



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/16265/2019 (V)

THE IMMIGRATION ACTS

Heard via Skype  
On 12 January 2021

Decision & Reasons Promulgated  
On 27 January 2021

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ROBERT MIAH

Respondent

**Representation:**

For the appellant: Mr Diwnycz, Senior Home Office Presenting Officer

For the respondent: Mr Biggs, Counsel

**DECISION AND REASONS (V)**

1. Following a 'resumed hearing' I now remake the decision concerning Mr Miah's appeal against the SSHD's decision dated 19 September 2019, refusing him leave to remain in the United Kingdom ('UK').
2. This decision should be read with my 'error of law' decision promulgated on 12 October 2020, in which I accepted that the SSHD's grounds of appeal were made out and concluded that, in its decision dated 18 February 2020, the First-tier Tribunal ('FTT') erred in law in allowing Mr Miah's appeal.

## Background

3. Mr Miah is a citizen of Bangladesh. His immigration history is lengthy and complex. The parties agreed a chronology and I include the most relevant aspects here.
  - 15.1.10 M arrives in the UK as a student having been granted a Tier 4 (General) Student Visa expiring on 30.7.12.
  - 30.7.12 M application to extend leave as a student (ultimately extended to 28.12.14)
  - 16.10.14 M receives a Degree in business studies from the University of Greenwich
  - 28.12.14 M further (in time) application to extend leave as a student
  - 9.4.15 FLR(O) application for leave to remain 'outside the Rules', attaching M's letter dated 1.4.15 in which he explains he seeks an extension in order to attend his graduation ceremony and to obtain a CAS to enable him to study for a Masters course in 'any good University'
  - 15.6.15 28.12.14 student application voided by SSHD
  - 8.10.15 ('the 2015 refusal')
 

SSHD's decision (no right of appeal) refusing to vary leave because:

    - (i) discretion should not be exercised in M's favour and the application for leave is being sought for a purpose not covered by the Rules pursuant to para 322(1), and
    - (ii) in his application dated 30.7.12 M used a TOEIC certificate fraudulently obtained, pursuant to para 322(5)
  - 23.10.15 M sends a pre-action protocol ('PAP') challenging the 2015 refusal but SSHD maintains the decision in a reply dated 28.10.15
  - 13.5.16 M (second) application to remain in the UK 'outside the Rules' (refused 18.7.16)
  - 22.7.16 M (third) application to remain 'outside the Rules' (refused 30.1.17)
  - 1.10.16 M application to remain as an EEA family member (refused 10.4.17, refusal unsuccessfully challenged in JR proceedings; 20.12.17 permission refused)
  - 22.3.18 M served with liability to removal
  - 3.5.18 M (second) application to remain as an EEA family member (refused 22.8.18). Third and fourth applications also refused.
  - 11.1.19 Final EEA family member application refusal
  - 27.4.19 M 'encountered' during an enforcement visit when he was arrested and detained. SSHD alleged that M was found with four credit cards, a driving permit not in his name and a counterfeit biometric residence permit in his name. M served with notice of removal window and bailed.
  - 3.6.19 M application to remain on basis of Article 8 private life

- 8.8.19 M attends an interview regarding the allegation that he used a fraudulent TOEIC certificate in 2012
- 19.9.19 ('the 2019 refusal')
- Human rights claim refused: M could not meet the requirements of the Rules and also failed on grounds of 'suitability' in the light of the materials found in his possession when he was arrested on 27.4.19
- SSHD makes it clear that M's interview responses re TOEIC certificate have been assessed as credible and the allegation that he committed TOEIC fraud is no longer maintained
- 2.10.19 M's grounds of appeal to the FTT alleging that as it is now accepted that he did not use a fraudulent TOEIC certificate, the SSHD's decision dated 8.10.15 was wrong and he should be put in the position he was in before that decision was made
- 18.2.19 FTT decision allowing M's appeal
- 12.10.20 UT decision allowing appeal against the FTT decision and giving directions

4. Mr Miah's immigration history may be summarised as follows. He entered the UK as a student on 15 January 2010. His student leave expired on 28 December 2014 and was not successfully extended. Although Mr Miah made regular efforts to regularise his immigration status by making applications to remain 'outside the Rules' and as an EEA family member, these were all unsuccessful. After his last EEA family member application was refused in January 2019, Mr Miah continued to remain in the UK unlawfully and only came to the attention of the SSHD because he was 'encountered' during an enforcement visit in April 2019, after which he made a human rights application. It is the refusal of that application, i.e. the 2019 refusal, that is the subject of Mr Miah's appeal before me.

## Hearing

### *Documentary evidence*

5. At the beginning of the hearing Mr Biggs confirmed that he relied upon a 162-page bundle prepared pursuant to my directions for the 'resumed hearing' before the Upper Tribunal ('the UT bundle') and a skeleton argument dated 22 December 2020.
6. Mr Diwnycz relied upon a short skeleton argument dated 4 January 2021, prepared by Mrs Aboni. He did not have a copy of the UT bundle. Mr Biggs emailed a copy of the bundle to Mr Diwnycz and I gave him further time to consider it. This repeated much of the evidence before the FTT but also contained a witness statement from Mr Miah dated 16 October 2020. I explained that the statement contained a number of assertions that were disputed by the SSHD and as such I anticipated that there would need to be

cross-examination. Mr Biggs acknowledged that the appellant was ready and willing to be cross-examined on the contents of his witness statement.

*Application to admit evidence late*

7. After a short break Mr Diwnycz indicated that he was ready to proceed but wished to make an application to rely upon evidence that had not yet been served – a note of the immigration officers’ enforcement visit in April 2019 (‘the IO note’). Mr Diwnycz explained that this evidence was material to the SSHD’s allegations underpinning the contention that Mr Miah did not meet the suitability criteria. I heard submissions from both representatives and then announced that I refused the application to admit late evidence. I outline my reasons for this here.
8. Mr Diwnycz accepted that the delay was lengthy and significant. He conceded that the evidence should have been disclosed before the FTT and he could see no reason why it was not. He accepted that the delay in seeking to rely upon this evidence continued during the course of the UT proceedings. I had made it clear that any evidence regarding the suitability allegation was relevant to Article 8 and gave both parties the opportunity to file and evidence regarding this in accordance with directions. The appellant filed and served his evidence on 21 October 2020 in compliance with the directions. According to the directions, the SSHD was therefore required to file and serve her evidence by 4 November 2020. The breach of directions therefore runs from this date to now – over two months.
9. At first Mr Diwnycz sought to explain the delay upon the assertion that the SSHD did not receive the UT bundle or at least it was not provided to the relevant officers to deal with. Mr Biggs clarified the chronology of relevant events as follows by reference to emails:
  - 21.10.20 Mrs Aboni (a Senior Home Office Presenting Officer) agrees the proposed chronology served by Mr Miah’s solicitors. UT bundle filed and served
  - 4.11.20 Last date for SSHD to file and serve evidence. Mr Miah’s solicitors chase Mrs Aboni / SSHD for their evidence pursuant to the UT directions.
  - 5.11.20 Mrs Aboni confirms that the SSHD has received the UT bundle and only relies upon the SSHD’s bundle before the FTT.
  - 22.12.20 Mr Miah’s skeleton argument makes it clear that notwithstanding serious allegations regarding suitability in the 2019 refusal, the SSHD elected to adduce no evidence to substantiate those allegations, and the SSHD cannot therefore displace the burden upon her in this regard.
  - 4.1.21 SSHD’s skeleton argument maintains the suitability allegation but makes no reference to any evidence in support of the suitability allegation.

10. Having had an opportunity to reconsider this chronology of relevant emails, Mr Diwnycz candidly accepted the chronology and expressly conceded that the SSHD had no clear explanation for the delay in seeking to rely upon the IO note. He acknowledged that this was a “*huge stumbling block*” but invited me to nonetheless admit the evidence because it was highly relevant to the suitability allegation. I accept that it would be very helpful to have a copy of the IO note and it was relevant to an issue in dispute, albeit it could not be said to be an issue determinative of the appeal. However there has been a significant delay and a flagrant breach of directions, without any clear or credible explanation for it. To admit the evidence at the very late stage of the hearing would probably have required an adjournment to enable instructions to be taken and further evidence in rebuttal sought. The appeal could still be determined fairly to both parties without the evidence. Having considered all the circumstances of the case, including the overriding objective I refused the application to admit the IO note.
11. Mr Diwnycz accepted that the burden to establish that Mr Miah did not meet the suitability criteria for the reasons alleged by the SSHD rested upon her, and she was unable to displace that burden in the absence of any evidence. In the circumstances Mr Diwnycz withdrew reliance upon the suitability allegation, and simply relied upon the remainder of the 2019 refusal.

*Issues in dispute*

12. Prior to hearing evidence, I invited the representatives to try to agree whether any other matters were agreed and the outstanding issues in dispute. I summarise the outcome of that discussion here. It was agreed that Mr Miah has been continuously resident in the UK from 15 January 2010 to the present. He was lawfully resident until just after 8 October 2015, first with leave as a student and then with ‘section 3C’ leave. Mr Biggs added the caveat that his primary position was that the 2015 refusal should be treated as void. However if he was wrong about that he accepted that Mr Miah should properly be treated as having a precarious immigration status from 2010 to October 2015, and then to have remained unlawfully after that, albeit pursuing various applications.
13. Mr Biggs also accepted that Mr Miah was unable to meet the Immigration Rules as at the date of the 2019 refusal or at the date of hearing. Mr Biggs confirmed that he continued to rely upon the three alternate arguments in his skeleton argument, which he submitted should result in Mr Miah’s appeal on Article 8 grounds being allowed. Mr Biggs clarified that he only relied upon Mr Miah’s private life for the purposes of Article 8. Whilst that private life necessarily included the family life with his brother and his brother’s immediate family members in the UK, Mr Biggs correctly conceded that this did not contain the necessary elements to constitute family life for the purposes of Article 8.

*Oral evidence*

14. I heard evidence from the appellant. He confirmed the truth of his witness statement and was then cross-examined briefly. Mr Diwnycz focussed upon the nature and extent of Mr Miah's private life. I then asked a few questions to clarify matters. The oral evidence is recorded in my record of proceedings.

*Submissions*

15. Mr Diwnycz invited me to find that Mr Miah's private life in the UK was relatively slight and could not on any view be regarded as strong enough to outweigh the public interest in his removal.
16. Mr Biggs' oral submissions mirrored his skeleton argument in large measure. He relied upon three alternative arguments which I summarise, but address in more detail below.
  - (i) The UT is obliged to make a finding that Mr Miah did not commit TOEIC fraud, and given the absence of any countervailing considerations including the withdrawal of the suitability allegation, Mr Miah was entitled to leave pursuant to the SSHD's policy such that his appeal must be allowed.
  - (ii) The 2015 refusal was vitiated by public law error and gave rise to 'historical injustice' with the consequence that Mr Miah should be treated as if that error had not been made in accordance with the principles set out in R (Ahsan and others) v SSHD [2017] EWCA Civ 2009, [2018] Imm AR 531, particularly [120].
  - (iii) In any event, Mr Miah has been seriously prejudiced by the belated recognition that he did not commit TOEIC fraud. This 'historical injustice' drastically reduced the weight to be attached to the public interest in this case - see Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351 (IAC), such that even though Mr Miah's private life was not strong, it nevertheless could not be outweighed by the applicable public interest.
17. At the end of his submissions, I invited Mr Biggs to clarify whether Mr Miah ever challenged the 2015 refusal including the TOEIC fraud allegation by way of judicial review proceedings. I had observed in my 'error of law' decision that although Mr Miah did not have a right of appeal, he did not seek to challenge the 2015 refusal "*by way of judicial review (yet challenged other decisions by judicial review) and made no further application until 13 May 2016*". This was not contradicted in his witness statement, which only referred to sending a pre-action protocol and receiving a reply maintaining the decision. However I noted that there was a reference in the papers to Mr Miah having lodged a judicial review on 20 November 2015 which was refused on 12 May 2016. No further information was given. In the light of this I asked Mr Biggs for the matter to be clarified in the form of an email to me by 10am the following day

after the hearing but nothing was received by the time this decision was finalised. The matter therefore remains unclear. I am satisfied that whether Mr Miah challenged the 2015 refusal in judicial review proceedings or not, my approach to the case would remain the same.

*Remote hearing*

18. At the conclusion of the hearing both representatives confirmed that they were content that the hearing, which took place over the course of some three hours via Skype for Business, was conducted fully and fairly and they had no concerns whatsoever. The representatives were satisfied, as was I, that this mode of hearing involved no prejudice to the interests of either party. I am satisfied that the mode of hearing was necessary, appropriate and proportionate.

**Relevant background and findings of fact**

19. It is unnecessary for me to make detailed findings of fact because much of the history is now of either marginal relevance or accepted. I have not made any findings regarding the matters relied upon by the SSHD to support the suitability allegation because this has been withdrawn. I have highlighted undisputed facts and made findings on the most relevant matters in chronological order, having considered all the evidence in the round, both documentary and oral. Mr Miah gave his evidence in a straightforward manner, and made a clear effort to answer the questions he was asked carefully and honestly. Notwithstanding this, I do not accept many of the assertions he made in his witness statement for the reasons I set out below.
20. It is undisputed that Mr Miah has been resident in the UK since entering lawfully as a student on 15 January 2010. He has therefore been resident in the UK for a lengthy period of some 10 years. He was lawfully present as a student until his leave expired on 28 December 2014. During that time he successfully completed a Bachelor of Arts in Business Studies, as evidenced by his October 2014 degree certificate from the University of Greenwich.
21. Mr Miah made an in-time application to vary his leave 'outside the Rules'. The reasons for this are not altogether clear but having considered all the evidence I am prepared to accept that his letter dated 1 April 2015 summarises his reasoning for wishing to remain in the UK: (i) to attend his graduation ceremony in July 2015; (ii) to pursue further studies in the form of a Masters degree in the UK. At that time he entirely accepted he could not meet the Immigration Rules because he did not have the requisite CAS. However his reasoning for not being able to obtain a CAS was unclear. In his letter he appears to assert that he was offered places in a few colleges but their licences were revoked and he therefore needed more time to obtain a CAS. There is some support for this in his earlier letter dated 26 January 2015. There was no evidence cited in support of this. No specific institution was named and dates were not provided. In any event, this was inconsistent with his witness

statement in which he stated that he applied to many universities and colleges but they refused to admit him because he “*sat for the ETS and also...did not have any valid leave*”. The evidence said to support Mr Miah’s attempts to enrol in a Masters in the UT bundle (pages 60-71) appear more exploratory in nature. His witness statement was silent on any current plans regarding his further education.

22. Mr Miah’s letter also made no meaningful effort to explain why he could not return to Bangladesh, in order to apply for a CAS and undertake any required English test from there. In his witness statement Mr Miah explained that he could not return to Bangladesh without a Masters degree because his family expected this from him and he needed a Masters to get a good job. I do not accept this explanation for not returning at the time. When I asked Mr Miah why he did not return to Bangladesh to make the required applications he said that he needed to clear his name in the UK, having been accused of TOEIC fraud. The difficulty with this explanation is that Mr Miah clearly gave up on clearing his name by October 2016, when he turned his attention to remaining in the UK as an EEA family member of his brother, an Italian citizen.
23. For the reasons I set out in my ‘error of law’ decision and below, the 2015 refusal is not vitiated by the SSHD’s later withdrawal of the TOEIC fraud allegation, because the primary reason for refusing the application remained. It follows that Mr Miah became an overstayer in October 2015. The chronology demonstrates that although Mr Miah made regular efforts to regularise his immigration status after becoming an overstayer by making applications to remain ‘outside the Rules’ and as an EEA family member, these were all unsuccessful. After his last EEA family member application was refused in January 2019, Mr Miah continued to remain in the UK unlawfully and only came to the attention of the SSHD because he was ‘encountered’ during an enforcement visit in April 2019, after which he made a human rights application. In his witness statement Mr Miah accepted that he was ‘encountered’ on 27 April 2019 at a London address where he was living in shared accommodation. In his witness statement, he claimed to have done “*nothing wrong*”. There has been a complete failure on his part to acknowledge that he remained in the UK as an unlawful overstayer, having been served with a RED.0001 on 22 March 2018 and his EEA application having been refused on 11 January 2019.
24. It is clear from the chronology that Mr Miah wished to remain in the UK ‘come what may’ and continued to reside in the UK in blatant disregard of immigration law. It is difficult to see why Mr Miah did not return to Bangladesh from where he could seek to clear his name with the help of legal representatives and his brother in the UK, with a view to lawfully re-entering the UK.
25. I do not accept Mr Miah’s vague and generalised assertions in his witness statement that he suffered anxiety, depression and lost his “*career ... youth ...*



*dignity and respect as a human being*” as a result of wrongly being accused of TOEIC fraud in the 2015 refusal. During his oral evidence, Mr Miah explained that he has been prescribed anti-depressive medication but accepted that there was no medical evidence to support his claims to have suffered anxiety and depression. In addition, Mr Miah has exaggerated the role that the TOEIC fraud allegation played on his life. He has entirely failed to acknowledge that he could not meet the Immigration Rules irrespective of the TOEIC allegation since his student leave expired in December 2014 and he chose to remain in the UK for a lengthy period in a state of unlawful limbo.

26. I now turn to Mr Miah’s private life. Although there has been lengthy residence, Mr Miah’s activities and contacts have been inevitably restricted as a result of his lengthy unlawful status. In his witness statement he explained that he has been living a “*destitute life*” for five years. I accept that Mr Miah has friendships in the UK and note all the evidence in support of this in the UT bundle. I also note that he has been involved in a cricket team in which he plays on a voluntary basis in a professional league and has undertaken charity activities with the Newham Welfare Trust.
27. I accept that Mr Miah enjoys family relationships with his brother and his brother’s family member and they do with him. These relationships are not particularly close. During his oral evidence Mr Miah admitted that although he used to divide his time between his brother’s home in Luton and London, since 2019 he only visited Luton once or twice a month. The brother’s assertion in his supporting letter dated 3 February 2020 that Mr Miah is a great support to his children and they have a strong bond with him must be viewed in this context.

## Assessment

### *Issue (i) – impact of policy*

28. Mr Biggs submitted that “*simply because*” Mr Miah was “*falsely accused of TOEIC fraud*”, he was entitled to benefit from the SSHD’s policy that he should be granted six months leave. I have no hesitation in rejecting this submission.
29. The SSHD policy relied upon is entitled Educational Testing Service (ETS): casework instructions (‘the ETS policy’). This states at page 9:

“If the appeal is dismissed on human rights grounds but a finding is made by the Tribunal that the appellant did not obtain the TOEIC certificate by deception, you will need to give effect to that finding by granting six months leave outside the rules.

This is to enable the appellant to make any application they want to make or to leave the UK.”
30. Mr Biggs submitted that I am obliged to make clear findings that Mr Miah did not cheat in his English language test and was falsely accused of TOEIC fraud

in the 2015 refusal. There is no need for me to make such findings. This is because the 2019 refusal made it clear that Mr Miah was “*deemed as credible*” in his explanation that he did not commit TOEIC fraud. The SSHD accepted the credibility of Mr Miah’s explanation that he did not obtain his TOEIC certificate by deception. For that reason, Mr Miah and his legal representatives have been aware that the SSHD withdrew the TOEIC fraud allegation since the 2019 refusal and have approached the Tribunal appeal proceedings with the knowledge that this was no longer an issue of concern to the SSHD – see the grounds of appeal against the 2019 refusal and [9] of the FTT’s decision.

31. Mr Biggs argued that I was required to make the requisite finding because it was clearly a relevant matter for the proper determination of the Article 8 balancing exercise. I entirely accept the relevance of the SSHD’s belated acceptance that Mr Miah did not exercise deception to the Article 8 balancing exercise but there is no need for me to make a formal finding in order to weigh up this undisputed fact.
32. In any event, there is no evidence available to me to support the proposition that the TOEIC fraud allegation was *falsely* made. Rather, the SSHD has belatedly accepted Mr Miah’s explanation as credible and acknowledged that her earlier contrary allegation was mistaken.
33. The ETS policy therefore does not require the SSHD to grant Mr Miah six months leave - the Tribunal has not been required to make a finding on the matter, because the issue as to whether there was TOEIC fraud was already determined in Mr Miah’s favour within the decision under appeal. Mr Biggs did not take me to any other part of the ETS policy or any other policy said to apply in circumstances such as this case wherein it was the SSHD and not the Tribunal who concluded that the individual did not obtain the TOEIC certificate by deception.

***Issue (ii) – application of Ahsan (supra)***

34. Mr Biggs acknowledged that in order to make good his submission that the reasoning in Ahsan applied by analogy to the instant case, he needed to establish that the 2015 refusal was vitiated by ‘public law error’. I am prepared to assume, without deciding the matter, that it is appropriate for me to consider whether the 2015 refusal contains the two public law wrongs identified by Mr Biggs, for the purposes of conducting the ultimate Article 8 balancing exercise.
35. First, Mr Biggs submitted that the 2015 refusal failed to take into account a relevant matter, Mr Miah was an unwitting victim of a series of unfortunate events including being let down by his sponsor. I am entirely satisfied that the SSHD properly and accurately summarised the reasoning provided by Mr Miah for making an application to remain ‘outside the Rules’: in short, he required an extension of a few months in order to obtain a CAS and arrange to

continue his studies. That encapsulates Mr Miah's reasons adequately. There was no requirement on the part of the SSHD to outline every single reason asserted. As I observed earlier, the articulated reasons were not entirely clear. In particular, the difficulties Mr Miah experienced in obtaining a CAS were obscure and there was no evidence to support his vague and contradictory assertions. The mere vague assertion, without any supporting evidence, that potential sponsors lost licences, was not without more capable of generating leave, particularly in circumstances where Mr Miah had completed his first degree and was hoping to begin an entirely discrete stage of his tertiary education i.e. this was not a case in which a course of education was being disrupted.

36. Second, Mr Biggs submitted that the decision to refuse leave 'outside of the Rules' in the 2015 refusal was a discretionary one and it was impossible to separate the TOEIC issue. In the premises, Mr Biggs submitted the 2015 refusal considered an immaterial matter: Mr Miah was guilty of TOEIC fraud. I have no hesitation in rejecting this submission for the reasons provided in my 'error of law' decision. For convenience I repeat a summary of that reasoning here.
37. It is clear from the wording of the 2015 refusal that the SSHD refused Mr Miah's application for two discrete reasons. The first reason was based upon the nature of the application itself. The application for leave 'outside the Rules' was based upon Mr Miah's desire to have more time to find a sponsor in order to obtain a CAS to support an application within the Rules to study for a Masters degree. In these circumstances, the SSHD was fully entitled to conclude that discretion should not be exercised in his favour and this was not a purpose covered by the Rules. The SSHD explained that it would undermine the immigration system and be unfair to other students for Mr Miah to be granted further leave when he was unable to provide a CAS, one of the most basic requirements of the Rules for students. The SSHD was also entitled to find that it was open to Mr Miah to return to Bangladesh to make an application for entry clearance there when he was in a position to meet the requirements of the Rules.
38. The second reason for the 2015 refusal related to the TOEIC fraud. That this reason was a discrete and alternative reason for refusal is apparent from the wording used in the 2015 refusal. This second reason was clearly "*in addition*" to the first reason. Hence the SSHD "*also*" refused the application under para 322(5) of the Rules.
39. In my judgment when the 2015 refusal is read as a whole, the first reason (inability to meet the requirements of the Rules) was clearly the primary reason for the refusal, with the second reason cited as an additional but unrelated and separate reason. I therefore do not accept Mr Biggs' submission that the mistaken second reason "*inevitably tainted*" the exercise of discretion in relation to the first reason. Each of the two reasons was capable of justifying

the refusal on its own and without the other. If one of the two reasons fell away the SSHD remained entitled to refuse the application for the other remaining reason. The fact that the SSHD has resiled from the second reason, did not obviate the well-foundedness of the first reason and the ultimate refusal. The application was a straightforward one asking for more time. In these circumstances the SSHD was entitled to conclude that discretion should not be exercised outside the Rules, irrespective of her conclusion as to the TOEIC certificate.

40. I therefore reject Mr Biggs' submission that Mr Miah should be treated as though he has always been in the UK with leave because his in-time application for further leave was not lawfully decided. Mr Biggs accepted that in order for the principles in Ahsan to apply by analogy, it was necessary for there to be a finding that the 2015 refusal was a nullity or vitiated by public law error. Given my findings, it is unnecessary for me to explore Ahsan in any further detail.

*Issue (iii) - Article 8 balancing exercise*

41. I now turn to the third alternative means by which Mr Biggs argued that the appeal should be allowed pursuant to Article 8 – Mr Miah was prejudiced by the false allegation of TOEIC cheating to such a degree that his removal at this stage would breach Article 8. Mr Biggs fine-tuned that submission during his oral submissions as follows: although he accepted that Mr Miah's private life was not strong, the public interest in support of his removal was so reduced that his private life outweighed the public interest.
42. It follows that the overarching issue to be determined is whether or not the SSHD's decision to refuse Mr Miah leave to remain constitutes a disproportionate breach of his private life pursuant to Article 8, ECHR. The jurisdiction I exercise is limited to human rights grounds, which may only be determined through the provisions of the ECHR - see Charles (human rights appeal: scope) [2018] UKUT 00089 (IAC).
43. The proper approach to the relevant Article 8 balancing exercise in a case such as this requires consideration of Part 5A of the Nationality, Immigration and Asylum Act 2002. I must therefore have regard to the considerations in s. 117B and do so. I must also apply the principles in the Strasbourg authorities to ensure compatibility with the UK's obligations under Article 8 - see the recent Strasbourg judgment of Unuane v UK, App no. 80343/17 (24 November 2020) at [72-75] and [81-83]. The Strasbourg authorities set out the relevant criteria to use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. The respective weight to be attached to these criteria will inevitably vary according to the specific circumstances of each case - see Unuane at [78]. These criteria include the following *inter alia*:
- the nature and seriousness of any offence committed;

- the length of the stay in the UK;
  - the nature and strength of any family life in the UK and the impact of disruption upon all family members, including a consideration of the best interests of children;
  - the time elapsed since the offence was committed and the conduct during that period;
  - the nationalities of the various persons concerned;
  - the seriousness of the difficulties the person is likely to encounter in the country to which the applicant is to be expelled;
  - the solidity of social, cultural and family ties with the host country and with the country of destination.
44. I must address the strength of the public interest and the nature and extent of Mr Miah's private life and then conduct the relevant balancing exercise. I note the warning in Patel (supra), against 'double-counting' at (4) of the headnote:

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

#### *Public interest*

45. The maintenance of effective immigration controls is in the public interest. It is undisputed that Mr Miah has been unable to meet the requirements of the Immigration Rules for a lengthy period. In addition, although he has made various applications along the way, on my findings he is an unlawful overstayer who has shown a blatant disregard for immigration controls. I bear in mind that Mr Miah can speak English and has the potential to be financially independent if given permission to work. These matters considered together give rise to a prima facie strong public interest in his removal. In recognition of the guidance in Patel (supra) Mr Biggs submitted that the public interest in this case was reduced because Mr Miah suffered a 'historical injustice'.
46. For the reasons explained in Patel (supra) at [41] this is not a case involving 'historic injustice'. Rather, there has been 'historical injustice' – see [46] of Patel. In my judgment, the SSHD formed a view about Mr Miah's behaviour, which led to a TOEIC fraud allegation and this formed an alternative basis for

an adverse immigration decision in the form of the 2015 refusal; but the SSHD's view turned out to be mistaken i.e. she accepted that Mr Miah provided a credible explanation. What bearing does this type of 'historical injustice' have on the Article 8 balancing exercise? At [47] of Patel, the President noted that one way in which this kind of erroneous treatment of an individual can have a bearing on the balancing exercise was where "*the individual would be able to argue that, if the [SSHD] had not formed the mistaken view of their conduct, he or she would have been given leave to remain; and that this should be given weight in the balancing exercise...*". For the reasons I have already provided, the 2015 refusal was inevitable for the first and primary reason contained within it. Even if there was no TOEIC fraud allegation, Mr Miah's application to remain 'outside the Rules' was bound to fail and he was not entitled to 'section 3C leave'. In the light of this there is no requirement to consider how Mr Miah should be put into the position he would have been in had the TOEIC fraud allegation not been made in the 2015 refusal. I accept that in 2015 Mr Miah wished to continue on to a wholly different level of studies in the UK. I do not accept that the TOEIC fraud allegation played a material role in preventing this at that time.

47. I accept that the extant TOEIC fraud allegation meant that there was little prospect that Mr Miah would be able to find a new sponsor in order to obtain leave to remain to continue his studies in the UK or obtain leave on some other basis. However, after the 2015 refusal, Mr Miah became an overstayer and it is difficult to see how any in-country application to remain as a student could be successful. I have already set out above that Mr Miah has not provided a reasonable explanation for continuing to remain in the UK after receiving the 2015 refusal. He could not meet the requirements of the Immigration Rules on any view. He clearly could not meet the requirements to remain as an EEA family member, hence four failed applications on this basis.
48. I nonetheless acknowledge that an allegation of deception is serious and is likely to have caused Mr Miah upset such that 'he wished to clear his name'. I have already found that this process could have continued from Bangladesh.
49. In all the circumstances I am prepared to find that the mistaken TOEIC fraud allegation caused Mr Miah limited, but not as Mr Biggs submitted "*incalculable*", prejudice. I accept the SSHD's mistake has caused Mr Miah stress and anxiety and there was a lengthy period before the mistake was corrected. This reduces the strong public interest in his removal but only to a modest degree.
50. Mr Miah has complained about various disappointments and inadequacies he encountered from educational institutions and legal advisors. Those inadequacies are not of a kind that can be linked to the SSHD and were essentially private concerns. In the circumstances they are not capable of

reducing the weight of the public interest in this case – see Patel (supra) at [78] to [81].

*Private life*

51. Mr Biggs accepted that Mr Miah’s private life could not be described as strong. He was correct to do so. In my judgment, it can at best be described as of moderate strength.
52. Regardless of how the SSHD, immigration advisors and educational institutions have behaved towards Mr Miah, it remains the case that his status has at all times been either precarious (in that he has at all times lacked indefinite leave to remain - see Rhuppiah v SSHD [2018] UKSC 58 [2018], 1 WLR 5536) or unlawful. I am satisfied that I should apply the ‘little weight’ provisions in s. 117B of the 2002 Act in this case. Little weight should generally be given to a private life established when a person was present in the UK unlawfully or without a right of permanent residence, absent “*particularly strong features*”. Although Mr Miah has been resident in the UK for a lengthy period and was wrongly alleged to have cheated, his private life does not contain any particularly strong features. He has been resident in the UK for 10 years but he spent most of his life (some 22 years) in Bangladesh, where he was born and brought up. The importance of upbringing and education in the formation of a person's social identity is well recognised. It is important to note that he spent no part of his childhood in the UK and only came here as an adult in order to commence tertiary education.
53. Mr Miah’s private life is nevertheless entitled to some weight. Relevant social ties obviously include relationships with friends, as well as ties formed through employment or other paid or unpaid work or through participation in communal activities. Mr Miah has not worked in the UK. I accept he has some friendship and community ties. A person's social identity is not defined solely by relationships with others but is constituted at a deep level by familiarity with and participation in the shared customs, traditions, practices, beliefs, values, linguistic idioms and other local knowledge which situate a person in a society or social group and generate a sense of belonging. Mr Miah speaks English and has adjusted over a long period to living a British life which has generated a certain sense of belonging. That is mitigated by the inevitable limitations that accompanied his unlawful status. He was unable to work and was reliant upon his brother, who I note earned a modest income as a crew member of Macdonald’s. As Mr Miah accepted he has lived a destitute life with inevitable constraints on his social life and activities in the UK.
54. I am satisfied that Mr Miah has family relationships with his brother and his brother’s family members, including children, but this does not include any particularly close or dependent family life. As acknowledged by Mr Biggs, Mr Miah faces no significant obstacles to *re-integration* in Bangladesh and can

maintain relationships with his family members in the UK via modern technology and visits.

*Balancing exercise*

55. I reject Mr Biggs' submission that the only way to remedy the 'historical injustice' in this case would be for the SSHD to give Mr Miah leave to remain allowing him time to seek to regularise his status. In any event, Mr Miah's witness statement offered no clue as to how he proposed to regularise his status if given the opportunity. The ambition to complete a Masters degree has not resulted in any updated research. In any event it is difficult to see how that would be funded.
56. For the reasons I have provided the public interest in favour of Mr Miah's removal remains strong but is tempered to a modest degree by the mistaken TOEIC fraud allegation. I must balance this public interest with the moderate strength of Mr Miah's private life in the UK. In addition, I note that Mr Miah's removal would cause no rupture to any meaningful close family relationships and within a reasonable period of time he would be able to re-integrate to Bangladesh. Having considered all the relevant circumstances I am satisfied that the public interest in this case outweighs private life by a considerable margin, such that Mr Miah's removal would be proportionate.

**Conclusion**

57. It follows that Mr Miah's removal would not give rise to a disproportionate breach of Article 8, ECHR.

**Decision**

58. I dismiss Mr Miah's appeal on human rights grounds.

Signed: *Ms Melanie Plummer*  
Judge of the Upper Tribunal

Dated: 14 January 2021