JR-2022-LON-001487

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

In the matter of an application for Judicial Review

The King on the application of
Nirpakash Verma & Davinder Kaur

Applicants

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Blundell

HAVING considered all documents lodged and having heard Jay Gajjar of counsel, instructed by Capital One Solicitors, for the applicants and Richard Evans of counsel, instructed by GLD, for the respondent at a hearing on 11 August 2023

IT IS ORDERED THAT:

(1) The application for judicial review is refused for the reasons in the attached judgment.

(2) The applicants shall pay the respondent's costs, summarily assessed at £8800.

(3) Permission to appeal to the Court of Appeal was not sought and is refused.

Signed: M.J.Blundell

Upper Tribunal Judge Blundell

Dated: **15 September 2023**

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): *18 September 2023*

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2022-LON-001487

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

15 September 2023

Before:

UPPER TRIBUNAL JUDGE BLUNDELL

- -

Between:

THE KING
on the application of

NIRPAKASH VERMA & DAVINDER KAUR

Applicants

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Jay Gajjar
(instructed by Capital One Solicitors), for the applicants

Richard Evans
(instructed by the Government Legal Department) for the respondent

Hearing date: 11 August 2023

- -

J U D G M E N T

- -

Judge Blundell:

1. On 5 July 2022, the Secretary of State decided that the applicants were not eligible for Indefinite Leave to Remain ("ILR"). She granted them limited leave to remain for thirty months on the basis of their family life instead. By this application for judicial review, the applicants submit that the Secretary of State erred in refusing their applications for ILR. They seek orders quashing the refusal of ILR and requiring that their applications be reconsidered.

Background

2. The applicants are Indian nationals. They are husband and wife. They have one child, who was born on 28 October 2016 and was registered as a British citizen on 20 January 2022. Their application for judicial review is brought jointly but the immigration status of the second applicant has at all times been dependent upon that of her husband. Where I refer to 'the applicant' in this judgment, therefore, it will be a reference to the first applicant.

3. The material parts of the applicants' immigration history are as follows.

4. The first applicant entered the United Kingdom on 24 January 2011. He held entry clearance as a Tier 4 (General) Student, valid from 17 December 2010 to 28 April 2012. The second applicant entered the UK on 22 April 2021. She held entry clearance as his dependant, with corresponding validity.

5. The applicants sought and were granted further leave to remain in the same capacity. This period of leave was valid until 30 March 2015. Before it expired, they submitted applications for leave to remain outside the Immigration Rules. Those applications were refused without a right of appeal on 9 November 2015.

6. The Secretary of State refused to alter his stance in response to pre-action correspondence and an application for judicial review (JR/15395/2015) was issued on 15 December 2015. Those proceedings were settled by consent and the respondent reconsidered the application. It was refused again on 14 March 2016, with a right of appeal on human rights grounds.

7. The applicants appealed to the First-tier Tribunal. Their appeals were heard by Fist-tier Tribunal Judge Ruth, sitting at Taylor House on 1 August 2017. In his reserved decision of 7 August 2017, Judge Ruth made findings which may be summarised quite shortly. Firstly, for reasons that he gave at [14]-[21], he did not accept the respondent's submission that the applicant had used a proxy to take a TOEIC English language test at European College of Higher Education in March 2012. Secondly, for reasons that he gave at [22]-[33], he did not accept that the applicants' removal from the United Kingdom would be in breach of Article 8 ECHR, and he dismissed the appeal accordingly.

8. Permission to appeal against Judge Ruth's decision was refused by the First-tier Tribunal and, on renewal, by Upper Tribunal Judge Plimmer (as

she then was). The applicants became appeal rights exhausted on Judge Plimmer's decision being sent to them in October 2017.

9. Three years passed. The applicants overstayed. There was seemingly some further pre-action correspondence in 2020 and 2021, but it was pointed out by the respondent that the decision under challenge had been upheld by Judge Ruth and that no further applications had been made.

10. On 8 February 2022, the applicants applied for Indefinite Leave to Remain. Their applications were accompanied by detailed representations. I will need in due course to return to the contents of those representations in more detail. It suffices for the time being to set out the helpful summary which appeared at their start:

> The Secretary of State is invited to treat this letter as representations seeking Indefinite Leave to Remain on the grounds of the Applicants' long residence under paragraph 276B, the Secretary of State's policy and new jurisprudence on those wrongly accused of using a proxy test taker in an English language test and as below.
>
> As part of this application, it will be advanced that the Applicants have been the victims of historical injustice; it is also the Applicant's case that their removal from the United Kingdom would be wholly unlawful in light of the evidence that the Secretary of State is drawn to but [sic] they are the parents of a British child.

11. The applications were decided on 5 July 2022, as I have already mentioned. The respondent stated that the applicants did not meet the requirements for ILR under paragraph 276B of the Immigration Rules because their continuous lawful residence had come to an end on 17 October 2017. The respondent nevertheless considered the applicants to be eligible for a grant of limited leave in recognition of their relationship with their daughter, who had been registered as a British citizen following a 'successful Stateless application'.

12. A pre-action letter dated 1 August 2022 submitted that the respondent had failed to consider the representations made by the applicants and that she had failed to apply her own policy. She should, it was submitted, have taken steps to put them in the position they would have been in had it not been for the historical injustice of the unfounded TOEIC allegation.

13. On 15 August 2022 the Secretary of State responded to the pre-action letter, stating that she would reconsider the applications for ILR. On the same date, the Secretary of State issued what she described as a supplementary refusal letter. That letter is short. It rehearsed the relevant history of the case before stating as follows:

> Although the appeal was dismissed on 7 August 2017 and your client was Appeal Rights Exhausted on 17 October 2017, it is

> recognised that the First-tier Tribunal found that your client did not take part in any fraud when relying upon a TOEIC certificate.
>
> Since becoming ARE on 17 October 2017, your client has had no leave and therefore would not meet the criteria required [sic] 10 years continuous lawful residence. The refusal of ILR remains but it is recognised that your client had not engaged in fraud and as the appeal determination states this remains an undisturbed finding.

14. The application for judicial review was issued on 27 September 2022. The grounds are somewhat discursive and do not follow the approach suggested at paragraph 7.3.4 of *The Administrative Court Judicial Review Guide 2022* but the following grounds of challenge emerge.

15. The applicants submit, *firstly*, that the respondent failed to engage rationally or at all with the submission that they had been the victim of a historical injustice. They submit, *secondly*, that the respondent failed to follow the policy she had placed before the Court of Appeal in Khan & Ors v SSHD [2018] EWCA Civ 1684; [2019] Imm AR 54 and the *Educational Testing Services (ETS): casework instructions* (version 4.0). The *third* ground of challenge is that the decisions of 5 July 2022 and 15 August 2022 are inadequately reasoned.

16. Permission was refused on the papers by Upper Tribunal Judge Lane but granted, at a hearing, by Upper Tribunal Judge Norton-Taylor. He was 'only just' persuaded to do so but was swayed by the second of the grounds which I have summarised above.

17. In her Detailed Grounds of Defence (which were settled by Mr Thomann of counsel), the Secretary of State submits that the concept of historical injustice has no purchase in this case, given its logical confinement to the scales of Article 8(2) and the fact that the applicants have been granted leave to remain. In any event, the Secretary of State's erroneous allegation of cheating was not the cause of the first applicant having been unable to secure a Confirmation of Acceptance for Studies ("CAS"). The Secretary of State maintains that the situation under consideration in Khan & Ors v SSHD was materially different, concerning as it did individuals with only an out of country right of appeal who were deprived of an effective remedy to challenge the allegation of fraud.

18. In his skeleton argument for this hearing, Mr Gajjar refined his arguments somewhat in light of the decision in Ahmed (historical injustice explained) [2023] UKUT 165 (IAC). He no longer relied on Article 8 ECHR or indeed on historical injustice but submitted that the respondent had failed for the reasons given in the original grounds for judicial review to exercise her discretion lawfully, by failing to take account of all the relevant matters drawn to her attention by the applicants' solicitors.

Submissions

19. Mr Gajjar began his oral submissions by confirming that he no longer relied on 'historical injustice' for reasons which were apparent from Ahmed. The remaining issues, he submitted, were ultimately whether the respondent had overlooked material matters and, if so, whether her decision would highly likely have been the same were it not for that error.

20. Mr Gajjar sought permission to rely on evidence which had not been before the Secretary of State when she made the decisions under challenge. An application had been made in the proper form on 20 July 2023. The evidence consisted of a witness statement from the applicant and three documents from academic institutions in the United Kingdom.

21. The application was opposed by Mr Evans, who submitted that the evidence could not be material to the decision under challenge because it had not been before the decision maker.

22. I agreed with the submissions made by Mr Evans. Although Mr Gajjar submitted that the evidence merely confirmed what had consistently been said by the applicant (about the prejudice demonstrated towards those with TOEIC certificates) the fact remained that this evidence had not been before the decision maker and could not establish, or assist in establishing, that the respondent had made a public law error in the decision under challenge.

23. That application having been resolved adversely to the applicant, Mr Gajjar made his submissions. He submitted that it was clear on the face of the decisions made in July and August 2022 that the respondent had failed to engage with the submissions made by the applicant. The later decision purported to address the points raised but did no such thing. There was on any proper view a detailed appeal to the Secretary of State's residual discretion in the ILR representations, which cited Khan & Ors v SSHD and the relevant policies.

24. I invited Mr Gajjar to address the point made by the Secretary of State as to what prejudice had been caused to the applicant by the erroneous allegation. It seemed that his application for leave to remain outside the Rules had been made because he could not obtain a CAS but this pre-dated the respondent's allegation that he had obtained his TOEIC certificate by fraud. Mr Gajjar took me to the grounds of appeal which had been considered by Judge Plimmer in 2017, which stated that colleges had refused to provide a CAS because of the stigma attached to the applicant's TOEIC certificate, even before that certificate was alleged to have been obtained by fraud. Mr Gajjar confirmed on instructions, however, that there was no reason to think that this document had ever been provided to the Secretary of State. That was immaterial, he submitted, where it was said in the ILR representations that the applicant had been unable to progress with his studies due to the respondent's allegation. That was the point that the respondent should have considered and did not.

25. Mr Gajjar submitted that the applicant was not required to establish prejudice in any event. The policy to which Singh LJ referred in Khan & Ors v SSHD showed that the respondent should have granted the

applicant leave as a result of Judge Ruth's finding. That policy was of general application in ETS cases, and the Secretary of State was wrong to submit that it was limited in some way. The ETS Caseworker Guidance was also relevant. Whilst it was accepted that it was not in existence at the time of Judge Ruth's decision, the point was that the applicant would not have become an overstayer if it had been in existence. The respondent was asked in the ILR representations to look at the sentiment in the policy but she had failed to do so.

26. I indicated to Mr Gajjar that he did not need to move on to consider criticisms of Judge Ruth's findings of fact made in the respondent's Detailed Grounds of Defence and skeleton argument; I would proceed on the basis that those previously unchallenged findings stood.

27. Mr Evans firstly addressed me on the contents of the ILR representations. It was notable, he submitted, that there had been no suggestion at any point in those representations that the applicant had been unable to secure a CAS in 2017 because of a general stigma which attached to those with TOEIC certificates. The respondent had only alleged fraud after the application for leave to remain outside the Rules had been made and there was no reason to believe that the applicant had been caused any difficulty as a result of his TOEIC certificate before then. The closest which the representations came to making this point was the allegation that sponsoring colleges had a fear of TOEIC tests in general. Those submissions were directed towards the historical injustice claim which was no longer pursued, however.

28. Even if the respondent had overlooked the submissions made, the result would highly likely have been the same in any event. The submission that the applicant had suffered prejudice prior to the application for leave to remain outside the Rules was based on mere assertion; there had been no evidence in support of it before the decision maker. The point could not go to Article 8 ECHR for the reasons explained in Ahmed and the submissions to the Secretary of State about discretion were poorly reasoned. Judge Ruth had not found that the applicant was prejudiced by the erroneous allegation, and it was clear from [31] of his decision that the applicant simply had no case for leave on Article 8 ECHR grounds. There was no reason to think that the grounds of appeal which had been considered by Judge Plimmer had ever been provided to the Secretary of State.

29. Mr Evans submitted that the respondent's position statement in Khan & Ors v SSHD was of no application to the applicant. It post-dated his appeal and he was not in an analogous position in any event, since he had enjoyed an in-country right of appeal. The only way to understand the policy logically was that it applied to those whose applications had been refused *solely* on the basis that they had employed ETS fraud. Were the policy construed in the way contended for by Mr Gajjar, it would merely delay the inevitable by providing leave to those who could not hope to obtain further leave. The published policy cited by Mr Gajjar post-dated Judge Ruth's decision and was of no application.

30. In summary, the position was that the respondent had considered the ILR representations which were made insofar as they were relevant to the applicant's immigration history and the Immigration Rules. The other submissions made amounted to nothing, and it was legitimate for the respondent to say nothing about them. Even if that was not so, relief should be refused for the same reason.

31. Mr Gajjar replied briefly. He noted that Ahmed post-dated the ILR representations and that it had been correct at the time to rely on historical injustice. The respondent had not disputed what was said in the representations about the difficulties caused by the applicant having a TOEIC certificate. Khan & Ors v SSHD was of wider application than the respondent was prepared to accept.

32. I reserved judgment at the end of the submissions.

Analysis

33. It is evidently the case that the respondent failed in the decisions under challenge to turn her mind to the detailed submissions which were made in the ILR representations. The initial decision went no further than considering whether the applicants were entitled to ILR under paragraph 276B of the Immigration Rules. They obviously were not as a result of the fact that their leave had come to an end in 2017, after Judge Plimmer had refused permission to appeal. That was not accepted by the applicants to be determinative of their claims to ILR, however, and the representations set out a detailed appeal to the Secretary of State's discretion.

34. The Secretary of State seemingly recognised that she had failed to consider anything that was said in those representations when she indicated, in response to the Letter Before Action, that she would reconsider the applications. Later that day, however, she issued the supplementary decision in the terms which I have recorded above, which came nowhere near to providing a reasoned answer to the representations. That letter merely repeated the conclusion reached by Judge Ruth about the TOEIC test; it did not engage with what was said by the applicants to be the legal significance of that finding in the consideration of the ILR applications.

35. For these reasons, I come to the clear conclusion that the respondent failed to take material matters into account in her decisions and that she failed to provide legally adequate reasons for those decisions by reference to the fact that she failed to engage with the case advanced by the applicants.

36. The real question in this case, therefore, is that which is posed by s16(6A) of the Tribunals, Courts and Enforcement Act 2007 and s31(2A) of the Senior Courts Act 1981: whether it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. In my judgment, the answer to that question is that the decision would inevitably have been the same even if the respondent had considered the representations in detail.

37. In order to explain why I have reached that conclusion, I propose to consider the following questions. Firstly, what was the discretion to which the applicant appealed in his ILR representations? Secondly, did anything said in the ILR representations without reference to the respondent's ETS/TOEIC policies provide a rational basis for exercising that discretion in the applicants' favour? Thirdly, did anything said in the ILR representations with reference to the respondent's policies provide a rational basis for exercising that discretion in the applicants' favour?

(i) Which Discretion?

38. It was obviously not submitted in the ILR representations that the applicant met the letter of paragraph 276B of the Immigration Rules. The submission was, instead, that the respondent should exercise her discretion in his favour and grant him ILR in recognition of the difficulties he had been caused by the erroneous allegation which was made in 2015 and 2016.

39. It is important to recognise in this connection that the applicant does not contend that he should have been granted some form of limited leave to remain. His application was for ILR and there would be no point in pursuing this application for judicial review in order to secure limited leave to remain because the applicant has already been granted leave to remain for thirty months.

40. What is not clear from the ILR representations is the precise basis upon which the applicant contended that he should be granted ILR. The respondent obviously retains a general discretion under the Immigration Act 1971 to grant leave to remain outside the Immigration Rules. The Secretary of State has from time to time published guidance on how she expects that discretion to be exercised. The Long Residence guidance, currently in its eighteenth iteration, is often cited and relied upon in cases of this nature but no reference was made to that guidance in the ILR representations. The absence of any such reference was evidently correct because the applicant had not, on any view, accrued the period of lawful residence required by paragraph 276B(i) and any discretion described in that guidance which applied to 'book-ended' periods of overstaying was of no application.

41. The Long Residence guidance was not applicable, therefore, and no other specific policy basis upon which the applicant might have been granted ILR was cited in the ILR representations. The applicant can only, therefore, have been inviting the Secretary of State to grant ILR outside the Rules on a purely discretionary basis. Such a decision was to be taken with reference to the respondent's policy on Leave Outside the Rules, as cited in *R (Alladin & Anor) v SSHD* [2014] EWCA Civ 1334. The policy emphasises that grants of leave outside the Rules will be rare and that an individual will have to demonstrate particularly compelling circumstances in order to receive ILR outside the Rules.

(ii) Non-policy based submissions in support of ILR

42. When stripped of references to the respondent's policies, the applicant's fundamental submission was quite simple. The respondent had accused him of cheating and had prevented him from obtaining further leave to remain as a result. Had she not made that allegation, which was found by Judge Ruth to be unfounded, the applicant would have been granted further leave to remain and would, in all likelihood, have gone on to secure ILR on grounds of long residence. To evaluate that submission, it is necessary to look at the events before and after Judge Ruth's decision in a little more detail.

43. As I have already described, the applicants were granted further leave to remain which was to expire on 30 March 2015. The first applicant was granted that leave as a student; the second applicant was his dependant. Before the expiry of that leave, they made applications for leave to remain outside the Immigration Rules. The FLR(O) application form on which that application was made is before me. Beyond the applicants' personal, family and financial information, there are two sections which have been completed. The first, on page 13 of the form, explains why the applicant was applying for an extension of stay in this way:

> "Not able to get CAS letter. Last date of visa expiry. So submitting this application"

44. The second, at p29 of the form, explains that the basis for the application was:

> "Not able to get CAS on the last date of visa expiry. So he want to submit this application to get a time to obtain CAS from different college."

45. The application was refused on 9 November 2015. It was in the course of that letter that the Secretary of State alleged for the first time that the applicant had used a proxy to take an English language test at European College of Higher Education on 28 March 2012. On any rational view, therefore, it was not the respondent's allegation of fraud which prevented the applicant from obtaining a CAS and applying for leave to remain as a student; that allegation was only made when the application was refused.

46. As I have already explained, the applicant secured a right of appeal against that decision when his judicial review proceedings were settled by consent. On the application being re-refused for similar reasons, he appealed to the First-tier Tribunal and Judge Ruth found that the allegation of cheating was not made out. Some criticism of that finding is made in the respondent's Detailed Grounds of Defence and skeleton argument but Mr Evans accepted before me that the respondent could not properly invite me to depart from those findings in the context of this case. That concession was properly made in light of R v SSHD *ex parte* Danaei [1997] EWCA Civ 2704; [1998] Imm AR 84 and subsequent authorities.

47. At [31] of his decision, Judge Ruth found that the applicant would probably not have been granted leave as a student even without the allegation of fraud, because he had no CAS document and there appeared to be no compelling circumstances which warranted a grant of leave on any other basis, including Article 8 ECHR.

48. It was submitted in the grounds of appeal to the Upper Tribunal that the applicant had been unable to secure a CAS because of his TOEIC English certificate. As Mr Gajjar accepted before me, however, there is no reason to think that these grounds of appeal were sent to the respondent, given that an application for permission to appeal is (and was at this time) an *ex parte* process. In any event, these grounds were not provided to the respondent with the ILR representations.

49. It was said in the ILR representations that the applicant had been unable to obtain a CAS to support his application for further leave in March 2015. The representations asserted that the applicant 'was unable to obtain a CAS given the issues raised by the Secretary of State and the fear sponsoring institutions had of TOEIC tests in general. But that assertion had never been put to the respondent before and it was unsupported by any evidence whatsoever. It is strange assertion; if the applicant had experienced adverse reactions from colleges when he presented his TOEIC certificate, it is not clear why would he not obtain a different certificate, given that they are relatively inexpensive and easy to obtain. The assertion is also contrary to experience. The Panorama documentary which broke the ETS story was aired on 10 February 2014 but there were many individuals who secured a CAS in reliance on a TOEIC certificate after that date, and who subsequently came before the appellate authorities when their TOEIC certificate was cancelled by ETS. The third appellant in Khan & Ors v SSHD (Mr Hossain) was one such person, who applied for further leave to remain in 2015, having secured a CAS to study an MBA despite having a TOEIC certificate.

50. In summary, therefore, the applicant's assertion that his TOEIC certificate prevented him from obtaining a new CAS to support his 2015 application even before that certificate was alleged to be unreliable, is not an assertion that the respondent could rationally have accepted. That assertion was not made in the application for further leave to remain in 2015 or in the subsequent appeal hearing before Judge Ruth. There was no evidence of that assertion put to the Secretary of State in 2021. And it is contrary to common sense and experience.

51. Insofar as Mr Gajjar relied on a general (post-Panorama) reluctance on the part of colleges to accept TOEIC certificates as proof of English language competency, however, he encounters an equally fundamental problem. The applicant relied in his 2021 representations on a submission that his immigration status had been derailed in 2015 as a result of something done by the Secretary of State. If his complaint is actually that the general scandal surrounding TOEIC and ETS in 2015 was such that he stood no chance of securing a new CAS, that is not a problem of the Secretary of State's making. She had not alleged that the applicant's own certificate was fraudulently obtained by the time he made his application in 2015 and I can see no reason why any general

stigma against such certificates at that time is a matter which was relevant to the exercise of her discretion seven years later.

52. Be that as it may, the reality of the applicant's situation in 2015 is quite clear from Judge Ruth's decision. He had no semblance of a basis for seeking leave to remain, whether as a student or on Article 8 ECHR grounds, and he simply wished to stay in the UK. When his appeal was dismissed, he remained in the UK without leave as an 'open ended' overstayer until a decade had elapsed since his entry to the UK. When assessed without reference to the respondent's subsequent policies, therefore, the events of 2015 provided no rational basis upon which the respondent could have exercised her discretion in the applicant's favour so as to grant him ILR despite his obvious inability to meet paragraph 276B of the Immigration Rules.

53. I therefore turn to the reliance placed by the applicant in his ILR representations on policies promulgated by the Secretary of State in connection with those accused of TOEIC fraud. The first reference to such a policy was to what was said by the Secretary of State in Khan & Ors v SSHD. Those appeals were conceded by the Secretary of State in the wake of the Court of Appeal's decision in Ahsan & Ors v SSHD [2017] EWCA Civ 2009; [2018] Imm AR 531. Rather than permitting the terms of consent to remain on the court file, the Court of Appeal recorded and endorsed the agreement of the parties due to the obvious desirability of doing so.

54. Unfortunately, I have not been provided with the full version of the relevant document by either the applicant or the respondent. As Singh LJ explained in his short judgment, the positions of the parties changed in the run-up to the hearing before the Court of Appeal and he drew on various documents including draft orders and skeleton arguments in setting out the position of the Secretary of State. The most important document for present purposes appears however to be that to which Singh LJ referred at [36] of his judgment: the Secretary of State's "Response to the Appellants' Position Statement" dated 22 June 2018. The part of that document which was drawn to the Secretary of State's attention in the ILR representations appeared underneath [37] of Singh LJ's judgment. I need not set out the whole section. The paragraph which was emboldened in the ILR representations was this one:

> For those whose leave had expired, and who had made an in time application for further leave to remain which was refused on ETS grounds, the effect of an FTT determination that there was no deception would be that the refusal would be withdrawn. The applicant in question would still have an outstanding application for leave to remain and the Respondent will provide them with a reasonable opportunity to make any further changes to their application which would be considered on the basis of them not having employed any deception in the obtaining of their TOEIC certificate, and they would in no way be disadvantaged in any future application they chose to make.

55. The applicant's submission, based on that policy was that "but for the unlawful and unfounded allegation that the First Applicant had cheated on his English language test, they would have been entitled to ILR on the basis of their long residence under paragraph 276B of the Rules." The representations stated that the respondent should act in accordance with this policy, to place the applicant in the position he should have been without the unfounded ETS allegation, and to conclude that the applicant would have been entitled to settlement had it not been for the error. There are three problems with that submission. I set out those problems in ascending order of importance.

56. Firstly, as submitted by the Secretary of State before me, the Khan & Ors v SSHD cohort of cases was of a different type. Those were cases in which, as a result of the statutory changes brought about by the Immigration Act 2014, the appellants had only a restricted right of appeal. The agreement reached between the parties to those appeals was said to apply to 'other analogous 'ETS' cases that fall within the new statutory scheme': [32] of Singh LJ's judgment refers. This is not such a case; the applicant's right of appeal to the FtT was not so restricted and he was not potentially deprived of an effective remedy to challenge the allegation of fraud contemporaneously.

57. Secondly, the settlement between the parties in Khan & Ors v SSHD was reached in advance of the hearing before the Court of Appeal in July 2018. The applicant's appeal was dismissed by Judge Ruth in August 2017. There is nothing in Singh LJ's judgment or the parts of the agreement which were reproduced by him which suggests that the policy was to have retrospective effect, so as to apply in any case in which there was a historical finding such as that made by Judge Ruth. The usual position is obviously that a policy is to apply from the date of issuance unless a contrary intention appears: Odelola v SSHD [2009] UKHL 25; [2009] 1 WLR 1230 refers. There is no contrary intention expressed in anything to which I was directed.

58. Thirdly, and most importantly, the applicant's submission assumes far too much. It assumes, in particular, that the applicant would have continued to secure leave to remain until 2021 but for the unfounded allegation made by the respondent. That assumption does not withstand any scrutiny at all. If the respondent's policy had been applicable and in existence in 2017, when Judge Ruth's decision was issued, the applicant would have been granted an opportunity to update his application and to have it reconsidered. Let us suppose that he was granted a further year's leave to remain as a student as a result of that process of reconsideration. He would have enjoyed leave to remain until the end of 2018. He would then have had to make a further application, and possibly a third application in order to cross the threshold presented by paragraph 276B of the Immigration Rules. He would only have reached the point of ten years' continuous lawful residence, after all, on 21 January 2021. Mr Gajjar's submission assumes that the applicant would have been able to afford those applications; that he would have submitted each application on time; and that he would have been able to meet the requirements for leave to remain on each occasion. It is simply not possible to make such a series of assumptions, and it is consequently

not possible to state that 'but for' the error, the applicant would have become eligible for ILR in 2021.

59. The second policy relied upon by the applicant in the ILR representations was version 4.0 of the *Educational Testing Service (ETS): casework instructions*, dated 18 November 2021. Under the sub-heading "Implementing appeal findings", the guidance provided:

> If an individual who has used an invalid Test of English for International Communications (TOEIC) certificate in support of an application wins an appeal on Article 8 ECHR grounds, then the grant of leave will depend upon whether the relevant rules are met. Usually, the individual will be on the path to 5 year settlement if the rules are found to be met and the 10 year route if the appeal succeeds on the basis of the exceptions in Appendix FM.
>
> 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.

60. The second and third difficulties which I mentioned in connection with the policy from Khan & Ors v SSHD apply equally in connection with this policy from 2021. Fundamentally, even if the applicant had been granted six months leave outside the Rules in accordance with the second paragraph above, it cannot simply be assumed that he would at all stages thereafter have continued to secure leave to remain until he met the requirements for the settlement under paragraph 276B. I reiterate – the applicant does not contend that he should have been granted six months' leave in accordance with this policy but that its historical application would have entitled him to ILR in 2021. As I have sought to explain, that assumes far too much about the four years between Judge Ruth's decision and the ILR representations.

Article 8 ECHR

61. Mr Gajjar abandoned any submissions he had previously made in reliance on Article 8 ECHR or 'historical injustice'. He was correct to do so because the applicants are not at risk of removal as a result of the respondent's decision to grant them limited leave to remain in recognition of their relationship with their British citizen daughter.

Summary of Conclusions

62. The respondent fell into public law error when she failed to engage with the applicants' ILR representations in either the original or supplementary decision. Had she engaged with those representations, however, it is highly likely that the outcome for the applicants would not have been substantially different for the following reasons:

(1) The respondent alleged fraud only after the applicant had sought leave to remain. It was not the respondent's unfounded allegation of fraud which derailed the applicant's lawful residence in the UK; it was his failure to obtain a CAS and the absence of any claim under Article 8 ECHR that his removal would be unlawful.

(2) The applicant's claim that there was a general stigma attached to TOEIC certificates which prevented him from securing a CAS could not rationally have been accepted by the respondent. He did not make that claim before the FtT in 2017; it was not supported by any evidence; and it is contrary to experience. Any such stigma was not the responsibility of the Secretary of State in any event, and was not relevant to the exercise of her discretion in 2022.

(3) The policies cited by the applicant are of no assistance. The settlement reached in Khan & Ors v SSHD does not apply in this type of case. Both policies post-date the decision of the FtT and give no indication that they are to apply to historical findings of the FtT. In any event, it cannot be assumed that the applicant would have continued to qualify for further leave even if he had been granted limited leave in accordance with those policies or the intention which underpinned them.

63. Had the respondent engaged fully with the ILR representations, therefore, she would have refused ILR and granted limited leave to remain. I therefore refuse relief on the basis stated in s31(2A) of the Senior Courts Act 1981, as applied in the Upper Tribunal by s16(6) of the TCEA 2007.

Postscript

64. It is important that I should record in this judgment what I said to Mr Gajjar at the start of the hearing. The applicants' bundle was provided to the Upper Tribunal electronically, in eight separate PDF files which were named in a manner which was likely to confuse and not to assist. There was no electronic index to the bundle and it contained no electronic bookmarks. My pre-reading was rendered impossible by the provision of the bundle in that way. Given the limited time available before the hearing, I had no choice but to use readily available software to 'stitch' the various parts of the bundle together and to insert bookmarking. That task took between one and two hours of my time.

65. When I informed Mr Gajjar of this, he revealed that the bundle had been provided to him in the same form and that he had taken it upon himself to do exactly what I had done with the bundle, stitching it together and bookmarking it for ease of reference. It had taken him about the same amount of time.

66. This is a waste of everyone's time. It is precisely what Lane P sought to avoid when he issued the Upper Tribunal's guidance on CE file and electronic bundles in 2021. That guidance was ignored in this case. There is no need for an electronic bundle to be broken down into eight separate sections so that it can be transmitted by email. With the use of

basic software, the DPI can be reduced and the size of the bundle can be brought within manageable limits. There is, in any event, no need to file bundles by email; they can be uploaded to the Upper Tribunal's e-filing system, as used by the GLD in this case. The difficulty in this case was caused by the fact that a hard copy bundle had been scanned at a high resolution. That is unacceptable in 2023 and it is apt to cause problems, as it did in this case.

67. Had I reached the opposite conclusion on the merits of this application for judicial review, I would not have been inclined to award the applicant any costs for the preparation of the trial bundle for these reasons.

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Form of Order

68. The judgment above was circulated to the parties in draft on 7 September 2023. I am grateful to Mr Gajjar for the typographical amendment he subsequently suggested. There was no application for permission to appeal to the Court of Appeal.

69. The parties were unable to agree on the question of costs and made short submissions. I can resolve the issue briefly. Mr Gajjar submits that the applicants should not be required to pay the respondent's costs. Although he obviously accepts that costs ordinarily follow the event, he submits that there are good reasons to depart from the usual order in this case. He points to two matters to justify that submission: (i) the respondent's summary and unhelpful reconsideration after the pre-action protocol correspondence; and (ii) the attempt by the Secretary of State to go behind the findings of Judge Ruth.

70. Neither of those points justifies a wholesale departure from the usual order. The reality of this case, as I explained in my judgment, is that there were fundamental errors in the applicants' ILR representations, and it should have been understood from the outset that there was really no possibility of persuading a reasonable Secretary of State to grant ILR outside the Rules. The supplementary decision was unhelpful, but the reality of the applicants' case was that it could not succeed. As for the respondent's submissions about Judge Ruth's decision, the degree of equivocation over Judge Ruth's decision was insubstantial and it was ultimately accepted in the detailed grounds, as it was by counsel before me, that it was too late to go behind those findings.

71. I am more persuaded by the submissions made by the applicant as to quantum. I accept that the applicants should not be required to shoulder the burden of the applications made by the respondent to extend time and to adjourn. There is also an element of duplication in the respondent's schedule of costs, in that there are two claims made for collating papers to send to counsel (items 25 and 26). Subject to those points, however, I do not consider that the sum claimed is excessive or disproportionate. In the circumstances, I order that the applicants shall pay the respondent's costs, which I summarily assess in the sum of £8800.
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