the grant of permission on 13 March 2020, the applicant sought the following relief:
- (a) A declaration that the respondent's section 10 decision made in December 2014 was *ultra vires* because the respondent had impliedly accepted that he had not used deception. It remained the applicant's position that he had not cheated in his ETS/TOEIC test; and/or
- (b) A declaration that the respondent should have placed the applicant in the position he would have been if he had not been notified of the section 10 decision in December 2014: see *Ahsan and others v Secretary of State for the Home Department* [2017] EWCA Civ 2009 at [120]; and/or

- (c) A declaration that the respondent's decision to grant the applicant 30 months' leave on the 10-year partner route engaged Article 8 ECHR in relation to the applicant and his minor stepson and was inconsistent with the *Ahsan* principles and historic injustice; and
- (d) A mandatory order requiring the respondent to grant leave to remain on the 5-year route or to treat the existing grant of leave to remain as having been made on that route, rather than on the 10-year route.
- (9) In Mr Biggs' skeleton argument settled for this hearing, the relief sought by the applicant was reframed as follows:
- (1) A finding and declaration that the December 2014 section 10 decision is unlawful;
  - (2) Declarations that:
    - (a) the applicant held leave to remain at the date of the decision in December 2014;
    - (b) the respondent's decision unlawfully determined his entitlement to a grant of leave on the 5-year route, not the 10-year route, pursuant to Appendix FM of the Rules, and
    - (c) the respondent's decision is contrary to Article 8 ECHR; and
  - (3) A mandatory order requiring the respondent to reconsider whether the applicant is entitled to leave to remain on the 5-year route.

### **The consent order**

- (10) At the hearing, the parties agreed a consent order in the following terms:

**"UPON HEARING** Counsel for the applicant and Counsel for the respondent  
**AND UPON**

- (1) The applicant proposing to advance such material as he wishes to rely upon in order to contest the allegation that he cheated on a TOEIC English language test and [that] the removal decision of 3 December 2014 was accordingly incorrect and provide any further representations and evidence on which he wishes to rely within 28 days.
- (2) The respondent agreeing to review, in light of that evidence, whether the applicant should be granted leave to remain on the five-year route to settlement and (although without prejudice to the generality of the foregoing) to consider whether the applicant has, or falls to be treated as though has had, leave to remain from 3 December 2014.
- (3) The respondent waiving the requirement for the use of the Form and payment of the fee specified in the Immigration Rules for applications under these routes.

- (4) The respondent agreeing that she will use her best endeavours to complete her decision within three months (absent special circumstances) of receipt of the applicant's materials.

**AND UPON** the parties being agreed that it is not necessary or appropriate in these circumstances, to determine the issues in paragraph 14 of the applicant's skeleton argument.

**IT IS ORDERED THAT:**

1. The judicial review is withdrawn.
2. Costs reserved."

**Costs submissions**

- (11) The hearing then proceeded solely on costs submissions. The issues and the reasons for my decision on costs are set out in the judgment which accompanies this order.
- (12) I considered the guidance given in the judgment of the Master of the Rolls (with whom Lady Justice Hallett DBE and Lord Justice Stanley Burnton agreed ) in *M v London Borough of Croydon* [2012] EWCA Civ 595, which identifies three types of cases, applicable either following a contested hearing or pursuant to a settlement:
- (i) Where a claimant has been wholly successful;
  - (ii) Where a claimant has succeeded only in part; or
  - (iii) Where there has been some compromise, which does not reflect the claimant's claims.
- (13) In the first case, the costs follow the event. In the second and third cases, the guidance is that the appropriate order will often be 'no order for costs' unless it is 'tolerably clear' who would have won if the application had proceeded to a full substantive hearing.
- (14) In this application, the consent order has the effect that the applicant has succeeded in part, in that the respondent has agreed to reconsider whether the applicant should be placed on the 5-year or the 10-year route. None of the declarations or mandatory orders which he sought have been made, and the application is withdrawn on that basis. I conclude that the second *Croydon* category applies.
- (15) The Tribunal is grateful to both Counsel and those instructing them for agreeing, at the eleventh hour, a pragmatic and practical compromise, but this is not a case where it is 'tolerably clear' which party would have won, had the application proceeded, and applying [62] in the *Croydon* case, I find that the appropriate order is that each party bear its own costs.

**Costs decision**

- (16) I make no order for *inter partes* costs.

**Permission to appeal**

(17) The proceedings having been compromised as reflected in the consent order, no appeal lies to the Court of Appeal against the substantive disposition of these proceedings.

(18) The applicant seeks permission to appeal the Upper Tribunal's costs decision to the Court of Appeal, pursuant to paragraph 44(4A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended). Mr Biggs argued:

(1) That the Tribunal's decision on costs is vitiated by a failure to consider material matters and by the consideration of immaterial matters, for example (and without prejudice to the generality of the foregoing) all of the applicant's offers of settlement and proposals relevant to the question of costs, and the respondent's responses or failure to respond to these; and that the applicant was entitled to file the evidence relied upon at the time he did pursuant to an order of the Tribunal; and that the applicant had provided at least some evidence in support of his case that he did not cheat on a TOEIC in earlier proceedings.

(2) That the Tribunal failed to give legally adequate reasons for its decision on costs in the light of the competing arguments.

(3) That in the light of all relevant considerations and applying the correct principles the Tribunal's decision on costs was not open to in the light of the reasons it gave.

(19) For the reasons set out more fully in my judgment, the application for permission to appeal cannot succeed. None of the grounds advanced amounts to a certainty that the applicant would have succeeded at a full hearing, nor that it is 'tolerably clear' he would have done so. Accordingly, applying [62] in the *Croydon* judgment, it was unarguably open to me to make the costs order which I have made.

(20) I am not satisfied that there is any error of law in the judgment I have given today.

(21) **I refuse permission to appeal.**

Signed: *Judith A J C Gleeson*  
Upper Tribunal Judge Gleeson

Dated: 5 May 2021

**The date on which this order was sent is given below**

---

**For completion by the Upper Tribunal Immigration and Asylum Chamber**

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 10/05/2021

Solicitors: ~  
Ref No. ~  
Home Office Ref: ~

---

**Notification of appeal rights**

There is provision for an appeal against this decision of the Upper Tribunal to the Court of Appeal **on a point of law only**. If any party wishes to appeal they must first apply for permission from the Upper Tribunal. If the Upper Tribunal refuses permission, then the party wishing to appeal can apply for permission from the Court of Appeal itself.

If you wish to apply to the Upper Tribunal for permission to appeal against the Upper Tribunal decision, you must do so in writing with reasons so that your application is received within **one (calendar) month** from the date this decision notice is sent, unless the Upper Tribunal states a different time: r44(4) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

On making an application to the Upper Tribunal for permission to appeal against the Upper Tribunal decision, you must also lodge with the Upper Tribunal a further fee of £100.00 or an Application for Remission of Fee.

IN THE UPPER TRIBUNAL  
IMMIGRATION AND ASYLUM CHAMBER

Case No: JR/5954/2019

Court 11

Field House  
15-25 Breems Buildings  
London  
EC4A 1DZ

13 April 2021

Before:

**UPPER TRIBUNAL JUDGE GLEESON**

**B E T W E E N:**

**MOHAMMED BABUL HUSSAIN**

**Applicant**

and

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

MR MICHAEL BIGGS appeared on behalf of the Applicant  
MR COLIN THOMANN appeared on behalf of the Respondent

**APPROVED JUDGMENT**

UTJ GLEESON: The applicant has permission to challenge the decision of the respondent on 29 August 2019 to grant him leave to remain in the United Kingdom for a period of 30 months on the 10-year family life route rather than the 5-year route, because at the date of application on 28 November 2019, the respondent considered the applicant to be an overstayer.

2. At the hearing today, Mr Biggs clarified that, contrary to the relief originally sought in the grounds for review, the applicant was not now asking the Upper Tribunal to quash the respondent's decision, the effect of which would be to remove the 30 months' leave granted in that decision, which the applicant should have had, whichever route he was on.
3. The proceedings were disposed of by a consent order agreed during the hearing, with the question of costs reserved to the Upper Tribunal. I am

grateful to both Counsel for their cooperation in reaching this sensible compromise of the proceedings.

4. The application was heard remotely by Skype for Business, with the consent of all parties. A face to face hearing was not held because it was not practicable and no-one requested the same. I am satisfied that the hearing was fair, with the assistance of both Counsel.

## Background

5. The applicant came to the United Kingdom in 2009 as a Tier 4 (General) Student Migrant. The respondent refused to extend that leave by a decision in 2013, but the applicant successfully appealed and the application was treated as still outstanding before the respondent for a lawful decision. On 19 August 2014, the respondent told the applicant's solicitors that his application was on hold as he had relied on an ETS/TOEIC test allegedly taken at South Quay College which was regarded as dubious.
6. South Quay College is one of those where almost no reliable ETS/TOEIC test results have been identified: the results are considered to be either invalid or questionable (which implies a testing irregularity at the test centre, not necessarily related to a particular test).
7. The applicant has obtained the voice recordings from the test, and agrees that the voice on the recordings is not his voice, but says that the College or ETS have made an error and he did not use a 'pilot' test taker. In June 2014, the applicant obtained a City and Guilds English language qualification at TEFL Level B2 and in October 2014, he enrolled at the London School of Marketing, although he still had no confirmed leave to continue his studies.
8. The respondent relied, until the day of this hearing, on a 'phantom' letter disposing of the Tier 4 application, said to have been served on the applicant in October 2014. Today, Mr Thomann conceded that there the respondent had been unable to find evidence of service of that letter, nor had she been able to trace the October 2014 decision in her files. Mr Thomann suggested that October 2014 might be a typographical error for the section 10(1)(b) decision served on the applicant on 3 December 2014, which carried an out of country right of appeal which has not yet been exercised.
9. The applicant's case is that he was still awaiting a lawful decision on his application of 25 January 2013, which had been made while he had extant leave, and that therefore he benefited from section 3C leave up to 3 December 2014. He later varied that undetermined application to a marriage application.
10. The applicant challenged the December 2014 decision by judicial review, but Mr Justice Blake refused permission and certified the application as clearly unfounded, because at that time the existence of an out of country right of appeal was considered to be a lawful remedy. That would not be the position now: see *Kiarie and Byndloss, R (on the applications of) v Secretary of State for the Home Department* [2017] UKSC 42 (14 June 2017).



11. In the meantime, the applicant's personal life in the United Kingdom had developed. In September 2015, or perhaps in the summer of 2017, the applicant met the woman who is now his wife. His partner had indefinite leave to remain based on a spouse visa issued to her for her previous relationship on 23 February 2004. She had been divorced since 23 January 2013. They underwent a religious marriage on 14 August 2017 and began to live together. In April 2018, they entered into a civil marriage.
12. On 21 December 2017, the applicant made an application for leave to remain on the basis of family life as a partner. The couple have a child, who is a British citizen. He applied for leave based on either family life as a partner (10 year route), family life as a parent (5 year route) or leave to remain outside the Rules on the basis of private and family life. His application stated in a number of places that he last had leave to remain on 8 May 2013, but that his leave had been extended under section 3C.
13. On 4 August 2017, the applicant's solicitors wrote to the respondent asking her to withdraw the section 10 decision made in December 2014 in the light of the decision of the Supreme Court, handed down on 14 June 2017, in *Kiarie and Byndloss, R (on the applications of) v Secretary of State for the Home Department* [2017] UKSC 42. There was no response.
14. On 29 August 2019, the respondent granted the applicant 30 months' leave to remain on the 10-year route, without recourse to public funds, with reference to paragraph D-LTRP.1.2 and GEN.1.11A of Appendix FM, but refused to grant limited leave on the 5-year partner route under paragraphs R-LTRP.1.1.(a),(b) and (c) for the following reasons:

"It is noted that your most recent application for leave to remain in the United Kingdom as a student was originally refused on 25 March 2013 and then refused a second time on 30 October 2014 following a reconsideration. You have remained in the United Kingdom since this date without valid leave and are therefore considered to be in breach of immigration laws. Paragraph 39E does not apply in your case and consequently, you fail to fulfil the requirements of E-LTRP.2.2(b) of Appendix FM of the Immigration Rules." [Emphasis added]

15. The respondent's GCID notes, which have been disclosed, show an express decision by the Home Office caseworker not to rely on the TOEIC deception element. The respondent's decision stated that she was granting leave because

"... there are exceptional circumstances in your case which would render refusal a breach of Article 8. This is because you have a British child, and it is not considered that it would be reasonable to expect your child to leave the United Kingdom."

It is clear that the reason that leave was granted relates to the applicant's child from the relationship with his settled spouse.

16. It is common ground that the terms of the leave granted (30 months, renewable, with no access to public funds) are the same both for the 5-year and 10-year route, the only disadvantage to the applicant being that he will not be able to apply for indefinite leave to remain until 10 years, rather than 5 years, have expired from the

initial grant. Almost 20 months of the initial 30 months have now elapsed.

17. The applicant lodged judicial review proceedings on 28 November 2019. The applicant's case is that he did not become an overstayer because he continued to benefit from section 3C leave until he varied his application for leave to remain.
18. Mr Biggs seeks to challenge the 2014 section 10 decision in the context of the 2019 decision, despite the refusal of permission in 2014, and to call the applicant to give oral evidence about what had happened at his ETS test.

### **Permission for judicial review**

19. Permission for judicial review was granted by Upper Tribunal Judge Rintoul at an oral hearing on 13 March 2020, for the following reasons:

“It is arguable that the [respondent's decision that the] applicant was to be granted leave to remain under the 10-year route was unlawful on the basis that this conclusion was based on the assumption that, at the time of application, he had no leave to remain. It is arguable that that assumption was unlawful, it being arguable that the decision to curtail his leave in 2014 pursuant to section 10(1)(b) of the Immigration and Asylum Act 1999 was unlawful and void ab initio with the result that his application for further leave pending at that point continued by operation of section 3C of the Immigration Act 1971, such that his application for leave to remain on the basis of his relationship with his wife was made at a time when he had leave to remain.”

20. The grant of permission was accompanied by the Upper Tribunal's standard directions, allowing for the submission of additional evidence. The applicant amended his grounds for review and on 29 September 2020, the respondent filed amended summary grounds of defence. The applicant recognised that his original grounds for review, which sought to have the respondent's decisions quashed, would have resulted in quashing his 30-month leave to remain, which was not what he wanted. In the amended grounds for review, the applicant contended:

- (a) That the section 10 decision was *ultra vires* because the respondent had impliedly accepted that he had not used deception. It remained the applicant's position that he had not cheated in his ETS/TOEIC test; and/or
- (b) That the respondent should have placed the applicant in the position he would have been if he had not been notified of the section 10 decision: see *Ahsan and others v Secretary of State for the Home Department* [2017] EWCA Civ 2009 at [120]; and/or
- (c) That the respondent's decision to grant 30 months' leave on the 10-year partner route engaged Article 8 ECHR in relation to the applicant and his minor stepson and was inconsistent with the *Ahsan* principles and historic injustice.

21. The applicant sought declarations on all three heads and a mandatory order requiring the respondent to grant leave to remain on the 5-year route or to treat the existing grant of leave to remain as having been made on that route rather than the 10-year route.
22. The respondent filed amended detailed grounds of defence. She continued to assert that the application for Tier 4 leave had been determined by a refusal letter in October 2014, so that by December 2014, when the section 10(1)(b) decision was made, the applicant had no extant leave, either substantive or by reason of section 3C of the Immigration Act 1971.

### **Substantive judicial review hearing**

23. Shortly before the hearing today, a year after the grant of permission and six months after the detailed grounds of defence had been amended, the applicant filed a hearing bundle, which included over 200 pages of documents which had not previously been disclosed ('the new material').
24. The new material appears at pages 203-412 of the judicial review bundle but cannot be taken into account in these proceedings as it has only just been submitted and formed no part of the respondent's decision-making process. Mr Biggs for the applicant acknowledged that the new material should have been produced sooner but was unable to provide any explanation why this had not happened.
25. Nevertheless, the new material appeared to me to be likely to be relevant to any principled assessment of whether the appellant took his ETS/TOEIC examinations himself and the route on which he is placed for settlement, whether it should be the 5-year or the 10-year route. I gave Mr Thomann and Mr Biggs an opportunity to take instructions from their respective clients, to see whether these proceedings could be disposed of by consent.
26. Following the short adjournment, Counsel were able to confirm that all matters except costs had been agreed. These proceedings were therefore compromised, by consent, on the following terms:

**"UPON HEARING** Counsel for the applicant and Counsel for the respondent

#### **AND UPON**

- (1) The applicant proposing to advance such material as he wishes to rely upon in order to contest the allegation that he cheated on a TOEIC English language test and [that] the removal decision of 3 December 2014 was accordingly incorrect and provide any further representations and evidence on which he wishes to rely within 28 days.
- (2) The respondent agreeing to review, in light of that evidence, whether the applicant should be granted leave to remain on the five-year route to settlement and (although without prejudice to the generality of the foregoing) to consider whether the applicant has, or falls to be treated as though has had, leave to remain from 3 December 2014.
- (3) The respondent waiving the requirement for the use of the Form and payment of the fee specified in the Immigration Rules for applications under these routes.

- (4) The respondent agreeing that she will use her best endeavours to complete her decision within three months (absent special circumstances) of receipt of the applicant's materials.

**AND UPON** the parties being agreed that it is not necessary or appropriate in these circumstances, to determine the issues in paragraph 14 of the applicant's skeleton argument.

**IT IS ORDERED THAT:**

1. The judicial review is withdrawn.
2. Costs reserved."

**Costs submissions**

27. The hearing then proceeded as a costs hearing only.
28. Mr Biggs reminded me that the applicant had made a number of offers and proposals. On 5 November 2019, in a pre-action letter, he had asked to be placed on the 5-year route. The respondent had relied on a decision letter which she claimed to have served on the applicant in October 2014: it was only on the day of the hearing that Mr Thomann accepted that the October 2014, if it ever existed, had not been served on the applicant. Mr Thomann's position at the hearing was that as the respondent's Counsel, he was not in a position to say whether the October 2014 decision ever existed, unserved. The respondent has been unable to trace any such document.
29. The applicant had written again to the respondent in January 2020, but the respondent did not reply to that letter. On 12 March 2020, the applicant filed a 'Reply to Amended Summary Grounds of Defence', responding to the respondent's Amended Summary Grounds of Defence. Before me, Mr Biggs argued that what he was there seeking was in substance what had been agreed at the hearing, as set out in his skeleton argument. The contents of Mr Biggs' pleadings, and the respondent's reply, are a matter of record and need not be further set out here, save to say that the 12 March 2021 Reply really adds nothing to the already pleaded case, and was submitted without leave.
30. Mr Biggs argued that the applicant should have his costs: the respondent had now agreed to reconsider without having taken, or had, the time to consider the new material in detail. That could not therefore be her reason for agreeing. Much of the new material had already been provided, and the rest was to the same effect as that which the respondent had already received. It was not correct to say that the applicant had not advanced his case in a timely manner.
31. For the Secretary of State, Mr Thomann observed that the new material had not been disclosed until Maundy Thursday, 1 April 2021. Allowing for the Easter break, that gave the respondent far too little time to consider whether she should continue to defend these proceedings or whether the new material exonerated the applicant. The respondent's agreement to the consent order arose from a change of approach, on instructions today, and a willingness to consider the new material.

32. The Tribunal had made no determination of the issues regarding the lawfulness of the 2014 or 2019 decisions on the basis of the evidence then available, and whether the applicant should be treated as having had leave to remain and not been an overstayer when the present application was made.
33. The applicant had not advanced in his original application the position taken in the amended grounds for review, which was that he had continuous leave up to and including December 2014.
34. On the contrary, the applicant knew of the December 2014 section 10 decision and challenged it, albeit permission was refused by Mr Justice Blake, on the basis of the law as it was then understood to be. The effect of the section 10 decision was to bring any extant leave to an end, as Mr Biggs confirmed at the beginning of the hearing.
35. The respondent's amended summary grounds of defence did not rely on suitability or on the section 10 allegation as a ground of refusal. However, the deception allegation was not withdrawn, and the respondent clarified that as soon as it was raised. The underlying application for leave to remain was made on the basis of the applicant's family life and was granted on the same basis. The suggestions made as to disposal bore little correlation to what had now been agreed.
36. The applicant had plenty of opportunity to file the new material now relied upon, and no good reason had been provided for the delay, and for producing the material this many years after the event, when it should have been filed *with* the grounds. The proper course where documents were adduced this late was to apply for an adjournment and to provide a further witness statement.
37. When granting permission to amend the grounds in March 2020, Upper Tribunal Judge Rintoul had also given leave for further documents, but they were not filed then, nor until a year later. They could have been filed in response to the detailed grounds in October 2020, but again, nothing was received.
38. The compromise reached today did not involve a finding of fact that the applicant was not guilty of TOEIC fraud, nor that he was entitled to a fact-finding in-country hearing. The respondent's agreement to look at the new material was the same as she would have needed to do in any event, had the documents been provided in a timely manner. The only advantage to the applicant was that in making these further submissions, he would not have to pay any fee for a new application. There was, at last, a detailed statement from the applicant explaining why he asserted that he had not cheated, which the respondent could consider.
39. Stepping back, Mr Thomann argued that the position was relatively conventional. One party had changed its case, repeatedly, and filed fresh evidence at the end of the process, which could properly have been filed at least a year earlier.
40. The parties have agreed that the appropriate course is for the first consideration of that material to be by the respondent, not the Upper Tribunal, and the matter had been settled on that basis. The settlement offers made by the applicant were far more ambitious than what had been achieved.
41. Mr Thomann submitted that the applicant should bear the costs of the proceedings,

or alternatively, that there should be no order for costs, given the timing of the new material, the shape of the applicant's application and judicial review grounds, and the extent to which he had succeeded.

42. I reserved my decision on costs, which I now give.

### ***M v London Borough of Croydon* principles**

43. I remind myself of the principles in *M v London Borough of Croydon* [2012] EWCA Civ 595, which identifies three types of cases, applicable either following a contested hearing or pursuant to a settlement:

- (i) Where a claimant has been wholly successful;
- (ii) Where a claimant has succeeded only in part; or
- (iii) Where there has been some compromise, which does not reflect the claimant's claims.

44. In the first case, the claimant gets his costs in the normal way. In the second case, the Tribunal is required to assess the reasonableness of the claimant pursuing the unsuccessful claim, how important it was in relation to the successful claim, and to take a view as to who should pay, or whether the costs should remain where they lie.

45. The Master of the Rolls in *Croydon*, with whom Lady Justice Hallett DBE and Lord Justice Stanley Burnton agreed, held that in case (ii), where there is a settlement, 'there is often much to be said for concluding that there is no order for costs', unless it is 'tolerably clear' who would have won if the matter had proceeded to trial. In case (iii), the Master of the Rolls considered that there was an even more powerful argument that the default position should be no order for costs, unless, again, it was 'tolerably clear' who would have won.

### **Analysis**

46. Neither party comes well out of the process which has led to this sensible resolution at the eleventh hour. Counsel and those instructing them are to be congratulated on reaching a settlement of the application, but that could and should have been possible much earlier, if the respondent had admitted that she could find no October 2014 decision on the Tier 4 application, served or otherwise, and the applicant had made the new material available to the respondent's case worker for consideration, at the latest by March 2020.

47. The issues which will no longer need to be determined in the light of the consent order were set out at [14] of Mr Biggs' skeleton argument of 1 April 2021:

- "(1) Is it open to the applicant to challenge the s.10 Decision in these proceedings?
- (2) Is the s.10 Decision lawful?
- (3) If it is not, does the illegality of the s.10 Decision render the Decision unlawful? In this respect, the following sub-issues arise:
  - (a) Does a finding that the s.10 Decision is unlawful entail it is a nullity, so that the 25 January 2013 application remained outstanding for decision until it was varied by the 22

December 2017 application, with the consequence that, by virtue of s.3C of the IA, the applicant held leave to remain at the date of the Decision? *Ground (1)*.

- (b) Was the illegality, or the claimed, or deemed, illegality of the s.10 Decision a material matter which had to be considered before the Decision was taken? *Ground (2)*.
- (c) Is the Decision contrary to article 8 ECHR, because it is without proportionate justification in the light of the historical injustice occasioned by the unlawful s.10 Decision? *Ground (3)*."

48. The relief sought by the applicant was set out at [71] in Mr Biggs' skeleton argument:

- (1) A finding and declaration that the 3 December 2014 section 10 decision is unlawful;
- (2) Declarations that:
  - (a) the applicant held leave to remain at the date of the decision,
  - (b) the respondent's decision unlawfully determined the applicant's entitlement to a grant of leave on the 5-year route, not the 10-year route, pursuant to Appendix FM of the Rules, and that
  - (c) the decision under challenge is contrary to Article 8 ECHR; and
- (3) A mandatory order requiring the respondent to reconsider whether the applicant is entitled to leave to remain on the 5-year route.

49. The applicant has obtained only a small part of the remedy he sought and has compromised the rest by way of a remaking on the new material and anything else he may submit within 28 days.

50. The consent order expressly does not determine the issues in [14] and gives the applicant only something akin to (3) in [71], albeit by consent rather than as a mandatory order by the Upper Tribunal. This application therefore falls into category (ii) in *Croydon*:

"62. In case (ii), when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. ... *I would accept the argument that, where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs.* That I think was the approach adopted in *Scott*. However, where there is not a clear winner, so much would depend on the particular facts. In some such cases, it may help to consider who would have won if the matter had proceeded to trial, as, if it is tolerably clear, it may, for instance support or undermine the contention that one of the two claims was stronger than the other. ..."

[*Emphasis added*]

51. Having considered the guidance in *M v Croydon*, I conclude that the proper order here is that each party should bear their own costs of these proceedings, as indicated

is the 'much to be said' option at [62] in *Croydon*. I do so because in this case, there is no clear winner, nor is it tolerably clear which party would have won, had the application proceeded to a substantive hearing. I do not consider that it is 'tolerably clear' which party would have won if this application had proceeded, due to the evidential difficulties on both sides:

- (1) The applicant's case is based on a disagreement with a decision made and challenged in December 2014, which he seeks to reopen substantially out of time, and which was refused totally without merit by Blake J on the basis of the law as it then stood.
- (2) The accepted position is that South Quay College is one where the ETS/TOEIC results were at best questionable, and the applicant accepts that the voice on the test is not his, though he says that is the fault of the College or ETS;
- (3) The applicant relied on 200+ pages of evidence, produced just a few days before the substantive judicial review hearing, none of which it appears to me could not have been disclosed promptly, or at least, in March 2020; and
- (4) The respondent maintained for a period of seven years that she relied on a decision letter dealing with the applicant's Tier 4 application in October 2014, which was not only never served, but cannot now be found in the respondent's records, even in an unserved form.

#### **Costs decision**

52. I make no order for *inter partes* costs.

#### **Onward appeal**

53. The proceedings having been compromised as reflected in the consent order, no appeal lies to the Court of Appeal against the substantive disposition of these proceedings.

54. The applicant seeks permission to appeal the costs decision on three grounds, arguing that:

- (1) The Tribunal's decision on costs is vitiated by
  - (a) a failure to consider material matters and by the consideration of immaterial matters, for example (and without prejudice to the generality of the foregoing) all of the applicant's offers of settlement and proposals relevant to the question of costs, and the respondent's responses or failure to respond to these; and
  - (b) that the applicant was entitled to file the evidence relied upon at the time he did pursuant to an order of the Tribunal; and
  - (c) that the applicant had provided at least some evidence in support



of his case that he did not cheat on a TOEIC in earlier proceedings.

- (2) The Tribunal failed to give legally adequate reasons for its decision on costs in the light of the competing arguments.
  - (3) In the light of all relevant considerations and applying the correct principles the Tribunal's decision on costs was not open to in the light of the reasons it gave.
55. As to (1)(a), the applicant's case as asserted immediately before the hearing is recited in this judgment, but he agreed to settle for reconsideration afresh on the terms already set out. A complete history of the applicant's offers and proposals over the previous two years does not avail him, since none comes close to offering to settle for what has been agreed today or establishes that the applicant would have been the winner, or even that it was 'tolerably clear' that he would have won, had the substantive hearing proceeded.
56. As to (1)(b), time for filing relevant evidence began to run in March 2020 and the applicant has not explained, satisfactorily or indeed at all, why he filed it on 1 April 2021, giving the respondent less than a fortnight in which to reach a conclusion on over 200 pages of new material. The consent order allows him to provide further material, over and above the new material before me. Again, the assertion that the applicant was entitled to file it at any time does not indicate that he would have been successful, nor that it was tolerably clear that he would have succeeded, and so the default position in [62] of *Croydon*, that no order for *inter partes* costs is appropriate, is the right answer.
57. As to (1)(c), the recital in the Consent Order that the parties had "agreed that it is not necessary or appropriate in these circumstances, to determine the issues in paragraph 14 of the applicant's skeleton argument" is dispositive of sub-paragraph (c) of the first ground of appeal.
58. As to (2), my judgment contains adequate reasons why I do not consider that either the applicant or respondent should have their costs.
59. As to (3), given the presumption in the *Croydon* guidance in favour of 'no order for costs' for examples (ii) and (iii) (see [62]-[63] of the judgment), and my finding that there was no clear winner, nor was it 'tolerably clear' that the applicant would have won following a full hearing, it was unarguably open to me to make the costs order which I have made.
60. I am not satisfied that there is any arguable error of law in my judgment.
61. I refuse permission to appeal.

-----

**THE UPPER TRIBUNAL  
IMMIGRATION AND ASYLUM CHAMBER**

**IN THE MATTER OF AN APPLICATION FOR PERMISSION TO APPLY FOR JUDICIAL  
REVIEW**

**BETWEEN:**

**THE QUEEN on the application of Md Babul Hussain**

**Applicant**

**-V-**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

---

**ORDER**

---

**UPON HEARING** counsel for the Applicant and Counsel for the Respondent

**AND UPON**

- (1) The Applicant proposing to advance such material as he wishes to rely upon in order to contest the allegation that he cheated on a TOEIC English language test and the removal decision of 3 December 2014 was accordingly incorrect and provide any further representations and evidence upon which he wishes to rely upon within 28 days.
- (2) The Respondent agreeing to review, in light of that evidence, whether the Applicant should be granted Leave to Remain on the Five-year Year Route to Settlement and

(although without prejudice to the generality of the foregoing) to consider whether the applicant has, or falls to be treated as though has had, leave to remain from 3 December 2014.

- (3) The Respondent waiving the requirement for the use of the Form and payment of the fee specified in the Immigration Rules for applications under these Routes.
- (4) The Respondent agreeing that she will use her best endeavours to complete her decision within three months (absent special circumstances) of receipt of the Applicant's materials.

**AND UPON** the parties being agreed that it is not necessary or appropriate in those circumstances, to determine the issues in paragraph 14 of Applicant's skeleton argument.

**It is ordered**

- 1. The judicial review action is withdrawn;
- 2. Costs reserved,

Dated this 14 day of April 2021

.....  
Lexwin Solicitors  
102-105 Whitechapel High Street  
London  
E1 7RA

Tel: 0208 0775079  
Fax: 0208 0773016  
Ref: ~

**Solicitor for the Appellant**

.....  
Government Legal Department  
102 Petty France  
Westminster  
London  
**SWIH 9GL**

Tel: 020 7210 3118  
Fax: 0207 210 3433  
Ref: ~

**Solicitor for the Respondent**