IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-000779

First-tier Tribunal No: HU/01769/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 09 May 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

HABIB HOSSAIN TARIF
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Balroop, Counsel, instructed by 1st Floor City Heights Solicitors For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 16 March 2023

DECISION AND REASONS

1. The appellant appeals, with permission, the decision of First-tier Tribunal Judge Bulpitt (the judge) promulgated on 5th August 2021 in which he dismissed the appellant's appeal against the decision of the respondent dated 9th January 2020 refusing the appellant's human rights claim on private life grounds.

2. The appellant is a national of Bangladesh born on 2nd January 1987 and entered the United Kingdom on 6th November 2009 on a student visa valid to 29th February 2012. On 28th February 2012 he applied for leave to remain as a Tier 4 (General) Student but on 21st March 2012 his application was rejected. He made another application on 5th April 2012 for leave to remain as a Tier 4 (General) Student and that was granted on 2nd July 2012 until 15th January 2014.

3. On 26th September 2012, his leave to remain was curtailed with effect from 26th

November 2012. On 23rd November 2012 he applied for leave to remain as a Tier 4 (General) Student and on 13th September 2013 he was granted leave to remain until 30th January 2016. On 29th January 2016, he applied for leave to remain outside the Rules and that was refused on 8th September 2016 with no right of appeal.

4. On 7th October 2016 he applied for leave to remain and that too was refused on 5th July 2017 with a right of appeal outside the UK. On 5th September 2017 he applied for indefinite leave to remain outside the Rules. That was refused on 9th January 2020.

The appellant's claim before the First-tier Tribunal

5. Before the First-tier Tribunal, the appellant maintained that he arrived in the UK to study at AA Hamilton College and completed a professional diploma in tourism and then enrolled at Barbican College, London to study a diploma in management. To gain the admission into Barbican College he was required to take an English language test and sat a Test of English for International Communication (TOEIC) to fulfil his English language requirement. He states in his witness statement that after a few months into the course the licence of the college was revoked by the Home Office.

6. Following a frantic search, he found a course at Radcliffe College and worked to complete a diploma but whilst awaiting his results he received a message from the college that he was no longer a student. The reason provided was that he had participated in a TOEIC exam and was subsequently expelled from Radcliffe College; the licence of Radcliffe College was also revoked by the Home Office. He applied to further colleges in good faith and selected colleges which were listed and approved but "for reasons entirely beyond my control the licences were revoked". When he sat the TOEIC test it had been an approved test by the Home Office, but he asserted became null and void thereafter. He staggered on and proceeded to apply to several higher education institutions but continued to face rejection from every institution as he held a TOEIC certificate which was by that time widely regarded as illegal (paragraph 17 of the appellant's witness statement dated 14th July 2020). The appellant in pursuing his appeal to the First-tier Tribunal raised the ground of historical injustice.

Grounds for Permission to Appeal

7. Ground 1. At [19] the judge concluded that the appellant's claim to be a victim of historical injustice did not satisfy the definition of new matter for the purposes of Section 85(5) of the Nationality, Immigration and Asylum appeals relying upon **Mahmud (S. 85 NIAA 2002 – 'new matters') [2017] UKUT 00488 (IAC)** at [30].

8. It was contended that the judge's approach reflected a narrow and controversial interpretation of the sub-Sections of Section 85(5) and Section 85(6).

9. It was arguably inconsistent with the ordinary meaning of the language used in these provisions when considered in context and against the purpose of sub-Section 85(5) which is to give the respondent control over whether a matter not already considered in the context of a decision under appeal can

be considered by the First-tier Tribunal so as to preserve the respondent's role as a primary decision-maker.

10. Moreover, the decision was arguably contrary to guidance given in **Mahmud**.

11. The judge's approach at [18] to [19] entails that a new matter must itself, that is if considered in isolation, be capable of establishing a ground of appeal under the NIAA.

12. If this was so, it was hard to see why the statutory draftsman did not make this clear. As stated in **Mahmud** at [30] it is enough for a new matter to raise or establish a ground of appeal. Raising a ground of appeal could occur by raising new facts or claims which could be added to the totality of the relevant circumstances to allow an appellant to argue the appeal should be allowed and establishing a ground of appeal could occur in the same way.

13. Although the respondent refused to give consent at the appeal hearing, as the appellant argued orally and in writing before the First-tier Tribunal, her position was contrary to her policy and therefore contrary to public law. As the policy Rights of appeal Version 10 stated, even if the new matter is not identified until shortly before or at the hearing if can be considered and a decision reached quickly, that should be done. The appellant applied for an adjournment to pursue proceedings for judicial review to compel the respondent to act lawfully and consent to the First-tier Tribunal considering the historical injustice point and this was the only available remedy, Quaidoo (new matter:procedure /process) Ghana [2018] UKUT 87. Had the First-tier Tribunal reached the view that the appellant was seeking to rely upon a new matter it should have allowed the appellant's application for an adjournment. This established the materiality of ground 1.

Ground 2

14. The judge acknowledged at [22] that the respondent did not challenge in any detail the appellant's evidence on the issue of historical injustice and recorded at [16] the disappointment that the respondent had failed to comply with a direction requiring her to consider whether to give consent to allow the judge to consider the historical injustice. It is recorded that the respondent's Presenting Officer suggested the failure to comply with this direction was a misunderstanding. As a result, the appellant was not given the chance in his evidence to address the matters relied on by the First-tier Tribunal at [22] to [30] and that was procedurally unfair.

15. Instead, the judge noted at [22] that it was put to the appellant that he was seeking to bolster his claim by his evidence. That point was made in relation to the suitability issues relied on by the respondent, not more generally.

16. The respondent argued in her closing submissions that the appellant had not provided sufficient evidence that he suffered prejudice because of being unable to complete his studies at Radcliffe College but she did not address the matters considered by the judge, at [23]-[30] in respect of the core of the claim on historical injustice.

17. The respondent's submissions did not mirror the points relied on by the judge in these passages. The respondent's primary argument was that the appellant was not victimised because his sponsor was shut down by the respondent due to it being involved with TOEIC as he was given 60 days '

leave to deal with this event. That was wrong, as the appellant's leave was not curtailed.

18. The way the respondent presented her position on the historical injustice issue meant the appellant did not have a fair opportunity of addressing the matters relied on by the judge to find against the appellant on the point. This resulted in procedural unfairness vitiating the judge's finding at [30].

19. Furthermore, given the adversarial nature of the proceedings before the judge because the respondent had not investigated the formed view as to the appellant's historical injustice claim or important elements, it was procedurally unfair for the judge to reject the appellant's case on this issue at least without having first acknowledged and made allowance for the fact that the respondent did not dispute the appellant's case in this respect.

20. Whilst the judge was of course required to evaluate the evidence before him, the proceedings before the Tribunal were adversarial and it was inappropriate and procedurally unfair for the Tribunal to take an issue against an appeal that has been not relied on by the respondent without giving the appellant a fair chance to address the issues.

Ground 3. Failure to address evidence or address by reasons. The Interviews

21. The judge did not consider or address by reasons the appellant's evidence as to why he did not attend the three interviews referred to in [24].

22. The appellant's evidence was that he was unable to attend the first and last of these due to illness, but the judge did not engage with his reasoning or that it was for the respondent to prove the appellant was invited to attend the interview given that this was disputed. The judge's finding was **Wednesbury** unreasonable.

The Application of January 2016

23. At [23] the judge held against the appellant he had adduced no documentary evidence in support of his testimony that his previous representatives raised the basis of his claim to have suffered an historical injustice made in January 2016.

24. However, the judge did not acknowledge that the respondent had not taken issue with the appellant's testimony on this, having had the opportunity to consider her records which could have resolved the matter.

25. It is notable that the respondent's primary position in her submissions that the appellant's leave was in fact curtailed to 60 days as a result of Radcliffe's licence revocation is misconceived and therefore indicated that she failed to cause adequate enquiries to be undertaken. The judge did not consider this either.

26. The judge erred at [26] by failing to consider the absence of adequate enquiries by the respondent which suggested there may be correspondence between Radcliffe and the respondent that assisted the appellant's case.

The Evidence of the Fellow Radcliffe College Students

27. In his oral evidence the appellant explained why the authors of the two

letters supporting his claim to have been expelled by Radcliffe College were not able to give oral evidence and despite relying on the absence for evidence from these people as damaging the appellant's case the judge did not address this evidence and failed to consider a material matter.

28. According to Counsel's note the respondent's Presenting Officer confirmed in oral evidence that Radcliffe College was involved in fraudulent activities regarding the TOEIC test, and it was shut down as a result.

29. She also argued that the appellant was not victimised directly or indirectly because he had taken a TOEIC test (as his leave was curtailed as a result of the revocation of Radcliffe College's sponsor licence or it being shut down) and that the appellant had failed to prove that he was unable thereafter to obtain a place to study at another sponsor. It was argued that it was proportionate to 'shut down ' Radcliffe College and allow the appellant to find a new sponsor.

30. This supported the appellant's case.

31. He argued that Radcliffe College had simply expelled him because he had taken a TOEIC test, and this undermined his immigration status and constituted an historical injustice and when the expulsion is considered in context (it was not that the respondent alleged he had cheated).

32. This argument is supported by the respondent's concession that Radcliffe was involved in TOEIC fraud and ultimately lost its licence as a consequence.

33. At paragraph 12(3) of the appellant's skeleton argument the judge was asked to consider two cases exemplifying the respondent's approach in respect of Tier 4 sponsors suspected of having recruited TOEIC cheats and contrary to the judge's unreasoned assertion at [29] these authorities, and in particular the **London St Andrews College v Secretary of State for the Home Department [2014] EWHC 4328 (Admin)** indicated that at the material time there was a clear incentive on Tier 4 sponsors to take action against students who sat TOEIC tests, irrespective of evidence they had cheated, in order to seek to allay the respondent's suspicion that a sponsor could not be trusted because it had recruited students who were not genuine. The judge did not consider these matters.

The Hearing

34. At the hearing Mr Balroop submitted that the factual matrix was different, and the Secretary of State had not made a decision on the historical injustice point. I was referred to [29] to [31] of **Mahmud** such that the Secretary of State had not addressed relevant aspects of the claim and in relation to submissions made in a letter by the appellant's solicitors on 14th February 2020. A supplementary decision was made on 22nd February 2021 but that focused on the appellant's health.

35. In relation to ground 2 the respondent did not cross-examine on the historical injustice aspect of the case and this the judge accepted at [22].

36. At [24] and [25] the judge focused on the fact that the appellant did not raise historical injustice in 2016 but only belatedly raised this point in relation to the TOEIC application. However, the issue that TOEIC could reduce the weight given

to the public interest was first raised in Ahsan [2017] EWCA Civ 2009 but it was only reinforced in the case Patel **[2020] UKUT 351** such that the Secretary of State had taken an adverse view of immigration where her view turned out to be mistaken and this could have an effect on Article 8. I was referred to [3] of the headnote. Therefore, the point made by the judge saying that this point was not raised until a later stage was not in fact well-founded. Further, the judge was asking for evidence in terms of correspondence, but the Secretary of State had not addressed this matter either.

37. It might be said that the Secretary of State was not involved with this appellant but that did not matter because the evidence from the appellant was that they did speak to the college. None of these issues were put to the appellant at the hearing and he was not cross-examined and there was no clarification. The appellant could have explained why his claim for historic injustice was made at this point.

38. In relation to ground 3 the Home Office had not given any view on what steps it took to investigate the claim by the appellant on applying to other colleges.

39. Mr Tufan submitted that it was not clear why the licence of Radcliffe College had been revoked but the question of revocation was irrelevant because the appellant's leave was not curtailed and it was open to him during that time to find another college, but he failed to do so. I was referred to the case of EK (Ivory Coast) [2014] EWCA Civ 1517, where there was a clerical error in revoking the CAS letter which was not the appellant's fault but nonetheless there was no breach by the Secretary of State. The Secretary of State is not responsible for general unfairness. This was a matter between the college and the appellant and there was no evidence save for what the friends had claimed and simply what the appellant was claiming.

40. There was no historical injustice, and it was clear that not every single TOEIC qualification was deemed to be unworthy because many colleges were genuine and the fact that the Secretary of State took no action on this particular TOEIC had nothing to do with the Secretary of State.

41. Mr Balroop responded that there was an atmosphere created by the investigation into TOEIC and this explained why the appellant could not find a new institution. The appellant could not use his TOEIC certificate which had tainted him. Ultimately the appellant had to apply outside the Rules. Mr Balroop also submitted that the historic injustice dated from the time Radcliffe stated he could not have his results. Before the appellant could take action against Radcliffe they were closed down. Therefore, he could not continue, and it was the fact that the approach to TOEIC was wholly unacceptable albeit there was no allegation of deception but a reputational effect.

Analysis

42. In terms of the **first ground** Sections 84 and 85 of the Nationality, Immigration and Asylum Act 2002 set out as follows:

> *"84.* ***Grounds of appeal***
>
> *(1) An appeal under Section 82(1)(a) (refusal of protection claim) must be brought on one or more of the following grounds –*

(a) *that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;*

(b) *that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;*

(c) *that removal of the appellant from the United Kingdom would be unlawful under Section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).*

(2) *An appeal under Section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under Section 6 of the Human Rights Act 1998.*

(3) *An appeal under Section 82(1)(c) (revocation of protection status) must be brought on one or more of the following grounds –*

(a) *that the decision to revoke the appellant's protection status breaches the United Kingdom's obligations under the Refugee Convention;*

(b) *that the decision to revoke the appellant's protection status breaches the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection.*

85. ***Matters to be considered***

(1) *An appeal under Section 82(1) against a decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under Section 82(1).*

(2) *If an appellant under Section 82(1) makes a statement under Section 120, the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in Section 84 against the decision appealed against.*

(3) *Subsection (2) applies to a statement made under Section 120 whether the statement was made before or after the appeal was commenced.*

(4) *On an appeal under Section 82(1) ... against a decision the Tribunal may consider ... any matter which it thinks relevant to the substance of the decision, including ... a matter arising after the date of the decision.*

(5) *But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.*

(6) *A matter is a 'new matter' if –*

(a) *it constitutes a ground of appeal of a kind listed in Section 84, and*

(b) *the Secretary of State has not previously considered the matter in the context of –*

(i) *the decision mentioned in Section 82(1), or*

(ii) *a statement made by the appellant under Section 120".*

43. The headnote of **Mahmud** sets out this:

"1. Whether something is or is not a 'new matter' goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine for itself the issue.

2. A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal.

3. In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive".

I am not persuaded that there is anything controversial in the judge's assessment of whether this was a new matter. As set out in **Mahmud** it was for the judge to decide whether this was a new matter and that is precisely what he did. Also as set out in **Mahmud,** a new matter is something which constitutes a ground of appeal of a kind listed in Section 84 and it must be a listed ground of appeal, particularly a ground of appeal is the legal basis on which the facts can form the basis of a challenge. That does not mean that every single new factual matrix can present a ground of appeal. **Mahmud** gave the example of the appellant's relationship with a new partner. That is clearly amenable to founding a legal ground of appeal and founding family life. That is how the judge directed himself at [18] by stating:

"18. ... In Mahmud (S. 85 NIAA 2002 – 'new matters') [2017] UKUT 00488 (IAC), the Vice President of the Upper Tribunal stated at [30] that 'Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal.' Here, as previously identified, the ground of appeal in question is the human rights ground i.e. that the decision is incompatible with the appellant's convention right to respect for his private and family life. The question therefore is whether the matter – i.e. whether the appellant has suffered an historical injustice – is one which could establish that the respondent's decision is incompatible with the appellant's convention

right to respect for his private and family life?"[my underlining]

44. In my view the judge asked himself the correct question of whether or not the appellant suffered an historical injustice on its own and which said nothing about his private and family life, see [19]. As the judge stated: "Its [historical injustice] relevance is, as Mr Biggs argues, to the extent of the public interest in maintaining immigration control, it is not however capable of establishing that the appellant's right to a private and family life has been disproportionately interfered with". It was open to the judge to find historical injustice cannot establish a right to private or family life. It is an aspect to the private life which was capable of being put forward in evidence and decided upon.

45. Secondly, the judge stated that whether a matter was a new matter was inevitably fact- sensitive and it was open to the judge in this case to find that the question of whether or not the appellant suffered an historical injustice did not establish a ground of appeal and therefore was not a new matter.

46. That leads into the part of the judgment where the judge considered whether the appellant had suffered historical injustice. Mr Balroop set out a very helpful chronology in respect of the appellant's immigration history which appeared almost entirely absent from evidence put before the First-tier Tribunal.

47. Leave was granted to him on 6th November 2009 as a Tier 4 (General) Student valid to 29th February 2012.

The appellant entered and studied at Hamilton College doing level 5 tourism.

On 28th February 2012 before the leave ended he applied for further leave as a Tier 4 (General) Student and was rejected on 21st March 2012.

He reapplied on 5th April 2012 to West End College.

That application was granted on 2nd July 2012 until 15th January 2014.

On 26th September 2012 his leave was curtailed to 26th November 2012 because West End College surrendered their licence.

On 23rd November 2012 the appellant reapplied with Barbican College as his sponsor.

On 29th June 2013 he was informed by letter that the Barbican College licence had been revoked.

The appellant amended his application to Radcliffe College.

His application was granted on 13th September 2013 and leave was granted to 30th January 2016.

Radcliffe College's licence was revoked at the end of 2014, either in November or December.

The appellant then made an application outside the Rules on 29th January 2016, a year later.

48. It is the appellant's claim in his witness statement of July 2020 that with his TOEIC certificate he could no longer find an alternative college and thus suffered historical injustice. The case he put to the First-tier Tribunal Judge was that the historical injustice which the appellant says he suffered, was being expelled from the course 'on instruction from the Home Office' because he had produced a TOEIC English language test certificate issued by ETS. He states that this was an injustice because his grounds for obtaining leave to remain were removed without any allegation of dishonesty leaving the appellant unable to obtain the qualification for which he had studied and having paid the course fees. [20].

49. As the judge recorded having received legal advice the appellant says he sought a place at a new college but despite approaching twenty colleges he was unable to secure a place as each college said they would not accept a student with a TOEIC certificate. Subsequently his leave to remain expired. As pointed out, the appellant's grounds for leave, however, were not removed because his leave, at this point, was never curtailed. It simply expired.

50. In relation to ground 2, I do not accept there was any procedural unfairness in the approach of the judge. It was the appellant who put forward the issue of historical injustice together with the documentary evidence or otherwise.

51. It was clear that paragraphs [22]-[26] related to the issue of historical injustice and the evidence tendered by the appellant to support his claim on historical injustice. The submission made by counsel at the First-tier Tribunal hearing was that the evidence was not contested but the judge clearly did not accept that. It is for the judge to weigh the evidence and the reference to '*it was put to the appellant that he was seeking to bolster his claim with this evidence*' cannot merely be confined to issues of suitability, as contended in the grounds. First the sub-heading at [20] onwards was in relation to the issue of historical injustice, secondly the judge recorded with reference to the account pre-2016 that the home office did not cross examine the appellant <u>in</u> <u>detail</u> about this account. There was therefore some cross examination regarding pre 2016 events and it was the appellant who put his case forward in detail by experienced counsel and any lack of challenge was to his advantage. It was still a matter for the judge to assess.

52. Further, even though suitability was raised in the 2020 refusal letter owing to his failure to comply with reporting conditions imposed in 2017, this and the failure to attend interviews in 2016 post date the issues relating to historical injustice. As the grounds themselves accept, the respondent even made submissions at the close of the hearing to the effect there was no historical injustice. The respondent clearly disputed that aspect of the case.

53. It was open to the judge at [22] to state that the appellant in previous statements had said nothing about trying to find another place at college and nothing about the Home Office giving direct instructions to Radcliffe College to expel him. Instead he relied on health difficulties and political difficulties.

54. The appellant's leave simply expired but as the judge rightly pointed out at [23] there was no <u>documentary</u> evidence of the appellant's account whether

or not it would have equated to historical injustice and it was open to the judge to find the appellant did not raise this account in his previous applications.

55. The judge at [23] made the point that it was the appellant's assertion that he did raise this alleged injustice contemporaneously in his application for leave to remain in January 2016 and yet the judge found there was no documentary evidence to support that assertion and no evidence from the former solicitor who was said to have 'lost the papers'. This is not merely that the appellant was not aware that he was unable to raise the issue of historical injustice, but he claims he did so in 2016 but has produced no evidence of that. That is a nuanced difference from the position as presented. According to the appellant's evidence, independently from Ahsan and the reinforcement of the point in Patel, the appellant had raised the issue in 2016. It was open to the judge to criticise the appellant's account on the basis that there was an absence of any contemporaneous documentary evidence in support of that claim about how he was treated [26].

56. I also note that the appellant's representatives must have been prepared to present the point on historical injustice because they expected it to be treated as a new matter when in fact it was not.

57. It was open to the judge at [30] to make the finding that "*having carefully weighed the evidence which has been adduced I find that the appellant has not established on the balance of probabilities that he was the victim of an historical injustice at the hands of Radcliffe College under the direct instruction of the Home Office*". That was the evidence that the appellant put forward and yet did not support that contention in evidence. Indeed as pointed out above, the appellant's evidence was found lacking in reliability.

58. There was no procedural error overall in the approach of the judge.

59. As set out in **EK (Ivory Coast)** there was no breach by the Secretary of State of her public law duty to act fairly. It was not evidenced, as the appellant claimed that he had been ejected from the college at the Secretary of State's behest. That is an assertion made by the appellant and for him to evidence. Even on the facts as presented by the appellant, it was not the Secretary of State which produced the TOEIC certificate but ETS, and nor did she prevent the appellant from applying to other colleges. It is not the Secretary of State's responsibility that the appellant has been unable to obtain a further place at college. The appellant had ample time to obtain further placement. As the judge found there was no historical injustice for which the Secretary of State was to blame and that is whether or not the injustice was being belatedly raised. As the grounds state the appellant's leave was not curtailed.

60. The assertion that the judge had not taken into account that the respondent had not investigated or formed a view as to the appellant's historical injustice claim has no foundation and the judge's approach was not procedurally unfair. It was the appellant's assertion that he had previously raised historical injustice and thus a fact for him to prove on balance. It was open to the judge to evaluate the evidence before him and to consider the evidence in the round. Moreover, that the judge does not refer to every single piece of evidence in the decision does not mean that it has not been addressed.

61. The last observation is also relevant in terms of ground 3 and in relation to the interviews. The judge clearly acknowledged that the appellant said he was seriously ill on the first date and did not receive notification of the second but as the judge pointed out both dates were sent directly to the appellant using the same address and were also sent to his solicitors at the same time. Additionally, the judge pointed out that the appellant received a letter sent a little more than a month later and when offered an opportunity for interview in connection with his current application again did not attend. The judge adequately engaged with that evidence.

62. In relation to the application of January 2016, it was the appellant's contention that he had experienced historical injustice and he put forward evidence to support that in his appeal. It was open to the judge to consider that evidence that was before him whether or not the respondent had taken issue with a particular point. It is for the appellant to show that he suffered historical injustice and, on the chronology, as it was outlined to me, it is difficult to see where that injustice lay. Clearly the judge did not accept there was any historical injustice.

63. The fact that there "may be correspondence between Radcliffe College and the respondent that assisted the appellant's case" is not to the point because nowhere was there any evidence save for the appellant's assertion and a bare assertion will not suffice to support the contention that Radcliffe College excluded the appellant because of his TOEIC certificate. It was the appellant who was at the college and would have had direct correspondence with the college.

64. Moreover, at [27] the judge also found the appellant's evidence about what happened at Radcliffe College was not entirely consistent. As the judge stated the appellant's account of expulsion, the key plank to his account, was 'altered' and 'embellished' between the witness statement of 14th July 2020 and his statement of 3rd May 2021.

65. As the judge found at [29] the assertion that the steps taken by Radcliffe were on direct instruction from the Home Office 'is entirely unsupported'. As the judge stated, there was nothing in the 'criticisms' or those cases to which counsel drew his attention to suggest that the respondent directed institutions to expel students simply because they had TOEIC certificates. As the judge pointed out the appellant's leave was not curtailed as might have been expected in that case, but simply expired.

66. Turning to the evidence of the fellow Radcliffe students, which is asserted the judge did not address, he referred at [28] to the evidence of Md Shahin Bhuyan. The judge commented that his letter was not accompanied by proof of his identity and as the judge reasoned neither witness produced any documentary evidence, contemporaneous nor otherwise about their "claimed expulsion from Radcliffe College". Further, neither witness produced their Home Office record number so the opportunities for considering their immigration history were limited. It was not simply the absence of oral evidence on which the judge, for sound reasoning, rejected their evidence.

67. It was clearly the case as stated in the grounds that the Secretary of State argued at the hearing that the appellant was not victimised directly or indirectly because he had taken a TOEIC test (here the grounds rather contradict earlier submissions that the Secretary of State made no challenge at the hearing), because the

appellant had failed to prove that he was unable thereafter to obtain a place at another college. Information was that in fact Radcliffe College was shut down because it was a fraudulent college. Whether he was expelled or the college was shut down, he had not been accused of cheating, which is correct, but it was open to the appellant to find a further college which he did not. That was his responsibility.

68. However, it was also suggested that all this supported the view that colleges under suspicion removed students from college irrespective of cheating, in order to allay the Secretary of State suspicion that students who were not genuine had been recruited. It was asserted the judge had not taken this into account.

69. I refer to the contention as to whether there is an incentive on Tier 4 sponsors to take action against students who sat TOEIC tests. The difficulty with this assertion is that the student involved in **Mohibullah** was indeed accused of TOEIC cheating and the students which were said to have been expelled were also involved in TOEIC fraud. That is not the alleged assertion here; as can be seen from **Mohibullah** it was the appellant who gave evidence in relation to the conduct of the UKVI officials in expelling the 218 students accused of committing fraud. It was not the case that all students who sat TOEIC tests were targeted. As stated in **Mohibullah** ETS, the Educational Testing Services, is "a global agency contracted to provide certain educational testing and assessment services" and "in all of these cases the impugned decision of the Secretary of State is based on an assessment that the TOEIC certificate of the person concerned was procured by deception". It was not the case that there was an incentive to take action against all students who sat TOEIC tests irrespective of evidence of whether they had cheated or not.

70. Nevertheless, the judge did not accept that there was evidence the appellant had been removed. In terms of historical injustice it can be seen from the chronology that, whether or not the appellant was removed from Radcliffe College, (and the judge found on sound reasoning his account was not credible) his leave was not curtailed and he had ample time to obtain another college place; it cannot be seriously suggested that all TOEIC certificates caused appellants to be rejected from all college places. It was entirely open to the appellant to obtain another certificate if required.

71. For the reasons given above I find that the judge approached the evidence that he was given without a material error of law. He made a decision open to him, considered the relevant factors and without procedural error; the appellant had ample time and an experienced counsel with which to present his case. The ingredients for historical injustice were simply not present as the judge indeed found.

72. The First-tier Tribunal decision contains no material error of law and shall stand.

Helen Rimington

Judge of the Upper Tribunal Rimington
Immigration and Asylum Chamber

Signed 19th April 2023